

**THE ESSENTIAL GUIDE TO THE TEXAS ANTI-SLAPP LAW,  
THE TEXAS DEFAMATION MITIGATION ACT, AND RULE 91A.**

**MARK C. WALKER, *El Paso***  
Dickinson Wright PLLC

State Bar of Texas  
**36<sup>TH</sup> ANNUAL**  
**LITIGATION UPDATE INSTITUTE**  
January 30-31, 2020  
Austin

**CHAPTER 4.1**



**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. THE TEXAS CITIZENS PARTICIPATION ACT: WHAT IS IT? ..... 3

    A. Background and Enactment of the TCPA. .... 3

        1. What is a SLAPP lawsuit?..... 3

        2. Alleged Purpose: Prevent Frivolous Suits. .... 4

        3. All Statutory Construction Must Be in Service of the Legislature’s Stated Dual Purposes. .... 4

        4. Legislative History 2011 - A Solution in Search of a Problem: Underlying Purpose is the Protection of Media Defendants..... 5

        5. The 2013 Amendments: Still Media-Driven. .... 7

        6. 2019 Legislative history: finally, some action, despite media resistance. .... 8

III. APPLICATION OF THE TCPA..... 9

    A. What is a “legal action” under the TCPA?..... 9

    B. Are TCPA motions to dismiss “legal actions” subject in turn to a responsive, or counter, motion to dismiss under the TCPA? ..... 10

    C. Is a Rule 202 petition considered a “legal action” subject to a motion to dismiss? ..... 12

    D. Do certain statutory, or other actions, such as for declaratory judgment, not qualify as “legal actions” under the TCPA? Does the construction clause provide a way out for statutory claims or remedies? ..... 12

    E. What nexus is required between the “legal action” and the rights protected under the TCPA, and why did the Legislature delete “relates to”?..... 14

    F. What speech rights are protected, is a hypothetical communication covered, and what does *in connection with* mean?..... 16

    G. Public or Private? Does it matter where communications occur?..... 18

    H. What is a “matter of public concern,” and how does a court make the determination? ..... 18

    I. What are the rights of petition that are protected?..... 20

    J. What are the rights of association that are protected, and are organizations now protected under the TCPA?..... 22

    K. Exemptions from the TCPA. .... 23

    L. Procedures and Proof..... 26

        1. Lawyers MUST KNOW this Threshold Dispositive Motion. .... 26

        2. Deadline to File the Motion, and Whether Amendment of Pleadings Extends the Deadline..... 27

        3. Deadline for Hearing and Ruling: “Set,” “Rule,” and Continuances. .... 28

        4. Discovery Stay – But Limited Discovery for “Good Cause.” ..... 29

    M. Standards and Burdens of Proof/Actions by Court. .... 30

        1. What role does the trial court play?..... 30

        2. Proof: what type of evidence may be considered, and can live testimony be presented? ..... 30

        3. Burden of Proof on the Movant – “Demonstrate.” ..... 31

        4. Burden of Proof on the Respondent..... 32

        5. Affirmative Defenses May Be the Basis of Motions to Dismiss..... 36

        6. Ruling by the Court – Dismissal Mandatory. .... 36

        7. Request for Ch. 27 Sanctions Likely Survive Nonsuit or Amended Petition Dropping Some Claims..... 36

    N. Mandatory, Not Discretionary, Award of Reasonable Fees for Movant Upon Dismissal of Legal Action..... 37

    O. The lodestar base..... 38

        1. Rates must be reasonable..... 38

        2. The amount of time must be reasonable..... 39

    P. Sanctions are now discretionary and must be accompanied by findings..... 39

    Q. TCPA: Award of Fees, Not Sanctions, for Respondent/Plaintiff – Predicated on Frivolous Motion to Dismiss, Unless Based on Responsive Motion to Dismiss the Initial Motion to Dismiss..... 40

    R. Miscellaneous 2019 Amendments..... 40

    S. Appellate Review. .... 40

- 1. Interlocutory Appeal: Stay of Proceedings, and What is Reviewable? ..... 40
- 2. Motion to Dismiss Timely Granted ..... 41
- 3. Deadlines for Chapter 27 Appeal or Writ..... 42
- 4. Any Appeal or Writ From An Order On A Chapter 27 Motion to Dismiss Shall be Expedited. .... 42
- 5. Standard of Review of Interlocutory Appeal..... 43
- T. Does the TCPA Apply in Federal Court?..... 44
- U. Constitutional Issues..... 45
  - 1. Does the TCPA violate the Open Courts provision of the Texas Constitution?..... 45
  - 2. Does the TCPA Violate the Right to Due Process?..... 46
  - 3. Does the Act Violate the Right to a Trial by Jury?..... 47
  - 4. Does the Act Conflict with the Supreme Court’s Rule-Making Authority?..... 48
  - 5. Does the Statute Conflict With Texas’ Constitutional Protection of Rights to Sue for Reputational Torts?..... 49
- IV. UNINTENDED CONSEQUENCES. .... 50
  - A. Overbroad Application and Chilling Effect on Meritorious Business Tort Actions. .... 50
  - B. Justice Delayed is Justice Denied..... 51
  - C. When The Texas Attorney General Must Be Invited to the Party..... 51
- V. THE TCPA – CONCLUSIONS DRAWN..... 52
- VI. THE “MULLIGAN BILL”: THE TEXAS DEFAMATION MITIGATION ACT. .... 52
  - A. Legislative History. .... 52
  - B. Application of the Defamation Mitigation Act: Prerequisites to Filing Defamation Suit, Request and Response, Abatement..... 54
  - C. Limitations of Damages. .... 55
  - D. Harmonizing (or Conflicting) With Texas Citizens Participation Act. .... 55
- ADDENDUM A - H.B. 2730..... 57

# **THE ESSENTIAL GUIDE TO THE TEXAS ANTI-SLAPP LAW, THE TEXAS DEFAMATION MITIGATION ACT, AND RULE 91A**

## **I. INTRODUCTION.**

*The “general right of an individual to be let alone ... is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed.”<sup>1</sup>*

*“Unlike the United States Constitution, the Texas Constitution twice expressly guarantees the right to bring reputational torts.”<sup>2</sup>*

The landscape of Texas civil litigation significantly changed when on June 17, 2011, Texas Governor Rick Perry approved the new Texas anti-SLAPP<sup>3</sup> law, entitled the Texas Citizens Participation Act (the “TCPA”), and in so doing Texas joined 27 states and the District of Columbia in enacting various forms of legislation purportedly aimed at preventing frivolous lawsuits from stifling free speech activities and the rights of petition and association.<sup>4</sup> As interpreted and applied, the TCPA is arguably the broadest anti-SLAPP law in the nation, which was the conclusion shared with the authors of the 2019 amendments to the TCPA. The Texas statute was one of 11 anti-SLAPP statutes enacted in 2010-2011.<sup>5</sup> Only Oklahoma (2014) and Kansas (2016) have enacted anti-SLAPP legislation since 2011.<sup>6</sup> Seventeen states have no anti-SLAPP law at all. Fourteen states expressly apply their anti-SLAPP statutes to communication involving rights protected by the U.S. and their state’s constitutions, though the Texas law is not so limited. Twelve states limit their anti-

SLAPP laws only to communications in the course of “public participation” in a governmental process, such as in a public hearing, supporting or opposing permit applications, litigation, and the legislative process. The Texas statute has no such limitation, and applies beyond participation in governmental processes.

Over the last eight years the TCPA launched a new and very expensive motions practice, clogging the dockets of trial and appellate courts with expensive, complicated, and time-consuming litigation, that often result in fee awards in the hundreds of thousands of dollars.<sup>7</sup> Seemingly catching Texas practitioners off guard, the law instead proved to be an “across-the-board game-changer in Texas civil litigation.”<sup>8</sup>

In 2017 there were 4 opinions from the Texas Supreme Court, and 22 from the courts of appeals. In the first six months of 2018, there were 8 opinions from the Texas Supreme Court, and 36 from the courts of appeals. Through the end of December, 2019, there were 340 Texas appellate opinions on the TCPA, of which 13 came from the Texas Supreme Court. Opinions from the Amarillo (13), Austin (49), Beaumont (8), Corpus Christi (15), Dallas (81), Eastland (6), El Paso (7), Fort Worth (26), Houston [1<sup>st</sup>] (52), Houston [14<sup>th</sup>] (30), San Antonio (20), Texarkana (4), Tyler (8), and Waco (8) make up the balance of the reported appellate decisions.

The TCPA gained momentum almost every year, with 121 decisions in 2019, 94 in 2018, 47 in 2017, 55 in 2016, 40 in 2015, 25 in 2014, 21 in 2013, 4 in 2012, and none in 2011.

At one point in 2018, roughly 40 percent of the entire docket in the Dallas Court of Appeals consisted of TCPA cases. In March, 2019, there were 15 TCPA cases pending at the Texas Supreme Court.

Going beyond appellate cases, nearly 100,000 documents in Texas court referenced the TCPA in 2018 alone.<sup>9</sup>

<sup>1</sup> Louis D. Brandeis and Samuel D. Warren, *The Right to Privacy*, 4 HARV. LAW REV. 193, 205 (1890).

<sup>2</sup> *Neely v. Wilson*, 418 S.W.3d 52, 60 (Tex. 2013).

<sup>3</sup> “Strategic Lawsuits Against Public Participation.”

<sup>4</sup> See TEX. CIV. PRAC. & REM. CODE § 27.001 *et seq.* The 27 other states, in addition to the District of Columbia, are Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, and Washington. Colorado recognizes similar protection through common law.

<sup>5</sup> See Reports of the Public Participation Project, [www.anti-slapp.org](http://www.anti-slapp.org).

<sup>6</sup> *Id.*

<sup>7</sup> \$624,000 in fees and costs awarded in February, 2017, and \$60,000 in fees and sanctions in July, 2017. See John C. Council, *Litigator of the Week: The King of Texas’ Animal Anti-Slapp Kingdom*, Texas Lawyer (Aug. 3, 2017), available

at <http://www.texaslawyer.com/id=1202794690875/Litigator-of-the-Week-The-King-of-Texas-Animal-Anti-SLAPP-Kingdom>; \$350,000 in fees and \$250,000 in sanctions against Schlumberger, August 2014. See Jeremy Heallen, *Schlumberger Fined, Trade Secrets Suit Against Ex-Atty Guttied*, Law360 (Aug. 27, 2014), available at <https://www.law360.com/articles/571752/schlumberger-fined-trade-secrets-suit-against-ex-atty-guttied>; \$124,000 in fees awarded, to be increased. See John C. Council, *Video: Winning Attorney Fees Under Texas’ Anti-Slapp Statute (and then some?)*, Texas Lawyer (Feb. 4, 2015), available at <http://www.texaslawyer.com/id=1202717046749/Video-Winning-Attorney-Fees-Under-Texas-Anti-SLAPP-Statute-and-then-some>.

<sup>8</sup> *Serafine v. Blunt*, 466 S.W.3d 352, 365 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring).

<sup>9</sup> See Briefing Document: H.B. 2730 (Engrossed), Tex. H.B. 2730, 86th Leg., R.S. (2019) (stating “99,300 documents were

The TCPA introduces what one judge hearing probably the first TCPA motion to dismiss called a “draconian” motion to dismiss that places a heavy burden on the aggrieved plaintiff to prove that his suit is not frivolous at the inception of the litigation without the benefit of any meaningful discovery.<sup>10</sup> Pleading became more of an art form for plaintiff lawyers, because “any skilled litigator could figure out a way to file a motion to dismiss under the TCPA in nearly every case.”<sup>11</sup>

The Act did not attempt to define the shape or scope of a true SLAPP suit or distinguish between causes of action subject to or protected from the anti-SLAPP statute. Instead, the TCPA has been applied to a very broad array of claims that do not resemble a SLAPP case, including UCC-1 financing statements,<sup>12</sup> theft of trade secrets,<sup>13</sup> breaches of nondisclosure agreements,<sup>14</sup> and a host of other business, commercial and personal disputes. In fact, very few of the cases currently making their way through the appellate courts

---

filed referencing the TCPA [in 2018]” (provided by Lauren Young, Chief of Staff for Rep. Jeff Leach) [hereinafter *H.B. 2730 Briefing Doc.*] at p. 2.

<sup>10</sup> In a campaign finance law case, the Mayor of El Paso filed suit to enjoin violations of the Texas Elections Code by several corporations and a group of individuals. The defendants filed a motion to dismiss under the lawsuit under the new anti-SLAPP statute, arguing that the corporate contributions at issue in the case were a form of “protected speech.” In denying the motion to dismiss, Judge Javier Alvarez stated that the new procedure for dismissal of a lawsuit without discovery and with the burden on the plaintiff was too draconian. The author of this paper was counsel for the plaintiff in that case, and received a rude introduction to the TCPA in one of its first applications. *See Cook v. Tom Brown Ministries, et al.*, 385 S.W.3d 592 (Tex.App.—El Paso 2012, pet. denied) (related interlocutory appeal of temporary injunction).

<sup>11</sup> *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at \*12, 2015 Tex. App. LEXIS 3337 at \*42 (Tex. App.—Austin Apr. 7, 2015, no pet.) (mem. op.) (Field, J., concurring).

<sup>12</sup> *See Quintanilla v. West*, No. 04-16-00533-CV, 2017 WL 1684832 (Tex. App.—San Antonio April 26, 2017, pet. filed).

<sup>13</sup> *See Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 203-04 (Tex. App. – Austin 2017, pet. dismissed).

<sup>14</sup> *See Elliott v. S&S Emergency Training Solutions*, No. 05-16-01373-CV, 2017 WL 2118787 (Tex. App.—Dallas May 16, 2017, pet. granted).

<sup>15</sup> TEX. CIV. PRAC. & REM. CODE § 27.003 & 27.005.

<sup>16</sup> TEX. CIV. PRAC. & REM. CODE § 27.008.

<sup>17</sup> Mario Franke, in our office, reviewed the cases appealed since the inception of the statute, and counted a case once in instances of more than one opinion.

#### **SUMMARY OF FINDINGS:**

##### **2017**

For 2017, there are a total of 37 reported cases on WestLaw.

could properly be characterized as a SLAPP case. So long as a defendant in a suit that involves a communication can characterize the suit as even tangentially “based on,” “relating to,” or “in response to” the exercise of free speech, petition or association, the motion to dismiss can be filed, and unless the plaintiff presents prima facie evidence of each element of his claim, the motion to dismiss must be granted, with mandatory fees and sanctions assessed.<sup>15</sup>

Our research also shows that, when confronted with a TCPA motion to dismiss, plaintiffs are almost certain to lose all or part of their cases to dismissal. Although there are no reported statistics on the number of TCPA motions to dismiss granted at the trial level, we do have a record of results on appeal. Since only the movant whose motion to dismiss is denied is entitled to an interlocutory appeal,<sup>16</sup> a review of results on appeal shows that more than 70% of appealed cases conclude with the motion to dismiss being granted in whole or in part.<sup>17</sup> Coupled with some sense of cases in which the

Of these, 27 of the reported cases granted the TCPA motion to dismiss at issue (either whole or in part). This constitutes a 72.97% percentage success rate for TCPA motions in reported cases for 2017.

Notably, to date, there have been already four (4) Supreme Court cases (*Hersh v. Tatum*; *Bedford v. Spasoff*; *D Magazine Partners, L.P. v. Rosenthal*; and *ExxonMobil Pipeline Co. v. Coleman*) addressing TCPA motions.

##### **2016**

For 2016, there are a total of 40 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).

Of these, 22 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 55.00% percentage success rate for TCPA motions in reported cases for 2016.

##### **2015**

For 2015, there are a total of 37 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).

Of these, 26 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 70.27% percentage success rate for TCPA motions in reported cases for 2015.

##### **2014**

For 2014, there are a total of 21 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).

Of these, 14 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 66.66% percentage success rate for TCPA motions in reported cases for 2014.

##### **2013**

For 2013, there are a total of 13 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that

motion to dismiss is granted at the trial court, it is simple math to infer that the success rate of TCPA motions to dismiss must be greater than 90%.

The passage of the TCPA unleashed on Texas courts a torrent of motions to dismiss, and as a result the Legislature took steps in 2019 to attempt to narrow the scope of the TCPA.

This paper is offered as a guide through the history of the TCPA, an outline of its provisions and application, and a navigation map for tactical and strategic considerations in its application and use, with many problems identified and discussed. With the sheer number of cases decided in recent years, it is impossible to review every TCPA case published.

## **II. THE TEXAS CITIZENS PARTICIPATION ACT: WHAT IS IT?**

### **A. Background and Enactment of the TCPA.**

#### **1. What is a SLAPP lawsuit?**

The consensus view among commentators is that SLAPP suits are “legally meritless suits designed, from their inception, to intimidate and harass political critics into silence.”<sup>18</sup> Hawaii defines a SLAPP suit as “a lawsuit that lacks substantial justification or is interposed for delay or harassment and that is solely based on the party’s public participation before a governmental body.”<sup>19</sup> According to some views, the typical SLAPP plaintiff “does not seek victory on the merits, but rather victory by attrition.”<sup>20</sup> The “object is to quell opposition by fear of large recoveries and legal costs, by diverting energy and resources from opposing

the project into defending the lawsuit, and by transforming the debate from a political one to a judicial one, with a corresponding shift of issues from the targets’ grievances to the filers’ grievances.”<sup>21</sup> The goal of a SLAPP suit is to “stop citizens from exercising their political rights or to punish them for having done so.”<sup>22</sup> None of the reported Texas decisions to date defines the scope of a SLAPP suit, and the Texas Legislature curiously never referred to SLAPPs in the legislation.

By definition, in the “typical” SLAPP case the motivation of the plaintiff is not to achieve a legal victory resulting in a judgment, but instead to make it prohibitively expensive and burdensome for the defendant to continue participation in her constitutionally protected activity. In other words, improper motive is an essential element of a SLAPP lawsuit. The concept assumes that the SLAPP plaintiff enjoys a great advantage in resources to fund litigation, and can afford to overwhelm the opposition with significant lawsuit expenses and fees. As one commentator explained, “[t]he typical SLAPP suit is brought by a well-heeled ‘Goliath’ against a ‘David’ with fewer resources, trying to keep David from opposing, for example, Goliath’s development plans or other goal.”<sup>23</sup> The developer tale is a frequently cited example of a SLAPP suit.<sup>24</sup>

A true SLAPP case is a type of lawsuit abuse that, if allowed to flourish, would threaten the discourse and criticism of public issues that are essential in self-government. If indeed the purpose and application of this law are congruent, Chapter 27 would provide a

---

were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).

Of these, 10 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 76.92% percentage success rate for TCPA motions in reported cases for 2013.

Notably, the vast majority of denials for TCPA motions are procedural nature (i.e., tardy appeals; movants not fulfilling the first prong the TCPA and therefore the Court of Appeals failing to have jurisdiction to address the merits of the claims). However, once the reviewing courts do address the claims set forth by the non-movant in a particular case, the result is largely an Order granting of the movant’s TCPA motion in whole or in part.

<sup>18</sup> Mark J. Sobczak, Symposium: *The Modern American Jury: Comment: Slapped in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, 28 N. Ill. U. L. Rev. 559, 560-61 (2008), quoting Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPP back: The Misuse of Libel Law for Political Purposes and Countersuit Response*, 7 J.L. & POL 417, 423 (1991).

<sup>19</sup> HAW. REV. STAT. § 634F-1 (2011).

<sup>20</sup> Sobczak, *supra*, at 561.

<sup>21</sup> *Id.*, quoting Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 969-70 (1999).

<sup>22</sup> *Id.*, citing George W. Pring, *SLAPP: Strategic Lawsuits Against Public Participation*, 7 PACE ENV’L L. REV. 3, 5-6 (1998).

<sup>23</sup> Richard J. Yurko and Shannon C. Choy, *Legal Analysis: Reconciling the anti-SLAPP Statute With Abuse of Process and Other Litigation-Based Torts*, 51 B.B.J. 15, 15 (2007).

<sup>24</sup> See John G. Osborn and Jeffrey A. Thaler, *Feature: Maine’s Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 MAINE BAR J. 32 (2008). A powerful developer files a frivolous defamation lawsuit against a group of outspoken homeowners that oppose the developer’s plans to build an industrial facility in their backyard. The developer’s complaint “is sufficiently drafted to survive... [a] motion to dismiss, and the developer then embarks upon a course of oppressive discovery and motion practice, forcing the defendants to engage in extensive document production and a seemingly endless string of depositions.” “After years of litigation, the defendants prevail at summary judgment or trial—but the victory is, in fact, the developer’s. The cost, stress and time involved in defending against the suit has fractured the community group, sapped the energy and financial resources of the group’s members, diverted their efforts from actually opposing the industrial plant and chilled the likelihood of future opposition to similar projects because of the toll the lawsuit took on the group and its members.” *Id.*

salutary benefit consistent with the traditional fierce defense Americans have provided to free speech rights. Whether the law applies in limited circumstances to prevent actual intimidation of free speakers, or is coercively used to chill litigation that was brought to protect business and personal reputations, remains to be seen as an increasing number of these TCPA cases proceed through litigation.

2. Alleged Purpose: Prevent Frivolous Suits.

The Citizens Participation Act was theoretically enacted to provide an expedited procedure to dismiss retaliatory, frivolous lawsuits that chill free speech. The Act’s legislative history states that it was intended to target “frivolous lawsuits aimed at silencing citizens who are participating in the free exchange of ideas” and “frivolous lawsuits aimed at retaliating against someone who exercises the person’s right of association, free speech, or right of petition.”<sup>25</sup>

Yet the Legislature in 2011 did not discuss the applicability of existing anti-frivolous lawsuit rules and statutes,<sup>26</sup> or how such established body of law was inadequate to curtail any perceived harm. Although the Legislature has been nothing less than vigilant regarding any litigation perceived as frivolous, and the political committee Texans For Lawsuit Reform (“TLR”) did not recognize SLAPPs as an issue of concern, SLAPP cases were not involved in any of the comprehensive tort reform efforts over the last 20 years, and TLR was uninvolved in the adoption or amendment of the TCPA.

Nothing in the 2011 legislative history of the Act discusses why the existing statutory framework for discouraging frivolous suits of all kinds was found

lacking, or why Chapters 9 and 10 of the Texas Civil Practice and Remedies Code should not be amended to address an unmet need.<sup>27</sup> Cases involving speech and traditional First Amendment rights are not exempted from the frivolous case deterrence functions of Rule 13 and Chapters 9 and 10. In fact, Chapter 9 specifically applies to cases involving defamation and tortious interference.<sup>28</sup>

When the Legislature took up the TCPA in 2019, it again failed to identify any unmet needs, or to address whether there was any “wave” of SLAPP cases that would justify the creation of a “tsunami” of TCPA motions to dismiss.

3. All Statutory Construction Must Be in Service of the Legislature’s Stated Dual Purposes.

In adding a new chapter to the Texas Civil Practice and Remedies Code,<sup>29</sup> the Legislature included a brief statement of (dual) purpose:

The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

TEX. CIV. PRAC. & REM. CODE § 27.002. This statutory provision is frequently cited as the appellate courts struggle to understand how to apply the new law.<sup>30</sup>

Since Chapter 27 is entitled “Actions Involving the

party to pay fees, expenses, and discouragement sanctions. See also TEX. CIV. PRAC. & REM. CODE § 9.001, *et seq.*, 10.001 *et seq.*

<sup>27</sup> Chapter 9 applies to “Frivolous Pleadings & Claims.” TEX. CIV. PRAC. & REM. CODE § 9.001, *et seq.* (enacted 1987). In enacting Chapter 10, the Legislature in 1995 went even further than Rule 13, and enumerated frivolous pleadings that could be subject to sanctions, TEX. CIV. PRAC. & REM. CODE § 10.001, and spelled out the sanctions available, including fees and expenses, and sanctions to deter future conduct, TEX. CIV. PRAC. & REM. CODE § 10.004. Chapter 10 provides a mechanism for a party to file a motion for sanctions or, on its own initiative, a court may issue a show cause order and direct the alleged violator to show cause why the conduct has not violated the statute. TEX. CIV. PRAC. & REM. CODE § 10.002(a,b). The Legislature even prohibits the Texas Supreme Court from amending or adopting rules in conflict with the statute. TEX. CIV. PRAC. & REM. CODE § 10.006.

<sup>28</sup> TEX. CIV. PRAC. & REM. CODE § 9.002(a)(2).

<sup>29</sup> The Chapter is entitled: “ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS.”

<sup>30</sup> See, e.g., *Ramsey v. Lynch*, 10-12-00198-CV, 2013 WL 1846886, at \*2 (Tex. App.—Waco May 2, 2013, no pet.) (mem. op.); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 89 (Tex. App. – Houston [1<sup>st</sup>

<sup>25</sup> House Comm. On Judiciary and Civ. Jurisprudence, *Bill Analysis*, Tex. HB 2973, 82<sup>nd</sup> Leg., R.S. (2011).

