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**PERILS AND PROTECTIONS FOR THE
UNDERCOVER JOURNALIST:
A Primer on Possible Claims and Defenses in Texas Courts
Based on Headline Journalism Cases**

**By Crystal J. Parker
Jackson Walker L.L.P.**

**PERILS AND PROTECTIONS FOR THE UNDERCOVER JOURNALIST:
A PRIMER ON POSSIBLE CLAIMS AND DEFENSES IN TEXAS COURTS
BASED ON HEADLINE UNDERCOVER JOURNALISM CASES**

By Crystal J. Parker¹

Recent lawsuits filed by Planned Parenthood and National Abortion Federation against the anti-abortion Center for Medical Progress, raise old and new questions about the legal liability and protections afforded to those who secretly record and publish conversations or events about matters of public concern. While *Food Lion, Inc. v. Capital Cities/ABC, Inc.*² brought attention in the 1990s to some of these issues, it left many issues on the table.

This article briefly discusses these cases and examines the civil claims often brought in cases against individuals who secretly videotape matters of public concern, along with a general discussion of how Texas courts might address those issues, and a brief discussion of some of the potential legal protections available under Texas law. It also briefly addresses instances where the nature of the newsgatherer or publisher (whether traditional media, citizen journalist, or advocacy group) might provide some distinction under the law.

I. THE FOOD LION CASE

In *Food Lion*, the grocery giant sued Capital Cities/ABC, Inc. (ABC), contending that two ABC employees had obtained employment in Food Lion stores in North Carolina and South Carolina under false pretenses to secretly videotape alleged unsanitary food practices for a national *PrimeTime* broadcast that was highly critical of Food Lion's food-handling practices. The November 5, 1992, broadcast included video made by employees Dale and Barnett appearing to show Food Lion employees repackaging and redating fish that had passed its expiration date, mixing expired beef with fresh beef, and applying barbecue sauce to expired chicken. It also included interviews with former and current Food Lion employees about the company's food practices.³

In 1993, Food Lion's profits reportedly fell from \$178 million to \$3.9 million.⁴ Food Lion sued ABC in North Carolina federal court asserting claims, for fraud, trespass, breach of the duty of loyalty, and unfair trade practices, among other claims.⁵ Importantly, Food Lion did not allege the story was false or assert defamation claims in the lawsuit in an effort avoid requirements of the First Amendment. Rather, it focused on the methods ABC used to obtain the video footage.⁶

¹ Ms. Parker is a Partner at Jackson Walker L.L.P. 1/27/2016.

² 194 F.3d 505 (4th Cir. 1999).

³ See Daniel A. Levin and Alen C. Roline, *Undercover Reporters, Tort Law, and the First Amendment: Food Lion v. ABC and the Future of Surreptitious Newsgathering*, available at <http://dlib.nyu.edu/undercover/sites/dlib.nyu.edu.undercover/files/documents/uploads/editors/Undercover-Reporters-Tort-Law-First-Amendment.pdf>.

⁴ See *id.*

⁵ 194 F.3d at 510.

⁶ See *id.* at 510, 522.

Food Lion obtained a jury verdict against the ABC defendants on its fraud, trespass, and claims for breach of the duty of loyalty. The trial court also determined, based on the jury's findings, that the ABC defendants had violated the state's Unfair and Deceptive Trade Practices Act. The jury awarded Food Lion compensatory damages of \$1,402.60, and punitive damages in excess of \$5.5 million on the fraud claim against the corporate defendants and producers, though the trial court reduced the punitive damages to \$315,000.⁷

The ABC defendants appealed the post-trial denial of their motion for judgment as a matter of law, and Food Lion cross-appealed on a pretrial ruling excluding proof of publication damages, including lost sales and loss of goodwill. The Fourth Circuit affirmed the district court's refusal to allow Food Lion to prove publication damages on First Amendment grounds, holding that Food Lion could not recover defamation-type damages without the constitutionally required showing of actual malice.⁸ The Fourth Circuit also reversed the judgment that the ABC defendants committed fraud because Food Lion could not demonstrate that it justifiably relied on the alleged fraud to their detriment.⁹ The Court likewise reversed the punitive damage award, which was based only on the fraud claim.¹⁰ The Court found that the state's unfair business practices act did not apply.¹¹ The Court affirmed the judgment that the ABC defendants had breached their duty of loyalty and committed trespass and affirmed nominal damages of \$2.00 for these torts.¹²

II. THE RECENT UNDERCOVER ABORTION-VIDEO CASES

Recent cases filed by Planned Parenthood (PP)¹³ and National Abortion Federation (NAF)¹⁴ against The Center for Medical Progress (CMP), Biomax Procurement Services, LLC (Biomax), and others bear many similarities to the *Food Lion* case and raise important considerations concerning how litigants and courts might address undercover videos moving forward.

In July of 2015, CMP, an organization that opposes abortions and federal funding for PP, released a series of videos aimed at exposing alleged illegal abortion practices; CMP says the videos show PP employees selling fetal tissue for profit, which is illegal. PP says that the fees being discussed in the videos were to cover costs and were legal. The videos rallied anti-abortion activists and fueled discussions in Congress about cutting off funding for PP.

On July 31, 2015, NAF filed a Complaint for Injunctive Relief and Damages against CMP, Biomax, and two individuals allegedly involved in the procurement and publication of the

⁷ *Id.*

⁸ *Id.* at 522.

⁹ *Id.* at 512-13.

¹⁰ *Id.* at 522.

¹¹ *Id.* at 520.

¹² *Id.* at 524.

¹³ *Planned Parenthood Federation of America, Inc., et al v. Center for Medical Progress, et al*, Case No. 3:16-cv-00236, United States District Court for the Northern District of California.

