RECENT DEVELOPMENTS IN MEDIA, PRIVACY, DEFAMATION, AND ADVERTISING LAW

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INTRODUCTION

This article addresses a range of significant legal developments relating to publishing from October 2017 to September 2018. The first two parts address developments in torts involving defamation and privacy. The third part recaps changes in Internet law about anonymous speech, personal jurisdiction, immunity under Section 230 of the Communications Decency Act, application of the single publication rule, and defamation on social media. Parts four and five cover newsgathering and protecting a reporter's confidential sources. Part six covers emerging trends in insurance coverage for content-based torts. Finally, part seven treats developments in advertising law, including the Consumer Review Fairness Act and cases, and FCC rulemaking on the Telephone Consumer Protection Act.

I. DEFAMATION

This year saw several interesting and noteworthy defamation cases decided. Two courts addressed claims of defamation against comedian Bill Cosby. The First Circuit affirmed dismissal of defamation claims brought against Cosby by one of his accusers, holding the statements were non-actionable opinion or not "of and concerning" her.[1] A California Appellate Court opinion came out the opposite way on another Cosby case, holding that the statements contained in a demand letter distributed to the media were provable fact, rather than mere opinion.[2]

Other courts also addressed interesting claims of defamation. The Third Circuit affirmed dismissal of a defamation case brought by a woman who TMZ reported was a prostitute who sold cocaine during the Super Bowl.[3] The Circuit held that TMZ was not liable for defamation under the fair report privilege because the report was based on a New York Attorney General press release.[4] In July 2018, the Texas Court of Appeals dismissed a lawsuit brought by the father of a 13-year-old Muslim student whose homemade alarm clock was mistaken for a bomb at school.[5] The father sued two talk show guests who alleged the incident was a "PR stunt" and "staged event." The Court dismissed, holding the statements arose from a public controversy and were not made with actual malice.[6]

Additionally, there are three federal circuit decisions and a Texas Supreme Court decision that merit additional review.

A. *Second Circuit Recognizes Plausibility of Small Group Defamation Claim*

In September 2017, the Second Circuit concluded that a magazine article alleging wrongdoing by members of a fraternity was sufficiently "of and concerning" all members of the fraternity under a theory of small group defamation.[7] Typically, "a statement made about an organization is not understood to refer to any of its individual members."[8] However, when the group is small and the statement could defame all members, an individual belonging to that group can maintain "an action for individual injury

1. McKee v. Cosby, 874 F.3d 54, 58–59, 64–65 (1st Cir. 2017). The plaintiff alleged statements in a letter written by Cosby's attorney—such as that she was a "Las Vegas showgirl" and lacked credibility—were defamatory.
2. Dickinson v. Cosby, 225 Cal. Rptr. 3d 430, 460 (Ct. App. 2017).
3. Lee v. TMZ Prods., Inc., 710 F. App'x 551, 554 (3d Cir. 2017).
4. *Id.* at 559.
5. Mohamed v. Ctr. for Sec. Policy, 554 S.W.3d 767, 771 (Tex. App. 2018), *review denied* Oct. 19, 2018.
6. *Id.* at 776.
7. Elias v. Rolling Stone LLC, 872 F.3d 97, 110 (2d Cir. 2017).
8. *Id.* at 107–08.

resulting from a defamatory comment about the group, by showing that he is a member of the group."[9]

In *Elias v. Rolling Stone*, three members of the Phi Kappa Psi fraternity at the University of Virginia sued the magazine for libel.[10] The article—which was later retracted—described a female student's gang rape at the Phi Kappa Psi fraternity house. The article alleged seven members participated in the rape, while two additional members looked on and did nothing to stop it. Three members of the fraternity sued for libel under a small group libel theory.[11]

The district court dismissed the complaint, but the Second Circuit reversed.[12] The Second Circuit held the plaintiffs stated a claim because a reader could plausibly conclude each fraternity member was implicated in the alleged rapes.[13] In reaching that conclusion, the Second Circuit looked at several factors, such as: "the size of the group, whether the statement impugns the character of all or only some of the group's members, and the prominence of the group and its individual members in the community."[14] While the fraternity had 53 members at the time of the alleged rape, the Second Circuit found that such a claim could proceed due to the "size of the university community and the prominence of Phi Kappa Psi on campus."[15]

B. *First Circuit Affirms Dismissal Based on Failure to Plead Actual Malice*

In August 2018, the First Circuit affirmed dismissal of a defamation claim brought by a limited purpose public figure because he had not pled sufficient facts to demonstrate actual malice.[16] In *Lemelson v. Bloomberg LP*, Bloomberg published an article stating the SEC was investigating the plaintiff, a hedge fund manager.[17] Prior to publishing the article, Bloomberg sent the plaintiff multiple emails outlining the allegations in his article and called the plaintiff. Receiving no response, Bloomberg published the article, attributing the allegations against the plaintiff to anonymous "people with knowledge of the matter."[18]

The First Circuit affirmed, holding that the plaintiff failed to allege actual malice because he did not allege a plausible motive for Bloomberg

9. *Id.* at 108.
10. *Id.* at 101.
11. *Id.*
12. *Id.* at 104 (reversing the district court's grant of the motion to dismiss for all claims except those related to plaintiff Stephen Hadford and claims made regarding the journalist's podcast interview).
13. *Id.* at 107.
14. *Id.* at 108 (internal citations and quotations omitted).
15. *Id.* at 108–10.
16. Lemelson v. Bloomberg LP, 903 F.3d 19, 25 (1st Cir. 2018).
17. *Id.* at 21–22.
18. *Id.* at 23.

to have fabricated the story and credited Bloomberg for asking the plaintiff several times for comment and publishing plaintiff's denial.[19] Further, the complaint did not deny that plaintiff was under investigation.[20]

The First Circuit additionally rejected the plaintiff's allegations that Bloomberg should have fact-checked its story or conducted a better investigation, concluding that Bloomberg's attempts to obtain comments from the SEC and plaintiff "raised no inference of reckless disregard."[21] The Circuit also rejected the plaintiff's argument that the reporter should have written a more "balanced" or "fair" article.[22]

C. *First Circuit Reverses Injunction as a Prior Restraint on Speech*

In a non-media libel case, a jury found in favor of a prominent scientist who claimed a woman and her mother defamed him by posting falsities on the Internet.[23] The district court enjoined the defendants from repeating six statements orally, in writing, or on the internet.[24]

In July 2018, the First Circuit reversed, holding that the post-trial injunction could not survive strict scrutiny, which is applied to prior restraints on speech.[25] The First Circuit recognized that "defamation is an inherently contextual tort," and by barring certain statements (even statements found by a jury to be unprotected speech), the injunction was not content-neutral and it failed to allow for contextual variation.[26] For example, the First Circuit pointed out that the defendants would not be able to repeat those statements in an apology letter to the plaintiff.[27] Further, the injunction was overbroad and could punish "future conduct that may be constitutionally protected."[28] The First Circuit limited its holding, refusing to rule on whether a federal court may permanently enjoin republication of ad hoc oral or written statements.[29]

D. *Texas Supreme Court Holds Column Is Non-Actionable Opinion*

In *Dallas Morning News v. Tatum*, the Texas Supreme Court reversed and granted summary judgment in favor of a newspaper and its columnist in a

19. *Id.*.
20. *Id.* The First Circuit also noted the complaint contradicted the article by, for example, alleging that Bloomberg had not contacted the SEC (the article stated that an SEC spokesman had declined to comment). *Id.* at 25.
21. *Id.*
22. *Id.*
23. Sindi v. El-Moslimany, 896 F.3d 1, 11–12 (1st Cir. 2018).
24. *Id.*
25. *Id.* at 30–31.
26. *Id.* at 33, 35.
27. *Id.* at 34.
28. *Id.* at 34-–35.
29. *Id.* at 35 (internal citations and quotations omitted).

libel lawsuit.[30] The column at issue, "Shrouding Suicide in Secrecy Leaves its Danger Unaddressed," criticized a couple for attributing their son's death to a car accident, rather than suicide, in his obituary and urged the public to talk more openly about suicide. While the column did not name the family involved, it quoted directly from the obituary and individuals recognized the column as referring to the plaintiffs.