<sup>26</sup> See TEX. R. CIV. P. 13, which provides, among other things, for sanctions to be imposed only upon “good cause, the particulars of which must be stated in the sanction order,” for a pleading that is “groundless and brought in bad faith or groundless and brought for the purpose of harassment”(the common definition of a frivolous pleading). Every pleading is required to be signed, which signature is a certification that the pleading is not frivolous. A party who brings a suit knowing that it is frivolous “shall be held guilty of a contempt.” “‘Groundless’ for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.” Knowing that sanctions are available, “Courts shall presume that pleadings, motions, and other papers are filed in good faith.” Accordingly, the party resisting the suit has the burden to prove that the suit is frivolous. “Bad faith is not simply bad judgment or negligence; rather, it is the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes. Improper motive is an essential element of bad faith. Harassment means that the pleading was intended to annoy, alarm, and abuse another person.” *Parker v. Walton*, 233 S.W.3d 535, 539-540 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2007, no pet.). Rule 13 permits the trial court to order the offending



Exercise of Certain Constitutional Rights,” and the Legislature directed that the chapter be “construed liberally to effectuate its purpose and intent fully,”<sup>31</sup> all courts interpreting the statute must do so in service of the two stated purposes of the statute, restated and separated here for clarity:

- (1) “to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and,”
- (2) “at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.”<sup>32</sup>

In service of these twin purposes, the expedited dismissal procedure in the TCPA cannot be used as merely another litigation tool to gain advantage and disrupt the balance the Legislature intended between protecting constitutional rights of expression and constitutional rights to file meritorious lawsuits for demonstrable injury. The Texas Supreme Court cautioned against overreaching use of the TCPA when it made it clear that “[t]he TCPA’s purpose is to identify and summarily dispose of lawsuits *designed only to chill* First Amendment rights, not to dismiss meritorious lawsuits.”<sup>33</sup>

It would be a fair statement that many opinions did not carefully consider *both* purposes, as the TCPA has left many struggling with its mechanics, let alone its purposes. Interpretation of the application of the statute consistent with not one, but both, purposes, should allow litigators and courts to avoid absurd results.

The Legislature did not otherwise define a frivolous lawsuit in the context of the statute, or define what constitutes a “meritorious lawsuit” that would otherwise not be subject to the anti-SLAPP motion to dismiss. The Legislature made no modifications to this language in 2019, and provided no further governance.

Despite the stated legislative intent, the Legislature did not require that a movant prove that a suit was frivolous in order to have it dismissed under the TCPA. The disconnect between the statutory provisions and the anti-frivolous suit rhetoric of the legislative history

suggests that we dig deeper into the history of this law in order to better understand it.

4. Legislative History 2011 - A Solution in Search of a Problem: Underlying Purpose is the Protection of Media Defendants.

It still appears that the statute continues to be a solution in search of a problem. The legislative history of the TCPA provides little guidance as to what evidence of SLAPP lawsuits, if any, existed, when the bill was presented to the Legislature. The House Committee on Judiciary and Civil Jurisprudence report was silent about whether any studies or data existed to demonstrate a particular need for the bill, other than generally stating that “abuses of the legal system have also grown, including the filing of frivolous lawsuits aimed at silencing these citizens who are participating in the free exchange of ideas.”<sup>34</sup> There was no data suggesting that there was any widespread abuse of suits involving speech issues, nor was there any indication that the bill was intended to correct any specific case. The report did not discuss any correlation of the bill with media interests.

The legislative history of the TCPA is devoid of any scientific or statistical evidence regarding the frequency or impact of SLAPP lawsuits in Texas, or how often individuals or businesses face meritless defamation or disparagement lawsuits. The author has yet to find any such studies or research, or any published data on the frequency or significance of any SLAPP lawsuits in Texas. The legislative history does not provide any analysis about the scope of the proposed law, or whether anyone considered it to be limited to SLAPP cases, or would also apply in the very broad scope we see today.

According to the H.R.O., supporters of the bill argued that “SLAPP suits chill public debate because they cost money to defend, even if the person being sued was speaking the truth.”<sup>35</sup> Supporters claimed: “[u]nder current law, the victim of a SLAPP suit must rely on a motion for summary judgment. While summary judgment disposes of a controversy before a trial, both parties still must conduct expensive discovery. By allowing a motion to dismiss, [the TCPA] would allow frivolous lawsuits to be dismissed at the

---

Dist.] 2013, pet. denied); *San Jacinto Title Services v. Kingsley Properties, LP*, 452 S.W.3d 343, 348 (Tex. App. – Corpus Christi – Edinburg 2013, pet. denied); *In re Lipsky*, 411 S.W.3d 530 (Tex. App. – Fort Worth 2013)(orig. proceeding); *In re Thuesen*, No. 14-13-00255-CV, 2013 Tex. App. LEXIS 4636 (Tex. App. – Houston [14<sup>th</sup> Dist.] April 11, 2013)(orig. proceeding) (mem.op.); *Jain v. Cambridge Petroleum Group, Inc.*, 395 S.W.3d 394 (Tex. App. – Dallas 2013, no pet.); *Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC*, 14-12-00896-CV, 2013 WL 407029, at \*1 (Tex. App.—Houston [14<sup>th</sup> Dist.] Jan. 24, 2013, no pet.); *Avila and Univision v. Larrea*, 394 S.W.3d 646, 653 (Tex.

App. – Dallas 2012, pet. denied); *Jennings v. Wallbuilder Presentations, Inc.*, 378 S.W.3d 519 (Tex. App. – Fort Worth 2012, pet. denied).

<sup>31</sup> TEX. CIV. PRAC. & REM. CODE § 27.011(b) (emphasis added)

<sup>32</sup> TEX. CIV. PRAC. & REM. CODE § 27.002.

<sup>33</sup> *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (emphasis added).

<sup>34</sup> House Comm. On Judiciary and Civ. Jurisprudence, *Bill Analysis*, Tex. HB 2973, 82<sup>nd</sup> Leg., R.S. (2011).

<sup>35</sup> *Id.*

outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system”<sup>36</sup>

Further research reveals the impetus behind the passage of the Act. Corpus Christi representative Todd Hunter was the principal designated legislative author of H.B. 2973. Representative Hunter worked with the Freedom of Information Foundation of Texas (“FOIFT”)<sup>37</sup>, represented by media lawyer Laura Prather,<sup>38</sup> in passing the legislation. The FOIFT receives its funding principally from state and national newspaper publishers, along with other media interests.<sup>39</sup> Media organizations, including FOIFT, were the principal proponents of both the TCPA<sup>40</sup> and the 2009 adoption of the reporter’s privilege, codified in TEX. CIV. PRAC. & REM. CODE § 22.021 *et seq.*

Ms. Prather, for the media groups, publicly states that she drafted the TCPA and proposed, organized, and supported its passage.<sup>41</sup> In her online biography, Ms. Prather states that she “was the lead author and negotiator for the three most significant pieces of First Amendment legislation in recent history in Texas – both the reporters’ privilege, the anti-SLAPP statute, and the Defamation Mitigation Act.”<sup>42</sup> She also states that “[t]he bill is designed to deter frivolous lawsuits directed at newsrooms and media personnel.”<sup>43</sup>

The collective media interests continue to zealously guard any effort to rein in the scope of the TCPA, as reflected in a recent *amicus* brief submitted to the Fifth Circuit in *Rudkin v. Roger Beasley Imports, Inc.*,<sup>44</sup> discussed in detail below in the section on application of the TCPA in federal courts. In the *Rudkin* appeal, the Reporters Committee for Freedom of the Press joined 39 other media organizations in urging the Fifth Circuit to embrace the use of the TCPA in federal courts in Texas.<sup>45</sup>

Given the context of the media organizations’ viewpoint and their efforts to further insulate the press from legal liability for its actions, the proposal of a summary mechanism to allow media to have their counsel attempt dismissal of defamation suits without discovery may have been a logical next step. Recognizing that the media was the principal proponent of the TCPA helps us better understand the purpose of the statute.

In true winning legislative fashion, the media interests caused the statute to be named the “Citizens Participation Act,” rather than the “Make It Harder to Sue the Media Act,” which may more accurately reflect the law’s true purpose. Indeed, many of the reported cases to date involve media defendants as the movants seeking to dismiss ordinary defamation cases.<sup>46</sup>

According to the Bill Analysis and legislative records, the principal witness before the House Judiciary and Civil Jurisprudence Committee was Ms. Prather, appearing for the FOIFT, the Texas Association of Broadcasters, the Better Business Bureau, and the Texas Daily Newspaper Association. Despite the overarching media protection purpose, the only example of alleged abuse that House Research Organization cited in its Bill Analysis was a doctor who sued “a woman who complained to the Texas State Board of Medical Examiners about the doctor and later complained to a television station.”<sup>47</sup> According to the H.R.O., “[t]he suit eventually was dismissed, but the television station was forced to pay \$100,000 in legal expenses.”<sup>48</sup> The H.R.O. did not give any other details about the case, or how it constituted a victory for the woman.

The bill was brought up for testimony on March 28, 2011 before the House Judiciary and Civil Jurisprudence Committee,<sup>49</sup> which heard comments from several witnesses, mostly associated with the

<sup>36</sup> *Id.*

<sup>37</sup> See <http://www.foift.org/>.

<sup>38</sup> Ms. Prather was with Sedgwick, and in 2012 joined the Austin office of Haynes & Boone as a partner.

<sup>39</sup> See [http://www.foift.org/?page\\_id=796](http://www.foift.org/?page_id=796) for a listing of “sponsors.”

<sup>40</sup> See [http://www.foift.org/?page\\_id=1923](http://www.foift.org/?page_id=1923) for FOIFT’s discussion of the passage of the Act.

<sup>41</sup> See Ms. Prather’s news release at <http://www.sdma.com/laura-prathers-efforts-lead-to-passage-of-texas-anti-slapp-law-06-12-2011/>. The news release was taken down after Ms. Prather joined Haynes & Boone in early June, 2012, but the Sedgwick release was virtually identical to the current Haynes& Boone biography description. Ms. Prather claims credit for passage of the reporter’s privilege act, the TCPA, and the Texas Defamation Mitigation Act.

<http://www.haynesboone.com/people/p/prather%20laura>

<sup>42</sup> See Ms. Prather’s bio at <http://haynesandboone.com/Laura-Prather/>.

<sup>43</sup> *Id.*

<sup>44</sup> *Rudkin v. Roger Beasley Imports, Inc.*, No. 18-50157.

<sup>45</sup> Brief of Amicus Curiae the Reporters Committee for Freedom of the Press and 39 Media Organizations, filed September 5, 2018.

<sup>46</sup> See, e.g., *Crazy Hotel*, 416 S.W.3d at 89; *Avila and Univision v. Larrea*, 394 S.W.3d at 653; *KBMT Op. Co. v. Toledo*, 434 S.W.3d 276, 283-90 (Tex. App. – Beaumont 2014, *rev’d sub nom. KBMT Operating Co., LLC v. Toledo*, 492 S.W.3d 710 (Tex. 2016)); *Shipp v. Malouf*, 439 S.W.3d 432 (Tex. App. – Dallas 2014) (pet. denied).

<sup>47</sup> H. Research Org., Texas House of Representatives, *Bill Analysis*, Tex. H.B. 2973 (May 2, 2011).

<sup>48</sup> *Id.*

<sup>49</sup> Chair, Jim Jackson (R) Dist. 115; Vice Chair, Tryon Lewis (R) Dist. 81; Rep. Dwayne Bohac (R) Dist. 138; Rep. Joaquin Castro (D) Dist. 125; Rep. Sarah Davis (R) Dist. 134; Rep. Will Hartnett (R) Dist. 114; Rep. Jerry Madden (R) Dist. 67; Rep. Richard Raymond (D) Dist. 42; Rep. Connie Scott (R) Dist. 34; Rep. Senfronia Thompson (D) Dist. 141; Rep. Beverly Wooley (R) Dist. 136.

media.<sup>50</sup> At the hearing, Rep. Hunter commented that “[i]t [TCPA] also provides for an expedited motion to dismiss if lawsuits like these are filed frivolously.”<sup>51</sup> The TCPA was one of 31 bills considered by the Committee that day, and the Committee devoted 33 minutes of its schedule to the discussion of the bill. Following the Committee hearing, there is no record of any further discussion in a committee, conference, or on the floor of the House. The bill passed the House on May 4, 2011.

On May 12, 2011, the bill was considered in public hearing in the Senate Committee on State Affairs<sup>52</sup> and discussed for three minutes, with no discussion beyond a basic description of the bill.<sup>53</sup> The bill passed the Senate on May 18.

The legislative history does not discuss media involvement, provides no examples of media litigation, or how the First Amendment and successive generations of litigation has proved inadequate to protect the media from meritless defamation suits.

The Committee did not discuss why a new expedited dispositive motion or appellate review was necessary for media or other defendants, given the Legislature’s codification of libel law,<sup>54</sup> and granting to the media interlocutory appeals in the event that a media defendant’s motion for summary judgment is denied.<sup>55</sup>

Opponents argued that the TCPA, “if interpreted broadly, could be used to intimidate legitimate plaintiffs. It could stifle suits brought legitimately under libel or slander laws because the plaintiff in such suits would have to overcome motions testing its pleadings.”<sup>56</sup>

The media interests successfully cast the legislation as protection for the average citizen, especially persons who faced larger, better-funded litigation opponents. The proponents avoided a discussion about the real interests at issue, namely, larger, well-funded media

entities defending suits brought by individuals or small businesses. The proponents apparently successfully convinced the Legislature that their vote in favor of the legislation was a vote for “the little guy,” since the Legislature passed the TCPA by unanimous vote in both the House and the Senate. There is nothing in the legislative history for the statute that suggests that the Legislature considered any of the issues raised in this paper before speeding the bill through the approval process.

#### 5. The 2013 Amendments: Still Media-Driven.

On June 14 Governor Perry signed into law, effective immediately, H.B. 2973,<sup>57</sup> which expanded the scope of interlocutory appeals from a denial of a motion to dismiss under TCPA Chapter 27, and extended hearing deadlines. Litigation and appeals under Chapter 27 revealed a number of technical flaws in the law, including what orders could be subject to the interlocutory appeal process created in Chapter 27. There was a division of authority between the 1<sup>st</sup>, 2<sup>nd</sup>, 13<sup>th</sup> and 14<sup>th</sup> Courts of Appeals on whether any order denying a motion to dismiss could be subject to an interlocutory appeal.

Rep. Todd Hunter was again the principal named proponent and introduced H.B. 2935 to address interlocutory appeals. Supported by the same media interests that were the primary sponsors of Chapter 27, H.B. did not amend Chapter 27, but instead amended TCPA Section 51.014, which generally designates when a party is entitled to an interlocutory appeal, only in the event of a denial, not granting, of a motion to dismiss.<sup>58</sup>

H.B. 2935 was referred to the Judiciary & Civil Jurisprudence Committee, which heard testimony in favor of the bill on April 1, 2013.<sup>59</sup> Representative Todd Hunter introduced the bill, and then Laura Prather (on

<sup>50</sup> Speaking for the bill: Laura Prather (Better Business Bureau, Freedom of Information Foundation of Texas, Texas Daily Newspaper Association, Texas Association of Broadcasters); Carla Main (journalist); Robin Lent (Coalition for Homeowners Association Reform); Brenda Johnson (HOA); Shane Fitzgerald (FOIFT); Joe Ellis (Texas Association of Broadcasters); and Janet Ahmad (Home Owners for Better Building). The Texas Citizens Participation Act; Hearings on Tex. H.B. 2973 Before the House Comm. on Judiciary & Civ. Jurisprudence, 82<sup>nd</sup> Leg., R.S. 10-17 (March 28, 2011). Sixteen others registered but did not testify.

<sup>51</sup> The Texas Citizens Participation Act; Hearings on Tex. H.B. 2973 before the House Comm. on Judiciary & Civ. Jurisprudence, 82<sup>nd</sup> Leg., R.S. 10-17 (March 28, 2011) (Rep. Todd Hunter).

<sup>52</sup> Robert Duncan (R) Lubbock, Chair.

<sup>53</sup> Hearing on Tex. CSHB 2973 before the Senate Committee on State Affairs, 82<sup>nd</sup> Leg., R.S. (May 12, 2011).

<sup>54</sup> See TEX. CIV. PRAC. & REM. CODE § 73.001 *et seq.*

<sup>55</sup> TEX. CIV. PRAC. & REM. CODE § 51.014(6) grants an appeal from an interlocutory order 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 First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73 [of the Civil Practice and Remedies Code].”

<sup>56</sup> *Id.*

<sup>57</sup> Tex. H.B. 2935, 8d Leg., R.S. (2013).

<sup>58</sup> TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12).

<sup>59</sup> Transcripts are no longer taken of committee meetings. However, a video recording of the testimony is available for download at <http://www.house.state.tx.us/video-audio/committee-broadcasts/committee-archives/player/?session=83&committee=330&ram=13040114330>. Real Player, which can be downloaded at no cost, is

behalf of herself, the Freedom of Information Foundation of Texas, Texas Press Association, and Texas Association of Broadcasters), Arif Panju (on behalf of The Institute for Justice), and Shane Fitzgerald (on behalf of his self and the Freedom of Information Foundation of Texas) testified in favor of the bill. No questions were asked by the Committee members throughout the testimony.

Hunter and Prather described H.B. 2935 as a “housekeeping measure.” Noting a split between appellate courts in interpreting the TCPA, Prather said, “It clarifies the intent of the legislature in the last session to permit an interlocutory appeal of any denial of a motion to dismiss under chapter 27.”<sup>60</sup>

Panju provided an example of a case in which a private developer sued the author of a book about eminent domain, the book’s publisher, and other entities. After a couple of years of litigation, an appellate court determined the developer had no evidence to support his claims. Panju testified that had the TCPA been in effect at that time, it would have placed the burden on the developer to show the case was not a SLAPP suit at an early stage of the litigation. Panju said the bill “solidifies the press and individual’s First Amendment rights to participate, engage in the public discourse without fear that their critique of government power or public projects or private developers . . . would shut them up through a lawsuit.”<sup>61</sup>

Fitzgerald, Vice-President of the *Corpus Christi Caller-Times*, testified before the Committee regarding an instance in which a woman threatened to sue the newspaper after a photographer captured an image from a public space. The newspaper’s attorney discussed the TCPA with the woman’s attorney, and a case was never filed. Fitzgerald described the incident as an example of how “the bill is working as it was intended.”<sup>62</sup>

The Committee made two substantial revisions to the bill. First, it eliminated a provision that specifically denied retroactive effectiveness by removing the following language: “The change in law made by this Act applies to a denial of a motion to dismiss made on or after the effective date of this Act. A denial of a motion to dismiss made before the effective date of this Act is governed by the law in effect immediately before

the effective date of this Act, and that law is continued in effect for that purpose.”<sup>63</sup> Additionally, C.S.H.B. 2935 repealed a provision under the TCPA itself—Section 27.008(c), which set a 60-day deadline for filing an appeal or writ related to a TCPA motion.<sup>64</sup>

Upon review in the Senate, the scope of the bill expanded to amend Section 27.004 to extend the deadline for a hearing on a motion to dismiss from 30 to 60 days following the date of service of the motion. The Senate also added to the hearing deadline exception by either a showing of good cause, or an agreement of the parties, and limiting such extension to no more than 90 days after service of the motion. The amendments to 27.004 also added a provision to allow a trial court to take judicial notice that docket conditions required a later hearing date, and, finally, allowed the court to extend the hearing date to conduct discovery, but for no more than 120 days after service of the motion.<sup>65</sup>

In addition to amending Section 27.010 to exempt from Chapter 27 legal actions brought under the Insurance Code or arising out of an insurance contract, the bill added Section 27.005(d), which required the court to dismiss an action if the defendant/movant established by a preponderance of the evidence each essential element of an affirmative or other valid defense.<sup>66</sup> This was not included in the original Chapter 27, and now allows a movant to essentially conduct a mini-motion for summary judgment or trial.

None of the amendments addressed the principal stated basis for the law, namely that it was intended to prevent strategic lawsuits against public participation.

We prepared proposed amendments to the TCPA for the 2015 legislative session, which were aimed at restricting the application of the TCPA to true SLAPP cases. We were advised that Rep. Hunter was not interested in any revisions in the 2015 session, and none were made. The same story played out in 2017.

6. 2019 Legislative history: finally, some action, despite media resistance.

As the 2019 legislative session approached, a number of different interests aligned to request changes to the TCPA in order to narrow it, or strengthen it, or add narrow exemptions. There were several bills floated

---

needed to view the video. Testimony relating to Tex. H.B. 2935 begins in the recording at 1:27:06 and ends at 1:33:02.

<sup>60</sup> *Hearing on Tex. H.B. 2935 Before the H. Comm. on Judiciary & Civ. Jurisprudence*, 2013 Leg., 83d Sess. (Tex. 2013) (statement of Laura Prather, on behalf of the Freedom of Information Foundation of Texas, Texas Press Association, and Texas Association of Broadcasters).

<sup>61</sup> *Hearing on Tex. H.B. 2935 Before the H. Comm. on Judiciary & Civ. Jurisprudence*, 2013 Leg., 83d Sess. (Tex. 2013) (statement of Arif Panju, on behalf of The Institute for Justice).

<sup>62</sup> *Hearing on Tex. H.B. 2935 Before the H. Comm. on Judiciary & Civ. Jurisprudence*, 2013 Leg., 83d Sess. (Tex. 2013) (statement of Shane Fitzgerald, on behalf of the Freedom of Information Foundation of Texas).

<sup>63</sup> H. Comm. on Judiciary & Civ. Jurisprudence, *Bill Analysis*, TEX. H.B. 2935, 83d Leg., R.S., No. 83R 21446, at 1–2 (Tex. 2013), available at <http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/HB02935H.pdf#navpanes=0>.

<sup>64</sup> *Id.*

<sup>65</sup> TEX. CIV. PRAC. & REM. CODE § 27.004(b,c).

<sup>66</sup> TEX. CIV. PRAC. & REM. CODE § 27.005(d).

and filed,<sup>67</sup> and eventually HB 2730 served as the vehicle of reform. Representative Jeff Leach, Republican Chair of the House Judiciary and Civil Jurisprudence Committee, was the principal author and sponsor, joined by El Paso Democrat and Speaker Pro Tempore Joe Moody, as well as other bipartisan House leadership. Senator Bryan Hughes of Mineola, Republican Chair of the Senate State Affairs Committee, carried the bill in the Texas Senate.

Rep. Leach cited to his colleagues a concurrence from Justice Robert Pemberton of the Austin Court of Appeals as a call to action:

“The TCPA presents difficult issues of statutory construction that broadly impact not only the sound operation of our civil justice system, but the sometimes-competing rights of Texans that statute was expressly intended to balance and reconcile. As my expressed concerns have failed to sway this Court thus far, I can only hope that some justice of the Texas Supreme Court might be listening.... Even better, I would hope that the Texas Legislature might be listening, because it could provide, by amending the TCPA, the clearest and most direct expression of any legislative intent that has been eluding the Judicial Branch.”<sup>68</sup>

Eventually joining the effort to pass HB 2730 was a long and diverse list of people, entities, and groups:

- Texans for Lawsuit Reform
- Texas Trial Lawyers Association
- Texas Civil Justice League
- Texas Association of Defense Counsel
- Texas Family Law Foundation
- AT&T
- Texas Medical Association
- Texas Apartment Association
- Texas Chemical Council
- Texas Association of Manufacturers
- Koch Companies

<sup>67</sup> *Free Speech Advocates Mobilize to Protect Texas Anti-SLAPP Law*, TEX. ASS’N OF BROAD. (Mar. 11, 2019), <https://www.tab.org/news-and-events/news/free-speech-advocates-mobilize-to-protect-texas-anti-slapp-law>. In total, there were five bills introduced. Sweeping changes were proposed by Rep. Jeff Leach, R-Plano, who introduced House Bill 2730; Rep. Dustin Burrows, R-Lubbock, who introduced House Bill 4575; Sen. Angela Paxton, R-McKinney, who introduced Senate Bill 2162; and Sen. Brian Hughes, R-Tyler, who introduced Senate Bill 1981. Alternatively, a more surgical approach was advanced by Speaker Pro-Tem Joe Moody, D-El Paso, in his House Bill 3547.

- Independent Insurance Agents of Texas
- Texas Action
- Texas Young Republicans
- Individual First Amendment Lawyers
- Individual Appellate Lawyers
- Protect Free Speech Coalition

Notably, the same media interests and advocates that pushed for the adoption of the TCPA in 2011 provided the greatest resistance to change.<sup>69</sup> The Texas Association of Broadcasters and the Texas Press Association and free speech organizations such as the American Civil Liberties Union (ACLU) of Texas signed up as opponents.<sup>70</sup>

Eventually HB 2730 passed by a wide margin, and the amendments became effective on September 1, 2019.<sup>71</sup> “Chapter 27 of the Civil Practice and Remedies Code, as amended by this HB 2730, applies only to an action filed on or after the effective date of [HB 2730]. An action filed before the effective date of [HB 2730] is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.”<sup>72</sup>

Based on this language, it appears that the new provisions will apply to pre-September 1 cases only to the extent that amendments to the suits add a “legal action” after the effective date of the amendments.

### III. APPLICATION OF THE TCPA.

#### A. What is a “legal action” under the TCPA?

The TCPA applies to “a *legal action* [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* or arises from any act of that party in furtherance of the party’s communication or conduct described by Section 27.010(b)...”<sup>73</sup> The Legislature defined each of these terms very broadly, and made significant modifications effective September 1, 2019.

A “legal action” “means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal,

<sup>68</sup> *Serafine v. Blunt*, 466 S.W.3d 352, 394-95 (Tex. App.-Austin 2015, no pet.) (Pemberton, J. concurring).

<sup>69</sup> *Free Speech Advocates Mobilize to Protect Texas Anti-SLAPP Law*, TEX. ASS’N OF BROAD. (Mar. 11, 2019), <https://www.tab.org/news-and-events/news/free-speech-advocates-mobilize-to-protect-texas-anti-slapp-law>.

<sup>70</sup> See H.B. 2730 House Committee Report, Witness List, Tex. H.B. 2730, 86th Leg., R.S. (2019) (listing parties in attendance testifying “AGAINST” H.B. 2730) at p. 1.