¹⁴ *National Abortion Federation (NAF) v. The Center for Medical Progress, et al*, Case No. 3:15-cv-3522, United States District Court for the Northern District of California.

videos.¹⁵ The lawsuit alleges that the defendants conspired to set up Biomax, a fake company that held itself out as a legitimate fetal tissue procurement company. It further alleged that individuals pretended to be officers and employees of Biomax, using pseudonyms and fake identifications, to gain access to private conferences held by PP and National Abortion Federation (“NAF”). It further alleges that these individuals signed confidentiality and non-disclosure agreements to gain access to the meetings, and that they wore hidden video cameras and secretly taped conversations that were used in the videos. The lawsuit further alleges that NAF heavily edited the videos, with critical content deliberately deleted, and presented disconnected portions sewn together to create a misleading impression.¹⁶

PP filed a similar lawsuit on January 14, 2016. The NAF and PP lawsuits assert claims for:

RICO Violations—conducting an enterprise to perpetrate a scheme to disrupt and burden PP and NAF’s mission through a pattern of racketeering activity by defrauding them, illegally taping them, publishing grossly misleading videos, placing their providers and staff in personal jeopardy, burdening their right to freedom of association, unlawfully burdening its members’ constitutional rights to freedom of association and lawful access to safe abortions,¹⁷ and using and disclosing contents of the illegal recordings, among other things.

Breach of Contract—breach of the written agreement Biomax representatives signed to register for conferences, including falsely representing Biomax as a company legitimately providing biological specimen procurement services, promises to follow laws, promises not to make recordings or disclose information learned at the meetings, and promises to only use information learned at the meetings to enhance the quality and safety of services provided by NAF members.

Trespass—fraudulent inducement of and exceeding the scope of the conditional consent of Plaintiffs to permit the Defendants to enter onto property leased by Plaintiffs.

Unlawful Business Practices under California Law—knowingly making untrue or misleading statements regarding Biomax’s services with the intent to induce Plaintiffs to enter into obligations relating thereto, with the intent not to provide the services as advertised, including by representing Biomax as a biological specimen procurement organization, among other things.

Fraud, Fraudulent Misrepresentation, and Conspiracy to Commit Fraud—making false representations and conducting a conspiracy to commit fraud to gain access to meetings, including making representations about Biomax and its purpose and

¹⁵ *Id.* at Docket No. 1.

¹⁶ *Id.*

¹⁷ Standing and legal authority to assert the illegal burdening of the constitutional rights of its members is an important issue for advocacy groups but is beyond the scope of this paper.

members and signing non-disclosure agreements in which they promised: not to make recordings at the NAF meetings, not to disclose information learned at the meeting, and that they would only use information learned at the meetings to enhance the quality and safety of services provided by NAF members.

Eavesdropping Violations—secretly recording confidential communication in violation of eavesdropping laws.

Invasion of Privacy and False Light—secretly recording staff, who had a reasonable expectation that conversations and interactions between participants at the conferences would be private and not secretly recorded by anyone or published to the public at large, and releasing videos that portray NAF and its members in a false light.

The lawsuits seek a preliminary and permanent injunction preventing Plaintiffs from attempting to gain access to future NAF meetings or PP conferences or properties; publishing or disclosing recordings or confidential information obtained at Plaintiffs' meetings, including the names and addresses learned at the meetings; publishing or disclosing dates or locations of Plaintiffs' future meetings; and recording conversations with PP staff or at its facilities without the consent of all parties.

The plaintiffs, like Food Lion, do not assert a claim for defamation, though PP has stated in a letter to Congress that one of the CMP videos is “heavily edited to create the false impression that Planned Parenthood is selling fetal tissue for profit when in fact the opposite is true.”¹⁸

On July 31, 2015, the NAF court issued an *ex parte* Temporary Restraining Order and Order to Show Cause restraining defendants from publishing or disclosing recordings or confidential information learned at NAF meetings, publishing or disclosing dates or locations of future NAF meetings or the names or addresses of NAF members learned at NAF meetings, and attempting to gain access to future NAF meetings.¹⁹ In doing so, the Court found that NAF was likely to prevail on the merits, was likely to suffer irreparable injury, and that the issuance of the order was in the public interest. The Court extended that order based in part on the fact that defendants signed an agreement stating that NAF would be entitled to injunctive relief in the event of a breach of the agreement. In doing so, the court noted:

Defendants' counsel candidly agreed that he was not aware of any case that has held that a party who (1) by false pretenses gains access to confidential information, (2) promises to keep the information confidential, and (3) agrees that breach of his agreement would subject him to injunctive relief, may nonetheless violate that agreement because of his First Amendment rights. Neither am I.²⁰

¹⁸ See Letter from Roger K. Evans to the House Energy and Commerce Committee, available at <https://www.plannedparenthood.org/files/9314/4716/5377/UptonResponse.pdf>.

¹⁹ Docket No. 27.

²⁰ *Id.*

The Court's order did not otherwise address the defendants' arguments concerning the First Amendment presumption against the validity of prior restraints or other constitutional principles.²¹ Thereafter, the Court granted NAF the right to conduct discovery notwithstanding the California anti-SLAPP motion, which CMP argued stays discovery by operation of law.

CMP filed a Petition for Writ of Mandamus to the Ninth Circuit, asking the Court to stay all discovery pending a ruling on the California anti-SLAPP motion to dismiss, and to rule on the preliminary injunction without conducting discovery.²² CMP did not seek review of the preliminary injunction. The Ninth Circuit denied the writ, holding that the District Court's decision to permit discovery was not erroneous.²³

While these cases were not brought under Texas law and remain pending, they and the authorities identified below offer instruction concerning how Texas litigants and civil courts might deal with similar claims brought against undercover journalists of the traditional and non-traditional sense. While a full discussion of all of the relevant issues is well beyond the scope of a single paper, this article endeavors to identify the major issues raised in lawsuits against undercover journalists as a starting point.