The Texas Court stated that although the column accused the plaintiffs of being deceptive, which could be defamatory *per se* because it was "reasonably capable of injuring the Tatums' standing in the community," it was also substantially true and therefore not actionable.[31] Further, the Court stated "if the column is reasonably capable of casting any moral aspersions on the Tatums, it casts them as opinions."[32]

II. PRIVACY

A. *Misappropriation*

Celebrities did not fare well in asserting claims of misappropriation. For example, a California court held that California's anti-SLAPP statute required dismissal of a misappropriation claim brought by actor Frank Sivero, who claimed that promotions for the television show "The Simpsons" misappropriated his name and likeness.[33] Sivero, who played the role of a mafia figure in the film "Goodfellas," based his claim on an episode which included as a character a mafia henchman known as Louie who resembled Sivero's character in Goodfellas. The Court found the Simpsons character "contains significant transformative content other than Sivero's likeness."[34]

The New York Court of Appeals rejected a misappropriation claim brought under New York Civil Rights Law § 51 by actress Lindsey Lohan, who claimed that the video game "Grand Theft Auto V" used a character who is her "look-a-like."[35] Although the Court agreed with Lohan that a computer generated image may constitute a "portrait" within the meaning of that statute, the Court concluded that the image used in the video game was not recognizable as her.[36]

30. Dallas Morning News, Inc. v. Tatum, 554 S.W.3d 614 (Tex. 2018).
31. *Id.* at 638, 641.
32. *Id.* at 640.
33. Sivero v. Twentieth Century Fox Film Corp., B266469, 2018 WL 833696, at *1 (Cal. Ct. App. Feb. 13, 2018) (unpublished), *reh'g denied*, Mar. 2, 2018.
34. *Id.* at *8. Even Sivero acknowledged that his likeness had been "Simpsonized." *Id.* at *10.
35. Lohan v. Take-Two Interactive Software, Inc., 97 N.E.3d 389 (N.Y. 2018).
36. *Id.* at 395.

B. *False Light*

Celebrities and other public figures also found it difficult to assert a claim of "false light." For example, actress Olivia de Havilland could not maintain a false light claim against the creators and producers of the television miniseries "Feud: Bette and Joan" for the docudrama's portrayal of the de Havilland character referring to her sister as a "bitch" when the term she actually used was "dragon lady," a California Court of Appeal concluded.[37] The docudrama portrays the rivalry between actresses Joan Crawford and Bette Davis. In one scene, Catherine Zeta-Jones portrays de Havilland having a telephone conversation with Bette Davis that refers to her well-known estrangement from her sister, Joan Fontaine. The de Havilland character refers to Fontaine as a "bitch," when, according to de Havilland, the term she had actually used in the real-life conversation had been "dragon lady." The Court held that the effect on the mind of the reader or viewer "would not have been appreciably different" had the term "dragon lady" been used.[38]

In a separate case, the parents of State Department employees killed in the 2012 attacks on United States facilities in Benghazi, Libya, did not state a claim for false light invasion of privacy against Hillary Clinton for publicly commenting during her 2016 Presidential campaign that her recollection of a meeting differed from the parents. The plaintiffs claimed that Clinton had called them liars, but the Court determined that "Clinton merely disagreed with [plaintiffs'] recollection of events and couched this disagreement in sympathy," and therefore "no reasonable person could conclude that Clinton's statements put [the plaintiffs] in a 'highly offensive' false light."[39]

C. *Intrusion*

A New Jersey court held the plaintiffs were not required to demonstrate that their images were actually captured in order to maintain an intrusion claim based on the surreptitious placement of a recording device in an office building restroom.[40] The Court held that a plaintiff need only show that a recording device was present in the restroom at a time the plaintiff was in the restroom, "where a reasonable expectation of privacy may be assumed."[41]

37. De Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d 625 (Ct. App. 2018).
38. *Id.* at 645.
39. Smith v. Clinton, 886 F.3d 122 (D.C. Cir. 2018).
40. Friedman v. Martinez, 184 A.3d 489, 493 (N.J. Super. Ct. App. Div. 2018).
41. *Id.* at 494. The Court, noted, however, that the absence of evidence of an actual image of the plaintiff "may have an impact on the victim's quest for damages." *Id.* at 494.

D. *Publication of Private Facts*

A citizen's disclosure of private facts claim against the California Franchise Tax Board failed when the information disclosed—including the plaintiff's name, address and social security number—had been publicly disclosed on prior occasions in court documents, even though the prior disclosures were "long ago."[42] The Court noted that "application of the public records defense" had never been based "on the length of time between the prior public disclosure and the alleged invasion of privacy."[43]

Meanwhile, a federal court in Illinois refused to dismiss a disclosure of private facts case brought against an author whose book had given "significant prominence to sexual assault and sexual harassment allegations" the plaintiff had made against a college professor while a student. [44] The court concluded that while "Title IX and the investigation of sexual assaults on college campuses constitute matters of legitimate public concern," it did not necessarily follow that every detail of the plaintiff's story "was, for purposes of a motion to dismiss, necessarily germane to that issue as a matter of law."[45]

III. INTERNET LAW

A. *Protection for Anonymous Online Speech*

In civil cases, anonymous online speakers gained more protection from unmasking efforts this year than in most years. The most remarkable decision in this area of law was issued by the Sixth Circuit. The court carved a new path for anonymous speakers seeking to remain anonymous even in the wake of a civil judgment being entered against them on the basis of their speech. *Signature Management Team, LLC v. Doe* concerned a copyright infringement case brought by a multi-level marketing company against an anonymous blogger who had criticized the company and, in connection with that criticism, posted online an entire copy of the company's copyrighted book.[46] The district court required the blogger to disclose his identity to the court and to the plaintiff's attorneys early in the litigation. After obtaining a judgment against the blogger and an injunction ordering him to destroy all copies of the book, the plaintiff requested the blogger's identity, but the court refused.

42. Franchise Tax Bd. of State of Ca. v. Hyatt, 407 P.3d 717, 734 (Nev. 2017), *cert. granted sub nom.* Franchise Tax Bd. of Ca. v. Hyatt, 138 S. Ct. 2710 (2018).

43. *Id.*

44. Doe v. HarperCollins Publishers, LLC, 17-CV-3688, 2018 WL 1174394, at *1 (N.D. Ill. Mar. 6, 2018).

45. *Id.* at *5.

46. 876 F.3d 831 (6th Cir. 2017).

On appeal the Sixth Circuit, invoking the "presumption of open judicial records," observed that there is "a presumption in favor of unmasking anonymous defendants when judgment has been entered for a plaintiff."[47] But the court held that this presumption could be overcome and set forth in detail the various factors courts should consider in making that determination.[48] On remand, the district court held that the presumption of openness had been overcome and permitted the speaker to remain anonymous.[49] The court was influenced by the facts that the infringement led to "insignificant" loss, the blogger regularly provided commentary on a public issue (i.e., the validity of multi-level marketing schemes), the blogger proffered credible evidence that unmasking him would chill his speech, the blogger had "acted in good faith and without malicious intent throughout [the] litigation," and the blogger had already complied with the relief ultimately ordered before the litigation had even begun.[50] Like the courts in *Signature Management Team*, other courts issued decisions this year rejecting vigorous efforts by banks and other corporations to unmask their anonymous critics.[51]

B. *Personal Jurisdiction Premised on Online Publication*

Evolving communications technologies have continued to confront courts with new challenges to determine under what circumstances a speaker may be subject to personal jurisdiction outside of his or her home forum. Recently, two federal courts of appeals held that where the plaintiff cannot show that anyone in the forum state actually received the challenged publication, personal jurisdiction over the speaker was lacking.

The ability to determine which users have accessed digital content benefitted the defendant in a First Circuit case involving a subscription-based financial news provider.[52] The plaintiffs in *Scottsdale Capital Advisors Corp. v. The Deal, LLC* claimed that three articles the defendant made available to its subscribers defamed them by asserting they were under investigation by law enforcement and securities authorities.[53] Although none of the parties had a connection to New Hampshire, plaintiffs filed suit there, relying on the fact that Dartmouth College had an institutional subscription to

47. *Id.* at 837.
48. *Id.* at 837–38.
49. 2018 WL 3997373 (E.D. Mich. Aug. 21, 2018).
50. *Id.* at *2–4.
51. *See, e.g.*, Doe v. Mahoney, 418 P.3d 1013 (Ariz. Ct. App. 2018); MiMedx Grp., Inc. v. Sparrow Fund Mgmt. LP, No. 17CV07568PGGKHP, 2018 WL 847014 (S.D.N.Y. Jan. 12, 2018), *report and recommendation adopted*, No. 17 CIV. 7568 (PGG), 2018 WL 4735717 (S.D.N.Y. Sep. 29, 2018).
52. Scottsdale Capital Advisors Corp. v. The Deal, LLC, 887 F.3d 17 (1st Cir. 2018).
53. *Id.* at 18–19.