<sup>71</sup> Section 12, Tex. H.B. 2730, 86th Leg., R.S. (2019).

<sup>72</sup> Section 11, Tex. H.B. 2730, 86th Leg., R.S. (2019).

<sup>73</sup> TEX. CIV. PRAC. & REM. CODE § 27.003(a) (emphasis added, and as amended eff. Sept. 1, 2019).

declaratory, or equitable relief.”<sup>74</sup> The Legislature added declaratory relief to what is included, and narrowed the scope:

The term does not include:

- (A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;
- (B) alternative dispute resolution proceedings; or
- (C) post-judgment enforcement actions.

Since a motion to dismiss may be made regarding any “judicial pleading or filing” in which some relief is requested, it appears that motions to dismiss may not be filed in administrative proceedings, although administrative proceedings are clearly included within the ambit of the “exercise of the right to petition,” which includes “an official proceeding, other than a judicial proceeding, to administer the law...”<sup>75</sup>

The latest additions to the definition were meant to narrow the extraordinarily broad catch-all phrase “any other judicial pleading or filing that requests legal or equitable relief” that concluded the statutory definition of “legal action”<sup>76</sup> prior to September 1, 2019. The Legislature in 2019 specifically considered a number of creative expansions of pleadings and motions sought to be dismissed under the TCPA, which are discussed below.

Although “legal action” is not a term defined in the Texas legal lexicon, “action” is. “The common meaning of the term ‘action’ refers to an entire lawsuit or cause or proceeding, not to discrete ‘claims’ or ‘causes of action’ asserted within a suit, cause, or proceeding.”<sup>77</sup> “The term ‘action’ is generally synonymous with ‘suit,’ which is a demand of one’s rights in court.”<sup>78</sup> “A suit, in turn, is ‘any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him.’”<sup>79</sup> “Although the word ‘suit’ can be ‘more general in its comprehension than the word ‘action,’ both terms refer to a judicial proceeding in which parties assert claims for relief.”<sup>80</sup> “Historically, ‘action’ referred to a judicial proceeding

in a court of law, while ‘suit’ referred to a proceeding in a court of equity.”<sup>81</sup>

“A ‘cause of action,’ by contrast, ‘has been defined ‘as a fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief.’”<sup>82</sup> This is “the generally accepted meaning of the term ‘cause of action.’”<sup>83</sup> “Thus, a ‘cause of action’ and an ‘action’ are not synonymous; rather, the ‘cause of action’ is the right to relief that entitles a person to maintain ‘an action.’”<sup>84</sup>

“A ‘cause of action’ is thus similar to a ‘claim,’ in that they both refer to a legal right that a party asserts in the suit that constitutes the action.”<sup>85</sup> The “ordinary meaning of ‘claim’ is ‘the assertion of an existing right; any right to payment or to an equitable remedy,’ and ‘the aggregate of operative facts giving rise to a right enforceable by a court.’”<sup>86</sup>

**B. Are TCPA motions to dismiss “legal actions” subject in turn to a responsive, or counter, motion to dismiss under the TCPA?**

Until the 2019 amendments, there was a split of authority on whether a TCPA motion to dismiss, or a motion to dismiss for sanctions, is a “legal action” subject to dismissal under the TCPA. The new definition in 27.001(6)(A) specifically excludes “a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief.”<sup>87</sup> That exclusionary language should settle the question for any legal actions filed after September 1, 2019.

For pre-2019 amendment cases still percolating through the appellate courts, the issue is more ambiguous. The Texas Supreme Court has been clear in its direction to courts to proceed with a plain-meaning, dictionary-definition analysis of the text of the TCPA.<sup>88</sup> Against this backdrop, the First Court of Appeals in Houston already determined that a TCPA motion to dismiss is a “claim for affirmative relief” that survives a nonsuit.<sup>89</sup> Since a Chapter 27 motion to dismiss is a claim for affirmative relief, it certainly falls within the plain meaning definition of “any other judicial pleading or filing that requests legal or equitable relief.”<sup>90</sup>

<sup>74</sup> TEX. CIV. PRAC. & REM. CODE § 27.001(6).

<sup>75</sup> TEX. CIV. PRAC. & REM. CODE § 27.001(4)(a)(ii).

<sup>76</sup> TEX. CIV. PRAC. & REM. CODE § 27.001(6).

<sup>77</sup> *Jaster v. Comet II Construction*, 438 S.W.3d 556, 564 (Tex. 2014) (citations omitted).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> “A ‘cause of action’ consists of ‘those facts entitling one to institute and maintain an action at law or in equity.’” *Jaster*, 438 S.W.3d at 564 n. 11.

<sup>85</sup> *Id.* (citations omitted).

<sup>86</sup> *Id.* (citations omitted).

<sup>87</sup> TEX. CIV. PRAC. & REM. CODE § 27.001(6)(A).

<sup>88</sup> *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898-02 (Tex. 2017)(per curiam); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 203-04 (Tex. App. – Austin 2017, pet. dism’d).

<sup>89</sup> *See Calkins*, 446 S.W.3d at 143-44.

<sup>90</sup> TEX. CIV. PRAC. & REM. CODE § 27.001(6). *See also Serafine v. Blunt*, 466 S.W.3d 352, 370 (Tex. App.—Austin

This construction of the statute gives full effect to the Legislature’s definition of “legal action,” which lists “cause of action” separately from both “lawsuit” and “petition.” It “is cardinal law in Texas that a court construes a statute, first, by looking to the plain and common meaning of the statute’s words.”<sup>91</sup> “[I]n construing the statute[, the court’s objective] is to give effect to the Legislature’s intent, which requires [the court] to first look to the statute’s plain language.”<sup>92</sup> “If that language is unambiguous, [the court] interpret(s) the statute according to its plain meaning. We presume the Legislature included each word in a statute for a purpose and that words not included were purposefully omitted.”<sup>93</sup> Courts are to “enforce the statute ‘as written’ and ‘refrain from rewriting text that lawmakers chose.’”<sup>94</sup> Courts “endeavor to read the statute contextually, giving effect to every word, clause, and sentence.”<sup>95</sup>

If the Legislature intended to limit the application of the TCPA to original petitions, lawsuits or “actions,” it certainly knew how to do so. It did not. The Legislature instead included the most expansive definition, including “filing,” which is simply “a particular document (such as a pleading) in the file of a court clerk or record custodian.”<sup>96</sup>

When presented with an appeal of a TCPA motion to dismiss, the First Court of Appeals earlier seemed to

accept that a responsive Chapter 27 motion to dismiss a Chapter 27 motion to dismiss is permitted.<sup>97</sup> But the same court later decided that the TCPA does not authorize the filing of a counter motion to dismiss, resorting to the doctrine of *ejusdem generis* to disregard the term “any other pleading or filing” to somehow refer only to “procedural vehicles for the vindication of a legal claim, in a sense that is not true for a motion to dismiss.”<sup>98</sup> The court of appeals did not explain why the Legislature used the more expansive term, “pleading or filing that requests legal or equitable relief.”<sup>99</sup>

Based mostly on that decision, the Eastland Court of Appeals declined to conclude that TCPA motions to dismiss were “legal actions” that are in turn subject to dismissal.<sup>100</sup>

On the other hand, The Austin Court of Appeals, which has been attempting to hew close to the Texas Supreme Court’s “plain meaning” interpretation of the TCPA, understands the final phrase to include both counterclaims *and* motions for sanctions in a March 2018 opinion.<sup>101</sup> In *Hawxhurst*, the Austin Court of Appeals held that a request for sanctions stated in a counterclaim under Chapter 9 of the Texas Civil Practice and Remedies Code, fell within the statutory definition of a “legal action” as either a counterclaim or a motion for sanctions.<sup>102</sup> This certainly makes sense under the plain meaning construction of the TCPA, and

2015, no pet.) (Pemberton, J. concurring), citing *In re Estate of Check*, 438 S.W.3d 829, 836 (Tex. App.— San Antonio 2014, no pet.) (observing that “pleadings” that “seek legal or equitable relief” and therefore qualify as “legal actions” under the TCPA would facially include, “e.g., motions for sanctions [and] motions for summary judgment”). Justice Pemberton’s thoughtful concurrence also pointed out that, “[b]y the same logic, even dismissal motions asserted under the TCPA itself would qualify as ‘legal actions,’ if dismissal with cost-shifting and sanctions can be considered ‘legal or equitable relief.’” *Serafine*, 466 S.W.3d at 370-71 n.34 (Pemberton, J. concurring), referring to *Hotchkin v. Bucy*, No. 02-13-00173-CV, 2014 WL 7204496, at \*1 (Tex. App.—Fort Worth Dec. 18, 2014, no pet.) (mem. op.).

<sup>91</sup> *Fitzgerald v. Advanced Spine Fixation Systems*, 996 S.W.2d 864, 865 (Tex. 1999).

<sup>92</sup> *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015).

<sup>93</sup> *Id.*

<sup>94</sup> *Jaster*, 438 S.W.3d at 562.

<sup>95</sup> *Id.* “When construing statutes, or anything else, one cannot divorce text from context. The meaning of words read in isolation is frequently contrary to the meaning of words read contextually in light of what surrounds them. Given the enormous power of context to transform the meaning of language, courts should resist rulings anchored in hyper-technical readings of isolated words or phrases. The import of language, plain or not, must be drawn from the surrounding context, particularly when construing everyday words and phrases that are inordinately content-sensitive.” *In re Office of the Attorney Gen.*, 456 S.W.3d 153, 155 (Tex. 2015).

<sup>96</sup> BLACK’S LAW DICTIONARY (9<sup>TH</sup> ED).

<sup>97</sup> *Paulsen v. Yarrell*, 455 S.W.3d 192, 193-95 (Tex. App.— Houston [1st Dist.] 2014, no pet.).

<sup>98</sup> *Paulsen v. Yarrell*, 01-16-00061-CV, 2017 WL 2289129 (Tex. App.—Houston [1st Dist.] May 25, 2017), *opinion withdrawn and superseded on denial of reh’g*, 537 S.W.3d 224 (Tex. App.—Houston [1st Dist.] 2017, pet. denied), *reh’g denied* (Nov. 21, 2017).

<sup>99</sup> The sister court of appeals, the Fourteenth, agreed with *Paulsen II*. See *Roach v. Ingram*, 557 S.W.3d 203, 217-18; 2018 WL 2672546, at \*4 (Tex. App. – Houston [14<sup>th</sup> Dist.] June 5, 2018, no pet. denied) *reh’g denied* (Aug. 2, 2018). And the First Court fell back on its incorrect *Paulsen II* opinion without further discussion in *Memorial Hermann Health System v. Khalil*, No. 01-16-00512-CV, 2017 WL 3389645 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2017, pet. denied).

<sup>100</sup> See *Deepwell Energy Servs. LLC v. Aveda Trasp. & Energy Servs.*, 574 S.W.3d 925 (Tex. App. – Eastland 2019, pet. denied); *But c.f. State ex rel Best v. Harper*, No. 16-0647, 2018 WL 3207125, at \*4 (Tex. June 29, 2018) (quoting *Yarrell* statement about TCPA motion to dismiss).

<sup>101</sup> See *Hawxhurst v. Austin’s Boat Tours*, 550 S.W.3d 220, 226 (Tex. App. – Austin 2018, no pet.); *Serafine v. Blunt*, 466 S.W.3d 352, 360 (Tex. App. – Austin 2015, no pet.) (“*Serafine I*”) (concluding that counterclaims were in part based on, related to, or in response to filing of suit); *Cavin v. Abbott*, 545 S.W.3d 47, 56 (Tex. App. – Austin 2017, no pet.) (concluding that filing lawsuits satisfied the TCPA definition of “exercise of the right to petition.”).

<sup>102</sup> *Hawxhurst*, 550 S.W.3d at 226.

the Austin Court of Appeals looked to sister courts for additional guidance.<sup>103</sup>

Against this backdrop, if “legal action” did not include motions for sanctions or TCPA motions to dismiss, then why did the Legislature specifically exclude them with a new definition? It is well known that that “[w]hen the legislature amends a law it is presumed that the intention was to change the law.”<sup>104</sup>

For now, the business and commercial litigator should spend her time focusing on other uses of the TCPA.

**C. Is a Rule 202 petition considered a “legal action” subject to a motion to dismiss?**

Unless a TCPA-weary trial court can be persuaded that a Rule 202 petition does not fall within the exclusion from the definition of “legal action,” the prudent practitioner should refrain from moving to dismiss such a petition. The 86<sup>th</sup> Legislature was well aware of the cases holding that “legal action” included Rule 202 proceedings, when properly invoked through a motion to dismiss brought under the TCPA.<sup>105</sup> The Dallas and Houston 14<sup>th</sup> Courts of Appeals joined Austin and Fort Worth in presuming that Rule 202 petitions were subject to dismissal,<sup>106</sup> while the First Court of Appeals held the opposite.<sup>107</sup> Although the exclusionary language in the new definition does not specifically identify pre-suit discovery requests under Rule 202, they would appear to be “procedural actions” that are not included in the “legal action” definition.

**D. Do certain statutory, or other actions, such as for declaratory judgment, not qualify as “legal actions” under the TCPA? Does the construction clause provide a way out for statutory claims or remedies?**

As the trial courts slow down their analysis into whether the TCPA applies to the action in the first instance, the courts are looking more closely at whether the complained-of action does not fall under the “legal action” definition under a saving or preemption theory.

The Legislature’s 2019 amendment of the “legal action” definition was a curious expansion in the scope of the TCPA, in light of the otherwise comprehensive efforts to narrow its reach. Why should actions for a declaratory judgment count as SLAPP cases, or meritless lawsuits?

In a very well-considered opinion, the Austin Court of Appeals in 2018 addressed for the first time whether “an action for declaratory relief brought under the UDJA<sup>108</sup> is or can be a ‘legal action’” subject to the TCPA’s dismissal procedures, and concluded that the declaratory judgment requests did not constitute separate “legal actions” under the TCPA.<sup>109</sup> In coming to this conclusion, the court of appeals analyzed key characteristics of the declaratory relief authorized by the UDJA. “While sometimes termed a ‘cause of action’ colloquially, declaratory relief under the UDJA is more precisely a type of *remedy* that may be obtained with respect to a cause of action or other substantive right...”<sup>110</sup> Critically for our TCPA analysis, “declaratory relief under the UDJA, as the Texas Supreme Court observed long ago, ‘is neither legal nor equitable, but *sui generis*.’”<sup>111</sup> To constitute a “legal action” under the TCPA, the complained-of pleading must seek legal or equitable relief,<sup>112</sup> which a declaratory judgment does not.

<sup>103</sup> See *In re Estate of Check*, 438 S.W.3d 829, 836 (Tex. App. – San Antonio 2014, no pet.)(observing that “numerous substantive ‘pleadings’ filed during the course of litigation, e.g., motions for sanctions, motions for summary judgment[,] ... do in fact seek legal or equitable relief” and therefore would qualify as “legal actions” under the TCPA); *Hotchkin v. Bucy*, No. 02-13-00173-CV, 2014 WL 7204496, at \*5 (Tex. App. – Fort Worth Dec. 18, 2014, no pet.)(mem. op.)(the court assumed without deciding that “filing a motion to dismiss is a procedurally proper manner to attack another motion to dismiss”).

<sup>104</sup> *Johnson v. McDaniel*, 461 S.W.2d 198, 201 (Tex. Civ. App. – Eastland 1970, writ ref’d n.r.e.).

<sup>105</sup> See *DeAngelis v. Protective Parents Coal*, 556 S.W.3d 836, 847-49 (Tex. App. – Fort Worth 2018, no pet.); 86<sup>th</sup> Int’l Ass’n of Drilling Contrs. v. *Orion Drilling Co.*, 512 S.W.3d 483, 491-92 (Tex. App. – Houston [1st Dist.] 2016, pet. denied); *In re Elliott*, 504 S.W.3d 455, 463 (Tex. App. – Austin 2016)(orig. proceeding) (holding that motion to dismiss invoking TCPA stays discovery in a Rule 202 proceeding until the court rules on the motion to dismiss).

<sup>106</sup> *Breakaway Practice, LLC v. Lowther*, No. 05-18-229-CV, 2018 WL 6695544, at \*2 n. 2 (Tex. App. – Dallas Dec. 20, 2018, pet. denied); *Puig v. Hejtamancik*, No. 14-17-358-CV, 2017 WL 5472781, at \*2 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2017, no pet.).

<sup>107</sup> *Caress v. Fortier*, 576 S.W.3d 778 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2019, pet. filed).

<sup>108</sup> Uniform Declaratory Judgments Act, *generally* TEX. CIV. PRAC. & REM. CODE §§ 37.001-.011.

<sup>109</sup> *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 297-98 (Tex. App. – Austin 2018, pet. denied).

<sup>110</sup> *Craig*, 550 S.W.3d at 298.

<sup>111</sup> *Id.*, citing *Cobb v. Harrington*, 144 Tex. 360, 190 709, 713 (1945); see also *Texas Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891,895 (Tex. 1970)(“an action for declaratory judgment is nether legal nor equitable, but is *sui generis*, i.e., the only one of its kind, peculiar.”). *Sui generis* means “of its own kind or class; unique or peculiar.” BLACK’S LAW DICTIONARY 9<sup>th</sup> Ed. (2009).

<sup>112</sup> See TEX. CIV. PRAC. & REM. CODE §27.001(6)(definition of legal action).



Even though the Legislature now includes declaratory judgments as legal actions subject to dismissal under the TCPA, this analysis is still important for examination of whether other statutory remedies constitute “legal actions” under the TCPA.

The Texas Supreme Court has been clear in its direction to courts to proceed with a plain-meaning, dictionary-definition analysis of the text of the TCPA.<sup>113</sup> The initial definition of “legal action” was adopted with full knowledge of a declaratory judgment’s status as seeking neither equitable nor legal relief. A TCPA motion to dismiss is a threshold dispositive motion, in which the trial court, and the appellate court on *de novo* review, make a merits determination in a two-part analysis. Under the UDJA, however, a party merely has a method to have its rights determined,<sup>114</sup> and an award of attorneys’ fees is not dependent on a finding that the party substantially prevailed, or require a judgment on the merits of the dispute.<sup>115</sup> Courts and practitioners routinely distinguish between claims for affirmative relief and requests for declaratory judgment.<sup>116</sup>

Holding that the TCPA does not apply to a declaratory judgment action is consistent with the purposes of both the TCPA and UDJA. Without even considering the definitional problem discussed above, a petition for declaratory judgment that does not seek to directly limit the opposing party’s right to speak freely or to participate in government to the maximum extent permitted by law would undermine the clear directive in the TCPA’s construction clause that the TCPA “‘does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions,’ such as the Declaratory Judgment Act.”<sup>117</sup> Nothing in “the TCPA creates a right for a TCPA movant to bypass the protections accorded by the UDJA to anyone whose own rights are affected by a statute”<sup>118</sup> [or contract].

“The permissible subjects of UDJA declarations expressly include ‘question[s] of construction or validity’ and ‘rights, status, or other legal relations’ under contracts ....”<sup>119</sup> The UDJA is “remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered”<sup>120</sup> and “was originally ‘intended as a speedy and effective remedy’ for settling disputes before substantial damages were incurred, and one that ‘is simpler and less harsh’ than the ‘coercive’ remedies of damages or injunctive relief.”<sup>121</sup> The UDJA “is to be liberally construed and administered,” and “shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.”<sup>122</sup>

This point is important: the TCPA does not exist in a vacuum, but coexists with the UDJA and many other statutes, federal and state, that necessarily affect a party’s exercise of rights of speech, petition, or association. The TCPA’s construction section declares that, “[t]his chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.”<sup>123</sup>

A prudent practitioner should closely look at the construction clause as an option to argue that the TCPA abrogates or lessens other defenses, remedies, or claims, whether statutory or at common law.

In another important Austin Court of Appeals decision, the court found that the TCPA conflicted with a statutory enforcement action, and therefore the TCPA did not apply, relying upon common statutory construction rules.<sup>124</sup> Importantly, the court stated that “the act does not protect the *unfettered* constitutional rights of free speech and petition but, rather, express protects those rights only “*to the maximum extent*

<sup>113</sup> *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898-902 (Tex. 2017)(per curiam); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 203-204 (Tex. App. – Austin 2017, pet. dismissed).

<sup>114</sup> See TEX. CIV. PRAC. & REM. CODE §37.004.

<sup>115</sup> *Feldman v. KPMG LLP*, 438 S.W.3d 678, 685 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2014, no pet.).

<sup>116</sup> See, e.g., *Holmes v. Cassel*, No. 01-16-00114-CV, 2017 WL 3389908, at \*2-4 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2017, no pet.)(discussing how, when declaratory judgment not coupled with a claim for affirmative relief, trial court still entitled to award fees without finding on merits, following *Feldman*).

<sup>117</sup> *Dolcefino v. Cypress Creek EMS*, 540 S.W.3d 194, 200-201 (Tex. Civ. App. – Houston [1<sup>st</sup> Dist.] 2017, pet. dismissed).

<sup>118</sup> *Dolcefino*, 540 S.W.3d at 201-202.

<sup>119</sup> *Craig*, 550 S.W.3d at 298, citing TEX. CIV. PRAC. & REM. CODE §37.004, and *Texas Ass’n of Bus. v. Texas Air Control*

*Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)(emphasizing, with respect to justiciability requirements, that UDJA is ‘merely a procedural device for deciding cases already within a court’s jurisdiction).

<sup>120</sup> TEX. CIV. PRAC. & REM. CODE ANN. §37.002(b); *Craig*, 550 S.W.3d, at 297-98.

<sup>121</sup> *Craig*, 550 S.W.3d at 298, quoting *MBM Fin. Corp. v. Woodlands Oper. Co.*, 292 S.W.3d 660, 670 (Tex. 2009)(quoting *Cobb*, 190 S.W.2d at 713), and Restatement (Second) of Judgments §33 cmt. C (Am. Law Inst. 1982).

<sup>122</sup> TEX. CIV. PRAC. & REM. CODE ANN. §37.002(b, c).

<sup>123</sup> TEX. CIV. PRAC. & REM. CODE ANN. §27.011(a).

<sup>124</sup> *Sullivan v. Texas Ethics Commission*, 551 S.W.3d 848, 855-56 (Tex. App. – Austin 2018, pet. denied)(finding the TCPA inapplicable to an action for enforcement of lobbyist registration laws under the Government Code).

permitted by law.”<sup>125</sup> With that constraint in mind, the Austin Court of Appeals determined that the “lobbyist-registration statute at issue is a legally permissible restriction on those rights.”<sup>126</sup>

The court explained that “[t]he TCPA does not exist in a vacuum but coexists with chapters 305 and 571 of the government code....”<sup>127</sup> “A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it.”<sup>128</sup> “A legislative enactment covering a subject dealt with by an older law, but not repealing that law, should be harmonized whenever possible with its predecessor in such a manner as to give effect to both.”<sup>129</sup> “If the two statutes cannot be harmonized, the more specific statutory provision prevails over the general one.”<sup>130</sup>

“A broad and isolated interpretation would sweep all ‘legal actions’ related to the exercise of First Amendment rights under its purview....”<sup>131</sup> This the legislature did not intend, as witnessed by its construction rules in the TCPA, and the only reasonable way to harmonize the TCPA with the UDJA is to conclude that the TCPA’s catch-all term “legal action” does not encompass the specific remedy afforded by the UDJA.<sup>132</sup> “To hold otherwise would allow respondents to end-run the specifically enacted scheme for [allowing early dispute resolution by declaratory judgment], a result the legislature could not have intended when enacting the TCPA.”<sup>133</sup>

Applying *Sullivan* to other claims, “the legislature cannot have intended to undermine that very procedure in enacting the TCPA, especially considering the TCPA’s purpose.”<sup>134</sup>

With these cases in mind, should the practitioner look at other causes of action with an eye toward attempting to limit the scope of “legal action” under the TCPA? The Texas Uniform Trade Secrets Act (“TUSA”)<sup>135</sup> has been a cause of action dismissed under

the TCPA,<sup>136</sup> but has not yet been subjected to the preemption analysis. To the extent that any argument still exists after adoption of the 2019 exemptions, the practitioner could look to this argument.

In 2013 the Texas Legislature passed TUTSA, and in so doing declared that “[t]his chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enforcing it.”<sup>137</sup> The Legislature also made clear that in the event of certain conflicts, the TUTSA displaces other common or statutory law. The Legislature declared that, “[e]xcept as provided by Subsection (b), this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.”<sup>138</sup> The Legislature did not exempt the TCPA from the primacy of the TUTSA provision of uniform remedies.

**E. What nexus is required between the “legal action” and the rights protected under the TCPA, and why did the Legislature delete “relates to”?**

It is important to note that the scope of application is not limited to legal actions “arising from” the exercise of a right, as in California,<sup>139</sup> but instead used the much broader terms “based on, relates to, or is in response to” prior to the 2019 amendments, which removed “relates to” from the definition, leaving “based on or is in response to” as the stated nexus requirement. The broad nexus so far supported the argument for a more expansive reading of the applicability of the statute.<sup>140</sup> The ordinary meaning of “relates to” merely “denotes some sort of connection, reference, or relationship.”<sup>141</sup> Removing “relates to” was a feeble effort to narrow the scope of the TCPA.

The statutory nexus requirements can be considered a starting point for this discussion. If the

<sup>125</sup> *Sullivan*, 551 S.W.3d at 853-54 (emphasis in original), quoting TEX. CIV. PRAC. & REM. CODE ANN. §27.002.

<sup>126</sup> *Sullivan*, 551 S.W.3d at 853-54 (emphasis in original), citing *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 369 (2010).