According to news reports, the Director of CMP, David Daleiden, 27, has been indicted in Houston on a felony charge of tampering with a government record and a misdemeanor charge relating to purchasing human organs.²⁴ Criminal charges are beyond the scope of this paper.

III. POTENTIAL CLAIMS UNDER TEXAS LAW

A. WIRE TAPPING/EAVESDROPPING

Under Texas law, it is generally lawful to record a conversation when at least one party to the conversation consents, so long as the person recording is not doing so for the purpose of committing a criminal or tortious act.²⁵ It is also lawful to record any communication when the speakers do not have an expectation that the communication is not being recorded under circumstances justifying the expectation,²⁶ though Texas law prohibits photographing or recording a person without consent in a public place "with the intent to arouse or gratify the sexual desire of any person," or to record or disclose recordings in a bathroom or private dressing room "with the intent to invade the privacy of the person, or arouse or gratify the sexual desires of any person."²⁷ The Federal Wiretap Act also generally permits recording telephone

²¹ *Id.*; see Docket No. 22.

²² *Id.* at Docket No. 119.

²³ *In re Center for Medical Progress, et al*, United States Court of Appeals for the Ninth Circuit, Case No. 15-72844, Docket No. 13. CMP also sought appellate relief from the Court's order requiring disclosure of the identities of its supporters, which the 9th Circuit denied. *Id.* at Docket No. 16. The issue was appealed to the U.S. Supreme Court, but the appeal was dismissed by agreement.

²⁴ See, e.g., Manny Fernandez, 2 Abortion Foes Behind Planned Parenthood Videos are Indicted, *available at* <http://www.nytimes.com/2016/01/26/us/2-abortion-foes-behind-planned-parenthood-videos-are-indicted.html? r=0>.

²⁵ Tex. Penal Code § 16.02.

²⁶ Tex. Crim. Proc. Code § 18.20.

²⁷ Tex. Penal Code § 21.15.

calls and in-person conversations with consent of at least one of the parties to the communication²⁸ and where there is no reasonable expectation of privacy.²⁹

Use of illegally recorded materials is also generally prohibited, though the First Amendment implications have not been clearly defined. For example, the Fifth Circuit held in *Peavy v. WFAA-TV, Inc.* that a party could be held liable civilly under the federal and Texas wiretap statutes for publishing illegally obtained tapes even where the party did not participate in obtaining the illegal recording but knew they were illegally obtained.³⁰ United States Supreme Court denied certiorari. However, the Supreme Court held in *Bartnicki v. Vopper*³¹ that media defendants cannot be held liable for publishing true information of public concern that was obtained illegally where the publisher was not involved in the illegal taping and did not know it was illegally obtained.³² Therefore, a defendant who does not participate in or know about illegally obtained recordings will likely be protected from liability in publishing those materials, provided they are about a matter of public concern and the information is truthful. However, the Court expressly refused to answer categorically “whether truthful publication may ever be punished consistent with the First Amendment” or whether matters of private concern might warrant a different result.³³

In undercover video situations, there are three main areas of concern. First, does the person making the recording have the requisite consent required under applicable laws? For instance, a journalist recording a phone conversation with someone in another state may be subject to that state’s laws, which could become important since some states require that all parties consent, and some states prohibit the use of hidden cameras generally.

Second, could a court interpret the recording as being done for purposes of committing a criminal or tortious act, in which case consent becomes ineffective? In many hidden camera cases, plaintiffs allege torts, as will be discussed further below. Recording the event for the purpose of committing a tort theoretically could subject one to liability. However, courts have often found that the interception of the communication was not made for the purpose of committing a tort. For example, the wiretapping claim in *Food Lion* did not survive a motion to dismiss because Food Lion did not assert a tort that was tied to the recordings. Similarly, in *Desnick v. American Broadcasting Companies, Inc.*,³⁴ involving ABC’s broadcast of hidden camera recordings of doctors recommending unnecessary surgeries by reporters posing as patients, the court held that the consent exception for tortious conduct did not apply, even if the eventual broadcast was tortious, because the plaintiffs did not allege that the interceptions were

²⁸ See 18 U.S.C. § 2511(2)(d). 18 U.S.C. §§ 2510-2521 provide civil and criminal penalties for the interception and use or disclosure of intercepted communications. For a discussion of this statute in the context of media liability, see Paul F. Enzinna, Wiretapping and Newsgathering: Criminal and Civil Liability for the Press, available at <http://apps.americanbar.org/forums/communication/comlawyer/summer99/sum99enzinna.html>.

²⁹ See *Edwards v. State Farm Ins. Co.*, 833 F.2d 535, 539-540 (5th Cir. 1987).

³⁰ *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), cert. denied, 532 U.S. 1051 (2001).

³¹ *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

³² *Id.* at 534-535

³³ *Id.* at 529, 534.

³⁴ 44 F.3d 1345 (7th Cir. 1995).

made for the purpose to committing defamation. Rather, the plaintiffs admitted that the recordings were made to see whether the doctors would recommend unnecessary surgeries.³⁵

However, advocacy groups and journalists with a stated mission that conflicts with the mission of the recorded party might have a harder time convincing the court or jury that the recording was not done for the purpose of committing a tort. Like Food Lion, PP does not allege that the communications were intercepted with the purpose of defaming the plaintiffs, but it does claim that Defendants intercepted the communications with the purposes of invading the privacy of PP's staff.³⁶ It will be interesting to see how the court deals with this issue.

PP claims that CMP intercepted the communications with the purposes of furthering its conspiracy to violate the RICO statute.³⁷ Advocacy groups with a stated mission that opposes the activities of the plaintiff may face a greater risk of liability under these statutes, especially where plaintiffs assert that the recording was made for the purpose of committing defamation or other torts and crimes.

