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Texas' Anti-SLAPP Regime Does Not Apply in Federal Diversity Cases, Says the Fifth Circuit

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A recent decision from the Fifth Circuit Court of Appeals in *Klocke v. Watson*, No. 17-11320 (August 23, 2019), appears to have answered a perennial jurisdictional question that had split federal district courts in Texas for several years: Are motions to dismiss pursuant to the Texas Citizens Participation Act (TCPA) allowed in federal court? According to the opinion handed down by a three-member panel of the Fifth Circuit, the answer, apparently, is no.

Texas's Anti-SLAPP Statute and Federal Jurisprudence

The TCPA was enacted by the Texas Legislature in 2011. Its stated purpose was to "encourag[e] public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights." Also called an anti-SLAPP statute (the acronym SLAPP stands for "strategic lawsuit against public participation"), the TCPA defines the rights of free speech, participation, and petition, how those rights may be exercised, and the method for dismissing legal actions that seek to infringe on them.

For example, the TCPA protects communications "in any form or medium, including oral, visual, written, audiovisual, or electronic." The right of association is defined as communications between individuals to collectively "express, promote, pursue, or defend common interests." Free speech includes communications in connection with a matter of "public concern." Finally, the right to petition includes communications in or pertaining to judicial, executive, legislative, or other governmental meetings.

When a lawsuit seeks to infringe on a person's rights, the TCPA allows the person to move to dismiss the offensive claim through a comprehensive step-by-step process. The TCPA dictates every detail of the process, including each party's burden of proof (which differs at each stage) and specific filing and oral hearing deadlines. The Act even sets a deadline for a court to rule on a motion to dismiss. If the moving party prevails on its motion, the court is required to award reasonable attorney's fees, costs, and sanctions against the losing party.

It is because of this prescribed framework that federal judges have struggled to determine whether the TCPA applies in their courts. At issue is the *Erie* doctrine, a line of cases based on Supreme Court of the United States precedent that holds that state-law substantive rights apply in federal

court, whereas state procedural law must yield to the Federal Rules of Civil Procedure (which dictate burdens of proof and deadlines in federal court). Many federal trial courts in Texas, especially in recent years, declined to apply the TCPA, reasoning that it interfered with the Federal Rules and was a mere procedural right. Other federal trial courts in Texas held the opposite view.

In the midst of this dichotomy, the Fifth Circuit declined to resolve the conflict while also sending mixed signals. In one such case, a party appealed the denial of its TCPA motion to dismiss after the district court did not act on it within the statutory deadlines. The appellate court granted the appeal and remanded the motion back to the district court for further consideration while specifically demurring on whether the motion was proper in federal court.

The Fifth Circuit's Decision

Through *Klocke v. Watson*, the confusion wrought by these differing rulings appears to have been settled. In *Klocke*, the Fifth Circuit held that motions to dismiss pursuant to the TCPA are procedural remedies unavailable in federal court. In the case, Klocke sued following the suicide of his son Thomas, a student at the University of Texas at Arlington. Thomas was allegedly the victim of Watson's false charge of homophobic harassment. The university investigated the charge and levied a severe punishment against Thomas under its Title IX procedures. Klocke then sued Watson for defamation and defamation per se alleging his false statements to the university had caused his son's death. Watson moved to dismiss the claims under the TCPA.

The trial court granted Watson's motion and awarded him over $23,000 in attorney's fees, costs, and sanctions. In overruling the trial court, the *Klocke* panel had to overcome a previous Fifth Circuit decision that had held Louisiana's anti-SLAPP statute applicable in federal court. That case, *Henry v. Lake Charles American Press*, 566 F.3d 164, 169 (5th Cir. 2009), involved a statute similar to the TCPA. Normally, under the Fifth Circuit's rules of orderliness and the common-law principle of precedent, such a decision would control the outcome of subsequent, similar cases. However, the *Klocke* court essentially ignored *Henry*, stating that it was not binding since (a) other Fifth Circuit panels had declined to apply *Henry* to TCPA cases; (b) the TCPA imposes higher, more complex preliminary burdens and rigorous procedural deadlines than Louisiana's law; and (c) the *Henry* panel lacked the benefit of an applicable Supreme Court opinion handed down in 2010.

The court then reasoned that the TCPA impermissibly conflicts with the Federal Rules because it "superimpose[s] additional requirements on the Federal Rules," namely, higher burdens of proof and different deadlines. The TCPA also offers no substantive legal remedy that is not already available through Rule 12 (regarding motions to dismiss) and Rule 56 (regarding motions for summary judgment), but merely a procedural mechanism for achieving the same result.

Are TCPA Motions to Dismiss Improper in All Federal Cases?

Notably, the *Klocke* court limited its ruling to cases pending in federal court pursuant to diversity jurisdiction under 28 U.S.C. § 1332, in in keeping with the *Erie* doctrine. As such, the question now is whether the same reasoning will be applied by other courts in cases involving federal question jurisdiction (i.e., questions of federal law) under 28 U.S.C. § 1331. Some post-*Erie* rulings, including in the Fifth Circuit, have held that *Erie* applies in federal question cases if they also involve questions of state law. Under this reasoning, it is likely district courts will begin applying *Klocke* to all cases irrespective of how they arrived in federal court, thereby barring TCPA motions to dismiss. In effect, parties seeking to dismiss lawsuits that infringe on their free speech, association, and petition rights will have to rely solely on the procedural remedies afforded by Federal Rules 12 and 56.

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