<sup>127</sup> *Sullivan*, 551 S.W.3d at 854.

<sup>128</sup> *Acker v. Texas Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990); *Sullivan*, 551 S.W.3d at 854.

<sup>129</sup> *Acker*, 790 S.W.2d at 301; *Sullivan*, 551 S.W.3d at 854.

<sup>130</sup> *Texas Indus. Energy Consumers v. CenterPoint Energy Hous. Elec., LLC*, 324 S.W.3d 95, 107 (Tex. 2010); *Sullivan*, 551 S.W.3d at 854.

<sup>131</sup> *Sullivan*, 551 S.W.3d at 854.

<sup>132</sup> See *Sullivan*, 551 S.W.3d at 854 (finding that the TCPA did not apply to appeals of Texas Ethics Commission orders enforcing the lobbyist-registration statute, and that such actions did not constitute a “legal action” under the TCPA).

<sup>133</sup> See *Sullivan*, 551 S.W.3d at 854.

<sup>134</sup> See *Sullivan*, 551 S.W.3d at 854; see *In re Lipsky*, 460 S.W.3d at 589; see also *Tex. Civ. Prac. & Rem. Code §27.002*.

<sup>135</sup> TEX. CIV. PRAC. & REM. CODE §134A.001 *et seq.*

<sup>136</sup> *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 203-04 (Tex. App. – Austin 2017, pet. dism’d).

<sup>137</sup> *Tex. Civ. Prac. & Rem. Code §134A.008*.

<sup>138</sup> *TEX. CIV. PRAC. & REM. CODE §134A.007(a)*.

<sup>139</sup> *CA. CIV. PROC. CODE § 425.16(B)(1)*.

<sup>140</sup> “Arising from” an agreement is more limited than “related to” an agreement. *Fazio v Cypress/GR Houston I, L.P.*, 403 S.W.3d 390,398 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2013, pet. denied).

<sup>141</sup> *Cavin v. Abbott*, 545 S.W.3d 47, 69, n. 85 (Tex. App. – Austin 2017, no pet.) (citing American Heritage Dictionary of the English Language 148 (5<sup>th</sup> ed. 2011)). Along the same lines, the court in *James v. Elkins*, 553 S.W.3d 596, 606 (Tex. App. – San Antonio 2018, pet. denied), the TCPA’s insurance exemption “arising out of” language was not as broad as “relates to.”

statute is read in service of its dual stated purposes, it becomes clear that courts should more closely examine the nexus requirement to avoid absurdly broad application.

The First Court of Appeals correctly observed that “the stated purpose of the statute indicates a requirement of some nexus between the communication used to invoke the TCPA and the generally recognized parameters of First Amendment protection. Otherwise, any communication that is part of the decision-making process in an employment dispute – to name just one example – could be used to draw within the TCPA’s summary dismissal procedures private suits implicating only private issues.”<sup>142</sup> The “explicitly stated purpose of the statute [is] to *balance* the protection of First Amendment rights against the right all individuals have to file lawsuits to redress their injuries.”<sup>143</sup>

For too long the relationship between a “legal action” and the purportedly compromised “First Amendment”<sup>144</sup> rights has been a mere speed bump on the TCPA express railroad. The Legislature did not include a statutory definition of the phrase used to define the causal connection between “legal action” and speech; “is based on, relates to, or is in response to...”

But this statutory language was not formed in a vacuum, and it is found in the Illinois anti-SLAPP statute, among others.<sup>145</sup> The ordinary meaning of “is based on” would mean that the right threatened would be the “main ingredient” or “fundamental part” of a suit.<sup>146</sup> If “relates to”<sup>147</sup> and the disjunctive “or is in response to” are interpreted in the broadest sense, they would extend immunity far beyond rights protected under the First Amendment. This is the sort of absurd result the Texas Legislature could not have intended.

Of the more than 300 Texas cases reported to date, only one, the *Kinney v. BCG* case,<sup>148</sup> could conceivably be construed as involving an actual SLAPP. None of the reported cases take time to analyze the meaning of the causal connection language, or determine whether accepting a rote application of “based on, relates to, or in response to” to mean essentially “anything remotely touching on” rights of speech, petition, and association, serves the stated purpose of the TCPA.<sup>149</sup> Reviewing causal connection language identical to that found in the TCPA, the Illinois Supreme Court decided that, in light of the clear legislative intent expressed in their statute, the same causal phrase or nexus must be construed to mean “*solely* based on, relating to, or in response to” the moving party’s asserted rights of petition, speech, and association.<sup>150</sup> In other words, “where a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants, the lawsuit is not solely based on defendants’ rights of petition, speech, association, or participation in government.”<sup>151</sup> This construction not only allows a court to identify meritless SLAPP suits subject to the TCPA, but it “also serves to ameliorate the ‘particular danger inherent in anti-SLAPP statutes ... that when constructed or construed too broadly in protecting the rights of defendants, they may impose a counteractive chilling effect on prospective plaintiffs’ own rights to seek redress from the courts for injuries suffered.”<sup>152</sup> Like the stated purpose of the TCPA, the Illinois Supreme Court recognized that “a solution to the problem of SLAPPs must not compromise either the defendants’ constitutional rights of free speech and petition, or plaintiff’s constitutional right of access to

<sup>142</sup> *Cheniere Energy*, 449 S.W.3d at 216-17.

<sup>143</sup> *Cheniere Energy*, 449 S.W.3d at 216.

<sup>144</sup> Courts tend to generally refer to the rights of speech, petition, and association discussed in Chapter 27 with First Amendment rights, but they are not in fact co-equal, and Texas generally guarantees rights more broadly than under the First Amendment.

<sup>145</sup> See 735 ILCS 110/15 (West 2014); *Sandholm v. Kuecker*, 202 IL 111443, 962 N.E.2d 418, 429-30 (Ill. 2012) (holding that ‘based on, relates to, or in response to’ standard identical to TCPA’s applies ‘only to actions based *solely* on the [movant’s] petition activities’ and not ‘where a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants’).

<sup>146</sup> *Serafine*, 466 S.W.3d at 390-91 n.145 (Pemberton, concurring): “See *Webster’s Third New Int’l Dictionary* 180 (2002) (defining ‘base’ (n.) as ‘main ingredient,’ and ‘fundamental part of something’); *The American Heritage Dictionary of the English Language* 148 (2011) (defining ‘base’ (n.) as ‘fundamental principle,’ ‘underlying concept’ ‘fundamental ingredient’ and ‘chief constituent’); see also BLACK’S LAW DICTIONARY 180 (10<sup>TH</sup> ED. 2014) (defining

‘base’ (v.) as “to use (something) as the thing from which something else is developed’).”

<sup>147</sup> “Relate” (v.) means “to have connection, relation, or reference.” *The American Heritage Dictionary of the English Language* 1472 (2000).

<sup>148</sup> *Kinney v. BCG Attorney Search, Inc.*, 03-12-00579-CV, 2014 WL 1432012, at \*1 (Tex. App.—Austin Apr. 11, 2014, pet. denied).

<sup>149</sup> Courts struggling with whether speech is “made in connection with a matter of public concern” correctly indicate that they “do not blindly accept” attempts by the movant to characterize the plaintiff’s claims as implicating protected expression.” *Adams v. Starside Custom Builders, LLC*, 545 S.W.3d 572, 578 (Tex. App.—Dallas 2016), *rev’d*, 547 S.W.3d 890 (Tex. 2018). “Rather, we view the pleadings in the light most favorable to the plaintiff; i.e., favoring the conclusion that the claims are not predicated on protected expression. Further, any activities by the movant that are not a factual predicate for the plaintiff’s claim are not pertinent to the inquiry.” *Id.*

<sup>150</sup> *Sandholm*, 962 N.E.2d at 430.

<sup>151</sup> *Id.*

<sup>152</sup> *Sandholm*, 962 N.E.2d at 431 (citation omitted).

the courts to seek a remedy for damage to reputation.”<sup>153</sup>

Just as the Texas Legislature looked to previously enacted anti-SLAPP laws for language guidance, so too courts may look to precedent in other states that have also experienced the mischief made by overused motions to dismiss that in turn more closely resemble a SLAPP than the suit sought to be dismissed.<sup>154</sup>

This trend in construction could give new life and meaning to Section 27.007, which provides for a finding by the court “regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.”<sup>155</sup> Without a closer examination of the purpose of the subject legal action, there is no reason for the trial court to issue such findings. Whether the underlying case was brought for an improper purpose and to deter or prevent the moving party from exercising constitutional rights is irrelevant, because “constitutional rights” are not protected under the TCPA and “improper purpose” is not a stated basis for awarding sanctions.

But if the movant must prove that the legal action was *solely* “based on or is in response to” the exercise of constitutionally protected communications, it makes perfect sense to request such findings if the motion is denied, since only the denial of a motion to dismiss is permitted an interlocutory appeal.<sup>156</sup>

If Texas followed the growing trend to construe its anti-SLAPP statute in a way to allow it to be applied as intended, by construing the TCPA’s causal connection language to mean *solely based on, relates to, or is in response to* the exercise of constitutionally protected First Amendment rights properly serves the dual

purposes of the statute and makes meaningful all sections of the TCPA.

**F. What speech rights are protected, is a hypothetical communication covered, and what does *in connection with* mean?**

Texas Supreme Court Justice Jimmy Blacklock’s pronouncement in 2018 that “[t]he TCPA casts a wide net” was an understatement.<sup>157</sup> He correctly observed that, under the current interpretations, “[a]lmost every imaginable form of communication, in any medium, is covered.”<sup>158</sup> “‘Exercise of the right of free speech’ means a *communication made in connection with* a matter of public concern.”<sup>159</sup> “‘Communication’ includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.”<sup>160</sup> These definitions did not change in 2019, and do not limit protected rights to those protected under state or federal constitutions, despite the TCPA’s title or stated purpose.

One of the keenest areas of debate about the scope of protection involves the conflict between the protections afforded speech and the legitimate interest in compensating persons for harm inflicted by defamatory falsehood. This is reflected in the statutory dual purpose, along with observations from the Texas Supreme Court in media cases about “the freedom to comment on matters of public concern” is one “of the foundational principles of American democracy.”<sup>161</sup> Yet the Court cautions that “members of the press are also ‘responsible for the abuse of that privilege,’” citing to TEX. CONST. art. I, §8.<sup>162</sup>

Additionally, the broad definitions of the communication rights in the statute, which did not change in 2019, suggest that a movant may file a motion to dismiss even if the speech or communication is not afforded full protection under the First Amendment.<sup>163</sup>

<sup>153</sup> *Id.*

<sup>154</sup> See, e.g., *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 691 N.E.2d 935, 941-44 (Mass. 1998) (construing “based on” standard in Massachusetts “anti-SLAPP” law to require that movant show “that the claims against it are ‘based on’ the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities”); see also *Town of Madawaska v. Cayer*, 2014 ME 121, ¶12, 103 A.3d 547 (stating that the standard in Maine is that “the moving party must show that the claims at issue are ‘based on the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities.’”) (internal citations omitted); *Sisto v. Am. Condo. Ass’n, Inc.*, 68 A.3d 603, 621-23 (R.I. 2013) (Goldberg, J. concurring in part and dissenting in part) (stating that “it is my opinion that, before a party is declared immune from suit under the anti-SLAPP statute, a threshold showing must be made that the claim brought against the party is not meritorious and that the suit *solely is based on the plaintiff’s petitioning activities and not in addition to those activities.*”) (emphasis added).

<sup>155</sup> TEX. CIV. PRAC. & REM. CODE § 27.007(a).

<sup>156</sup> TEX. CIV. PRAC. & REM. CODE § 27.008(a); TEX. CIV. PRAC. & REM. CODE § 51.014(A)(12).

<sup>157</sup> *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018).

<sup>158</sup> *Id.*

<sup>159</sup> TEX. CIV. PRAC. & REM. CODE § 27.001(3) (emphasis added).

<sup>160</sup> TEX. CIV. PRAC. & REM. CODE § 27.001(1).

<sup>161</sup> *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 433 (Tex. 2017).

<sup>162</sup> *Id.*

<sup>163</sup> A number of categories of speech receive little or no First Amendment protection. “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New*

The TCPA does not extend to future or hypothetical communications. A “communication” under the TCPA “includes the *making* or *submitting* of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.”<sup>164</sup> Any right protected under the TCPA must arise from a “communication” under the statute.<sup>165</sup> Nothing in the definitions or interpretive case law extends the definition of a “communication” to a future act.

Setting the tone for the most expansive application of the TCPA, the Texas Supreme Court in the seminal 2017 *ExxonMobil Pipeline Co. v. Coleman* case took the “plain meaning” review of the TCPA to an extreme, finding that the TCPA’s use of speech “in connection with” a matter of public concern did not require more than a *tangential* relationship.<sup>166</sup> It is important to note here that the 2019 amendments did not alter that language.

Although the opinion from the Dallas Court of Appeals was notable for finding a requirement of public concern for the exercise of the right of association, the Texas Supreme Court resolved the appeal on issues of speech. After Coleman was fired from his job as a petroleum terminal technician, Coleman sued ExxonMobil and two supervisors for, among other things, defamation in a private employment document. The defendants moved for dismissal under the TCPA. The trial court denied the motion, finding that the TCPA did not apply. In affirming the trial court’s judgment, the Dallas Court of Appeals found that the supervisors’ communications about Coleman were not a matter of public concern.

The Texas Supreme Court rejected the Dallas Court of Appeals’ holding that “to constitute an exercise of the right of association under the Act, the nature of the ‘communication between individuals who join together’ must involve public or citizen’s participation.”

---

*Hampshire*, 315 U.S. 568, 571-73 (1942). Obscenity enjoys no First Amendment protection and may be banned simply because a legislature concludes that banning it protects “the social interest in order and morality.” *Roth v. United States*, 354 U.S. 476, 485 (1957). Child pornography is not protected by the First Amendment. *Osborne v. Ohio*, 495 U.S. 103 (1990). Advocacy directed to inciting or producing imminent lawless action and is likely to incite or produce such action is also not protected by the First Amendment. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Other categories of speech receive limited protection under the First Amendment. “Commercial speech” receives less First Amendment protection, and *false* commercial speech receives none. *P&G v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001). Importantly, commercial speech may relate to a matter of “public concern,” but it nonetheless receives limited First Amendment protection as commercial speech if the motivation of the speaker is primarily economic. *Id.* at 556.

Otherwise, a reading of the definition alone “would result in giving constitutional right of association protection to virtually any private communication between two people about a shared interest.”

Instead, the Supreme Court found that “[t]he TCPA does not require that the statements specifically ‘mention’ health, safety, environmental, or economic concerns, nor does it require more than a ‘tangential relationship’ to the same; rather, TCPA applicability requires only that the defendant’s statements are ‘in connection with’ ‘issues related to’ health, safety, environmental, economic, and other identified matters of public concern chosen by the Legislature.”<sup>167</sup> The court found that the private personnel records about Coleman working on a fuel tank were a matter of public concern.

The court took an extremely narrow view of statutory construction, and left lower courts and practitioners struggling with questions of whether any boundaries exist for the TCPA, if no more than a tangential relationship between speech and a very broad matter of public concern is required.

The 2019 amendments left unchanged *Coleman* and *Lippincott*’s principal admonitions that courts should not “read language into a statute that is not there,” and that “courts may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written.”<sup>168</sup>

The Austin Court of Appeals in 2017 confronted this issue, and, feeling constrained by the Texas Supreme Court decision in *ExxonMobil v. Coleman*, decided that a strict, “plain meaning” dictionary-definition analysis of the text of the TCPA does not link the definition of “communication” with any constitutional rights or concepts.<sup>169</sup> The opinion, by Justice Bob Pemberton, noted that a plaintiff could offer proof of unprotected speech in his *prima facie* case.

Misleading commercial speech receives no First Amendment protection. *Goodman v. Ill. Dep’t of Fin. & Prof’l Reg.*, 430 F.3d 432, 438 (7th Cir. 2005). Content-neutral restrictions, such as time, place, or manner restrictions, as well as incidental restrictions on speech, also enjoy less First Amendment protection. *Vincenty v. Bloomberg*, 476 F.3d 74, 84 (2nd Cir. 2007). Defamation is clearly an exception to the First Amendment, in which greater protection is afforded to public officials and figures.

<sup>164</sup> TEX. CIV. PRAC. & REM. CODE §27.001(1)(emphasis added).

<sup>165</sup> See TEX. CIV. PRAC. & REM. CODE §27.001(2)(association), (3)(speech), and (4)(petition).

<sup>166</sup> *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 901-02(Tex. 2017(emphasis added)).

<sup>167</sup> *Coleman*, 512 S.W.3d at 900.

<sup>168</sup> *Coleman*, 512 S.W.3d at 900-01; *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508-09 (Tex. 2015).

<sup>169</sup> *Elite Auto Body*, 520 S.W.3d at 201-03.

Justice Pemberton also pointed out that in “its more extensive analysis of the TCPA’s text in *Coleman*, the supreme court never suggested that the *constitutional* concepts of ‘freedom of speech’ or ‘public concern’ had any bearing on its ‘plain-meaning’ construction of the TCPA’s definitions of those terms.”<sup>170</sup> And so the TCPA was applied to alleged misappropriation or misuse of a business’s trade secrets or confidential information, because there were “communications” involved.

This case illustrates the absurd results possible with a “plain-meaning” construction of the statute without consideration of its purposes or longstanding constitutional jurisprudence. And this discussion would not be complete without Justice Pemberton’s observation that “the statute, whatever its merits as an ‘anti-SLAPP’ mechanism, has certainly proven itself to be an extraordinarily powerful tool for media defendants to use in combating defamation claims.”<sup>171</sup>

Other cases illustrate the judicial frustration with “plain meaning” interpretation that extends the scope of the TCPA to include a private family dispute over a daughter’s selection of a husband.<sup>172</sup> The same was found true of private text and email messages about sellers of home goods.<sup>173</sup>

**G. Public or Private? Does it matter where communications occur?**

The Legislature in 2019 did not address whether speech, to be protected under the TCPA, could be uttered in private as well as public fora. In 2015 the Texas Supreme Court reviewed the narrow issue of whether speech involving a public subject is within the scope of the TCPA, regardless of whether it is publicly or privately stated.<sup>174</sup> The court decided that speech need not be publicly published to be protected under the TCPA. Prior to this decision, the discussion about “purely private speech” seemed to conflate the subject of the speech with the forum in which it was delivered, if the only difference was *where* the communication was made.

The Court concluded that “the plain language of the Act merely limits its scope to communications involving a public subject – not communications in public form.”<sup>175</sup>

**H. What is a “matter of public concern,” and how does a court make the determination?**

A significant revision to the definition of a “matter of public concern” received the most attention in the Legislature in 2019. Before amendment, the term employed a short but very broad list of topics subject to different interpretations, since it “*includes* an issue related to:

- (A) health or safety;
- (B) environmental, economic, or community well-being;
- (C) the government;
- (D) a public official or public figure; or
- (E) a good, product, or service in the marketplace.”

TEX. CIV. PRAC. & REM. CODE § 27.001(7) (emphasis added).

In 2019, the Legislature adopted a portion of the *Snyder*<sup>176</sup> and *Connick*<sup>177</sup> analysis:

“Matter of public concern” means a statement or activity regarding:

- (A) a public official public figure, or other person who has drawn substantial public attention due to the person’s official acts, fame, notoriety, or celebrity;
- (B) a matter of political, social, or other interest to the community; or
- (C) a subject of concern to the public.

So, what do those topics mean?

What on earth is “a subject of concern to the public?” The Legislature did not see fit to further define the three topics, but because they are largely derived from the U. S. Supreme Court’s existing First Amendment jurisprudence, specifically *Connick* and *Snyder*, it is possible that courts will need to look to those cases for guidance. It is also likely that courts will have to look to cases decided under the prior iteration of “matter of public concern” in the statute. The courts will just have to work it out.

An important change with the 2019 definition is the inclusion of “activity,” not just communications, within the meaning of “matter of public concern.”<sup>178</sup> This is consistent both with activities being protected as speech under First Amendment litigation, and the amendment of the “Motion to Dismiss” Section of the TCPA to

<sup>170</sup> *Id.*

<sup>171</sup> *Serafine*, 466 S.W.3d at 377.

<sup>172</sup> *Cavin*, 545 S.W.3d at 56.

<sup>173</sup> *Camp v. Patterson*, No. 03-16-00733-CV, 2017 WL 3378904 (Tex. App. – Austin August 3, 2017, no pet.).

<sup>174</sup> *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508-09 (Tex. 2015).

<sup>175</sup> *Id.*

<sup>176</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>177</sup> *Connick v. Myers*, 461 U.S. 138 (1983).

<sup>178</sup> TEX. CIV. PRAC. & REM. CODE §27.001(7).

allow for motions to dismiss based on exercise of a right “or arises from any act of that party in furtherance of the party’s communication or conduct...”<sup>179</sup>

Under the pre-2019 amendment laundry list, the scope of topics covered was impressive. In private enterprise, is there anything that is not “a good, product, or service in the marketplace?” A “matter of public concern” as applied so far can include almost anything. Among other things, courts have found a mayor’s performance as a public official,<sup>180</sup> operation of an assisted living facility,<sup>181</sup> gas leaks from fracking,<sup>182</sup> and a lawyer’s legal services, to fall under the rubric of a “good, product, or service in the marketplace”<sup>183</sup> and constitute a “matter of public concern.”

The 2019 amendments to the definition of “matter of public concern” did not address the *methodology* of making the determination of whether acts or communications fall within the scope of the term.

It should come as no surprise from the history of the TCPA that the term “matter of public concern” is an important and much analyzed term in First Amendment jurisprudence, especially in cases involving the media, and First Amendment rights of public employees. Traditionally, whether a communication involves a “matter of public concern” is a question of law.<sup>184</sup>

The *methodology* of determination of whether a communication is the exercise of the right of speech is a matter of public concern is well established by the Texas and United States Supreme Courts. The courts provide the methodology: “[w]hether ‘speech addresses a matter of public concern must be determined by [the expression’s] *content, form, and context* ... as revealed by the whole record.”<sup>185</sup> “In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.”<sup>186</sup>

Like the Texas Legislature’s TCPA description of a matter of public concern, the Texas Supreme Court applies the methodology of determination to the scope or definition: “[a]ccording to the Supreme Court, speech ‘deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community.’”<sup>187</sup> Much like the Texas Supreme Court’s precedent,<sup>188</sup> the Legislature supplied an inclusive list of matters in the TCPA that may generally be matters of public concern, but it did not alter the existing methodology courts use to make the determination.<sup>189</sup> The Legislature was well aware of existing law when the TCPA was enacted, and chose not to alter the methodology.<sup>190</sup> The *Connick* methodology is not a one-size-fits-all interpretation of what issues are matters of public concern.

Since the U.S. Supreme Court in *Snyder* adopted the *Connick* court’s methodology to determine what constitutes a “matter of public concern” in public employee cases, we can look to post-*Connick* cases for guidance.

Following *Connick*, the Fifth Circuit Court of Appeals held that “[b]ecause almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff’s role as citizen or primarily in his role as employee. In making this determination, *the mere fact that the topic of the employee’s speech was one in which the public might or would have had a great interest is of little moment.*”<sup>191</sup> Finding that the issue was a personnel matter, and that the subject communications were not communicated to the public, the Fifth Circuit found that Terrell was not speaking on a matter of public concern,

<sup>179</sup> TEX. CIV. PRAC. & REM. CODE §27.003(a).

<sup>180</sup> *Ramsey*, 2013 WL 1846886, at \*4.

<sup>181</sup> *Crazy Hotel*, 416 S.W.3d at 81.

<sup>182</sup> *In re Lipsky*, 411 S.W.3d at 537.

<sup>183</sup> *Larrea*, 394 S.W.3d at 655; *Kool Smiles v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 748 (5th Cir. 2014). Matters of public concern include those “related to a good, product, or service in the marketplace.” *Barbara Soules Young and Amy Ganci v. Krantz*, 434 S.W.3d 335 (Tex. App. – Dallas 2014, no pet.) (holding that a consumer’s review on Angie’s List was protected as a matter of public concern because it related to a “good, product, or service in the marketplace” and was an exercise of the customer’s free speech.) Matters of public concern are not statements made on a blog about drug abuse, fathers’ responsibilities to their children, and family dynamics when such statements relate to a private person (even a limited-purpose public figure) and not the issues generally. *Pickens v. Cordia*, 433 S.W.3d 179, 184 & 187 (Tex. App. – Dallas 2014, no pet.).

<sup>184</sup> *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017).

<sup>185</sup> *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017), quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 469, 492 (1985); *Connick v. Myers*, 461 U.S. 138 (1983), *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

<sup>186</sup> *Snyder*, 562 U.S. at 453; *Klentzman*, 515 S.W.3d at 884.

<sup>187</sup> *Brady*, 515 S.W.3d at 884, quoting *Snyder*, 562 U.S. at 453, quoting in turn *Connick*, 461 U.S. at 146.

<sup>188</sup> “Public matters *include*, among other things, ‘commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions.’” *Brady*, 515 S.W.3d at 884, quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (emphasis added).

<sup>189</sup> Section 27.001(7) provides that “[m]atter of public concern” *includes* an issue related to....”(emphasis added).

<sup>190</sup> *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877-78 (Tex. 2001) (presuming that the Legislature is aware of existing law when it enacts legislation).