Third, while the law generally protects conversations where the plaintiff does not have a reasonable expectation of privacy, how far does that extend? For example, PP and NAF allege (though not under Texas law) that one of the doctors in a video had a reasonable expectation of privacy concerning conversations in a restaurant where she requested a private booth, sat with her back to the wall, and observed ambient noise that would not allow others to hear the conversation.³⁸ It is unclear whether this will be sufficient to raise the requisite expectation of privacy. In *Wilkins v. National Broadcasting Co., Inc.*,³⁹ a California court held that surreptitiously recording a conversation in an open patio of a restaurant did not give rise to liability under the wiretapping statute. However, a Houston Court of Appeals has held that even in a crowded area, a fact question may exist as to whether there was a reasonable expectation of privacy where the speakers were standing close to each other and speaking quietly.⁴⁰

Recent commentaries concerning the ready availability of smartphones and other recording devices, security cameras on every corner, and the "normalizing" of sharing personal information on social media, suggest that the expectation of privacy is changing,⁴¹ and the law may adapt to reflect this change by further limiting the expectation of privacy.

³⁵ *Id.* at 1353.

³⁶ Docket No. 1 at ¶ 166.

³⁷ Docket No. 1 at ¶ 166.

³⁸ *Id.* at ¶ 73.

³⁹ 33 Cal. Rptr. 2d 744 (Ct. App. 1994).

⁴⁰ *See Stephens v. Dolcefino*, 126 S.W.3d 120, 135-36 (Tex. App.—Houston [1st Dist. 2003, pet. denied) ("Viewed in the appropriate light, a factfinder could reasonably infer" that the speakers "were speaking in a tone that could objectively be considered private, that they did not intend to be audible" where there was evidence that the conversation could not be heard by outsiders with the naked ear, but rather was audibly by enhancing the tape's sound).

⁴¹ *See, e.g.*, Milly Wood, Facebook Generation Rekindles Expectation of Privacy Online, *available at* http://bits.blogs.nytimes.com/2014/09/07/rethinking-privacy-on-the-internet/?_r=0; Hon. Jeremy Fogel, From the Bench: A Reasonable Expectation of Privacy, *available at* http://www.americanbar.org/publications/litigation_journal/2013-14/spring/a_reasonable_expectation_privacy.html; David K. Shipler, It's Time for a 21st Century Debate on Privacy

B. TRESPASS

Surreptitiously recording conversations may also give rise to trespass claims. For instance, in *Food Lion*, the undercover journalists had permission to be in nonpublic areas of the store, but recording those areas exceeded the scope of their permission and thus supported a claim for trespass.⁴² However, what constitutes consent to enter the property is also a tricky issue. For instance, a California case held that CBS was not liable for trespass when a woman allowed its camera crew to come into her home with a crisis intervention team in response to a domestic violence call.⁴³ The woman conceded that she had consented to the videotaping, but stated that she was led to believe that the camera crew was affiliated with the district attorney's office. The Court held that the state statutes governing trespass and intrusion did not require that the individual's consent be "knowing or meaningful," even if the consent was "fraudulently induced," and that the camera crew had acted within the scope of the woman's consent.⁴⁴ *Food Lion* likewise was held that ABC's employees' lying on their applications to obtain entry onto Food Lion's property was not trespass, but that "Food Lion's consent for them to be on its property was nullified when they tortiously breached their duty of loyalty to Food Lion."⁴⁵ Thus, the *Food Lion* case can likely be distinguished in cases that do not involve employment giving rise to a duty of loyalty.

However, even when trespass is a viable claim, it may offer little in relief to the plaintiff. For example, Food Lion claimed damage to its reputation was caused by the publication of the news story, not due to the trespass, and Food Lion was unable to demonstrate any damages caused by the trespass itself. Thus, Food Lion was only able to recover nominal damages of \$1 for the trespass claim.⁴⁶

C. FRAUD

Undercover taping may also give rise to fraud claims, but the damages are likely to be minimal unless the fraud itself (as opposed to the publication) causes substantial damages. In *Food Lion*, though the ABC employees misrepresented matters such as their background, experience and other employment, they did not make any representations about how long they would work. Thus, Food Lion could not show that its alleged administrative costs associated with the employment were caused by the fraud.⁴⁷ Although Food Lion argued it should receive damages in the amount of money it paid to the employees, the Court rejected the argument, holding that "Dale and Bennett were paid because they showed up for work and performed their assigned task as Food Lion employees," not "because of misrepresentations on job applications."⁴⁸ The Court further held that the cost of training was not recoverable as fraud

and Surveillance, available at <http://www.thenation.com/article/its-time-21st-century-debate-privacy-and-surveillance>.

⁴² *Food Lion*, 194 F.3d at 519.

⁴³ *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 747 (N.D. Cal. 1993).

⁴⁴ *Id.*

⁴⁵ *Food Lion*, 194 F.3d at 518-519.

⁴⁶ *Id.* at 522.

⁴⁷ *Food Lion*, 194 F.3d at 513.

⁴⁸ *Id.* at 514.

damages because it was too speculative given the at-will nature of the employment. Because damages were an essential element of the claim, the Fourth Circuit held that Food Lion's fraud claim failed as a matter of law.⁴⁹

Courts following this reasoning will likely find that promises made to obtain employment will not support a fraud claim with any teeth apart from the threat of the cost of defense, which can be substantial and certainly was for ABC in the *Food Lion* case. For example, PP and NAF alleged that the defendants made false representations to gain access to conferences and meetings. But as in *Food Lion*, their alleged damages stem from the publication, not the fraud itself, and thus the claim is likely to fail. However, in cases involving promises other than employment or involving promises to work for a specified amount of time, a fraud claim might succeed.