The Deal.[54] Jurisdictional discovery revealed that no one at Dartmouth had accessed any of the challenged articles.[55] Two people at Dartmouth had subscribed to The Deal's emailed newsletter, and analysis showed neither had opened two of the three relevant newsletters.[56] Without any indication that anyone read the articles, there was no personal jurisdiction because the publication element of defamation did not occur in New Hampshire.[57] And though there was no way to tell if either user had opened the third newsletter; the court held that the number of recipients was "too small to generate on its own a reasonable assumption that at least one recipient must have opened the attachment."[58]

The Eleventh Circuit came to a similar conclusion in *Catalyst Pharmaceuticals, Inc. v. Fullerton*.[59] There, the Florida-based plaintiff sued a Texas resident over posts he made about the company to a Yahoo! Finance page.[60] Florida law allows for jurisdiction over an out-of-state defamation defendant where the challenged publication was accessed in Florida.[61] Catalyst submitted affidavits from its counsel and three shareholders testifying that they had accessed the posts in Florida.[62] Those were insufficient to make a prima facie showing of personal jurisdiction at the pleading stage, the Eleventh Circuit panel said, because defamation requires publication to a third party, not an owner or agent of the plaintiff corporation.[63]

Other courts have frequently interpreted the Supreme Court's jurisdictional jurisprudence—particularly *Walden v. Fiore*[64]—far more narrowly. For example, a court in the Eastern District of Tennessee held that it did not have personal jurisdiction over a South Carolina resident who made Facebook posts critical of a Tennessee resident who headed a company that owned a South Carolina golf course, because commentary about the golf course was aimed at South Carolina, not Tennessee.[65]

Another jurisdictional wrinkle is the question of whether linking to content that is aimed at the forum state is sufficient to confer jurisdiction over the person who posted the link. Two federal courts held that the answer to that question is "no." In *Marfione v. KAI U.S.A., Ltd.*,[66] a court in the Western District of Pennsylvania held that it did not have jurisdiction

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 21.
58. *Id.* at 22.
59. 748 F. App'x 944 (11th Cir. 2018).
60. *Id.* at *1.
61. *Id.* at *2.
62. *Id.* at *2–3.
63. *Id.*
64. 571 U.S. 277 (2014).
65. *Kent v. Hennelly*, 328 F. Supp. 3d 791, 799 (E.D. Tenn. 2018).
66. Civil Action No. 17-70, 2018 WL 1519042 (W.D. Pa. Mar. 28, 2018).

over an Oregon resident who made an Instagram post linking to a third party's article about the plaintiff corporation.[67] Because the post was available worldwide and did not mention Pennsylvania or any other forum, the court held that it did not target Pennsylvania residents and therefore jurisdiction there did not exist.[68] Likewise, a federal court in Minnesota held that tweets and Facebook posts linking to an allegedly defamatory article about a Minnesota resident did not confer personal jurisdiction over the out-of-state defendant.[69] The court held that "if the use of a Facebook page or Twitter handle was sufficient to confer personal jurisdiction, a defendant could be haled into court in any state."[70]

C. *Section 230 Immunity for Intermediaries*

2018 saw an upturn in the trajectory of recent judicial precedents applying Section 230 of the Communications Decency Act of 1996. In a case that was watched closely over the past two years, California's Supreme Court, in July 2018, reversed the Court of Appeals' ruling in *Hassell v. Bird*[71] and held that Section 230 barred the trial court's order commanding consumer review website Yelp to remove third party content that was held (by default judgment) to be false and defamatory.

The ruling was widely celebrated by the internet community, which had previously feared the prospect of other crafty libel plaintiffs following Dawn Hassell's game plan (her counsel conceded they had not named Yelp as a defendant because they feared it would invoke Section 230 immunity).[72]

Two significant developments in the law of Section 230 occurred in the legislative domain. First, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA") was passed into law in April 2018, to address the scourge of online advertising of sexual escort services,

67. *Id.* at *4–5.

68. *Id.*

69. Higgins v. Save Our Heroes, Civil No. 18–42(DSD/BRT), 2018 WL 2208319, at *3 (D. Minn. May 14, 2018).

70. *Id.*

71. 420 P.3d 776 (Cal. 2018).

72. A couple of decisions in 2018 applied the traditional expansive view of Section 230 immunity to Internet intermediaries. *See* Bennett v. Google, LLC, 882 F.3d 1163 (D.C. Cir. 2018) (Google's Blogger service immune from plaintiff's claim that the blogging platform facilitated the preparation of a third party's defamatory blog posting, notwithstanding that the blog post complied with Google's "Blogger Content Policy"); Twitter, Inc. v. Super. Ct. ex rel Taylor, Case No. A154973 (Cal. Ct. App. Aug. 17, 2018) (Section 230 protects Twitter from claims of a white supremacist whose account was permanently suspended under Twitter's policy barring "violent extremist groups"). *But see* HomeAway, Inc. v. City of Santa Monica, Case Nos. 2:16-cv-06641-ODW (AFM), 2:16-cv-06645-ODW (AFM), 2018 WL 1281772 (C.D. Cal. Mar. 9, 2018) (denying preliminary injunction against city ordinance that websites from offering rentals not listed on the City's registry), *appeal pending* (Ninth Circuit No. 18-55367); the district court case was subsequently dismissed, 2018 WL 3013245 (C.D. Cal. June 14, 2018).

embodied in the (former) website Backpages.com. That law specifically removed from Section 230's immunity websites that promote or facilitate child sex-trafficking or prostitution. Second, in October 2018, the United States-Mexico-Canada Agreement ("USMCA"), which President Trump heralded as "NAFTA's replacement," extends to internet intermediaries immunity mirroring that of Section 230 to Canada and Mexico. If the Senate approves that new treaty, it will export our country's protective view of Section 230 to our neighbors to the North and South.

D. *The Single Publication Rule Applied to Online Speech*

In May, 2018, New Jersey's Supreme Court applied the single publication rule to an internet publication, and set forth a substantive test to determine whether modification of a prior posting constitutes a new publication, which triggers a new statute of limitations. In *Petro-Lubricant Testing Labs, Inc. v. Adelman*,[73] the defendant posted an article, in August 2010, summarizing a gender discrimination, workplace harassment, and retaliation lawsuit that had been filed against the testing lab company. More than a year later, the company complained about the posting and the defendant made some "minor modifications" to it. The company sued based on the modified article, and the defendant sought to dismiss on grounds that the claim was time barred, and the modified article accurately summarized the allegations in the filed civil case against the company.

The trial court ruled that the modifications the defendant made to the article in December 2011 rendered the revised article a new publication within the statute of limitation. However, because the modified article was a fair report of the filed lawsuit, the plaintiff's claims were dismissed. New Jersey's Appellate Division reversed the trial court's finding that the modifications made in December 2011 rendered the revised article a new publication and therefore affirmed the trial court's dismissal on that ground alone, without reaching the fair report privilege issue.

On review, New Jersey's Supreme Court held that the single publication rule applies to internet publications.[74] The court held that "a material and substantive change" to the article's defamatory content will constitute a new publication triggering a new statute of limitations.[75] The court held that there was a genuine issue of material fact whether one of the modifications to the article—changing the allegation that the company's co-owner "allegedly forced workers to listen to and read white supremacist materials" to the allegation that he "regularly subjected his employees to 'anti-religion, anti-minority, anti-Jewish, anti-[C]atholic, and anti-gay rants'"—was

73. 184 A.3d 457 (N.J. 2018).
74. 184 A.3d at 467.
75. 184 A.3d at 468–69.

sufficiently material to constitute a new publication. However, because the court found that the modified article was a fair report of the filed civil complaint, the court affirmed the trial court's dismissal of the lawsuit.