<sup>191</sup> *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) (emphasis added).

and his termination was not retaliatory.<sup>192</sup> Following this analysis, the relevant federal cases find that “a matter of public concern does not involve ‘solely personal matters or strictly a discussion of management policies that is only interesting to the public by virtue of the manager’s status as an arm of the government.’”<sup>193</sup> “Speech is not on a matter of public concern if it is made solely in furtherance of a personal employer-employee dispute.”<sup>194</sup> “Typically, an employee speaks in furtherance of his personal employer-employee dispute when he discusses personnel matters directly impacting his job or criticizes other employees or supervisors’ job performance.”<sup>195</sup> “If the speech at issue was made primarily in the [speaker’s] role as an employee, rather than in his role as citizen, it did not address an issue of public concern.”<sup>196</sup>

Similarly, “[b]ecause nearly anything occurring within a public hospital could be of concern to the public, the focus is not on the subject matter plaintiff discussed. Instead, the inquiry is ‘whether the speech at issue was made primarily in the employee’s role as a citizen, or primarily in the role of employee.’”<sup>197</sup> “When an employee communicates matters in the ‘normal course of his duties’ these matters are communicated as an employee and are not protected speech.”<sup>198</sup> In *Nero*, the court found that “the letter and any other communication to the Medical Staff concerning the peer review process was carried out in Marshall Nero’s capacity as Hospital Administrator and not as a concerned private citizen.”<sup>199</sup> The district court further found that “the fact that Marshall Nero did not communicate this concern to the public, while not fatal by itself, is evidence that he was merely acting as Administrator when he communicated to the Medical Staff about the peer review process. The fact that the peer review process is likely of interest to the public does not alone make it a ‘public concern’ for *First Amendment* purposes. Otherwise ‘virtually every remark ... would plant the seed of a constitutional case.’”<sup>200</sup>

Texas courts have not yet adopted a full *Connick* analysis in determining what methodology to employ in

determining what constitutes a matter of public concern. The Amarillo, San Antonio and Dallas courts of appeals properly applied at least a portion of the *Connick* and *Brady* test in TCPA cases: “[T]o determine whether a lawsuit relates to the exercise of free speech, we must look to the *context* of the entire communication in which the allegedly defamatory statement is made.”<sup>201</sup> “Whether speech is a matter of public concern is a question of law.”<sup>202</sup>

The TCPA’s language about what can be a matter of public concern does not constitute an exclusive definition, but describes broad subject matters. The *Snyder* and *Connick* methodology offers a process by which a court can determine whether the subject speech properly falls within protected subject matters as a matter of public concern.

### **I. What are the rights of petition that are protected?**

Not surprisingly, the Legislature left the right of petition unchanged.

Unlike the definition of speech, the statute does not explicitly limit exercise of the right of petition to matters of public concern. This leads to the application of the TCPA to cases that clearly do not fall within any definition of a SLAPP case.

“Exercise of the right of petition” means any of the following: (1) a communication “in or pertaining to” a judicial, administrative, executive, legislative, or public proceeding, including all types of public hearings and meeting before any governmental body, (2) a communication “in connection with” an issue under consideration or review by a legislative, executive, judicial, or other governmental body, (3) a communication that is “reasonably likely to encourage consideration or review of an issue by any governmental body, (4) a communication “reasonably likely to enlist public participation” in an effort to effect consideration of an issue by any governmental body, and, (5) any

<sup>192</sup> *Id.* at 1363.

<sup>193</sup> *Salge v. Edna I.S.D.*, 411 F.3d 178, 186 (5th Cir. 2005) (quoting *Kennedy v. Tangipahoa Parish Library Bd. Of Control*, 224 F.3d 359, 366-67 (5th Cir. 2000) (relying on *Connick*)).

<sup>194</sup> *Id.* at 187.

<sup>195</sup> *Id.* at 188.

<sup>196</sup> *Fouts v. Little Cypress-Mauriceville I.S.D.*, 09-03-223 CV, 2004 WL 2404342, at \*1 (Tex. App.—Beaumont Oct. 28, 2004, pet. denied).

<sup>197</sup> *Nero v. Hospital Auth.*, 86 F. Supp. 2d 1214, 1224 (S.D. Ga. 1998) (relying on post-*Connick* Eleventh Circuit cases).

<sup>198</sup> *Nero*, 86 F. Supp. at 1225, quoting *Morris v. Crow*, 142 F.3d 1379, 1382 (11th Cir. 1998).

<sup>199</sup> *Nero*, 86 F. Supp. at 1225.

<sup>200</sup> *Id.* at 1225-26, quoting *Connick*, 461 U.S. at 149.<sup>200</sup>

<sup>201</sup> *Harwood v. Gilroy*, No. 04-16-00652-CV, 2017 WL 2791321, at \*3 (Tex. App.—San Antonio June 28, 2017, no pet.) (emphasis added), citing *Campbell v. Clark*, 471 S.W.3d 615, 624 (Tex. App.—Dallas 2015, no pet.), quoting *Shipp v. Malouf*, 439 S.W.3d 432, 438 (Tex. App.—Dallas 2014, pet. denied)(disapproved on other grounds, *In re Lipsky*, 460 S.W.3d 579, 587, 591 (Tex. 2015).)

<sup>202</sup> *Cummins v. Lollar*, 07-16-00337-CV, 2018 WL 2074636, at \*6 (Tex. App.—Amarillo May 3, 2018), reh'g denied (May 29, 2018), *cert. denied*, 139 S. Ct. 1353 (2019)(affirming denial of a TCPA motion to dismiss), citing *Connick*, 461 U.S. at 148 n.7.



communication protected by the Texas or federal constitutions.<sup>203</sup>

In the spring of 2018, the Texas Supreme Court examined the right to petition, holding that “[i]t does not follow from the fact that the TCPA professes to safeguard the exercise of certain First Amendment rights that it should *only* apply to constitutionally guaranteed activities.”<sup>204</sup> In finding that the TCPA guaranteed potentially a much greater breadth of communications than are constitutionally protected, the court stated that “[w]hether that definition maps perfectly onto the external constitutional rights it aims to protect is irrelevant; we are bound by the statutory definition for the purposes of the TCPA.”<sup>205</sup> The court found that a lawyer’s statements in court for his clients (reciting the terms of a settlement agreement) were made in the exercise of the right to petition, as recognized by the TCPA. The court cautioned, however, that it was not giving an opinion “on whether an attorney has a constitutional right to petition that encompasses speaking on behalf of a client.”<sup>206</sup>

It should be obvious, but the filing of a lawsuit, which is a “judicial proceeding,” clearly constitutes the “exercise of the right to petition” under the plain-meaning construction to be given the TCPA.<sup>207</sup>

Filing a notice of lis pendens, filing pleadings in a guardianship, and prosecution of those claims falls within the definition of “communication in or pertaining to a judicial proceeding” within the scope of the TCPA.<sup>208</sup> Reporting a possible crime has been found to qualify as the reporting party’s exercise of the right to petition.<sup>209</sup> Additionally, witness testimony,<sup>210</sup> affidavits,<sup>211</sup> and complaints to administrative agencies<sup>212</sup> fall within the definition of the exercise of the right to petition.

Unmoored by a requirement that the exercise of right to petition be a “matter of public concern,” a property boundary dispute between long-quarreling residential neighbors has been found to fall within the early dispositive boundaries of the TCPA, and the most vexatious of the neighbors able to dismiss counterclaims from her neighbors.<sup>213</sup> In *Serafine*, Ms. Serafine won the race to the courthouse and sued her neighbors, the Blunts, for tearing down a chain-link fence, erecting a new wooden fence, digging a trench for a drainage system adjacent to Ms. Serafine’s lot, asserting claims for trespass, trespass to try title, nuisance, negligence, fraud by nondisclosure, sought declaratory and injunctive relief, and damages, and filed a lis pendens. The Blunts counterclaimed, claiming that Serafine tortiously interfered with their relationship with their contractor, and that the lis pendens was fraudulent and a violation of Chapter 12 of the Civil Practice and Remedies Code. Despite all evidence that it was Serafine whose claims sought to bully her neighbors and most closely resembled a SLAPP, Serafine won dismissal of the Blunts’ counterclaims for tortious interference and for fraudulent lien.<sup>214</sup> In his concurrence, Justice Bob Pemberton appropriately observed that “Serafine’s pattern of conduct toward the Blunts is motivated, at least in part, by the sort of harm-for-harm’s sake animus that is characteristic of SLAPP litigation.”<sup>215</sup> Justice Pemberton pointed out the incongruity of the result, since “it is Serafine’s claims that are exalted and protected as the ‘exercise of the right to petition’ under the TCPA, in derogation of the Blunts’ rights.”<sup>216</sup>

The Tyler Court of Appeals held that the TCPA applies even to suits for false imprisonment, malicious prosecution, and negligence.<sup>217</sup> In *Murphy USA v. Rose*

<sup>203</sup> TEX. CIV. PRAC. & REM. CODE § 27.001(4); *see also* *Rio Grande H2O Guardian v. Robert Muller Family P’ship Ltd.*, 04-13-00441-CV, 2014 WL 309776, at \*\*2-4 (Tex. App.—San Antonio Jan. 29, 2014, no pet.), *disapproved of by In re Lipsky*, 460 S.W.3d 579 (Tex. 2015) (holding in a subsequent tortious interference suit that the appellants underlying lawsuit challenging the legality of zoning ordinances was based on or related to their exercise of the right to petition and, therefore, could not be a tortious act).

<sup>204</sup> *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018)(emphasis in original).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Hawxhurst v. Austin’s Boat Tours*, 550 S.W.3d 220, 226 (Tex. App. – Austin 2018, no pet.); *Serafine v. Blunt*, 466 S.W.3d 352, 360 (Tex. App. – Austin 2015, no pet.) (“*Serafine F*”) (concluding that counterclaims were in part based on, related to, or in response to filing of suit); *Cavin v. Abbott*, 545 S.W.3d 47, 64-65 (Tex. App. – Austin 2017, no pet.) (concluding that filing lawsuits satisfied the TCPA definition of “exercise of the right to petition.”).

<sup>208</sup> *Calkins*, 446 S.W.3d at 147.

<sup>209</sup> *Charalambopoulos v. Grammer*, 3:14-CV-2424-D, 2015 WL 390664, at \*6 (N.D. Tex. Jan. 29, 2015) (making an *Erie* guess).

<sup>210</sup> *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 283-84 (Tex. App. – Dallas 2015, pet. denied).

<sup>211</sup> *Collins v. Collins*, No. 01-17-00817-CV, 2018 WL 1320841 (Tex. App. – Houston [1<sup>st</sup> Dist.] Mar. 15, 2018, pet. denied).

<sup>212</sup>

<sup>213</sup> *Serafine v. Blunt*, 466 S.W.3d 352 (Tex. App.—Austin, June 26, 2015, no pet.).

<sup>214</sup> *Id.* at 364.

<sup>215</sup> *Id.* at 376-77.

<sup>216</sup> *Id.* The author commends to you Justice Pemberton’s lengthy concurrence, as he explores several facets of the TCPA’s overbroad reach, discusses possible readings of the statute to limit its harshness and avoid absurd results that are possible due to the language in the law.

<sup>217</sup> *Murphy USA, Inc. v. Rose*, No. 12-15-00197-CV, 2016 Tex. App. LEXIS 10829, 2016 WL 5800263, at \*1 (Tex. App. - Tyler Oct. 5, 2016, no pet.) (mem. op.).

and Irving, a customer at a Murphy gas station at a Wal-Mart in Center, Texas, pumped gas, then had his credit card, personal check, and business check declined. The manager called the police to report an attempted theft, and stood in front of the vehicle until the police arrived. Rose was arrested for attempted theft, had his car impounded, and left Ms. Irving stranded. Rose in fact did have sufficient funds in his accounts, but the checks were declined for some other reason. The charges were dropped, and Rose and Irving sued Murphy USA and the manager for malicious prosecution, defamation, false imprisonment, and negligence.<sup>218</sup> Murphy filed a Chapter 27 motion to dismiss the whole suit, which the trial court denied. On appeal, the Court of Appeals held that filing a police report “implicates a person’s right to petition the government.”<sup>219</sup> The Court of Appeals held that the trial court erred in failing to grant the motion to dismiss, and rendered judgment that all claims – negligence, false imprisonment, malicious prosecution, in addition to defamation – were dismissed.<sup>220</sup>

How does the *Murphy USA* case resemble a SLAPP? There was of course no discussion of how the application of the TCPA in that case served the dual purposes of the statute.

Similarly, pre-suit demand letters have been found to be an exercise of the right to petition. An HOA letter to homeowners to give notice of intent to sue was found to be an exercise of the HOA’s right to petition, leading to the dismissal of a homeowner’s suit for harassment, intentional infliction of emotional distress, negligence, and injunctive relief.<sup>221</sup>

**J. What are the rights of association that are protected, and are organizations now protected under the TCPA?**

In the last session the Legislature narrowed the definition of “exercise of the right of association” to tie it to governmental proceedings or matters of public concern. Now, “‘exercise of the right of association’ means to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern.” The prior definition meant “a communication between individuals who join together to collectively express, promoted, pursue, or defendant common

interests.”<sup>222</sup> There was no earlier requirement that the exercise of associational rights be about “matters of public concern” as in speech cases.

These revisions were in answer to a number of cases, especially theft of trade secret cases, that took “right of association” to unanticipated extents. “Governmental proceeding” was already defined in the TCPA,<sup>223</sup> and now the right of association is tied to the newly defined “matter of public concern.”<sup>224</sup>

In another curious move, the Legislature quietly deleted the earlier definition limitation of the right of association to *individuals*. Without such limitation, organizations can now claim TCPA protection for associational rights. We are unaware of any discussions about why the scope of the associational right was expanded, and no Texas cases took up the issue of whether the TCPA’s earlier definition of associational rights could be extended to organizations.

In the first case discussion associational rights under the TCPA, communications between members of the Combined Law Enforcement Associations of Texas (“C.L.E.A.T.”) concerning a former C.L.E.A.T. staffer’s claims were found to fall within the right of association.<sup>225</sup> Although the right of association has not been explored in many cases, there is a potential argument that it may allow purely private speech to covered by the TCPA. In *C.L.E.A.T.*, the Austin Court of Appeals held that this definition is not unconstitutionally vague.<sup>226</sup> But in a separate concurrence in *Cheniere*, Justices Sharp and Jennings noted that this broad definition must necessarily be restricted by the TCPA’s stated purpose of safeguarding *constitutional rights*.<sup>227</sup> Notwithstanding the language of the statute, however, it is well-established in the common law that a qualified privilege exists for “statements that occur under circumstances wherein any one of several persons having a common interest in a particular subject matter may reasonably believe that facts exist that another, sharing that common interest, is entitled to know.”<sup>228</sup> Accordingly, there is a conceivable argument that the TCPA merely codified this privilege, and that no showing of a relationship to a constitutionality protected right is required.

<sup>218</sup> *Id.* at 2016 Tex. App. LEXIS 10829 \*2.

<sup>219</sup> *Id.* at \*8. See also *Ford v. Bland*, No. 14-15-00828-CV, 2016 Tex. App. LEXIS 13285, 2016 WL 7323309, at \*1 (Tex. App. – Houston [14<sup>th</sup> Dist.] Dec. 15, 2016, no pet.) (customer of jewelry shop filed complaint with police department; counterclaim by jeweler for defamation and business disparagement; it is unclear whether the Court of Appeals reviewed based on speech or petition rights).

<sup>220</sup> *Id.* at \*19.

<sup>221</sup> *Long Canyon Phase II & III HOA v. Cashion*, 517 S.W.3d 212, 219-21 (Tex. App. – Austin, 2017, no pet.).

<sup>222</sup> TEX. CIV. PRAC. & REM. CODE § 27.001(2).

<sup>223</sup> TEX. CIV. PRAC. & REM. CODE §27.001(5);

<sup>224</sup> TEX. CIV. PRAC. & REM. CODE §27.001(7);

<sup>225</sup> *Combined Law Enft Ass'n of Texas v. Sheffield*, 03-13-00105-CV, 2014 WL 411672, at \*5 (Tex. App.—Austin Jan. 31, 2014, pet. denied)(mem. op.).

<sup>226</sup> *Id.* at \*12.

<sup>227</sup> *Cheniere*, 449 S.W.3d at 217-19.

<sup>228</sup> *Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 92 (Tex. App.—Dallas 1996, writ denied).

Some cases have held that the movant failed to produce sufficient evidence to show that the plaintiff’s claim arose from the exercise of this right.<sup>229</sup>

It was the intermediate court opinion in *Coleman* that triggered the Texas Supreme Court’s emphasis that the “plain meaning” of the statute did not permit courts to judicially amend the TCPA.<sup>230</sup> The Dallas Court of Appeals held that “to constitute an exercise of the right of association under the Act, the nature of the ‘communication between individuals who join together’ must involve public or citizen’s participation.”<sup>231</sup> The Texas Supreme Court opinion did not reach the question of application of the right of association, so it did not expressly disapprove of the Dallas Court of Appeals’ addition of a “public participation” requirement for the exercise of the right of association. We can certainly imagine that the court would have rejected that effort. Ironically, the Legislature’s new definition does place a similar public participation or public purpose requirement on the right of association protected under the TCPA.

After the *Coleman* decision, the Austin Court of Appeals’ significant *Autocraft* opinion held that stolen information communicated among former employees at their new place of employment were communications in the exercise of their right of association as protected under the TCPA.<sup>232</sup> In reaching that conclusion, Justice Pemberton wrote that “*Coleman*’s analysis makes clear that this Court is to adhere to a plain-meaning, dictionary-definition analysis of the text within the TCPA’s definitions of protected expression, not the broader resort to constitutional text that some of us have urged previously.”<sup>233</sup>

We should now expect to see different results based on the new association definition, along with the new exemptions under the TCPA.

**K. Exemptions from the TCPA.**

Perhaps recognizing the overbroad nature of the statutory definitions, the proponents in 2011 provided an initial three general categories of exemptions from the application of the statute. Exemptions mean that a party that might otherwise move to dismiss a case, cannot invoke the TCPA. Those initial three exemptions included government enforcement

actions,<sup>234</sup> suits for bodily injury, wrongful death, or survival,<sup>235</sup> and actions 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 or a commercial transaction in which the intended audience is an actual or potential buyer or customer.”<sup>236</sup> The party asserting the exemption bears the burden of proving its applicability.<sup>237</sup>

The **government enforcement actions** exemption gained greater clarity and strength in 2019, when the Legislature made it clear that a governmental entity, agency, or an official or employee acting in an official capacity is not considered a “party” under the TCPA able to invoke its protections.<sup>238</sup>

It is this last exemption, the **commercial speech exemption**, that occupied an increasing amount of the time of trial and appellate courts. The language is very broad and open to significant interpretation. The party invoking the exception bears the burden of proving its applicability.<sup>239</sup> So, would a physician who sues an ex-partner in a “doctor divorce” case for tortious interference and defamation related to advertising for patients be subject to a Chapter 27 dismissal motion, or would the case be exempt as arising from commercial speech? What about a suit between a business and a trade organization over comments in the trade organization’s membership drive documents?

Yet these statutory exemptions fall short of curing the potential for abuse of the TCPA, and actually create a disparate impact on certain businesses. For example, the commercial speech exemption applies to actions brought *against* a “person primarily engaged in the business of selling or leasing goods or services,” which would include entities such as a new or used car dealer. That is, the motion to dismiss is not available to a car dealer that defends a DTPA suit over alleged misrepresentations about sale or service, because that would be an action “against” the dealer, and because it “arises out of the sale or lease of goods.” In Example 1, Car Dealer cannot avail itself of the motion to dismiss in response to the DTPA suit by Customer, although the Customer can bring a motion to dismiss against Car Dealer in response to its counterclaim.

<sup>229</sup> *Cheniere*, 449 S.W.3d at 216-17; *Herrera v. Stahl*, 441 S.W.3d 739, 744 (Tex. App. – San Antonio, 2014, no pet.); and *Jardin v. Marklund, et al.*, 431 S.W.3d 765, 774 (Tex. App. – Houston [14th Dist.], 2014, no pet.).

<sup>230</sup> *Coleman*, 512 S.W.3d at 901.

<sup>231</sup> *ExxonMobil Pipeline Co. v. Coleman*, 464 S.W.3d 841, 848 (Tex. App. – Dallas 2015), *rev’d*, *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017).

<sup>232</sup> *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 205-206 (Tex. App. – Austin 2017, pet. dismissed).

<sup>233</sup> *Id.* at 204.

<sup>234</sup> TEX. CIV. PRAC. & REM. CODE § 27.010(a).

<sup>235</sup> TEX. CIV. PRAC. & REM. CODE § 27.010(c).

<sup>236</sup> TEX. CIV. PRAC. & REM. CODE § 27.010(b) (emphasis added).

<sup>237</sup> *Schimmel*, 438 S.W.3d at 855-56, citing *Crazy Hotel*, 416 S.W.3d at 89.

<sup>238</sup> TEX. CIV. PRAC. & REM. CODE § 27.003(a)

<sup>239</sup> *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 89 (Tex. App. – Houston [1st Dist.] 2013, pet. denied).

Thus far the Better Business Bureaus in Dallas and Houston have managed to fend off allegations that their ratings of businesses fall under the commercial speech exclusion, as the reviewing courts have found that the BBB’s online business reviews and ratings amount to protected speech, because the intended audience is the consumer public at large, not the business to which the BBB attempts to sell membership services.<sup>240</sup>

By contrast, a law firm was not successful in fending off allegations that the commercial speech exception applied to its advertisements.<sup>241</sup> Making an “Erie guess” the United States Court of Appeals for the Fifth Circuit held that the commercial speech exemption did not protect the law firm’s advertisements implying that Kool Smiles had performed unnecessary and, at times, harmful dental work on children because its intended audience was its actual or potential buyers or customers (*i.e.* future clients).<sup>242</sup> The El Paso Court of Appeals also held that attorney advertising is commercial speech, and that advertising to attract clients against a specific doctor were commercial speech and do not fall under the commercial speech exception.<sup>243</sup>

Additionally, the granting of an attorney’s motion to dismiss was upheld in a lawsuit in which his former client sued, among other things, for defamation, after the attorney wrote to his former client’s parole board noting that his former client’s lawsuit indicted a lack of a lack of taking responsibility.<sup>244</sup> The motion to dismiss was upheld because his action of writing to the parole board did not arise out of the sale or lease of goods, services, or an insurance product or a commercial transaction.<sup>245</sup>

The Texas Supreme Court in 2018 clarified the scope of the commercial-speech exemption, and declared that, “[f]ocusing on the text and context of the TCPA’s commercial-speech exemption, we construe the exemption to apply when (1) the defendant was primarily engaged in the business of selling or leasing goods, (2) the defendant made the statement or engaged in the conduct on which the claim is based in the defendant’s capacity as a seller or lessor of those goods

or services, (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the defendant provides, and (4) the intended audience of the statement or conduct were actual or potential customers of the defendant for the kind of goods or services the defendant provides.”<sup>246</sup> Despite professing to follow *Lippincott* and *Coleman*, the Texas Supreme Court did feel compelled to rewrite the TCPA regarding the commercial speech exemption.

**Insurance Code claims.** The insurance industry, at least, has paid close attention to the commercial speech exemption and sought clarification. In the 2013 session, the Legislature added another exemption, namely “legal actions brought under the Insurance Code or arising out of an insurance contract.”<sup>247</sup> The legislative history is silent as to why such provision was added, and there was no testimony or evidence that insurance litigation was endangered. The net result is to disallow to insurance agents or companies that are defendants in insurance product and services litigation the ability to file a Chapter 27 motion to dismiss.

In 2019 the interest groups lined up and convinced the Legislature to add eight new exemptions.

**Employment relationships.** The Legislature added subsection (a)(5) in order to “address known overreaches” relating to trade secret litigation and enforcement of non-compete and non-disclosure agreements.<sup>248</sup> This amendment was an important issue for business and commercial litigators, especially after cases like *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*,<sup>249</sup> where a trade secret lawsuit was dismissed using TCPA protections, and *Abatecola v. 2 Savages Concrete Pumping, LLC*,<sup>250</sup> where a non-compete lawsuit was subject to dismissal under the TCPA.

This subsection exempts from the TCPA:

(5) a legal action arising from an officer-director, employee-employer, or independent contractor relationship that:

<sup>240</sup> See *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Services*, 441 S.W.3d 345, 354 (Tex. App. – Houston [1st Dist.] 2013, pet. denied); *Wholesale TV & Radio Advert., LLC v. Better Bus. Bureau of Metro. Dallas, Inc.*, 05-11-01337-CV, 2013 WL 3024692, at \*\*2-3 (Tex. App.—Dallas June 14, 2013, no pet.); *Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299 (Tex. App. – Dallas 2013, pet. denied); *Better Bus. Bureau of Metro. Dallas, Inc. v. Ward.*, 401 S.W.3d 440 (Tex. App. – Dallas 2013, pet. denied).

<sup>241</sup> *Kool Smiles*, 745 F.3d at 748.

<sup>242</sup> *Id.* at 749.

<sup>243</sup> *Miller Weisbrod LLC v. Llamas-Soforo*, 511 S.W.3d 181, 190-91 (Tex. App. – El Paso, 2014, no pet.).

<sup>244</sup> *Pena v. Perel*, 417 S.W.3d 552 (Tex. App.—El Paso 2013, no pet.).

<sup>245</sup> *Id.*

<sup>246</sup> *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018)(per curiam).

<sup>247</sup> TEX. CIV. PRAC. & REM. CODE § 27.010(d). The Legislature also amended Section 27.010(b), to insert “insurance services” following “insurance product” among the types of commercial speech activities exempt from Chapter 27.

<sup>248</sup> *H.B. 2730 Briefing Doc.*, *supra* note 2, at p. 4.