D. BREACH OF THE DUTY OF LOYALTY

The duty of loyalty also may be implicated in cases involving recordings during employment. Under Texas law, an employee generally may not "act for his future interest at the expense of his employer by using the employer's funds or employees for personal gain or by a course of conduct designed to hurt the employer."⁵⁰ In *Food Lion*, the Court held under North and South Carolina law that the surreptitious recording violated the ABC employees' duty of loyalty because their interests "were adverse to the interests of Food Lion" since they intended to "expose Food Lion to the public as a food chain engaged in unsanitary and deceptive practices."⁵¹ However, again Food Lion was unable to demonstrate damages beyond the publication itself, which were held not to be compensable under First Amendment principles discussed below.⁵² However, the results might be different where some harm to the business (apart from reputation) could be shown, such as if the undercover journalist caused the business to lose clients because of the work performed by the journalist (as opposed to the publication).

E. PRIVACY/FALSE LIGHT

The Texas Supreme Court has held that Texas does not recognize the tort of false light.⁵³ However, Texas law does prohibit an intrusion into a plaintiff's solitude, seclusion, private affairs or concerns where the intrusion is highly offensive to a reasonable person.⁵⁴ For instance, a federal court applying Texas law has held that using a binocular and cameras to watch inside a man's house violated his right to privacy, and imposition of damages did not offend the First Amendment.⁵⁵ However, cases applying Texas law have often found that the First Amendment interest concerning publication of matters of public concern may override privacy interests.⁵⁶ A

⁴⁹ *Id.*

⁵⁰ *Johnson v. Brewer & Pritchard*, 73 S.W.3d 193, 201 (Tex. 2002).

⁵¹ 194 F.3d at 515.

⁵² *Id.* at 514-15.

⁵³ *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994).

⁵⁴ *Tomplins v. Cyr*, 995 F. Supp. 664, 684 (N.D. Tex. 1998) (rev'd on other grounds).

⁵⁵ *See id.*

⁵⁶ *See Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980) (granting summary judgment where true details of plaintiff's marriage were logically connected to interesting and newsworthy events which were matters of legitimate public interest); *Brueggemeyer v. Associated Press*, 609 F.2d 825, 826 (5th Cir. 1980); *Cinel v. Connick*, 15 F.3d 1338, 22 Media L. Rep. 1945 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 189 (1994).

federal court applying Texas law has noted that “[r]eports of the investigation of crimes or matters pertaining to criminal activity have almost without exception been held to be newsworthy or matters of legitimate public interest as a matter of law.”⁵⁷ A court applying Texas law to the PP and NAF cases would thus likely find no invasion of privacy given the public interest at stake, if the publications are true in their apparent depiction of the illegal sale of fetal tissue. Other true publications on matters of public concern should likewise be protected from invasion of privacy claims under Texas law, provided the privacy interest is not too great (such as recording a person in their own home without permission).

F. DEFAMATION AND RELATED CLAIMS

Many cases involving undercover video have not alleged defamation or other reputational torts that have typically involved First Amendment scrutiny in what appears to be an effort to avoid First Amendment protections. For instance, in the *Food Lion* case, the Plaintiff admitted that “it did not sue for defamation because its ‘ability to bring an action for defamation... required proof that ABC acted with actual malice’.”⁵⁸ *Food Lion* may also have sought to avoid litigation of the truth of the publication. *Food Lion* made this strategic decision despite the fact that its alleged damages were primarily reputational damages flowing from the publication. Although the *Food Lion* court rejected the effort to “recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (*First Amendment*) standards of a defamation claim,”⁵⁹ defamation and other reputational torts are likely the greatest risk for those who publish undercover videos because the very reason for going to such great lengths to obtain the information—publishing on a matter of public concern—often means the information is likely to have a substantial impact on the reputation of the subject. Defamation claims are thus a risk for undercover journalists, especially in instances where there is no required showing of actual malice, and therefore journalists should take great care in how the recordings are presented to make sure the depiction is true and does not create a misleading impression.

G. BREACH OF CONTRACT

When the recording party has signed a non-disclosure or other agreement that prohibits recording, they may be held liable for breach of contract or promissory estoppel without running afoul of the First Amendment. However, it is likely that reputational damages and emotional distress are not recoverable. In *Cohen v. Cowles Media*⁶⁰, the United States Supreme Court held that a newspaper publisher that broke its promise of confidentiality did not have immunity from a claim for promissory estoppel based on the First Amendment, though the Court noted that Cohen was not seeking damages for injury to his reputation or his state of mind, but rather the loss of his job and earning capacity due to the breach.⁶¹ However, the interplay between the First Amendment and contracts for silence are not defined. While some have advocated for a mere

⁵⁷ *Lowe v. Hearst Communs., Inc.*, 414 F.Supp. 2d 669, 647 (W.D.S.A. 2006) (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975)).

⁵⁸ 194 F.3d at 522 (quoting *Food Lion*’s brief). *Food Lion* later tried to amend its complaint to add a claim for defamation, but the court rejected the amendment of a claim “*Food Lion* may have contemplated over two years ago.” *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 165 F.R.D 454, 547 (M.D.N.C. 1996)

⁵⁹ *Id.*

⁶⁰ 501 U.S. 663 (1991).