E. *Defamation in Social Media (a/k/a Twibel)*

As the number of defamation actions involving social media postings has continued to increase, courts have continued to wrestle with questions about how—or whether—comments on platforms such as Twitter or Facebook should be treated differently from traditional print, broadcast, or spoken defamation. Although most courts have applied traditional principles of defamation law in the social media context, some judges have found difficulties in applying longstanding legal standards to this relatively new medium.

For example, a federal court in the Southern District of Ohio struggled with the question of how to determine the proper context in evaluating whether an allegedly defamatory tweet should be considered a statement of fact or an expression of opinion.[76] *Boulger v. Woods* involved a retweet by actor James Woods of a post juxtaposing a photograph of a Bernie Sanders supporter with a photograph of a woman giving a Nazi-like salute at a Donald Trump rally, and commenting, "So-called #Trump 'Nazi' is a #BernieSanders agitator/operative?"[77] As it turned out, the plaintiff was not the woman at the Trump rally, and she sued the conservative actor for defamation.[78] In analyzing whether the tweet would be considered a statement of fact, the court noted that "the nature of a 'tweet' is fundamentally different from a statement appearing in the context of a longer written work" and found it difficult to determine whether the proper context was simply the tweet itself, Woods' Twitter feed as a whole, or "the entire Twitter social media platform."[79] Because each Twitter account "is unique in tone and content," the court said, "a reader cannot tell anything about whether a particular Twitter account is likely to contain reporting on facts, versus personal opinion or rhetorical questions, from the mere fact that the author uses . . . Twitter as his or her preferred communication medium."[80] The court eventually held that while it could not determine what the proper context would be, the question was moot—the tweet was not actionable because reasonable readers could interpret it as a question rather than an assertion of fact.[81]

76. Boulger v. Woods, 306 F. Supp. 3d 985, 1002–03 (S.D. Ohio 2018).
77. *Id.* at 990.
78. *Id.*
79. *Id.* at 1002–03.
80. *Id.* at 1003.
81. *Id.* at 1004.

A California appellate panel confronted a similar question of context in an unpublished opinion involving videos and comments posted on YouTube.[82] In *Nelson v. Superior Court*, the plaintiff sued over videos posted to You Tube and statements made in the platform's comment sections denigrating him and his company's vegan food products.[83] One of the defendants argued that her video was satiric commentary on a different user's video about the plaintiff's products, thus rendering it nonactionable opinion.[84] The court rejected that argument: "The context of [the defendant's] video may include other statements [the defendant] makes *in the same video*; it does not include the statements [a third person] allegedly made in a different video on a different You Tube channel."[85] Although the unpublished opinion cannot be cited as precedent in California courts, it illustrates a contextual analysis that other courts may find persuasive.

In contrast, a New York appellate court considered an allegedly defamatory Facebook post in the context of other posts on the same Facebook page in affirming a trial court's ruling that the post was nonactionable opinion rather than verifiable fact.[86] The defendant had made a series of comments critical of the owner of a building next to the defendant's home, including one that the owner had "lied" about his plans to redevelop the property.[87] The court held that "[a]lthough one could sift through the series of posts, including the challenged one, and argue that the author made false factual assertions, viewing the entire series of posts as a whole, as we must, we conclude that the posts constituted an expression of protected opinion."[88]

Unsurprisingly, President Trump has been embroiled in several significant cases involving allegations of defamation via Twitter. In the most recent cases, courts in New York split over whether his tweets should be considered expressions of fact or opinion. In *Jacobus v. Trump*, a New York appellate court affirmed a trial court ruling dismissing a lawsuit against the president on the grounds that his tweets would not be considered statements of fact.[89] The plaintiff, a Republican political consultant, sued over Trump's tweets calling her a "dummy" who had unsuccessfully "begged" his campaign for a job (she said she decided not to pursue possible employment with the Trump camp).[90] On the other hand, a state trial court denied Trump's motion to dismiss a defamation lawsuit by a woman who accused

82. Nelson v. Superior Court, No. B283743, 2018 WL 1061575, at *7 (Cal. Ct. App. Feb. 27, 2018), *as modified on denial of reh'g*, Mar. 27, 2018 (unpublished and nonprecedential).
83. *Id.* at *1.
84. *Id.* at *7.
85. *Id.*
86. Stolatis v. Hernandez, 77 N.Y.S.3d 473, 476–77 (App. Div. 2018).
87. *Id.*
88. *Id.*
89. Jacobus v. Trump, 64 N.Y.S.3d 889, 889 (App. Div. 2017), *leave to appeal denied*, 102 N.E.3d 431 (2018).
90. *Id.*

Trump of sexual harassment.[91] The court held that Trump's tweets asserting that Summer Zervos had made "100% fabricated and made up charges" against him asserted verifiable facts rather than opinions.[92] The New York Court of Appeals summarily dismissed Trump's appeal on its own motion.[93]

IV. NEWSGATHERING

A. *Surreptitious Surveillance*

This year's blockbuster case involved neither newsgathering nor the media. In *Carpenter v. United States*,[94] a criminal defendant challenged his federal bank-robbery conviction because of the admission of cell-site location information ("CSLI") generated by his cell phone. The government had obtained Carpenter's cell phone records from his service provider with an order under the Stored Communications Act, rather than with a warrant supported by probable cause.[95] In an opinion written by Chief Justice Roberts, the Supreme Court reversed the conviction, holding that this "search" had been unreasonable and that a warrant was required to obtain CSLI.[96] The Court identified the level of detail in the information at issue, the "pervasive" use of cell phones, and the lack of an affirmative act by a cell phone user (other than turning on his phone) in holding that an individual has an even greater expectation of privacy in CSLI than in GPS-tracking information.[97] The Court declined to extend the "third-party principle" which holds that an individual has no expectation of privacy in information voluntarily turned over to third parties.[98]

Cases involving claims arising from surreptitious surveillance are working their way through the lower courts. In *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, Planned Parenthood and others sued anti-abortion group The Center for Medical Progress on multiple federal and state claims after defendants released videos purporting to show Planned Parenthood officials and doctors discussing the sale of fetal tissue.[99] In simultaneously issued opinions, the Ninth Circuit affirmed the denials of defendants' anti-SLAPP motion to dismiss[100] and motion to dismiss under Rule 12(b)(6).[101]

91. Zervos v. Trump, 74 N.Y.S.3d 442, 445–46 (Sup. Ct. 2018).
92. *Id.*
93. Zervos v. Trump, 105 N.E.3d 354 (N.Y. 2018).
94. 138 S. Ct. 2206 (2018).
95. *Id.* at 2208–09.
96. *Id.* at 2223.
97. *Id.* at 2219–20.
98. *Id.* at 2216–17.
99. 890 F.3d 828 (9th Cir. 2018); 735 F. App'x 241 (9th Cir. 2018).
100. 890 F. 3d at 831.
101. *Planned Parenthood*, 735 F. App'x at 245.

The District Court for the District of Columbia reached a similar result in *Democracy Partners, LLC v. Project Veritas Action Fund*.[102] Plaintiffs sued defendants for violations of the federal and District of Columbia wiretapping laws and for common law torts based on defendants' alleged deceptive tactics in gaining access to meetings at which surreptitious recordings were made.[103] The court denied defendants' motion to dismiss under Rule 12(b)(6) and also denied defendants' anti-SLAPP motion to dismiss under the D.C. Circuit's prior holding in *Abbas v. Foreign Policy Group*[104] that the D.C. anti-SLAPP statute does not apply in federal court.[105]

Two notable cases challenging Massachusetts's wiretap statute[106] remain pending.[107]

B. *Ag-Gag Laws*

Ag-gag laws continue to occupy the courts' attention as a special type of surreptitious surveillance litigation. This past year saw decisions from the Fourth,[108] Ninth,[109] and Tenth Circuits,[110] and the Southern District of Iowa,[111] as well as the payment of over $300,000 in attorneys' fees to the successful plaintiffs in the bellwether action brought in the District of Utah.[112] These cases reflected a mixed bag of First Amendment analysis, with the courts recognizing that the majority of activity targeted by these statutes is constitutionally protected, but sometimes striking different balances between First Amendment and property rights.