<sup>249</sup> See, e.g., 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. dismissed) (showing the TCPA overreaches on trade secret lawsuits).

<sup>250</sup> See, e.g., 14-17-00678-CV, 2018 WL 3118601, at \*6 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) (mem. op.) (showing the TCPA overreaches on non-compete agreements).

- (A) seeks recovery for misappropriation of trade secrets or corporate opportunities; or
- (B) seeks to enforce a non-disparagement agreement or a covenant not to compete.

These exemptions would seem to remove from the reach of the TCPA trade secret (TUTSA) claims, and other, limited, matters. However, the exemption does not exempt from the TCPA any trade secret claims against parties with whom there was no prior relationship, such as a competitor.

Nor does the exemption reach non-disclosure agreements (NDA) with former employees or others. NDAs are becoming more common, especially in the tech world, where both employees and prospective investors sign NDAs while employed or considering investments.

This exemption also leaves intact the application of the TCPA to other employment claims, such as claims for discrimination or retaliation. Both the plain text of the statute and relevant case law establish that Texas state discrimination claims are subject to the dismissal procedures under the TCPA. The Texas Supreme Court in *Coleman* found that the TCPA applied to a terminated employee’s claims against his former employer and supervisors for communications they made about Coleman’s inspection of a storage tank, which they communicated to Coleman before terminating him.<sup>251</sup> In *Coleman*, the Texas Supreme Court relied heavily on its earlier opinion in *Lippincott*, in which the Texas Supreme Court first declared that the TCPA applied to discussions with and about a nurse anesthetist’s provision of medical services, in an employment case including a defamation claim.<sup>252</sup>

More specifically on point, the Houston First District Court of Appeals and the U. S. District Court for the Southern District of Texas separately held that the TCPA applied to private deliberations among a hospital’s staff about a physician’s job performance, in response to discrimination and other claims.<sup>253</sup> In *Memorial Hermann*, the First District Court of Appeals applied the

TCPA to defamation, fraud, tortious interference, and conspiracy claims arising from communications to and about her, while in the companion case in federal court,<sup>254</sup> the Southern District of Texas applied the statute to a state-law age discrimination claim. As both courts explained, although the First Amendment generally does not reach private communications about job performance, the TCPA’s broader definition of the right of free speech includes issues related to “health or safety,” and statements concerning a healthcare professional’s competence.<sup>255</sup> The District Court also said that “the Act’s liberal-construction clause and the fact that the Act excludes some causes of action, but not discrimination claims, Tex. Civ. Prac. & Rem. Code 27.010(a)-(d), support the conclusion that the Act applies to ... state-law discrimination claims....”<sup>256</sup>

Commentators continue to note that the TCPA applies to state discrimination law claims, such as reflected in CLE papers in the State Bar’s Advanced Employment Law Course.<sup>257</sup> The application of the TCPA in state employment law claims is also reflected in Texas Bar Webinars,<sup>258</sup> as well as other publications, such as *The Advocate*.<sup>259</sup>

**Family law.** Subsection (a)(6) was added in order to deal with TCPA motions associated with family law cases.<sup>260</sup> Although the motions were not as numerous as in business and commercial litigation, the problem was that TCPA motions stayed other legal action. Accordingly, “[i]f all action in [a family] case is stayed, a court cannot grant a divorce, issue temporary or permanent custody orders, provide for child support, divide marital property—all the things needed for families to get on with their lives.”<sup>261</sup> For example, in *Collins v. Collins*, the TCPA was used to stall and dismiss a family law case revolving around divorce and probate proceedings.<sup>262</sup> The implications of Subsection (a)(6) are that certain lawsuits based on the Family Code or protective orders are no longer subject to TCPA dismissal.<sup>263</sup>

**DTPA.** The Legislature added Section (a)(7) in order to reduce overreaches in DTPA cases.<sup>264</sup> For

<sup>251</sup> *Coleman*, 512 S.W.3d at 512.

<sup>252</sup> *Lippincott*, 462 S.W.3d at 509-10.

<sup>253</sup> *Memorial Hermann Health System v. Khalil*, No. 01-16-00512, 2017 WL 3389645, at \*5-6 (Tex. App.—Houston [1st Dist.] 2017, pet denied).

<sup>254</sup> *Khalil v. Memorial Hermann Health System*, No. H-17-1954, 2017 WL 5068157, at \*5-6 (S.D. Tex. 2017)

<sup>255</sup> *Memorial Hermann*, 2017 WL 3389645, at \*5-6; *Khalil*, 2017 WL 5068157, at \*5-6.

<sup>256</sup> *Khalil*, 2017 WL 5068157, at \*5.

<sup>257</sup> See Darron G. Gibson and Andrew Gray, *Texas Anti-Slapp in Employment Cases: From Innovative to Expected (Except Maybe in Federal Court)*, 27<sup>th</sup> Annual Advanced Employment Law Course, State Bar of Texas (January 17-18, 2019); Darron G. Gibson and Andrew Gray, *Texas Anti-Slapp in Employment Cases: Landmines for Plaintiffs and Opportunities for*

*Defendants*, 26<sup>th</sup> Annual Advanced Employment Law Course, State Bar of Texas (January 18-19, 2018).

<sup>258</sup> See Joe Ahmad, Kelsi White, Mark Oberti, Charles A. Sturm, and Edwin Sullivan, *SLAPP your Opponents: What Employment Lawyers Need to Know About the Anti SLAPP Act*, State Bar of Texas (October 2018).

<sup>259</sup> See Ehsan Tabesh & Stephen J. Roppolo, *SLAPP Wary: What Employment Lawyers Need to Know About the Texas Anti-SLAPP Law*, 84 *The Advocate* (Texas) 37, 38 (2018).

<sup>260</sup> *H.B. 2730 Briefing Doc.*, *supra* note 2, at p. 3.

<sup>261</sup> *Id.*

<sup>262</sup> See, e.g., 01-17-00817-CV, 2018 WL 1320841, at \*1 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018, pet. denied) (mem. op.).

<sup>263</sup> See *H.B. 2730 Briefing Doc.*, *supra* note 2, at p. 4.

<sup>264</sup> *Id.*

example, in, the Third (Austin) Court of Appeals was faced with determining whether a lawsuit based on provisions in the DTPA was subject to dismissal under the TCPA.<sup>265</sup> The implication of the addition of Subsection (a)(7) prevents the TCPA from ending lawsuits based on DTPA subject matter. Additionally, Subsection (b) denies even media entities the ability to dismiss DTPA legal actions under the TCPA.

**Medical peer review.** At the belated request of the Texas Medical Association, the Legislature added the exemption in Subsection (a)(8) for medical peer review lawsuits.<sup>266</sup> This addition was in response to the First (Houston) Court of Appeal's decision in the author's *Memoriall Hermann* case, in which the hospital successfully dismissed an elderly pediatric anesthesiologist's lawsuit by applying the TCPA.<sup>267</sup> This is important to the medical community, which can now sue to dispute peer review findings without facing the draconian provisions of the TCPA.

**Evictions.** Subsection (a)(9) was added at the request of the Texas Apartment Association to exempt suits for forcible entry and detainer.<sup>268</sup> This addition prevents actions like evictions from being subject to TCPA protection.

**Attorney discipline.** Subsection (a)(10) was added because of the overreach associated with State Bar disciplinary cases and enforcement of law against unauthorized law practice.<sup>269</sup> This addition was likely in response to cases like *Comm'n for Lawyer Discipline v. Rosales*, which dealt with issues associated with a lawyer trying to escape State Bar discipline by using a TCPA to dismiss the disciplinary action.<sup>270</sup> The implications of this subsection are that lawyers may no longer use the TCPA to avoid legal discipline. Additionally, it allows for enforcement actions related to legal practices. It is noteworthy for lawyers that the Legislature was eager to take the TCPA away from lawyers to defend against disciplinary cases after only one published opinion.

**Whistleblower suits.** Subsection (a)(11) was added to moderate concerns that whistleblower lawsuits were subject to dismissal under the TCPA. The implication of this change is that whistleblower lawsuits may not be dismissed using TCPA motions.<sup>271</sup>

**Common law fraud.** Subsection (a)(12) was added to prevent common law fraud from being subject to TCPA protection. "It was added because 'common law

fraud almost always involves a misrepresentation [in the form of] oral or written speech.'"<sup>272</sup> However, there is no constitutional right to fraud, so the TCPA should not be applicable.<sup>273</sup>

**Exemptions to the exemptions: media protection.** In order to help overcome media interest opposition to any changes to the TCPA, the Legislature added Subsections (b)(1) and (b)(2). These exemptions to the exemptions expressly allow media and online business reviews and ratings to invoke the TCPA. With the media-drafted language, claims arising out of the communications described do not have to be related to matters of public concerns. And the media and online reviewers also enjoy an exemption from the commercial speech exemption and the new exemptions for DTPA and fraud claims. The implications of these are that Texas's anti-SLAPP statute now provides "the strongest, most explicit media protections in the United States."<sup>274</sup>

Because the Legislature could not find another section to address family violence and related claims, the Legislature added Subsection (c). This subsection expressly allows victims of family violence, dating violence, and revenge porn to invoke the TCPA in response to suits brought against them.

## **L. Procedures and Proof.**

### **1. Lawyers MUST KNOW this Threshold Dispositive Motion.**

It became abundantly clear fairly early in the life of the TCPA that its applications reached far beyond cases involving the media. The author faced probably the first TCPA motion to dismiss in September, 2011, less than a month after it became effective, in a lawsuit to stop an illegal recall election against the El Paso mayor. Since then, as the author spoke to lawyers across the state about the TCPA, the topic first met with mild amusement at the novelty of the law, then with concern, and finally fear and loathing by respondents and glee from movants.

Regardless whether a lawyer loves it or hates it, the TCPA is probably here to stay, and is now an essential part of the fund of knowledge that every civil trial and appellate lawyer must have. It is now part of Board Certification exams, and knowledge of the TCPA is part of the Texas litigator's standard of care.

<sup>265</sup> See generally *Bumjin Park v. Suk Baldwin Properties, LLC*, 03-18-00025-CV, 2018 WL 4905717, at \*4 (Tex. App.—Austin Oct. 10, 2018, no pet.) (mem. op.).

<sup>266</sup> *H.B. 2730 Briefing Doc.*, *supra* note 2, at p. 6.

<sup>267</sup> See 01-16-00512-CV, 2017 WL 3389645, at \*6 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied) (mem. op.).

<sup>268</sup> *H.B. 2730 Briefing Doc.*, *supra* note 2, at p. 6.

<sup>269</sup> *Id.* at p. 4.

<sup>270</sup> See generally, *Comm'n for Lawyer Discipline v. Rosales*, 03-18-00147-CV, 2019 WL 1463105, at \*3 (Tex. App.—Austin Apr. 3, 2019, no pet. h.) (showing the complexity associated with legal action relating to disciplinary actions associated with TCPA).

<sup>271</sup> *H.B. 2730 Briefing Doc.*, *supra* note 2, at p. 6.

<sup>272</sup> *Id.* at p. 4.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

2. Deadline to File the Motion, and Whether Amendment of Pleadings Extends the Deadline.

The motion to dismiss must be timely. It must be filed within 60 days following the service (or voluntary appearance) of the legal action.<sup>275</sup> The time to file the motion to dismiss may be extended on a showing of good cause.<sup>276</sup> In 2019 the Legislature allowed the parties to agree to extend the time to file a motion to dismiss.<sup>277</sup> The length, or number, of extensions to file the motion is not addressed in the statute.

Whether an amended pleading opens a new window to file a motion to dismiss is not quite settled. As a general rule, “[a]n amended pleading that *does not add* new parties or claims does not restart the deadline for filing a motion to dismiss under the TCPA.”<sup>278</sup> That suggests that if a pleading *does* add a new claim or a new party, then the 60-day deadline applies to such claim or party.

The Corpus Christi Court of Appeals held that the 60-day deadline for filing a Chapter 27 motion to dismiss begins anew as to additional causes of action alleged in subsequent pleadings.<sup>279</sup>

Similarly, an amended pleading that raises a new claim for tortious interference against a lawyer in a suit for breach of fiduciary duty and fee forfeiture could be subject to a Chapter 27 motion to dismiss, if brought timely.<sup>280</sup>

However, the El Paso Court of Appeals very recently judicially imposed a “same basic factual allegation” requirement on when a motion to dismiss may be filed against newly asserted causes of action.<sup>281</sup> In so doing, the Court of Appeals did not address the *Hicks* opinion, which found that new claims for “conspiracy and joint enterprise” and “criminal coercion of a public servant,” brought in an amended petition based on the same emails referenced in the original petition, were new “legal actions” subject to the TCPA,

and the 60-day deadline to file a motion to dismiss ran from the date of service of the amended petition.<sup>282</sup> This ruling is undisturbed in any other cases. In fact, the Eastland Court of Appeals recently found that when a fourth amended petition alleged breach of fiduciary duty for the first time, the motion to dismiss that claim was timely, though the petition did not restart the deadline for filing a TCPA motion to dismiss for breach of contract and fraud, which were previously asserted, even though there were additional factual allegations about those earlier claims.<sup>283</sup>

The *Chandni* companion cases from the El Paso Court of Appeals will go to the Texas Supreme Court for determination.

Will the Texas Supreme Court allow judicial amendment of the TCPA to add a requirement to the definition of “legal action” that it “must allege new or different facts?”

It is now black-letter law in Texas that in TCPA cases, a movant need look no further than the pleadings to determine whether the Act applies. “The basis of a legal action is not determined by the defendant’s admissions or denials but by the plaintiff’s allegations ... When it is clear from the plaintiff’s pleadings that the action is covered by the Act, the [movant] need show no more.”<sup>284</sup> The movant may rely on the claimant’s “pled allegations to determine whether rights were exercised, while simultaneously denying the (pleading’s) factual allegations.”<sup>285</sup>

“A ‘legal action’ can consist of an entire lawsuit or a single cause of action.”<sup>286</sup> Also, different “claims” or causes of action within the same lawsuit or pleading instrument are considered separate “legal actions” in context of a TCPA motion.<sup>287</sup>

The existence, and timing, of a “legal action” under the TCPA depends on the claim asserted, not just the

<sup>275</sup> TEX. CIV. PRAC. & REM. CODE § 27.003(b); *In re Estate of Check*, 438 S.W.3d 829 (Tex. App. – San Antonio [4th Dist.], 2014, no pet.) (dismissing the motion to dismiss for failure to timely file); *Calkins*, 446 S.W.3d at 141-42.

<sup>276</sup> TEX. CIV. PRAC. & REM. CODE § 27.003(a). A motion to dismiss filed 61 days after an amended petition was filed, but less than 60 days after received, was either timely or the court found good cause for the late filing. *Schimmel*, 438 S.W.3d at 856.

<sup>277</sup> TEX. CIV. PRAC. & REM. CODE § 27.003(a)(eff. Sept. 1, 2019).

<sup>278</sup> *Paulsen v. Yarrell*, 455 S.W.3d 192, 198 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *In re Estate of Check*, 438 S.W.3d at 836-37.

<sup>279</sup> *Hicks v. Group & Pension Admins., Inc.*, 473 S.W.3d 518, 529 (Tex. App.—Corpus Christi 2015, no pet.).

<sup>280</sup> See *Schimmel v. McGregor*, 438 S.W.3d 847, 856 (Tex. App. - Houston [1st Dist.] 2014, pet. denied).

<sup>281</sup> See *Chandni, Inc. v. Patel*, No. 08-18-00108-CV, 2019 WL 6799759 (Tex. App. – El Paso Dec. 13, 2019, no pet. h.);

*Chandni I, Inc. v. Patel*, No. 08-18-00107-CV, 2019 WL 6799747 (Tex. App. – El Paso Dec. 13, 2019, no pet. h.).

<sup>282</sup> *Hicks*, 473 S.W.3d at 529-30.

<sup>283</sup> See *ETC Texas Pipeline, Ltd. V. Addison Exploration & Development, LLC*, 582 S.W.3d 823, 833-34 (Tex. App. – Eastland 2019, pet. filed).

<sup>284</sup> *Adams v. Starside Custom Builders*, 547 S.W.3d 890, 897 (Tex. 2018)(quoting *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017)).

<sup>285</sup> *MVS Int’l Corp. v. International Advertising Solutions*, 549 S.W.3d 180, 194 (Tex. App. – El Paso 2017, no pet.).

<sup>286</sup> *Adams*, 547 S.W.3d at 892.

<sup>287</sup> See *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 441 (Tex. 2017); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 197 (Tex. App.—Austin 2017, pet. dism’d)(each of its component claims for such relief is a ‘legal action.’); *MVS Int’l Corp.* (ruling on a supplemental TCPA motion to dismiss addressing newly added causes of action, though the “core of the factual allegations ... were the same).

factual allegations.<sup>288</sup> Similarly, a counterclaim for sanctions in response to an amended petition counts as a “legal action” under the TCPA.<sup>289</sup>

“The TCPA defines “‘legal action’ ... both expansively and variously ... referring to everything from an entire action or proceeding to particular facts that underlie a claim or cause of action. This nomenclature contemplates the drawing of distinctions not only between claims, but also between factual theories, as here.”<sup>290</sup>

This is not an insignificant issue, regardless of whether litigants are apply the original or amended TCPA.

**3. Deadline for Hearing and Ruling: “Set,” “Rule,” and Continuances.**

The Legislature in 2019 updated the schedule for briefing and hearing the motion to dismiss to more closely follow summary judgment practice. Now the movant must “provide written notice of the date and time of the hearing not later than 21 days before the date of the hearing on the motion to dismiss unless otherwise provided by an agreement of the parties or an order of the court.”<sup>291</sup> This follows summary judgment hearing rules and practice. Similarly, a response must be filed not later than seven days before the hearing, again “unless otherwise provided by an agreement of the parties or an order of the court.”<sup>292</sup> For some reason, the Legislature did not address reply briefs, which are almost always filed. The practitioner will have to consider local rules for any further guidance.

The Legislature did not change any requirements about the setting of hearings. The hearing on the motion must be “set” not later than 60 days after the date of service of the motion, unless the court’s docket conditions require a later hearing, upon a showing of good cause, or by agreement of the parties.<sup>293</sup> There is no guideline as to how long the hearing may be delayed due to the court’s “docket conditions,” nor does the statute define the term. “Docket conditions” found to excuse a trial court’s conducting a hearing after the 30-day deadline included a delay due to the recusal of the

trial court after the filing of the motion to dismiss, and until a new judge was assigned to the cause of action.<sup>294</sup>

The extensions are not to take the hearing further than 90 days after service of the dismissal motion, except where discovery is allowed.<sup>295</sup> The trial court may take judicial notice of the court’s docket conditions, but reiterate that the hearing must still *occur* no more than 90 days after service of the dismissal motion.<sup>296</sup>

Pursuant to the amendments, in the event that discovery is allowed under Section 27.006, the court may extend the hearing date, but no longer than 120 days after service of the Chapter 27 motion.<sup>297</sup>

Does the requirement that the hearing *occur* mean that the hearing must be *concluded* at that time? Or may it be *recessed* and continued from time to time without doing violence to the mandatory deadlines? Could a hearing commence timely, then recess, allowing further discovery, recommence, recess again, and continue the process until the court and/or the parties are ready for a decision?

There was a split of authority on whether a continuance of a hearing complies with the deadlines or whether the ruling must still be made within the deadline for the setting of the hearing. The opinion in the *Ramsey* case does not include information on whether the trial court made a “docket conditions” finding, or whether it was simply not heard, and the “docket conditions” finding was simply made by the court of appeals. When the trial court makes no finding that the docket conditions of the court required a hearing outside the [prior deadline of] thirty days, a continuance after the hearing started to allow parties to obtain new counsel “did not stop the statutory-deadline clock,” and thus motions to dismiss were denied by operation of law.<sup>298</sup>

The Fort Worth Court of Appeals has taken a different approach than the First Court in Houston, finding that “the plain language of Section 27.004 applies to the setting, not the hearing or consideration, of a Chapter 27 motion to dismiss; if the legislature had meant to require the holding of a hearing within thirty days (or as soon as the trial court’s docket allows) rather than the setting of a hearing within that time period, it knew how to say so.”<sup>299</sup>

<sup>288</sup> See *MVS Int’l Corp.*, 549 S.W.3d at 194.

<sup>289</sup> See *Hawxhurst v. Austin’s Boat Tours*, 550 S.W.3d 220, 226 (Tex. App. – Austin 2018, no pet. h.).

<sup>290</sup> *Abatecola v. 2 Savages Concrete Pumping, LLC*, 14-17-00678-CV, 2018 WL 3118601, at \*6 n.5 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied).

<sup>291</sup> TEX. CIV. PRAC. & REM. CODE § 27.003(d).

<sup>292</sup> TEX. CIV. PRAC. & REM. CODE § 27.003(e).

<sup>293</sup> TEX. CIV. PRAC. & REM. CODE § 27.004(a). This provision was first amended in 2013 to change the deadline from 30 to 60 days, and to add good cause and agreement exceptions, and to add subsections (b) and (c).

<sup>294</sup> *Ramsey*, 2013 WL 1846886.

<sup>295</sup> TEX. CIV. PRAC. & REM. CODE § 27.004(a).

<sup>296</sup> TEX. CIV. PRAC. & REM. CODE § 27.004(b).

<sup>297</sup> TEX. CIV. PRAC. & REM. CODE § 27.004(c).

<sup>298</sup> *Crazy Hotel*, 416 S.W.3d at 79.

<sup>299</sup> *Lipsky*, 411 S.W.3d at 540. The court of appeals referred to sections of the Family and Finance Codes for language regarding “holding” hearings. In this case arising from claims that fracking in the Barnett Shale caused gas contamination of water wells, the property owners (Lipskys) sued the oil and gas company (Range Production) for damages, only to be faced with counterclaims from Range Production for civil conspiracy, aiding and abetting, defamation, and business disparagement. *Id.* at 537. The Lipskys timely filed Chapter



The 2019 amendments brought some clarity and resolved the issue. In Section 27.005, entitled “Ruling,” the Legislature now requires that the trial court must *rule* on the motion not later than 30 days following *conclusion* of the hearing.<sup>300</sup> This practical change recognizes that hearing may need to be continued, and allows the trial court the flexibility to take its time to conclude the hearing and allow the parties to make their presentations.

But what does it mean to “rule” on the motion? Does it mean to make some ruling, such as for continuance, or to either “dismiss” or “not dismiss?” One court that directly addressed this issue found that there are only two options are described in Section 27.005, and that a court does not “rule on” a motion to dismiss for purposes of Section 27.005(a) when it enters an order to allow discovery and continue the hearing.<sup>301</sup> But a court does “rule on” the motion when it states in writing within two days following a hearing that the court granted in part and denied in part the motion to dismiss.<sup>302</sup>

4. Discovery Stay – But Limited Discovery for “Good Cause.”

When the motion to dismiss is filed, it operates to immediately suspend all discovery in the underlying legal action until the court rules on the motion to dismiss.<sup>303</sup> This is an automatic suspension that requires no further order of the court. There is no requirement in the statute that the motion to dismiss include a notice to court and parties about the discovery suspension. The suspension of discovery would apparently refer to all discovery, including that unrelated to communication litigation. Nor is there any provision in the statute for remedies in the event that parties attempt to conduct

discovery without leave of court, or whether the discovery stay applies to the entire case, if the motion to dismiss applies only to certain causes of action.

The Legislature made no changes to the discovery provisions in 2019.

On a showing of good cause, (very) limited discovery may be allowed on issues relevant to the motion to dismiss, based on a motion by the court or a party.<sup>304</sup> Since the motion must be heard within 60 days of the service of the motion, and the new statute does not address whether the deadlines in the Rules of Civil Procedure may be modified, discovery is likely limited to depositions, possibly with production of some record production, unless the opponent refuses to waive the response times contemplated in TEX. R. CIV. P. 196.2 and 199.2(5). Although the amendments to Section 27.004 to extend the hearing date from 30 to 60 days, and to allow an extension up to 120 days to permit discovery are helpful, such amendments do not cure limited discovery concerns. Since the statute provides for discovery only by discretionary order of the court, the order for discovery will have to modify normal discovery deadlines, and parties will still have to be very mindful of the limited extension under Section 27.004(c).<sup>305</sup>

There is no provision for when a motion for discovery may be brought, whether a movant is entitled to hearing, what information or evidence may be considered, or how the court may respond to such a motion. There still does not appear to be any authority for a trial court to extend hearing deadlines further than 120 days in order to permit discovery for reasons unique to the parties, such as illness, incarceration, or any other reason that would normally constitute “good cause.” What constitutes “good cause” is unclear.<sup>306</sup> One case

---

27 motions to dismiss the counterclaims and the trial court was unable to conduct a hearing until just over two months later due to intervening docket conditions [for which there was no apparent finding, but Range concedes the issue – this was not an issue decided by the court of appeals]. The Friday before the Monday hearing Range filed a response with an appendix containing more than 1,600 documents. *Id.* at 540. The following Monday, the Lipskys sought a continuance of the hearing to digest the response. The trial court continued the hearing for about six weeks then issued an order about two weeks later denying the motions to dismiss. *Id.* The Lipskys contended that they complied with Section 27.004 because the hearing was set timely, and the statute does not require it to be heard within thirty days. *Id.* The Fort Worth Court of Appeals noted that Section 27.011(b) requires courts to construe Chapter 27 liberally to “effectuate its purpose and intent fully,” and that “applying the statute’s plain meaning does not lead to an absurd result because that meaning encourages trial courts to resolve a Chapter 27 motion to dismiss quickly while allowing flexibility for extending the time for hearing the motion under circumstances similar to those that relators faced in this case.” *Id.*

<sup>300</sup> TEX. CIV. PRAC. & REM. CODE § 27.005(a) (emphasis added).