⁶¹ *Id.* at 672.

determination of whether the parties consented to a waiver of First Amendment rights, Justice Souter, joined by Justices Marshall, Blackmun and O'Connor rejected this categorical approach in their dissent in *Cohen*, noting that the interest of public discourse should also be considered:

Nor can I accept the majority's position that we may dispense with balancing because the burden on publication is in a sense "self-imposed" by the newspaper's voluntary promise of confidentiality... This suggests both the possibility of waiver, the requirements for which have not been met here... as well as a conception of First Amendment rights as those of the speaker alone, with a value that may be measured without reference to the importance of the information to public discourse. But freedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed. "The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978). In this context, "it is the right of the [public], not the right of the [media], which is paramount," *CBS, Inc. v. FCC*, 453 U.S. 367, 395, 69 L. Ed. 2d 706, 101 S. Ct. 2813 (1981) (emphasis omitted) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969)), for "without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally," *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975); cf. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980); *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-279, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).⁶²

Even putting aside the unsettled constitutional question, contract law is ill-suited to compensate for reputational and emotional injuries because courts limit special damages to what is foreseeable at the time of contract, and to what can be calculated with reasonable certainty—often an impossible task when it comes to reputational damages and emotional distress.⁶³ Reputational and emotional distress damages in contract cases involving matters of public concern would also frustrate the legal concepts explained in *Hustler* and *Food Lion*, discussed below, and therefore are likely not recoverable. However, a plaintiff may be able to recover other damages such as loss of employment, as in *Cohen*.

The PP and NAF cases will likely shed more light on how courts will handle these types of claims.

A successful breach of contract claim under Texas law also carries the heavy burden of placing attorneys' fees on the losing party under Chapter 38 of the Texas Civil Practices &

⁶² *Id.* at 677-78

⁶³ See Susan M. Gilles, Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy, 43 Buffalo L. Rev. 1 (1995).

Remedies Code in some instances, though such an award would implicate First Amendment issues that exceed the scope of this paper.

H. RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT

The PP and NAF cases both assert federal RICO⁶⁴ claims, which permit a cause of action for acts performed as part of an ongoing criminal organization and permits leaders of the group to be tried for crimes they order others to commit, and permits the recovery of treble damages, costs and attorneys' fees.⁶⁵ The plaintiff in the *Food Lion* case also asserted RICO claims based on the predicate acts of mail and wire fraud. However, the District Court dismissed those claims, finding that the pleadings failed to state a claim because they did not allege facts sufficient to meet RICO's requirement that the defendant engage in a pattern of racketeering activity.⁶⁶ The Court applied a two-part test: (1) "the predicate acts must be related" and (2) "the predicate acts must amount to or pose a threat of continued criminal activity."⁶⁷ The Court held that the Defendants' admitted use of hidden cameras and microphones was not sufficient, noting "[t]his Court declines to equate the use of hidden cameras and microphones with mail and wire fraud."⁶⁸ The Court further determined that committing mail or wire fraud directed at one victim (Food Lion) over a six month span was insufficient to meet the continuity requirement of RICO, noting it was unaware of any cases involving schemes lasting less than ten months and that the alleged acts of mail and wire fraud "were part of a limited purpose, to obtain information from Food Lion to be aired on PTL."⁶⁹

Although a full discussion of RICO is beyond the scope of this paper, a court following *Food Lion* will likely find that like ABC, typical undercover journalism does not meet the requirements of RICO, even if mail and wire fraud can be shown, because the purpose will likely be limited to obtaining information for a specific purpose over a relatively short amount of time. However, as that amount of time increases, and the number of "victims" of the wire or mail fraud increases, the risk of a RICO violation also increases. Moreover, organizations such as CMP with an ongoing mission against the activities of the plaintiff face a greater risk of liability under the statute because they are more likely to target more "victims" over a greater period of time with the same goal.

I. AG-GAG/VEGGIE LIBEL LAW

Under Texas law, those who publish videos relating to perishable food products are also subject to statutory liability where they know the information is false and the publication states or implies that the food product is not safe for consumption by the public.⁷⁰ In such cases, the person who disseminates such information "is liable to the producer of the perishable food product for damages and any other appropriate relief arising from the person's dissemination of

⁶⁴ The Texas Organized Crime Statute may be found at Tex. Penal Code § 71.01 and beyond the scope of this paper.

⁶⁵ 18 U.S. Code § 1962(c); see also Criminal RICO Prosecutors Manual, available at <http://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/rico.pdf>.

⁶⁶ *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 816-820 (M.D. N.C. 1995).

⁶⁷ *Id.* at 817.

⁶⁸ *Id.* at 819.

⁶⁹ *Id.*

⁷⁰ TEX. CIV. PRAC. & REM. CODE § 96.002.

the information.”⁷¹ Undercover video concerning perishable foods therefore may run afoul of these laws. While not an undercover case, the case against Oprah Winfrey for violation of the False Disparagement of Perishable Food Products Act of 1995⁷² made national headlines. In that case, the District Court held that cows were not perishable goods and thus the statements did not fall under the scope of the statute. The Appellate Court focused on the lack of evidence that the defendants knowingly disseminated false information concerning beef and thus did not address the perishable good issue.

More recently, Beef Product, Inc. has sued ABC News and others for violations of South Dakota’s Agricultural Food Products Disparagement Act, defamation and other claims concerning reports of the use of “pink slime” in meat products. The court has denied ABC’s motion to dismiss,⁷³ and the lawsuit is still pending.

Journalists who publish videos relating to food products must also be wary of these statutes.

IV. POTENTIAL PROTECTIONS AVAILABLE

A. FIRST AMENDMENT PROTECTION

1. Protection from liability for reputational damages absent proper constitutional showing.

In the *Food Lion* case, the Court held that plaintiffs may not recover for reputational damages under theories other than reputational torts simply to avoid the application of First Amendment principles, following the U.S. Supreme Court’s decision in *Hustler Magazine v. Falwell*.⁷⁴ In the *Hustler* case, the Court held that public figure plaintiff must demonstrate actual malice to recover for intentional infliction of emotional distress against a defendant speaking on a matter of public concern.⁷⁵ However, under the reasoning of these decisions, this constitutional restriction only impacts cases where the plaintiff would not be required to prove actual malice (knowledge of falsity or acting with reckless disregard for the statement’s truth or falsity at the time of publication).