In *People for the Ethical Treatment of Animals v. Stein*, the Fourth Circuit reversed the district court's dismissal for lack of subject-matter jurisdiction.[113] The court focused on the detailed allegations that plaintiffs made about their past and planned animal cruelty investigations and held that plaintiffs had alleged sufficient "injury-in-fact" "fairly traceable" to defendants to challenge North Carolina's ag-gag law.[114] In *Western Watersheds*

102. 285 F. Supp. 3d 109 (D.D.C. 2018).
103. *Id*. at 112.
104. 783 F.3d 1328 (D.C. Cir. 2015).
105. 285 F. Supp. 3d at 127–28.
106. Mass. Gen. Laws ch. 272, § 99.
107. Project Veritas Action Fund v. Conley, 270 F. Supp. 3d 337 (D. Mass. 2017); Martin v. Evans, 241 F. Supp. 3d 276, 287–88 (D. Mass. 2017).
108. People for the Ethical Treatment of Animals, Inc. v. Stein, 737 F. App'x 122 (4th Cir. 2018).
109. Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).
110. Western Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017).
111. Animal Legal Defense Fund v. Reynolds, 297 F. Supp. 3d 901 (S.D. Iowa 2018).
112. Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00679-RJS, ECF No. 222 (D. Utah Nov. 17, 2017); ECF No. 226 (D. Utah Mar. 29, 2018).
113. *People for the Ethical Treatment of Animals*, 737 F. App'x at 132 .
114. *Id*. at 128–30 (citing N.C. Gen. Stat. § 99A-2).

Project v. Michael, the Tenth Circuit, in a limited opinion, reversed the district court's dismissal of claims concerning Wyoming's statute that criminalized "[c]ross[ing] private land to access adjacent or proximate land [to] . . . collect [ ] resource data."[115] The court reasoned that this statute criminalized the collection of resource data on public lands and noted that the statutory definitions of "resource data" and "collect" were "expansive."[116] The court remanded for further proceedings.[117]

In *Animal Legal Defense Fund v. Wasden*, a divided Ninth Circuit panel affirmed the summary judgment striking down the portions of Idaho's ag-gag law that criminalized the making of misrepresentations to enter an agricultural production facility and barred the making of audio and video recordings in such a facility.[118] The majority reasoned that the former criminalized innocent behavior, was overbroad, and was targeted at investigative journalists and that the latter was a classic, viewpoint and content-based restriction that failed strict scrutiny.[119] However, the panel reversed and upheld the portions of Idaho's law that criminalized obtaining records of an agricultural production facility by misrepresentation and obtaining employment at such a facility by misrepresentation with intent to cause economic or other injury.[120] Both of these provisions passed constitutional muster because they "protect[ ] against a 'legally cognizable harm associated with a false statement.'"[121] In *Animal Legal Defense Fund v. Reynolds*, the Iowa district court faced a similar statute.[122] The court granted in part and denied in part defendants' motion to dismiss, rejecting defendants' standing arguments and holding that the statute was a content and viewpoint-based restriction on protected speech potentially violative of the First Amendment.[123] The court dismissed plaintiffs' Equal Protection claims, however.[124]

And in the final chapter of the Utah case, plaintiffs, who had prevailed on summary judgment in their constitutional challenge to Utah's criminalization of "agricultural operation interference," pocketed $349,000 in attorneys' fees.[125]

115. 869 F.3d at 1191–92.
116. *Id.* at 1195.
117. *Id.* at 1197–98.
118. 878 F.3d at 1204–05.
119. *Id*. at 1190.
120. *Id*.
121. *Id*. at 1199 (quoting United States v. Alvarez, 567 U.S. 709, 719 (2012)).
122. 297 F. Supp. 3d at 909–10.
123. *Id*. at 911–16.
124. *Id*. at 926–29.
125. *See supra* note 112.

C. *The Right to Record in Public*

The courts continue to reaffirm and to recognize the right to record in public, creating a potentially confusing patchwork of law about when this constitutional right was "clearly established" in different federal circuits for purposes of defendants' assertion of qualified immunity in civil rights actions.

In *Askins v. Department of Homeland Security*, the ACLU brought suit on behalf of two border policy reform advocates who had attempted to photograph U.S. Customs and Border Protection ("CBP") activities near Southern California ports of entry.[126] The district court agreed with CBP that it could designate any area a "port of entry" and prohibit members of the public from photographing or recording there and granted CBP's motion to dismiss.[127] The Ninth Circuit reversed and remanded, finding CBP's general assertions of "national security" insufficient to overcome plaintiffs' First Amendment interests.[128]

In *State v. Russo*, the publisher of *Maui Time Publications* who was arrested for allegedly interfering in a traffic stop moved to dismiss the resulting criminal charges on First Amendment grounds and for lack of probable cause.[129] The Hawaii Supreme Court recognized that the right to photograph police officers in public was protected under both the First Amendment and the Hawaii Constitution (subject to reasonable time, place, and manner restrictions) and ordered that the charges be dismissed for lack of probable cause on the basis of the evidentiary record.[130] In the court's view, the video of the incident demonstrated the absence of probable cause because it showed that Russo did comply with the police directives.[131]

As the federal courts have become more skeptical about qualified immunity defenses in right to record cases, several high profile cases have settled on undisclosed terms.[132]

126. 899 F. 3d 1035, 1038–40 (9th Cir. 2018).
127. *Id*. at 1040–41.
128. *Id*. at 1047.
129. 407 P.3d 137, 140–41 (Haw. 2017).
130. *Id.* at 152.
131. *Id*. at 151.
132. *See* Reed v. Lieurance, 863 F.3d 1196 (9th Cir. 2017) (reversing and remanding for further proceedings on Fourth and First Amendment claims; case settled on remand in February 2018); Fields v. City of Philadelphia, 862 F.3d 353 (3d Cir. 2017), *on remand*, No. 14-4424, slip op., ECF No. 69 (E.D. Pa. Oct. 6, 2017) (order denying defendant's motion for summary judgment) (case was closed as settled on November 22, 2017); Smith v. Baltimore City Police Dep't, 840 F. 3d 193 (4th Cir. 2016) (case settled while defendants' motion for summary judgment was pending).

D. *National Security*

This year saw the imposition of the stiffest sentence ever under the Espionage Act,[133] as well as a number of other high-profile prosecutions and investigations[134] and an unprecedented civil lawsuit against Wikileaks and others.[135] In *Democratic National Committee v. Russian Federation*, the plaintiff alleges claims for violations of the Computer Fraud and Abuse Act, RICO, RICO conspiracy, the federal Wiretap Act, the Stored Communications Act, the DMCA, and various state laws arising out of the hacking of the DNC computer systems and the resulting dissemination of documents.[136] Defendants include numerous Russians, Wikileaks, Julian Assange, and President Trump and his campaign.[137]

V. REPORTER'S PRIVILEGE

At the state level, reporter's privilege laws continue to grow, with Vermont joining the ranks of states that have codified the privilege in a statute.[138] However, Hawaii has not renewed its reporter's privilege law since it expired in 2013,[139] and recent decisions across the country have cut back on protections for the media. At the federal level, the Department of Justice's revised guidelines towards the media are in a questionable state in light of the seizure of a reporter's records this past summer and former Attorney General Sessions' refusal to commit that he would not prosecute journalists for doing their jobs.

133. United States v. Winner, No. 1:17-cr-00034-JRH-BKE-1 (S.D. Ga. filed June 7, 2017) (Winner, a former Air Force member and NSA contract worker with top-security clearance, pleaded guilty to Espionage Act charges in August 2018 and was sentenced to 63 months in prison).

134. United States v. Schulte, No. 1:17-cr-00548-PAC-1 (S.D.N.Y. filed June 18, 2018) (superseding indictment charged former CIA software engineer charged with providing Wikileaks with documents about U.S. government hacking tools); United States v. Wolfe, No. 1-18-cr-00170 (D.D.C. filed June 7, 2018) (former Intelligence Committee aide charged with lying to federal investigators about contact with reporters); United States v. Albury, No. 0:18-cr-00067-WMW (D. Minn. filed Mar. 27, 2018) (former FBI agent pleaded guilty to leaking FBI documents to The Intercept; sentencing scheduled for Oct. 18, 2018).

135. Democratic Nat'l Comm. v. Russian Fed., No. 1:18-cv-03501-JGK (S.D.N.Y. filed April 20, 2018).

136. *Id*.

137. *Id*.