<sup>301</sup> *Larrea*, 394 S.W.3d at 656.

<sup>302</sup> *Kinney v. BCG Attorney Search*, No. 03-12-00579-CV, 2013 Tex. App. LEXIS 10481 (Tex. App. – Austin August 21, 2013, , *opinion withdrawn* by No. 03-12-00579, 2014 Tex. App. LEXIS 3998, pet. denied)

<sup>303</sup> TEX. CIV. PRAC. & REM. CODE § 27.003(c).

<sup>304</sup> TEX. CIV. PRAC. & REM. CODE § 27.006(b).

<sup>305</sup> *See* TEX. CIV. PRAC. & REM. CODE § 27.004. *See also Larrea*, 394 S.W.3d at 652, 656 (finding an order allowing limited discovery and providing for a continuation of the hearing did not constitute a “ruling” to comply with the 30-day deadline, therefore resulting in the motion to dismiss being overruled by operation of law).

<sup>306</sup> The Waco Court of Appeals did not discuss reasons for requested discovery, but only noted that the “trial court concluded that there was no good cause for discovery....” *Ramsey*, 2013 WL 1846886, at \*4; *In re D.C.*, No. 05-13-00944-CV, 2013 Tex. App. LEXIS 10006 (Tex. App. – Dallas Aug. 9, 2013)(mem. Op.), *appeal dism’d by D.C. v. McClinton-Hunter*, 2015 Tex. App. LEXIS 5005 (Tex.

held that good cause did not exist when the party seeking depositions in a malicious prosecution case “stated no good cause for the discovery in his emergency motion for expedited discovery.”<sup>307</sup> Simply stating in a hearing and mandamus response that prior depositions already confirmed subject statements as false, and that additional, limited depositions were needed in order to defend the motion to dismiss, was insufficient to show good cause.<sup>308</sup>

The effective result of a discovery stay is to create “gotcha” motions that seek to trap a plaintiff with limited information with the aim to dismiss claims that might otherwise be properly developed. Although some commentators regularly lump together all claims that might be lost in a TCPA “gotcha” motion as “meritless,” in truth cases that really lack merit face traditional sanctions motions. In reviewing many of the cases decided under the TCPA, it is apparent that the vast majority of decisions are based not on a case lacking any merit at all, but whether they would eventually prevail.

The Texas Rules of Civil Procedure permit parties to make alternative claims for relief or defense,<sup>309</sup> and do not require a claimant to have amassed by the time of filing suit all evidence necessary to prevail at trial. Indeed, the Texas Supreme Court, in adopting the Rules of Civil Procedure, allocated 15 of the 330 rules generally applicable in county and district courts to the discovery not just of admissible evidence, but of information that “appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>310</sup> Few trial lawyers are likely to claim or admit that their case was fully developed prior to filing suit, that fairly substantial evidence is at hand on every element of every cause of action, and that no discovery was necessary to prove the case. For more than 150 years Texas jurisprudence has dealt with the scope of discovery available to parties as they seek to flesh out their cases.

Perhaps some commentators have a closer relationship with “meritless” claims than the author after 34 years in litigation. Regardless, we would caution responsible Texas litigators against labeling an opponent’s pleading as “meritless” unless you can prove it under a sanctions standar.

## **M. Standards and Burdens of Proof/Actions by Court.**

### **1. What role does the trial court play?**

The TCPA requires the trial court, in the first phase of determining whether the action falls within the TCPA, to be a factfinder and to weigh the evidence. In the second phase, determining whether the respondent met its evidentiary burden of proof, the trial court should act as a gatekeeper, much like when reviewing *Daubert* challenges to experts. “The trial court’s role is not to act as a factfinder and to resolve opposing reasonable inferences ... but instead to determine whether the nonmovant met its burden to produce evidence sufficient to meet its burden under [the Act] some of which may include relevant evidence from which more than one reasonable inference may be drawn.”<sup>311</sup>

### **2. Proof: what type of evidence may be considered, and can live testimony be presented?**

The statute establishes mandatory pleadings and evidence for the trial court to consider. “[T]he unique language of the TCPA directs courts to decide its applicability based on a holistic review of the pleadings.”<sup>312</sup> The 2019 legislative session altered the proof to be considered. “In determining whether a legal action is subject to should be dismissed under [the TCPA], the court shall consider the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based.”<sup>313</sup> The Legislature amended the heading on Section 27.006 to “Proof” rather than “Evidence,” ostensibly to better align the use of pleadings in TCPA motions with long-standing rules against considering pleadings as evidence.

Since affidavits are already to be considered, and TCPA cases routinely refer to summary judgment cases about sufficiency of knowledge and conclusions, the added language may not add much. But it certainly gives trial courts a reference point when considering evidence, and also makes clear that the trial court may consider deposition testimony.

Live testimony is probably not permitted at the hearing. The TCPA still does not clearly indicate whether the trial court may consider live testimony or take up the motion by submission. The Legislature does not prohibit live testimony or documents offered at

---

App.—Dallas May 15, 2015) (conditionally granting a writ of mandamus where the trial court allowed expedited discovery, because a conclusory statement that depositions were needed to defend against the motion to dismiss did not constitute “cause.”),

<sup>307</sup> *In re D.C.*, 2013 Tex. App. LEXIS 10006 at \*3.

<sup>308</sup> *Id.*

<sup>309</sup> TEX. R. CIV. P. 48.

<sup>310</sup> TEX. R. CIV. P. 192.3(a).

<sup>311</sup> *Dallas Morning News, Inc. v. Hall*, 524 S.W.3d 369, 378 (Tex. App. – Ft. Worth 2017), reversed on other grounds, *Dallas Morning News v. Hall*, 579 S.W.3d 370 (Tex. 2019); *Berry v. ETX Successor Tyler*, No. 12-18-00095-CV, 2019 WL 968528, at \*7 (Tex. App. – Tyler Feb. 28, 2019, no pet.); *Morgan v. Clements Fluids South Texas, Ltd.*, No. 2018 WL 5796994, at \* 4 (Tex. App. – Tyler Nov. 5, 2018, no pet.).

<sup>312</sup> *Adams*, 547 S.W.3d at 897.

<sup>313</sup> TEX. CIV. PRAC. & REM. CODE § 27.006(a).

hearing. The Legislature is quite capable of using qualifying language such as “only consider” if it intended to prohibit a full evidentiary hearing.

Yet the language of the statute often leads trial courts to deny live testimony.<sup>314</sup> The El Paso Court of Appeals in 2013 stated that “[b]y statute, the trial court’s decision on a motion to dismiss under Section 27.003 is not based on live testimony or oral argument, but instead must be based on the pleadings and the supporting and opposing affidavits.”<sup>315</sup>

The Texas Supreme Court addressed the issue of what constitutes sufficiently specific pleadings in TCPA motions. The court reminded us that, “under notice pleading, a plaintiff is not required to ‘set out in his pleadings the evidence upon which he relies to establish his asserted cause of action.’”<sup>316</sup> Because the TCPA requires more than notice of theories to defeat a motion to dismiss, “mere notice pleading – that is, general allegations that merely recite the elements of a cause of action – will not suffice. Instead, a plaintiff must provide enough detail to show the factual basis for its claim.”<sup>317</sup> In an attempt to provide some clearer guidance to courts and litigants, the court stated that “[i]n a defamation case that implicates the TCPA, pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss.”<sup>318</sup>

The Texas Supreme Court also settled the issue of what evidence is necessary to invoke the TCPA, finding that a defendant may rely upon the plaintiff’s pleadings to prove applicability.<sup>319</sup> At the same time, the court held that a defendant may obtain dismissal even if she denies making the communication.<sup>320</sup>

A prudent practitioner must now shed the “only notice pleadings are required” doxology of our training, and re-examine our pleadings for sufficient specificity. The prudent practitioner may include exhibits attached to the petition as specifically allowed in the Rules of

Procedure.<sup>321</sup> Nothing in the statute precludes a plaintiff from amending a petition in response to a motion to dismiss. There is no requirement that the pleading be verified, and there is nothing in the statute that allows the movant to object to statements in the pleadings. The non-movant should consider amending pleadings in response to a motion to dismiss, to put as many details in the pleadings as possible. Again, the pleading need not be verified, but practitioners should be mindful of the First Court of Appeals’ observation that: “a party’s decision not to offer evidence beyond the pleadings may have a bearing on whether that party successfully meets its respective burden under the TPCA.”<sup>322</sup> In short, a party that relies only on its pleadings does so at its own risk of being found not to have satisfied its TCPA burden under the circumstances of the case, but the act does not require parties to always offer evidence in addition to the pleadings.”<sup>323</sup>

When it comes to taking up evidence on attorney’s fees, courts have allowed both affidavit and live testimony.<sup>324</sup>

### 3. Burden of Proof on the Movant – “Demonstrate.”

The Legislature in 2019 removed the “preponderance of the evidence” standard for the trial court to weigh the quantum of evidence necessary to show that the TCPA applied. The Legislature did so in response to complaints that it created constitutional problems by requiring the trial court, not the jury, to weigh the evidence. This issue is discussed later in the paper.

Now, the movant must “demonstrate” “that the legal action is based on or is in response to” the party’s exercise of rights of free speech, petition, or association.”<sup>325</sup> What does “demonstrate” mean under the TCPA? There is no definition, but if we assume that the courts again open a dictionary to provide the definition, Merriam-Webster defines the term to mean “to show clearly,” or “to prove or make clear by reasoning or evidence.”<sup>326</sup> Few cases, in different

<sup>314</sup> See *Pena v. Perel*, 417 S.W.3d 552, 556 (Tex. App. – El Paso 2013, no pet.); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 195 (Tex. App. – Austin 2017, pet. dism’d); See *Larrea*, 394 S.W.3d at 652 (counsel for Univision objected to an email being admitted into evidence at hearing “because the statute makes it quite clear that this is not to be an evidentiary hearing.”).

<sup>315</sup> *Pena*, 417 S.W.3d at 556.

<sup>316</sup> *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (“*Lipsky II*”).


<sup>317</sup> *Id.* at 591.

<sup>318</sup> *Id.*

<sup>319</sup> *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

<sup>320</sup> *Id.*

<sup>321</sup> See TEX. R. CIV. P. 59.

<sup>322</sup> See  *Watson v. Hardman*, 497 S.W.3d 601, 607–08 (Tex. App.—Dallas 2016, no pet.) (holding that, because plaintiffs’ live pleading alleged facts demonstrating that defendant’s statements were covered by TPCA, defendant was not required to adduce additional evidence beyond pleadings to carry his Section 27.005(b) burden)

<sup>323</sup> *Gaskamp v. WSP USA, Inc.*, No. 01-18-00079-CV, 2018 WL 6695810, at \*7 (Tex. App. – Houston [1<sup>st</sup> Dist.] Dec. 20, 2018, no pet.).

<sup>324</sup> See *Ramsey*, 2013 WL 1846886, at \*\*3-5; *Elite Auto Body*, 520 S.W.3d at 195; TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1).

<sup>325</sup> *Id.* § 27.005(b).

<sup>326</sup> *The Merriam-Webster.com Dictionary*, s.v. “demonstrate (vb.),” accessed January 9, 2020, <https://www.merriam-webster.com/dictionary/demonstrate>; *Sierra Club v. Johnson*, 541 F.3d 1257, 1266 (11th Cir.2008) (noting that the

circumstances,<sup>327</sup> attempt to define “demonstrate,” but most refer to different dictionaries<sup>328</sup> and come to roughly the same conclusion<sup>329</sup> – that the movant has to persuade the trial court that the TCPA applies to the legal action, and probably with evidence.<sup>330</sup>

Whether the movant meets that burden is reviewed de novo as an application of law to facts.<sup>331</sup>

In order to require a dismissal of the underlying legal action, there is no requirement that the movant obtain any finding that the action against him was frivolous or groundless and brought in bad faith or for purposes of harassment, despite the avowed intent of the statute, or otherwise was brought for the purpose of harassing or maliciously inhibiting the free exercise of First Amendment rights. Importantly, the Legislature did not condition the application of the TCPA on a finding of improper motive by the plaintiff. There is no *mens rea* requirement that the intent of the lawsuit be to chill free speech, petition or association. Nor is there a requirement under the statute that the trial court take into consideration any disparity in the resources available to the parties.

---

“plain meaning of the word ‘demonstrate’ ” is “ ‘to show clearly’ or ‘to prove or make clear by reasoning or evidence’ ” (quoting MERRIAM–WEBSTER’S COLLEGIATE DICTIONARY 308 (10th ed.1999)).

<sup>327</sup> See *Horning v. White*, 314 S.W.3d 381, 384 (Mo. Ct. App. 2010): The relevant dictionary definitions of “demonstrate” are: “to show clearly and deliberately; manifest,” and “to show to be true by reasoning or adducing evidence.” THE AMERICAN HERITAGE DICTIONARY (5th ed. 2015).

<sup>328</sup> *Miller v. Astrue*, CIV. A. H-07-3230, 2009 WL 211083, at \*3 (S.D. Tex. Jan. 28, 2009): The term “demonstrate” in clause (iii) means “to prove by a preponderance of the evidence.” Although the statute has no definition of “demonstrate,” dictionary definitions of the term use phrases like “show that something is true” or “establish the truth of ... by providing practical proof or evidence” or synonyms like “prove.” The Cambridge English Dictionary entry for “demonstrate” lists “to show that something is true; prove,” available at <http://dictionary.cambridge.org/us/dictionary/english/demonstrate> (last visited September 16, 2016). The Merriam-Webster Dictionary entry for “demonstrate” lists to prove (something) by showing examples of it: to show evidence of (something),” available at <http://www.merriam-webster.com/dictionary/demonstrate> (last visited September 16, 2016). The Oxford English Dictionary entry for “demonstrate” lists “to prove.” IV OXFORD ENGLISH DICTIONARY 448 (2d ed. 1989). The American Heritage Dictionary entry for “demonstrate” lists “[t]o show to be true by ... adducing evidence; prove.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 483 (5th ed. 2011); see also WEBSTER’S THIRD NEW INT’L DICTIONARY 600 (2002) (listing ““prove” and “show” as synonyms of “demonstrate”).

<sup>329</sup> See *In the matter of: Kenneth Palmer, Complainant v. Canadian National Railway/Illinois Central Railroad Co.*,

#### 4. Burden of Proof on the Respondent.

Once the movant files a verified motion that merely asserts the statutory allegations, the burden of proof shifts to the plaintiff/respondent. There are crucial questions about what the burden of proof on the respondent is and how it is met. The court “may not dismiss a legal action under this section if the party bringing the legal action establishes by *clear and specific* evidence a prima facie case for each essential element of the claim in question.”<sup>332</sup> This burden remained unchanged in the 2019 Legislature. What does that mean? What must a respondent do to defeat a motion to dismiss?

##### i. **“Clear and specific evidence” – a measure of quality, not quantity, of proof.**

The Legislature initially surprised non-media lawyers in Texas by the use of “clear and specific evidence,” as there is no such recognized standard under Texas law for any cause of action.<sup>333</sup> Fortunately the Texas Supreme Court finally weighed in to resolve disputes among the courts of appeals<sup>334</sup> and clarify that “clear and specific evidence” “does not impose an

*Respondent*, 2016 WL 5868560 (U.S. Dept. of Labor SAROX), 9, n.75: The American Heritage Dictionary of the English Language, 484 (4th ed.2006) defines “demonstrate” as: “1: To show clearly and deliberately; manifest; 2: To show by true reasoning or adducing evidence; prove[.]” Random House Webster’s Unabridged Dictionary 530 (2nd ed.2001) provides a similar definition: “to make evident or establish by arguments or reasoning; prove[.]” These definitions indicate that “demonstrate” means more than merely presenting evidence. The term connotes the need to present evidence or reasoning as a means of clearly and deliberately establishing a fact or proposition.

<sup>330</sup> In an anti-SLAPP case, with similar use of “demonstrate” in an anti-SLAPP statute, “[u]se of the word “demonstrate” indicates that once the burden has shifted to the claimant, the statute requires more than mere reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim.” *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1233 (D.C. 2016), as amended (Dec. 13, 2018)

<sup>331</sup> *John Moore Services*, 441 S.W.3d at 353.

<sup>332</sup> *Id.* § 27.005(c) (emphasis added).

<sup>333</sup> *Lipsky II*, 460 S.W.3d at 589. (Clear and specific evidence is not a recognized evidentiary standard.)

<sup>334</sup> The First Court of Appeals resorted to opening a dictionary to define parts of the phrase, but without reference to a standard of proof.. *John Moore Services*, 441 S.W.3d at 355, quoting MERRIAM–WEBSTER’S COLLEGIATE DICTIONARY AT 1198 *John Moore Services*, 441 S.W.3d at 355, quoting MERRIAM–WEBSTER’S COLLEGIATE DICTIONARY 229 (11<sup>th</sup> ed. 2003), and BLACK’S LAW DICTIONARY 287 (9<sup>th</sup> ed. 2009) (“unambiguous,” sure,” or “free from doubt.”). Five days earlier, the same court looked to the 8<sup>th</sup> edition of BLACK’S LAW DICTIONARY for the same definitions. *KTRK Television, Inc. v. Robinson*, 409 S.W.3d

elevated evidentiary standard or categorically reject circumstantial evidence. In short, it does not impose a higher burden of proof than that required of the plaintiff at trial.”<sup>335</sup>

There has been some confusion of that standard with “clear and convincing evidence,” which is the highest civil evidentiary standard to meet with a long history of interpretation.<sup>336</sup> The standard should not mean anything other than *some* evidence of each element; otherwise, the Act imposes a higher burden of proof in response to a pre-discovery motion to dismiss than would ultimately be required of a plaintiff to prevail at the trial of the legal action. Yet this is exactly what the drafter intended.

“Clear and specific evidence” is evidently derived from the reporter’s privilege codified in 2009 in the “Journalists’ Qualified Testimonial Privilege in Civil Proceedings” in TEX. CIV. PRAC. & REM. CODE CHAPTER 22, SUBCHAPTER C, in which a party seeking to compel information from a reporter must make a “clear and specific showing” about the need to obtain the information.<sup>337</sup> The “clear and specific showing” does not apply to any cause of action, or a burden of proof for any right of action for damages.

Without definitions from the TCPA or common law for “clear and specific evidence,” “words and phrases that are not defined by statute and that have not acquired a special or technical meaning are typically given their plain or common meaning.”<sup>338</sup> The Texas Supreme Court states that “clear and specific” evidence describes the clarity (of evidence) required to avoid dismissal.<sup>339</sup>

“Clear” means “unambiguous, sure, or free from doubt.”<sup>340</sup>

“Specific” means explicit or relating to a particular named thing.<sup>341</sup>

Conclusory and vague affidavits do not amount to “clear and specific evidence.” “Conclusory” means

“[e]xpressing a factual inference without stating the underlying facts on which the inference is based.”<sup>342</sup> “Bare, baseless opinions [in an affidavit] do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the TCPA.”<sup>343</sup> Instead, “opinions must be based on demonstrable facts and a reasoned basis.”<sup>344</sup> Finding that general statements of a company officer of direct economic losses and lost profits, without more, do not satisfy the minimum requirements of the TCPA, the Texas Supreme Court provided additional guidance by stating that an affidavit from a senior vice president of Range stating that stated that Range “suffered direct pecuniary and economic losses” was devoid of any specific facts that illustrated how Lipsky’s alleged remarks about Range’s activities caused such losses.<sup>345</sup>

Similarly, an affidavit from neighbor Blunt describing an alleged interference with his contractor lacked details, did not attach a contract, failed to attach prior emails or correspondence, and did not rise to “clear and specific evidence.”<sup>346</sup>

The prudent practitioner who is resisting a motion to dismiss should take close heed of these cases, and in addition to pleading more specifically, include as much information as possible in an affidavit, but attach supporting documents. The non-movant’s burden is to put on some evidence on each element of the subject causes of action, and conclusions are inadequate.

**ii. What is a “prima facie case, and does it allow for inferences?”**

Although “the term ‘prima facie evidence’ is ambiguous at best; it sometimes entitles the producing party to an instructed verdict, absent contrary evidence, and sometimes means that a party has produced sufficient evidence to go to the trier of fact on the issue,”<sup>347</sup> and is not defined in the TCPA, the Texas

682, 689 (Tex. App. - Houston [1st Dist.] 2013, pet. denied). The court also looked to an opinion from the Fourteenth Court, in *Rehak Creative Services*, which misquoted a 1971 case that has not been cited by any other case regarding “clear and specific evidence” in the last 42 years. *John Moore Services*, 441 S.W.3d at 355, citing *Rehak Creative Servs. v. Witt*, 404 S.W.3d 716 (Tex. App. – Houston [14th Dist.] 2013, pet. denied), which purported to quote from *McDonald v. Clemens*, 464 S.W.2d 450, 456 (Tex. Civ. App.—Tyler 1971, no writ) for the proposition that “Clear and specific evidence” has been described as evidence that is “unaided by presumptions, inferences, or intendments.” However, the court in *McDonald* actually stated that “Charges of fraud must be established by clear and specific evidence unaided by presumptions, inferences or intendments,” with no citations to any authorities. 464 S.W. 2d at 456. See also, *Rio Grande H2O Guardian*, 2014 WL 309776, at \*2.

<sup>335</sup> *In re Lipsky*, 460 S.W.3d at 590-91.

<sup>336</sup> TEX. CIV. PRAC. & REM. CODE § 41.001(2): “Clear and convincing” means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

<sup>337</sup> TEX. CIV. PRAC. & REM. CODE § 22.024.

<sup>338</sup> *In re Lipsky*, 460 S.W.3d at 590-91.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Serafine*, 466 S.W.3d at 358 n.2 (quoting BLACK’S LAW DICTIONARY 351 (10<sup>th</sup> ed. 2014)).

<sup>343</sup> *Lipsky*, 460 S.W.3d at 592.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Serafine*, 466 S.W.3d at 361-62.

<sup>347</sup> *Hinojosa v. Columbia/St. David’s Healthcare System, L.P.*, 106 S.W.3d 380, (Tex. App.—Austin 2003, no pet.),

Supreme Court in *Lipsky* states that it has a traditional meaning. “It refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted.”<sup>348</sup> “It is the ‘minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true.’”<sup>349</sup> With this definition, the Texas Supreme Court explicitly allows the consideration of inferences in a prima facie case.

Most civil courts will be familiar with a prima facie case in the context of evidence to support an application for a temporary injunction, in which the applicant must make a prima facie case, but need not prove that he will ultimately prevail.<sup>350</sup> It is unclear why, in the context of the scope of evidence that a respondent must admit in support of each element of the causes of action, the Legislature referred to a prima facie case, rather than evidence, to describe proof for each element. Courts familiar with “prima facie case” will recognize the term to describe multiple elements or multiple causes of action, rather than evidence specific to a single element of a single cause of action. The cases describing the term under Chapter 27 already commingle the terms case and evidence, which will likely lead to additional confusion in the interpretation of the statute.

Interestingly, in early comments about the media bias for the origin of the prima facie case language, Laura Prather said: “**Where did the prima facie establishment of the elements of the claim come from?** This is the test Texas courts currently use in determining whether someone has a valid claim to access information about an anonymous speaker. It only makes sense to apply the same test to all forms of speech — anonymous and non-anonymous, and Texas courts are used to applying this test in speech-related cases.”<sup>351</sup>

There is now a good body of TCPA case law that describes what may constitute a prima facie case, and none refer to media cases about anonymous speakers.

Since the respondent is required to provide “prima facie case for each essential element of the claim in question”<sup>352</sup> in response to the motion to dismiss, and will have to specifically brief on appeal the evidence supporting each element,<sup>353</sup> the prudent business disputes litigator should be familiar with the elements of defamation,<sup>354</sup> business disparagement,<sup>355</sup> fraud,<sup>356</sup> negligent misrepresentation,<sup>357</sup> and tortious interference,<sup>358</sup> at least.

---

citing *Coward v. Gateway Nat’l Bank*, 525 S.W.2d 857, 859 (Tex. 1975).

<sup>348</sup> *Lipsky II*, 460 S.W.3d at 590.

<sup>349</sup> *Lipsky II*, 460 S.W.3d at 590; *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004)(orig. proceeding) (citing *Tex. Tech Univ. Health Science Ctr. v. Apodaca*, 876 S.W.2d 402, 407 (Tex. App. – El Paso 1994, writ denied)).

<sup>350</sup> *See Henson v. Denison*, 546 S.W.2d 898, 901 (Tex. Civ. App. – Fort Worth 1977, no writ).

<sup>351</sup> <http://www.sdma.com/texas-newsrooms-will-benefit-from-anti-slapp-law-07-15-2011/>. (emphasis in original).

<sup>352</sup> TEX. CIV. PRAC. & REM. CODE § 27.005(b)(c).

<sup>353</sup> *Wholesale TV*, 2013 WL 3024692, at \*3.

<sup>354</sup> Defamation is a false and injurious impression of a plaintiff published without legal excuse. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000); *John Moore Services*, 441 S.W.3d at 355. To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or with negligence, if the plaintiff was a private individual, regarding the truth of the statement. *WFAA-TV Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). A prima facie case in a defamation action requires the plaintiff to present the requisite minimum quantity of evidence that the “gist” of the complained-of statement was false. *KBMT Op. Co. v. Toledo*, 434 S.W.3d 276, 283-90 (Tex. App.—Beaumont 2014, *rev’d sub nom. KBMT Operating Co., LLC v. Toledo*, 492 S.W.3d 710 (Tex., June 17, 2016)) Statements that are not verifiable as false cannot form the basis of a defamation claim. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21-22 (1990). Whether words are capable of the defamatory meaning the plaintiff

attributes to them is a question of law for the court. *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989).