Arguably, other First Amendment principles should also apply to other elements of non-reputational torts used to do an end-run around the First Amendment, such as the element and burden of proof of falsity⁷⁶ and the concept of substantial truth,⁷⁷ and greater scrutiny concerning the amount of damages awarded to plaintiffs who do not prove actual malice.⁷⁸

⁷¹ *Id.* at § 96.002(b).

⁷² See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998).

⁷³ See Memorandum Decision, available at <http://lgdata.s3-website-us-east-1.amazonaws.com/docs/3144/1070567/BPIMemoOpinionMarch2014.pdf>.

⁷⁴ 485 U.S. 46 (1988).

⁷⁵ *Id.* at 52-53.

⁷⁶ See *Burroughs v. FFP Operating Partners, L.P.*, 28 F.3d 543, 549 (5th Cir. 1994) (“The plaintiff (who was a private figure) has the burden of proof as to the element of falsity”); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (private figure plaintiff writing on a matter of public concern compelled a “constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.”)

Although *Food Lion* and *Hustler* both involved media defendants, it is reasonable to argue that these First Amendment principles should be applied regardless of the status of the defendant as a media defendant. As the United States Supreme Court once stated:

To recognize the existence of a first amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved would be incompatible with the fundamental first amendment principle that “[t]he inherent worth of... speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”⁷⁹

The *Food Lion* Court declined to apply a First Amendment analysis to Food Lion’s breach of loyalty and trespass claims, apart from the damages issue. It held that the laws regarding employee loyalty and trespass were laws of general application, from which the press could not be exempt, and the application of those laws to the media would have merely “an ‘incidental effect’ on newsgathering.” In doing so, the Court distinguished *Barnes v. Glen Theater Inc.*⁸⁰ where heightened First Amendment scrutiny applied to a law of general application grounds because it directly affects the expression itself—nude dancing.

The treatment of these issues in the PP and NAF cases may offer useful guidance concerning these issues.

2. Protection from wiretapping laws.

With respect to wiretapping laws, the United States Court of Appeals for the Fifth Circuit has held that the federal and Texas wiretapping laws do not run afoul of the First Amendment, in part because the scienter requirement makes it “highly unlikely that [the statutes] will result in ‘timidity and self-censorship’...”⁸¹ A California Court has likewise held that California’s wiretapping statute does not violate the First Amendment on its face, and that the state law should not be construed narrowly in favor of an interest in newsgathering, stating “California’s law is quite clear that persons who engage in news gathering are not permitted to violate criminal laws in the process.”⁸²

⁷⁷ *Wehling v. Columbia Broad. Sys.*, 721 F.2d 506, 509 (5th Cir. 1983)(holding in the defamation context that “[i]f the effect on the mind of the recipient would be the same, any variance between the misconduct charged and the misconduct proved should be disregarded.”)

⁷⁸ *See Burbage v. Burbage*, 447 S.W.3d 249, 259 (Tex. 2014) (“Even in a case outside the realm of media defendants and public officials, judicial review of jury discretion remains important to protect free speech... We must ensure that noneconomic damages compensate for *actual* injuries and are not simply “a disguised disapproval of the defendant.”)

⁷⁹ *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S.Ct. 1407, 1416, 55 L.Ed.2d 707 (1978); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749 (1985) (at least five of the Justices apparently believed that disparate treatment of media and non-media would be inappropriate in the constitutional law of defamation); *Casso v. Brand*, 776 S.W.2d 551, 551 (Tex. 1989) (plurality opinion) (“We are reluctant to afford greater constitutional protection to members of the print and broadcast media than to ordinary citizens”); *see also Burbage*, 447 S.W.3d at 259.

⁸⁰ 501 U.S. 650 (1991).

⁸¹ *See Peavy v. WFAA-TV, Inc.*, 221 F.2d 158, 185-192 (5th Cir. 2000).

⁸² *Vera v. O’Keefe*, 791 F.Supp.2d 959, 965-967 (S.D. Cal. 2011).

However, the U.S. Supreme Court has held that with respect to matters of public concern, wiretapping statutes were unconstitutional when applied to publication of illegally obtained materials where the publishing party played no part in the illegal tapings.⁸³

B. SHIELD LAWS

The Texas shield law protects a “journalist” and certain communication service providers from subpoenas in an official proceeding seeking (1) any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist; or (2) the source of that information. TEX. CIV. PRAC. & REM. § 22.023. The statute defines journalist as:

a person, including a parent, subsidiary, division, or affiliate of a person, who for a *substantial portion of the person's livelihood or for substantial financial gain*, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider and includes:

(A) a person who supervises or assists in gathering, preparing, and disseminating the news or information; or

(B) notwithstanding the foregoing, a person who is or was a journalist, scholar, or researcher employed by an institution of higher education at the time the person obtained or prepared the requested information, or a person who at the time the person obtained or prepared the requested information:

(i) is earning a significant portion of the person's livelihood by obtaining or preparing information for dissemination by a news medium or communication service provider; or

(ii) was serving as an agent, assistant, employee, or supervisor of a news medium or communication service provider.

Id. at § 22.021 (2). “News medium” is defined broadly to include the traditional media as well as electronic media and one that “disseminates news or information to the public by any means, including means “known or unknown, that are accessible to the public.” *Id.* at § 22.021 (3).⁸⁴

As one commentator has stated in comparing it with other shield laws, “Texas has by far the most exhaustive description of covered persons.”⁸⁵ However, the shield law does not protect those who are not obtaining income from their reporting activities. For example, bloggers may not be covered where they are not making “substantial financial gain” based on their blogging activity, although courts should interpret this broadly to fulfill the goals of the statute. For

⁸³ *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

⁸⁴ The criminal shield law is beyond the scope of this paper but can be found at Tex. Crim. Proc. Code § 38.11.