138. Erin Mansfield, *Scott Signs Shield Law for Journalists*, VT Digger (May 17, 2017), https://vtdigger.org/2017/05/17/scott-signs-shield-law-journalists.

139. Brett Oppegaard, *Reader Rep: Hawaii Should Reinstate Shield Law Immediately*, Honolulu Civil Beat (Nov. 7, 2016), https://www.civilbeat.org/2016/11/reader-rep-hawaii-should-reinsate-its-shield-law-immediately.

A. *Status of the DOJ Guidelines*

In late February 2015, the Department of Justice's revised guidelines toward the news media (the "Guidelines") went into effect.[140] According to those new Guidelines, the DOJ must give "reasonable and timely notice" to the media prior to the use of a subpoena, court order, or warrant, unless it would present a "clear and substantial" threat to the investigation in question, "risk grave harm to national security," or present potential risk of injury or death.[141] Moreover, under the new Guidelines, a subpoena "should not be used to obtain peripheral, non-essential or speculative information."[142] The DOJ strengthened these Guidelines after the Obama Administration's secret seizure of phone records of Associated Press editors and reporters came to light.[143]

However, the state of these updated Guidelines is unclear following the Trump Administration's seizure of *New York Times*' reporter Ali Watkins's phone and email records. In June, the Justice Department seized years' worth of customer records and subscriber information for two email accounts and one phone number belonging to Watkins in the course of investigating charges against James Wolfe, the former director of security for the Senate Intelligence Committee, who was alleged to have lied to the FBI about his contacts with three reporters.[144] The Justice Department has not explained whether it viewed any of the Guidelines' exceptions to apply to the Watkins incident, or whether it even considered itself bound by the Guidelines. Combined with former Attorney General Sessions' intent to prosecute leakers aggressively,[145] and his refusal to provide assurances that he would not jail journalists for doing their jobs,[146] the Watkins incident is particularly concerning for journalists. It would not be surprising to see less media-friendly revisions to the Guidelines in the future.

B. *Resurgence (Yet Again) of a Proposed Federal Shield Law*

In response to Sessions' refusal to categorically commit to not prosecuting journalists, two members of the House of Representatives introduced

140. 28 C.F.R. § 50.10

141. *Id.* § 50.10(e)(1)(i).

142. *Id.* § 50.10(c)(4)(i)(A).

143. *Justice Dept Tightens Guidelines on Reporter Data*, Associated Press (July 12, 2013), https://www.ap.org/ap-in-the-news/2013/justice-dept-tightens-guidelines-on-reporter-data.

144. Erik Wemple, *Five Questions About the Ali Watkins-James Wolfe Story*, Washington Post (June 27, 2018), https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/06/27/five-questions-about-the-ali-watkins-james-wolfe-story/?utm_term=.d1170bd22784.

145. Betsy Woodruff, *Leak Investigations Rise 800% under Jeff Sessions*, The Daily Beast (Nov. 14, 2017), https://www.thedailybeast.com/leak-investigations-rise-800-under-jeff-sessions.

146. Mallory Shelbourne, *Sessions Declines 'Blanket' Assurance to Not Jail Journalists*, The Hill (October 18, 2017), http://thehill.com/homenews/administration/356070-sessions-declines-blanket-assurance-to-not-jail-journalists.

"The Free Flow of Information Act of 2017" (H.R. 4382), which sets up a balancing test for when "the public interest in compelling disclosure . . . outweighs the public interest in gathering or disseminating news or information."[147] Prior attempts to codify the privilege on a federal level have failed in the past decade.[148]

C. *Developments Under State Law*

In a blow to journalists in New York, the state's highest court held that a *New York Times* reporter did not have the right to appeal the order denying her motion to quash a subpoena issued to her in the Baby Hope case, a decades old unsolved murder.[149] The court ruled that an order resolving a motion to quash issued after a criminal action commences is not appealable because it was a nonfinal order under the relevant statute.[150] While the court was "not unsympathetic" to the fact that a subpoenaed nonparty would be deprived of "vidicat[ing] its position before an appellate body," it refused to "create a right to appeal" without legislative authorization.[151]

In the headline-grabbing case against a Chicago police officer who shot a black teenager sixteen times as the teen moved away from police, the court quashed a trial subpoena to a freelance reporter who was the first to report on evidence that contradicted the police department's account of the shooting.[152] The subpoena sought testimony about the reporter's sources, but the court found such information to be "irrelevant" to the case.[153]

In Texas, an appellate court found that the Texas shield statute applied to the show *The First 48* on the A&E network and quashed defendant's subpoena for outtakes in a capital murder case.[154] The court ruled that the defendant had failed to show the outtakes were essential to his defense where he "merely speculated as to what the outtakes might depict."[155]

147. Paul Fletcher, *Sessions Testimony Prompts New Federal Shield Law Bill Protecting Journalists*, Forbes (Nov. 29, 2017), https://www.forbes.com/sites/paulfletcher/2017/11/29/sessions-testimony-prompts-new-federal-shield-law-bill-protecting-journalists/#3b475624912e

148. *Id.*

149. People v. Juarez, 107 N.E.3d 556 (N.Y. 2018). The trial court denied the reporter's motion to quash in connection with the trial proceedings, but the Appellate Division reversed, and the prosecution sought and received leave to appeal. *Id.* at 557.

150. *Id*. at 558–59.

151. *Id*. at 559–60.

152. Megan Crepeau, *Laquan Mcdonald Reporter Won't Be Forced to Testify at Chicago Cop's Hearing*, Chi. Trib., Dec. 13, 2017, https://www.chicagotribune.com/news/laquanmcdonald/ct-met-laquan-mcdonald-jamie-kalven-sources-20171212-story.html

153. People v. Van Dyke, No. 17 CR 4286 (Cook County, IL Dec. 13, 2017); order available at https://www.chicagotribune.com/ct-laquan-mcdonald-reporter-20171213-htmlstory.html.

154. Brooks v. State, No. 08–15–00208–CR, 2017 WL 6350260, at *9–12 (Tex. App. Dec. 13, 2017).

155. *Id.* at *12.

Finally, a federal magistrate judge in the Southern District of Florida did not compel Buzzfeed to identify its confidential sources in response to discovery requests made in a defamation case concerning the infamous "Trump dossier" published before the 2016 election.[156] Plaintiff argued that Florida's shield law did not apply to Buzzfeed because it was not a covered media entity, but the magistrate rejected that argument."[157] The court also found that the plaintiff had failed to make a "clear and specific showing" that the requested sources were not available from alternative means, in light of other potential sources that had not been explored.[158] Notably, the court found it was unnecessary to decide whether Florida or New York law controlled because plaintiff could not even meet the standards under either Florida law, which provides only a qualified privilege for confidential sources, or New York law, which provides an absolute privilege.[159]

D. *Developments Under Federal Law*

In the District of Colorado, the court denied a motion to quash a subpoena to a reporter whose articles were alleged to have furthered the "smear campaign" perpetuated by the defendants in the underlying defamation action.[160] Although the reporter was entitled to assert the privilege despite not being independent from the parties (contrary to Second Circuit precedent otherwise), the court found that all of the factors favored disclosure.[161] In considering whether the plaintiff had other available sources of the information sought, the court rejected the requirement of exhausting "all reasonable alternative sources of information," and found that "only an independent attempt to obtain the information elsewhere" was required.[162]

VI. INSURANCE

A. *Data Breaches and Hacking*

In the context of liability policies providing "personal and advertising injury" coverage, courts looked at potential coverage for data breach and hacking claims. Courts recognized that the insured's failure to protect against data breaches by third-party hackers or other malicious users was

156. Gubarev v. BuzzFeed, Inc., No. 1:17-cv-60426, 2017 WL 6547898 (S.D. Fla. Dec. 21, 2017).
157. *Id.* at *3–4.
158. *Id.* at *4.
159. *Id.* at *2.
160. In re Bacon v. Archer, No. 17-mc-00192-KLM, 2018 WL 4467182, *6–7 (D. Colo. Sept. 17, 2018).
161. *Id.*
162. *Id.* at *6.

not covered.[163] Instead, the insured itself must have disseminated confidential information to third parties.[164]