⁸⁵ Jason A. Martin, Anthony L. Fargo, *Rebooting Shield Laws: Updating Journalist's Privilege to Reflect the Realities of Digital Newsgathering*, 24 U. Fla. J. L. Pub. Pol'y 47, 56 (April 2013).

instance, a blogger who obtains all of his or her income from the blog should fall within the protection even if the amount of the income is less than that of a traditional journalist.

The protection provided by the Texas Shield Law is not absolute, especially in cases involving undercover videos involving claims of misleading editing, especially when the video concerns a matter of great public concern. Under the Texas Shield law, after notice and an opportunity to be heard, a court may compel disclosure upon a “clear and specific” showing that:

- (1) all reasonable efforts have been exhausted to obtain the information from alternative sources;
- (2) the subpoena is not overbroad, unreasonable, or oppressive and, when appropriate, *will be limited to the verification of published information and the surrounding circumstances relating to the accuracy of the published information*;
- (3) reasonable and timely notice was given of the demand for the information, document, or item;
- (4) in this instance, *the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of the journalist*;
- (5) the subpoena or compulsory process is not being used to obtain peripheral, nonessential, or speculative information; and
- (6) the information, document, or item is relevant and material to the proper administration of the official proceeding for which the testimony, production, or disclosure is sought and is essential to the maintenance of a claim or defense of the person seeking the testimony, production, or disclosure.

Sec. § 22.024 (emphasis added).

Federal courts in the Fifth Circuit have also held that the First Amendment provides a reporter with a qualified privilege to refuse to disclose the identity of confidential informants.⁸⁶ However, the conditional privilege must yield if (1) the information is relevant to the inquiry at hand, (2) the information is unavailable by alternative means, and (3) there is a compelling need for the information.⁸⁷ In libel cases, the privilege can be overcome only when the person seeking disclosures shows: substantial evidence that the challenged statement was published and is both factually untrue and defamatory; that reasonable efforts to discover the information from alternative sources have been made and no other reasonable source is available; and that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.⁸⁸

C. ANTI-SLAPP STATUTE

⁸⁶ *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *modified*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (recognizing the privilege but compelling disclosure of an informant’s identity because there was a compelling need since the plaintiff would have to demonstrate his actual malice).

⁸⁷ *Id.* at 726.

⁸⁸ *In re Selcraig*, 705 F.2d 789, 791 (5th Cir. 1983).

The Texas anti-SLAPP statute, or Citizens Participation Act may offer some protection for those who obtain or publish secret recordings, regardless of their status as a journalist or the media. The statute provides for an expedited motion to dismiss, with no or limited discovery, in any case that is “based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association,” all of which are defined broadly.⁸⁹ The statute is thus not limited to defamation cases.

When a motion to dismiss is filed under the Act, a hearing must be set not later than the 60th day after the date of service of the motion in most cases,⁹⁰ and the court must rule no later than the 30th day following the hearing on the motion.⁹¹

When the statute applies, the court must dismiss the action unless the plaintiff establishes by “clear and specific evidence a prima facie case for each essential element of the claim in question.”⁹² If the court orders dismissal of an action, it is required to award to the moving party “court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require” and “sanctions... as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.”⁹³ The court may award court costs and attorneys’ fees to the plaintiff where the anti-SLAPP motion “is frivolous or solely intended to delay.”⁹⁴ The statute also provides an expedited appeal process for cases where the judge fails to timely rule on the motion.⁹⁵

The statute thus provides a substantial amount of protection for those who publish on matters on public concern, regardless of their status as a media defendant. Although the statute has been applied in federal courts in Texas, the matter has not been addressed by the Fifth Circuit.⁹⁶

D. INTERLOCUTORY APPEALS OF DENIALS OF SUMMARY JUDGMENT

Under Texas law, a defendant in state court may appeal from an interlocutory order of a district court that:

denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the

⁸⁹ TEX. CIV. PRAC. & REM. CODE §§ 27.001, 27.003, 27.006. It does not apply to enforcement actions by the statute or a political subdivision of the state; an action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer; or a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

⁹⁰ *Id.* at § 27.004.

⁹¹ *Id.* at § 27.005.

⁹² *Id.*

⁹³ *Id.* at § 27.009.

⁹⁴ *Id.*

⁹⁵ *Id.* at § 27.008.

⁹⁶ See *Culbertson v. Lykos*, 790 F.3d 608, 631 (5th Cir. 2015).

First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73.⁹⁷

Therefore, a media defendant, or a person whose communication appears in electronic or print media, may bring an interlocutory appeal challenging First Amendment protections of undercover journalism. This remedy is not available to non-media defendants whose work has not been published in electronic or print media, and therefore may not be available to some advocacy groups and others who self-publish or use less traditional means of publication. However, a Texas case has held that an internet article was a media defendant for purposes of the statute.⁹⁸

V. CONCLUSION

While *Food Lion* provided some answers to the legal landscape of undercover journalism, there are many remaining questions. Some of those questions may be answered in the *Planned Parenthood* and *National Abortion Federation* and other pending cases. I hope this paper will serve as a starting point for consideration of some of those issues.

⁹⁷ Tex. Civ. Prac. & Rem. Code § 51.014 (a)(6).

⁹⁸ See *Kaufman v. Islamic Society of Arlington*, 291 S.W.3d 130 (Tex. App.—Fort Worth 2009, pet denied) (holding that author of internet article stating that two sponsors of “Muslim Family Day” had ties to terrorism were “media defendants” because the author had extrinsic notoriety through appearances on television, magazine on whose website article appeared had monthly readership of approximately 500,000, there was inherent public concern in terrorism issues on which author reported and opined, and author was full-time investigative journalist who had been writing for national publications for 12 years).