B. *Surreptitious Videotaping*

The duty to defend a lawsuit seeking damages arising from surreptitious videotaping was addressed under Maryland law.[165] The court held that a commercial general liability insurer had a duty to defend an insured business against allegations that its manager videotaped women using the restaurant restroom without their knowledge based on the policy's coverage for "invasion of the right of private occupancy of a room . . . committed by or on behalf of its owner, landlord or lessor."[166] However, the policy's criminal acts exclusion precluded any duty to defend the manager.[167]

C. *Unsolicited Telephone Calls, Text Messages, and Faxes*

Courts continue to parse whether insurance coverage exists for unsolicited telephone calls, text messages, and faxes that allegedly violate the Telephone Consumer Protection Act ("TCPA")[168] and related state laws. A court applying New York law held claims related to unsolicited text messages were covered under the terms of a professional liability insurance policy.[169] Whether policy exclusions for violations of state laws similar to the TCPA also apply to communications that violate other statues remains open for interpretation depending on the exclusion wording and jurisdiction.[170] For

163. *See*, *e.g.*, St. Paul Fire & Marine Ins. Co. v. Rosen Millennium, Inc., No. 6:17-cv-540-Orl-41GJK, 2018 WL 4732718, at *3 (M.D. Fla. Sep. 28, 2018) (appeal filed Oct. 19, 2018) (holding no duty to defend insured provider of data security services against claims by client hotel and resort arising from third-party data breach; distinguishing Travelers Indem. Co. of Am. v. Portal Healthcare Sols., LLC, 644 F. App'x. 245, 248 (4th Cir. 2016) (applying Virginia law) (holding an insured's alleged data breach resulting in exposure of client medical records on the Internet for more than four months were covered personal injury offenses under two differently worded policies); Innovak Int'l v. Hanover Ins. Co., 280 F. Supp. 3d 1340 (M.D. Fla. 2017) (applying S.C. law).

164. *Rosen*, 2018 WL 4732718 at *6; *Innovak*, 280 F. Supp. 3d at 1348.

165. Harleysville Preferred Ins. Co. v. Rams Head Savage Mill, LLC, 187 A.3d 797 (Md. Ct. Spec. App. 2018).

166. *Id.* at 808, 813.

167. *Id.* at 817–18.

168. 47 U.S.C. § 227.

169. Ill. Union Ins. Co. v. U.S. Bus Charter & Limo Inc., 291 F. Supp. 3d 286, 291–92 (E.D.N.Y. 2018) (holding unsolicited text messages sent to consumers promoting deals on bus and limousine rentals fell within professional liability insurance policy's coverage).

170. *Compare* Hartford Cas. Ins. Co. v. Greve, No. 3:17CV183-GCM, 2017 WL 5557669 (W.D.N.C. Nov. 17, 2017) (finding exclusion for alleged violation of laws similar to the TCPA that prohibit or limit the sending, transmitting, communicating or distribution of material or information barred coverage for claims for alleged violations of the Federal Driver's Privacy Protection Act, 18. U.S.C. § 2722), *with* Harleysville Preferred Ins. Co., 187 A.3d at 814 (holding recording and distribution exclusion may not apply to surreptitious videotaping).

example, some courts limit carrier indemnity obligations by ruling that amounts sought under TCPA are financial penalties.[171]

D. *Advertising*

The "personal and advertising injury" provisions in general liability policies may cover some claims related to advertising. The Supreme Judicial Court of Massachusetts found an insurer owed a duty to defend claims for violations of the right of publicity and trademark under the "advertising idea" offense based on the insured's alleged use of an athlete's name to sell running shoes.[172]

Courts upheld various exclusions to bar coverage for "personal and advertising" injury claims. For example, one court rejected arguments that trademark infringement should not fall within the intellectual property exclusion when the allegedly infringing mark also constitutes an "advertising idea."[173] Another court applying Florida law found no coverage for unfair trade practices and false advertising claims based on the policy's exclusion for "advertising injury" arising from "the failure of [the insured's] goods, products or services to conform with advertised quality or performance."[174]

VII. ADVERTISING LAW

A. *FTC Brings Its First Action Under the Consumer Review Fairness Act*

In July 2018, the FTC filed its first lawsuit under the Consumer Review Fairness Act ("CRFA"). 15 USC § 45(b). The FTC brought the action a little more than a year after the CRFA took effect. Congress passed the CRFA in response to companies' attempts to stifle negative online reviews through onerous provisions in website terms of service. The CRFA prohibits companies from using their terms of service that punish or limit consumers' honest online reviews. In July of 2018, the FTC and Minnesota Attorney General sued a company called Sellers Playbook and other defendants in Minnesota federal court for violations of the CRFA and other

171. Ace Am. Ins. Co. v. Dish Network, LLC, 883 F.3d 881, 892 (10th Cir. 2018) (applying Colorado law) (statutory damages sought by the plaintiffs in the underlying suit are actually financial penalties not covered under Colorado law; injunctive relief intended to prevent future harm does not constitute "damages").

172. Holyoke Mut'l Ins. Co. in Salem v. Vibram USA Inc., 106 N.E.3d 572, 580–81 (Mass. 2018) (family name constituted advertising idea where athlete came from a family of famous marathon runners, and his family utilized their name to promote their status in the running community).

173. Sterngold Dental, LLC v. HDI Global Ins. Co., No. 17-11735, 2018 WL 4696744 at *3–4 (D. Mass. Sept. 29, 2018).

174. Scott, Blane, and Darren Recovery, LLC v. Auto-Owners Ins. Co., 727 F. App'x 625 (11th Cir. 2018).

alleged statutory violations.[175] According to the FTC, the defendants operated a scam in which purchasers were assured they would make thousands of dollars a month on Amazon using defendants' "customized system to perfect the individual's ability to sell on Amazon effectively and profitably." Not surprisingly, according to the FTC, the defendants used "form contract provisions that restrict individual consumers' ability to review defendants' products, services, or conduct." The FTC based the CRFA claim on the existence of those provisions. The district court entered a temporary restraining order, and the case is pending.

B. *New Developments in TCPA Class Action Litigation*

1. D.C. Circuit's Ruling in *ACA International v. FCC*

On March 16, 2018, the D.C. Circuit issued a much anticipated opinion in *ACA International v. FCC*,[176] in connection with the FCC's 2015 Order interpreting the TCPA. In *ACA International*, petitioners challenged several FCC actions set forth in the 2015 Order including (1) the explanation of which devices qualify as an automatic telephone dialing systems ("ATDS") and (2) the FCC interpretation regarding when a caller violates the TCPA by calling a wireless number previously held by a consenting party but reassigned to a person who has not given consent.[177]

The court noted that the TCPA definition of ATDS raises two questions: (i) when does a device have the "capacity" to perform the two enumerated functions; and (ii) what precisely are those functions?[178] On the "capacity" question, the court diverged from the "present capacity" versus "potential functionalities" debate from the 2015 Order and focused "more on considerations such as how much is required to enable the device to function as an autodialer: does it require the simple flipping of a switch, or does it require essentially a top-to-bottom reconstruction of the equipment?"[179] The Court noted that a "device's 'capacity' includes functions that could be added through app downloads and software additions, and if smartphone apps can introduce ATDS functionality into the device, it follows that *all smartphones*, under the [FCC's] approach, meet the statutory definition of an autodialer."[180] The court recognized that under that scenario—where every smartphone qualifies as an ATDS—the statute's "restrictions on autodialer calls assume an eye-popping sweep."[181] The court concluded that such an outcome is "an unreasonable, and impermissible, interpretation of

175. FTC v. Sellers Playbook, Inc., No. 18-cv-02207 (D. Minn.).
176. 885 F.3d 687 (D.C. Cir. 2018).
177. *Id.* at 695.
178. *Id.*
179. *Id.* at 696.
180. *Id.* at 697 (emphasis added).
181. *Id.*

the statute's reach. The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent."[182] Accordingly, the court held that the FCC's interpretation of "capacity" in the 2015 Order does "not constitute reasoned decision-making and thus would not satisfy the [Administrative Procedure Act] arbitrary-and-capricious review."[183]

Turning to the precise definition of required ATDS functions, the court noted that the statutory phrase "'using a random or sequential number generator,' has generated substantial questions over the years."[184] The question is whether this phrase modifies both "store" and produce." Is a device an ATDS if it simply stores and automatically dials a list of random or sequential numbers that it did not generate? In other words, must the device "*itself* have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from a database of telephone numbers generated elsewhere?"[185] The court concluded that the 2015 Order offered "no meaningful guidance" on this issue.[186] The court noted that the 2015 Order "while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decision-making, espouse both competing interpretations in the same order."[187] The court also took issue with the FCC's interpretation of the "human intervention" aspect of an ATDS, noting that "[a]ccording to the Commission . . . the 'basic function' of an autodialer is to dial numbers without human intervention, but a device might still qualify as an autodialer even if it cannot dial numbers without human intervention. Those side-by-side propositions are difficult to square."[188] Accordingly, the court ruled that the 2015 Order interpretation of functions a device must perform to qualify as an ATDS "fails to satisfy the requirement of reasoned decision making. The order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the 'capacity' to perform the necessary functions. *We must therefore set aside the Commission's treatment of those matters.*"[189]

182. *Id.*
183. *Id.* at 699.
184. *Id.* at 701.
185. *Id.*
186. *Id.*
187. *Id.* 702–03.
188. *Id.* at 703.
189. *Id.*

Following the 2015 Order, "the reassignment of a wireless number extinguishe[d] any consent given by the number's previous holder and exposes the caller to liability for reaching a party who has not given consent."[190] However, the FCC created a one time "safe harbor" whereby "[f]or that first call [to a reassigned number], the caller can continue to rely on the consent given by the 'previous subscriber.'" [191] In *ACA International*, the court noted that the FCC did "not presume that a single call to a reassigned number will always be sufficient for callers to gain actual knowledge of the reassignment."[192] Rather, "it believed that "one call represents an appropriate balance between a caller's opportunity to learn of the reassignment and the privacy interests of the new subscriber.'"[193] In reviewing the FCC's interpretation of the phrase "called party," the court noted that there are multiple instances within broader the TCPA statute where the term refers to the current subscriber—not the previous, pre-assigned subscriber. In addition, the phrase "intended recipient" does not appear in § 227—indicating that there is no justification for the FCC's equating "called party" with "intended recipient of the call."[194] Accordingly, the court found that "the Commission was not *compelled* to interpret 'called party' in § 227(b)(1)(A) to mean the 'intended recipient' rather than the current subscriber. The Commission thus could permissibly interpret 'called party' in that provision to refer to the current subscriber."[195]

The *ACA International* petitioners also argued that the FCC's institution of a one-call safe harbor for reassigned numbers was arbitrary and capricious. The court noted that, "[t]he question we face is, why should that [reasonable reliance on consent from prior subscriber] necessarily stop with a single call?[196] The court noted that the FCC has consistently adopted a "reasonable reliance" approach when interpreting the TCPA's approval of calls based on prior express consent, but that the FCC "gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message."[197] The court ultimately "set aside the Commission's interpretation on the ground that the one-call safe harbor is arbitrary and capricious."[198] The court also concluded that the law requires "setting aside not only [the FCC's] allowance of a one-call safe harbor, but also its treatment of reassigned numbers more

190. *Id.* at 705.
191. *Id.* at 706.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 708.
197. *Id.*
198. *Id.* at 705.

generally."[199] The court noted that this broader approach avoids a situation where "a caller is strictly liable for *all* calls made to [a] reassigned number, even if she has no knowledge of the reassignment."[200]

2. Post-*ACA International* Developments

The Third Circuit granted summary judgment in a TCPA claim in favor of a caller.[201] Plaintiff purchased a cell phone with a reassigned telephone number. The prior owner of the number had subscribed to Yahoo's Email SMS Service, through which a user would receive a text message each time an email was sent to the user's Yahoo email account. Because the prior owner of the number never canceled the subscription, plaintiff received a text message from Yahoo every time the prior owner received an email. Plaintiff unsuccessfully attempted to turn of the SMS notifications, and ultimately received approximately 27,800 text messages from Yahoo over the course of 17 months.[202] Plaintiff filed a class action under the TCPA. While the case was pending, both the 2015 Order and *ACA International* decision were released. The Third Circuit ruled that "[i]n light of the D.C. Circuit's holding [in *ACA International*] we interpret the statutory definition of autodialer as we did prior to the issuance of the 2015 Declaratory Ruling."[203] The court stated that the plaintiff "can no longer rely on is argument that the Email SMS Service had the latent or potential capacity to function as an autodialer, and that "the only remaining question, then, is whether [plaintiff] provided evidence to show that the Email SMS Service has the present capacity to function as an autodialer."[204] The court concluded that plaintiff failed to adduce any evidence of how "the Email SMS System actually did or could *generate* random telephone numbers to dial."[205] The record indicated only that the Email SMS Service sent messages to "numbers that had been individually and manually inputted into its system by a user" and the court determined that because of that fact, "[t]he TCPA's prohibition on autodialers is therefore not the proper means of redress."[206]

The Ninth Circuit vacated a summary judgment in favor of a caller.[207] The device at issue in *Marks v. Crunch San Diego, LLC* was a web-based marketing platform designed to send promotional text messages to a list of

199. *Id.* at 708.
200. *Id.*
201. Dominguez v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018).
202. *Id.*
203. *Id.*
204. *Id.* 373.
205. *Id.* at 372 (emphasis added).
206. *Id.* at *10.
207. Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1043 (9th Cir. 2018).

stored telephone numbers.[208] The device captured and stored phone numbers in one of three ways: an operator of the system manually entered a phone number into the system; a current or potential customer responded to a marketing campaign with a text (which automatically provided the customer's phone number); or a customer provided a phone number by filling out a consent form on a client's website.[209] Defendant Crunch used the platform by logging in to the system, selecting the recipient phone numbers, generating the content of the marketing message and selecting the date and time for the message to be sent.[210] Plaintiff received three text messages from Crunch after signing up for a gym membership.[211] The case turned on whether Crunch's marketing platform qualified as an ATDS. The court ruled that "[b]ecause the D.C. Circuit vacated the FCC's interpretation of what sort of device qualified as an ATDS, only the statutory definition of ATDS as set forth by Congress in 1991 remains."[212]

The court rejected Crunch's argument that an ATDS must be fully automatic, meaning that it must operate without any human intervention whatsoever.[213] Because Crunch did not dispute that the platform dialed numbers automatically, the court determined that the system "ha[d] the automatic dialing function necessary to qualify as an ATDS, even though humans, rather than machines, are needed to add phone numbers to the platform."[214]

The court ruled that the platform's capacity to "store numbers and dial[] them automatically to send text messages to a stored list of phone numbers as part of scheduled campaigns . . is sufficient to survive summary judgment" on the issue of whether the platform qualifies as an ATDS.[215] The court concluded that "the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator."[216]

On October 3, 2018, the FCC issued yet another Public Notice relating to TCPA interpretation in connection with the recent *Marks v. Crunch San Diego, LLC* decision.[217] Specifically, the FCC sought "further comment on what constitutes an 'automatic telephone dialing system.'"[218] The FCC noted the apparent conflict between the Ninth Circuit's conclusion that

208. *Id.* at 1048.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 1050.
213. *Id.* at 1052
214. *Id.* at 1053.
215. *Id.*.
216. *Id.* at 1043.
217. 2018 FCC LEXIS 2610, *1.
218. *Id.* at *2.

the phrase "using a random or sequential number generator" does not apply to equipment that has the capacity "to store numbers to be called" and the D.C. Circuit's conclusion that the TCPA unambiguously forecloses any interpretation that "would appear to subject ordinary calls from any conventional smartphone to the Act's coverage."[219] To the extent the phrase "using a random or sequential number generator" is ambiguous, the FCC sought comment on how it should exercise its discretion to interpret such ambiguities.[220] In addition, the FCC sought comment on the following issues: does the interpretation of the *Marks* court mean that any device with the capacity to dial stored numbers automatically is an automatic telephone dialing system? What devices have the capacity to store numbers? Do smartphones have such capacity? What devices that can store numbers also have the capacity to automatically dial such numbers? Do smartphones have such capacity? In short, how should the Commission address these two court holdings?[221] Approximately 30 entities provided comment in response to the Public Notice, and the majority advocated for an interpretation of ATDS that is narrower than the meaning adopted in *Marks*. The existing conflict between the Third Circuit and Ninth Circuit interpretations of the ATDS definition suggests that swift action by the FCC is likely.

219. *Id.* at *3.
220. *Id.* at *4.
221. *Id.*