<sup>355</sup> The elements of business disparagement are that (1) the defendant published false and disparaging information, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff. *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003). “A business disparagement claim is similar in many respects to a defamation action.” *Id.* The two torts differ in the interest protected: a defamation claim protects an injured party’s personal reputation, while a business disparagement claim protects economic interests. *Id.*

<sup>356</sup> A person commits fraud by (1) making a representation of material fact (2) that is false (3) and was known to be false or asserted recklessly without knowledge of its truth (4) with the intent that the misrepresentation be acted upon, and (5) the person to whom the misrepresentation is made justifiably relies upon it and (6) is injured as a result. *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009). The defendant’s acts or omissions must be a cause-in-fact of the plaintiff’s injury. *Formosa Plastics Corp. USA v. Presidio Eng’rs & Contractors Inc.*, 960 S.W.2d 41, 47 (Tex. 1998).

<sup>357</sup> “The elements of negligent misrepresentation are (1) the defendant made a representation in the course of its business or in a transaction in which it had an interest, (2) the defendant supplied false information for the guidance of others in their business, (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information, and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation.” *Ostrovitz & Gwinn, LLC v. First Specialty Ins. Co.*, 393 S.W.3d 379, 397 (Tex. App. – Dallas 2012, no pet.).

<sup>358</sup> To establish a cause of action for tortious interference with a contract, a plaintiff must prove that (1) a contract subject to

**iii. What about circumstantial evidence?**

The Texas Supreme Court in *Lipsky* also resolved a conflict among the courts of appeals and held that “clear and specific evidence under the Act includes relevant circumstantial evidence.”<sup>359</sup> In so doing, the Court rejected some lower court opinions that interpreted the TCPA to require a heightened evidentiary standard, unaided by inferences.<sup>360</sup> “Circumstantial evidence can, of course, be vague, indefinite, or inconclusive, but it is not so by definition. Rather, it is simply indirect evidence that creates an inference to establish a central fact.”<sup>361</sup> “It is admissible unless the connection between the fact and the inference is too weak to be of help in deciding the case.”<sup>362</sup> Importantly, the Court brought the “no circumstantial evidence” crowd to ground when it noted that “[t]he common law has developed several distinct evidentiary standards, but none of these standards categorically rejects the use of circumstantial evidence.”<sup>363</sup>

It has long been the rule in Texas that “[a]ny ultimate fact may be proved by circumstantial evidence,”<sup>364</sup> and that “[b]oth direct and circumstantial evidence may be used to establish any material fact.”<sup>365</sup> There are many types of cases in which a cause of action can be proved only through circumstantial evidence, without a “smoking gun” admitting complicity, such as conspiracy, fraud, theft liability, and misappropriation of trade secrets.<sup>366</sup>

The careful practitioner will make sure to distinguish between circumstantial evidence and impermissible conclusory opinions.

**iv. What about non-communication or “mixed” claims joined in the same lawsuit?**

It is becoming more apparent that the broad scope of the statute’s definitions is netting a broad array of claims that we would not normally consider to be based

on a communication. In business litigation, for example, conduct that gives rise to a breach of contract may precede emotionally based communications that form the basis of defamation or other torts. Since, under joinder rules,<sup>367</sup> and in the interest of judicial economy, an aggrieved party usually sues for all applicable causes of action against the offending party, the entire “legal action” could be the subject of the motion, regardless of whether each cause of action is based on speech rights.

It would certainly be more sensible for a motion to dismiss to target only the portions of a lawsuit related to the protected speech or exercise of petition or association rights.

The issue is made more difficult to resolve in light of the statute’s provisions suspending “all discovery in the legal action,”<sup>368</sup> requiring dismissal of “a legal action,”<sup>369</sup> and permitting limited rights of appeal and writ of “a trial court order on a motion to dismiss a legal action” could certainly be interpreted by a trial court to halt discovery and require dismissal of even non-communication claims.

A real trap for the practitioner lies in the ambiguity of the scope of dismissal contemplated by the statute. Most good practitioners make alternative allegations in their lawsuits, most of which are supported by known evidence, and some of which are believed will be supported by the evidence adduced during discovery. If the defendant moves to dismiss the entire suit, which includes all theories alleged and remedies sought, including extraordinary remedies, a movant may very well persuade the trial court to dismiss the entire lawsuit even if only one element of one of the causes of action is not clearly supported by evidence.

In light of the passage of the TCPA, and in the appropriate case, the prudent practitioner who represents the plaintiff, or defendant on a counterclaim, may consider whether to avoid joining related claims in

---

interference exists, (2) the defendant committed a willful and intentional act of interference with the contract (3) the act proximately caused injury, and (4) the plaintiff sustained actual damages or loss. *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). Similarly, to establish a cause of action for tortious interference with prospective business relationships, a plaintiff must show that (1) a reasonable probability existed that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant’s conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff’s injury; and (5) the plaintiff suffered actual damage or loss as a result. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W. 3d 909, 923 (Tex. 2013); *Richardson-Eagle, Inc. v. Mercer, Inc.*, 213 S.W.3d 469, 475 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2006, pet. denied).

<sup>359</sup> *Lipsky*, 460 S.W.3d at 584.

<sup>360</sup> *Id.* at \*10-11.

<sup>361</sup> *Id.* at \*13-14.

<sup>362</sup> *Id.* at \*13-14.

<sup>363</sup> *Id.* at \*13-14.

<sup>364</sup> *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993).

<sup>365</sup> *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004).

<sup>366</sup> See, e.g., *Southwest Energy Prod. Co. v. Berry Helfand*, 411 S.W.3d 581, 599 (Tex. App. – Tyler 2013, *rev’d sub nom. Southwestern Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699 (Tex., June 10, 2016) (“Proof of trade secret misappropriation often depends on circumstantial evidence.”); *Lamons Gasket Co. v. Flexitallic LP*, 9 F.Supp.3d 709, (S.D. Tex. 2014) (in a TCPA case, the court stated that proof of motive “must necessarily, at this early stage of the proceeding, be circumstantial.”).

<sup>367</sup> TEX. R. CIV. P. 51.

<sup>368</sup> TEX. CIV. PRAC. & REM. CODE § 27.003(c).

<sup>369</sup> TEX. CIV. PRAC. & REM. CODE § 27.005(b)(c).

the same suit. By the same token, such parties should consider whether to seek to sever<sup>370</sup> certain claims after the filing of a Chapter 27 motion to dismiss to preserve them and continue with discovery. The same practitioners should refresh their knowledge of the rules on compulsory and permissive counterclaims<sup>371</sup> and whether “actions involving a common question of law or fact” should be consolidated<sup>372</sup> or proceed in separate trials.<sup>373</sup>

5. Affirmative Defenses May Be the Basis of Motions to Dismiss.

The Legislature in 2013 added a provision that required the trial court to dismiss a legal action “if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim.”<sup>374</sup> In 2019 the Legislature changed the burden to more closely match summary judgment practice. Now, the trial court “shall dismiss a legal action against the moving party if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.”<sup>375</sup> The Legislature dropped the term “valid defense” for “affirmative defense,” and also dropped “preponderance of the evidence” as the standard of proof the movant must meet. This again was to avoid valid constitutional challenges to invasion of the province of the jury by the trial court weighing evidence. We anticipate that the trial courts will avail themselves of the many decades of jurisprudence in summary judgment practice to determine when a party establishes a defense as a matter of law.

6. Ruling by the Court – Dismissal Mandatory.

If the movant/defendant meets her modest burden, the court has no discretion, but “*shall dismiss*” the legal action brought against the movant/defendant. This is an important provision, as it seems to make the trial court’s determination nondiscretionary, so long as the nonmovant does not “establish” “clear and specific evidence” on *some* element of *any* cause of action. This is a significant attraction to practitioners to use the TCPA, without having to go through showing that a claim is frivolous under Rule 13, for example.

Unlike the provisions in Rule 13 and Chapters 9 and 10 of the Civil Practice and Remedies Code, there is no statutory requirement of any written finding in support of the trial court’s ruling on the dismissal.

7. Request for Ch. 27 Sanctions Likely Survive Nonsuit or Amended Petition Dropping Some Claims.

Another issue of concern is whether the trial court must rule on the TCPA motion if the plaintiff nonsuits the case, or a portion of it, or amends the suit to delete certain claims after receiving the motion to dismiss. Normally counterclaims and certain requests for sanctions survive a non-suit, but the motion to dismiss is not a counterclaim for damages, nor is it a traditional motion for sanctions. As a general rule, a party has an absolute right to nonsuit a claim, which is effective as soon as the plaintiff files a motion for non-suit.<sup>376</sup> And it is well established that amendment of the suit to drop a party or claim is effective upon the filing of the amended pleading. At the same time, a non-suit does not affect any pending claim for affirmative relief or motion for attorney’s fees or sanctions.<sup>377</sup> A non-suit renders the merits of the case moot.<sup>378</sup>

Since the TCPA motion to dismiss is predicated on a review of the merits of the lawsuit, does the motion constitute a claim for affirmative relief or sanctions? Although arguably the non-suit should render the motion to dismiss moot, most Texas appellate courts generally recognize that because the fees and sanctions provisions of the TCPA were designed to deter claimants from filing meritless suits, and a nonsuit under the TCPA “does not affect a non-moving party’s independent claims for affirmative relief, which may include a motion for sanctions” a nonsuit of a party that has sought fees and sanctions does not render the motion to dismiss moot.<sup>379</sup>

The TCPA cases generally find that a Chapter 27 motion to dismiss does survive a nonsuit,<sup>380</sup> with the First Court of Appeals in *James v. Calkins* likening the purpose of sanctions under the TCPA to sanctions under the Texas Medical Liability Insurance Improvement Act (MLIIA).<sup>381</sup> The Fourteenth Court also held that a Chapter 27 motion to dismiss survived amendment of

proceeding, raised by a litigant, but not reached because the Fourteenth District Court of Appeals determined that an appeal from a final judgment, rather than mandamus, was appropriate).

<sup>370</sup> *See The IOLA Barker v. Hurst*, No. 01-17-00838-CV, 2018 WL 3059795, at \*4-6 (Tex. App. – Houston [1<sup>st</sup> Dist.] June 21, 2018, no pet. ).

<sup>371</sup> *See Calkins*, 446 S.W.3d at 143, citing *Villafani v. Trejo*, 251 S.W.3d 466, 470-471 (Tex. 2008); *accord Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC*, 05-14-00299-CV, 2015 WL 1519667, at \*2 (Tex. App.—Dallas Apr. 1, 2015, pet. denied).

<sup>370</sup> TEX. R. CIV. P. 41.

<sup>371</sup> TEX. R. CIV. P. 97.

<sup>372</sup> TEX. R. CIV. P. 174(a).

<sup>373</sup> TEX. R. CIV. P. 174(b).

<sup>374</sup> TEX. CIV. PRAC. & REM. CODE § 27.005(d).

<sup>375</sup> *Id.*

<sup>376</sup> *Epps v. Fowler*, 351 S.W.3d 862, 868 (Tex. 2011).

<sup>377</sup> *Id.*; TEX. R. CIV. P. 162.

<sup>378</sup> *UTMB v. Estate of Blackmon*, 195 S.W.3d 98, 101 (Tex. 2006).

<sup>379</sup> *Calkins*, 446 S.W.3d at 141-42; see also, *In re Thuesen*, 2013 WL 1461790, at \*2 (in the context of a mandamus



counterclaims.<sup>382</sup> This practice is similar to survival of sanctions under Chapter 150 of the Texas Civil Practice and Remedies Code.<sup>383</sup>

**N. Mandatory, Not Discretionary, Award of Reasonable Fees for Movant Upon Dismissal of Legal Action.**

The TCPA provides no deadline for the trial court to hear or consider the issue of the award of fees in the event that the motion to dismiss is granted. In TCPA cases parties normally file requests or motions for the award of fees, and submit evidence in support of the request by affidavit and record. The fee issue will need to be resolved before the entry of a final judgment. Typically trial courts hear the fee request after deciding the motion to dismiss.

In 2019 the Legislature’s amendments left intact the mandatory nature of the fee award, but made sanctions discretionary. Now, if the court dismisses a legal action, again the court has no discretion, but “(1) shall 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;~~”<sup>384</sup> The Legislature removed from the award “other expenses,” and also removed the safe harbor “as justice and equity may require,” which simply added confusion. As witnessed in a number of TCPA cases, those numbers can be very significant.

There is no explanation in the legislative history or the statute why the trial court has seemingly been stripped of the discretion to award fees, which discretion has long been given to courts.<sup>385</sup> Even a suit with significant merit can result in a mandatory fee award if the court does not think that there is “clear and specific evidence.”

The Texas Supreme Court in 2019 clarified the legal and evidentiary requirements to establish a reasonable fee in a fee-shifting situation, and made the same rules apply to fees awarded as sanctions.<sup>386</sup> “[T]o secure an award of attorney’s fees from an opponent, the prevailing party must prove that (1) recovery of attorney’s fees is legally authorized, and (2) the requested attorney’s fees are reasonable and necessary

for the legal representation, so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process.”<sup>387</sup> The “inquiry requires consideration of eight nonexclusive factors articulated in *Arthur Andersen*.”<sup>388</sup> The factors include, but are not limited to:

1. The time and labor required, the novelty and difficulty of the questions involved and the skill required to perform the legal service properly;
2. The likelihood that acceptance of the particular employment would preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation and abilities of the lawyers performing the services in question; and
8. Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.<sup>389</sup>

“[W]ithout evidence of [the *Arthur Andersen* factors], the fact finder has no meaningful way to determine if the fees sought are reasonable and necessary.”<sup>390</sup> The Texas Supreme Court emphasized that “[t]he award and the ability to enforce it thus belongs to the party, not the attorney, absent express statutory or contractual text mandating otherwise.”<sup>391</sup> And, “because such fee awards are compensatory in nature, fee-shifting is not a mechanism for greatly improving an attorney’s economic situation.”<sup>392</sup> The court also clarified that it sees no material distinction in any statutory provisions for “reasonable” and “reasonable and necessary” attorney’s fees, and held that “[w]hen a claimant wishes to obtain attorney’s fees from the opposing party, the

<sup>382</sup> *Bland*, 2016 Tex. App. LEXIS 13285 \*5.

<sup>383</sup> *CTL/Thompson Texas, LLC v. Starwood Homeowner’s Ass’n*, 390 S.W.3d 299, 301 (Tex. 2013).

<sup>384</sup> TEX. CIV. PRAC. & REM. CODE § 27.009(a) (emphasis added).

<sup>385</sup> *But see*, CLEAT, 2014 WL 411672, at \*11 (holding that the TCPA’s sanctions are not necessarily mandatory if the judge, in her discretion, determines that “justice” and “equity” does not require them or that none are needed to “deter” the plaintiff).

<sup>386</sup> *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 487 (Tex. 2019); *see also Nath v. Texas Children’s Hospital*, 576 S.W.3d 707,709-710 (Tex.

2019)(extending *Rohrmoos Venture* to sanctions order, because “all fee-shifting situations require reasonableness.”).

<sup>387</sup> *Rohrmoos Venture*, 578 S.W.3d at 487.

<sup>388</sup> *In re National Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017)(emphasis added); *Rohrmoos Ventures*, 578 S.W.3d at 493-494; *El Apple I v. Olivas*, 370 S.W.3d 757, 762 (Tex. 2012); *Sullivan I*, 488 S.W.3d 294; *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)

<sup>389</sup> *Rohrmoos Venture*, 578 S.W.3d at 494.

<sup>390</sup> *Rohrmoos Venture*, 578 S.W.3d at 494.

<sup>391</sup> *Rohrmoos Venture*, 578 S.W.3d at 487.

<sup>392</sup> *Id.*

claimant must prove that the requested fees are both reasonable and necessary.”<sup>393</sup>

The *Rohrmoos Venture* opinion did not abrogate existing law on general rules that guide the factfinder in determining the reasonableness and necessity of fees. “A ‘reasonable’ attorney’s fee ‘is one that is not excessive or extreme, but rather moderate or fair.’”<sup>394</sup> In reaching this definition, the Texas Supreme Court relied upon Webster’s Ninth New Collegiate Dictionary.<sup>395</sup> The same dictionary defines “moderate” as “tending toward the mean or average amount or dimension.”<sup>396</sup> The amount and reasonableness of statutory attorney’s fees is a question of fact.<sup>397</sup> The determination of what is moderate and tending towards the mean, thus recoverable under the TCPA, rests within the court’s sound discretion.<sup>398</sup>

In *Sullivan*, the Texas Supreme Court made clear that a court can only consider “reasonableness,” not “justice and equity,” in making a fee award.<sup>399</sup> The trial court cannot attempt to ameliorate the harshness of the TCPA by reducing the amount of fees the nonmovant faces, and instead must award fees only on traditional standards,<sup>400</sup> and will still require documentation of services performed in sufficient detail.<sup>401</sup>

**O. The lodestar base.**

The Texas Supreme Court clarified that the determination of reasonable and necessary fees involves a two-step methodology of calculating first a lodestar base (reasonable market hourly rate multiplied by reasonable amount of time to perform necessary tasks in the litigation), and second, subject to potential adjustment up or down.<sup>402</sup> The court stated that “we reaffirm today that the fact finder’s starting point for calculating an attorney’s fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts.”<sup>403</sup> “Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services

were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services.”<sup>404</sup> *Id.*

“The base lodestar figure should approximate the reasonable value of legal services provided in prosecuting or defending the prevailing party’s claim through the litigation process.”<sup>405</sup> “The lodestar calculation should produce an objective figure that approximates the fee that the attorney would have received had he or she properly billed a paying client by the hour in a similar case.”<sup>406</sup> “[T]here is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable and necessary attorney’s fees that can be shifted to the non-prevailing party.”<sup>407</sup>

1. Rates must be reasonable.

The Texas Supreme Court was at pains to emphasize that “reasonableness and necessity are not dependent solely on the contractual fee arrangement between the prevailing party and its attorney, as a client’s agreement to a certain fee arrangement or obligation to pay a particular amount does not necessarily establish that fee as reasonable and necessary.”<sup>408</sup> “Stated differently, an amount incurred or contracted for is not conclusive evidence of reasonableness or necessity.”<sup>409</sup> “The fee claimant still has the burden to establish reasonableness and necessity.”<sup>410</sup> In considering what rates charged may be reasonable, the trial court is not bound by a rate charged by a lawyer to a client, since “parties who are not seeking to shift responsibility for their fees may freely choose to spend more or less time or money than would be ‘reasonable’ or ‘necessary’ for parties who are.”<sup>411</sup> “Hourly rates are to be computed according to the prevailing market rates in the relevant legal market, not the rates that lions at the bar may command.”<sup>412</sup>

<sup>393</sup> *Id.* at 489.

<sup>394</sup> *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016)(quoting *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010)).

<sup>395</sup> See *Garcia*, 319 S.W.3d at 642 n.3.

<sup>396</sup> See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY, 763.

<sup>397</sup> *Garcia*, 319 S.W.3d at 642; *Sullivan v. Abraham*, No. 07-17-00125-CV, 2018 WL 845616, at \*2 (Tex. App. – Amarillo Feb. 13, 2018, no pet.)(*Sullivan II*, on remand); *John Moore Services, Inc. v. Better Business Bureau of Metropolitan Houston, Inc.*, No. 01-14-00906-CV, 2016 WL 3162206, at \*4 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2016, no pet.).

<sup>398</sup> See *Sullivan I*, 488 S.W.3d at 299.

<sup>399</sup> *Sullivan*, 488 S.W.3d at 299.

<sup>400</sup> See *Ramsey*, 2013 WL 184668, at \*5.

<sup>401</sup> *Sullivan*, 488 S.W.3d at 299- 300.

<sup>402</sup> *Rohrmoos Venture*, 578 S.W.3d at 501.

<sup>403</sup> *Id.* at 498.

<sup>404</sup> *Id.* at 498.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at 499.

<sup>408</sup> *Id.* at 487-88.

<sup>409</sup> *Id.* at 488.

<sup>410</sup> *Id.*; *In Re National Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017).

<sup>411</sup> *In re National Lloyds*, 532 S.W.3d at 810.

<sup>412</sup> *Hopwood v. Texas*, 236 F.3d 256, 281 (5<sup>th</sup> Cir. 2000).

2. The amount of time must be reasonable.

The base lodestar calculation usually includes at the least the following considerations from *Arthur Andersen*: “the time and labor required,” “the novelty and difficulty of the questions involved,” “the skill required to perform the legal service properly,” “the fee customarily charged in the locality for similar legal services,” “the amount involved,” “the experience, reputation, and ability of the lawyer or lawyers performing the services,” “whether the fee is fixed or contingent on results obtained,” the uncertainty of collection before the legal services have been rendered,” and “results obtained.”<sup>413</sup> Lawyers are required to exercise good billing judgment. “Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.”<sup>414</sup> This factor may weigh against the reasonableness of a fee request and could be the basis to object.<sup>415</sup> Cuts may be made by line-item or may be “across-the-board” reductions, particularly when fee documentation is voluminous.<sup>416</sup> Additionally, travel time may properly be reduced from fee applications.<sup>417</sup> Recovery for work of legal professionals other than attorneys “normally requires evidence about the person’s qualifications to perform substantive legal work, the performance of such work under the direction and supervision of an attorney, the nature of the work performed, the person’s hourly rate, and the number of hours expended.”<sup>418</sup>

**P. Sanctions are now discretionary and must be accompanied by findings.**

The 2019 Legislature changed mandatory language (shall) to discretionary (may) “as the court determines

sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.”<sup>419</sup> This change recognizes the reluctance of many trial courts to award sanctions, and that some courts found that awarding nominal sanctions, as low as \$1, met the statute’s then-mandatory sanctions requirements.<sup>420</sup> The TCPA “does not specify a particular formula, amount, or guideline for determining the sanctions amount other than to say that the amount is to be sufficient to deter the party who brought the legal action from bringing similar actions.”<sup>421</sup> “What if the trial court decides that the party to be sanctioned is unlikely to bring similar actions again?”<sup>422</sup>

Chapter 27 sanctions now more closely track those available under Rule 13 or Chapter 10 of the Civil Practice and Remedies Code, since Chapter 27 now requires that “[i]f the court awards sanctions under Section 27.009(b), the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.”<sup>423</sup> This change finally finds a purpose for Section 27.007, but the findings do not track Rule 13<sup>424</sup> or Chapter 10<sup>425</sup> finding requirements.

The Legislature did not follow the lead of some other states and allow for the recovery of exemplary or punitive damages. An award of sanctions is reviewed for an abuse of discretion, while Texas law provides a strict, high standard of proof to recover exemplary

<sup>413</sup> *Rohrmoos Venture*, 578 S.W.3d at 500, citing *Arthur Andersen*, 945 S.W.2d at 818.

<sup>414</sup> *Id.* at 498-99, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), and *El Apple*, 370 S.W.3d at 762 (“Charges for duplicative, excessive, or inadequately documented work should be excluded.”).

<sup>415</sup> See *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 799-802 (5<sup>th</sup> Cir. 2006)(reasoning downward adjustment justified where counsel failed to exercise billing judgment).

<sup>416</sup> See *Aguayo v. Bassam Odeh, Inc.*, No. 3:13-CV-2951-B, 2016 WL 7178967, at \*4 (N. D. Tex. 2016).

<sup>417</sup> See *In re Babcock & Wilcox Co.*, 526 F.3d 824, 828 (5<sup>th</sup> Cir. 2008)(finding no abuse of discretion in reduction of travel time); *McGibney v. Rauhauser*, 549 S.W.3d 816, 836 (Tex. App. – Fort Worth 2018, pet. denied)(“Adding insult to injury, Appellee was also billed \$13,585 for two attorneys to travel to Fort Worth, attend the hearing on the motion to dismiss, and return to Houston. These are other factors that the trial court should consider in determining a reasonable amount of attorney’s fees to be awarded here.”)(TCPA case, in

which the Fort Worth Court of Appeals found the fees excessive and unreasonable).

<sup>418</sup> *El Apple*, 370 S.W.3d at 762-63; *Sullivan II*, 2018 WL 845615, at \*5.

<sup>419</sup> TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2).

<sup>420</sup> See *Rich v. Range Resources Corp.*, 535 S.W.3d 610, 612-14 (Tex. App. – Fort Worth 2017, pet. denied)(finding that Range Resources did not need deterrence from filing similar actions).

<sup>421</sup> *Tatum v. Hersh*, 559 S.W.3d 581, 587 (Tex. App. – Dallas 2018, no pet.)(on remand).

<sup>422</sup> *Id.* (finding harmless error in trial court’s failure to award sanctions).

<sup>423</sup> TEX. CIV. PRAC. & REM. CODE § 27.007(a).

<sup>424</sup> “No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order.”

<sup>425</sup> “A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed.” TEX. CIV. PRAC. & REM. CODE § 10.005.

damages.<sup>426</sup> The legislative history and bill analyses do not discuss why the Legislature chose sanctions over punitive damages.

**Q. TCPA: Award of Fees, Not Sanctions, for Respondent/Plaintiff – Predicated on Frivolous Motion to Dismiss, Unless Based on Responsive Motion to Dismiss the Initial Motion to Dismiss.**

In contrast to the broad recovery favoring the subject of the legal action, the only recovery that a plaintiff/respondent in the action may obtain in responding to a motion to dismiss would be for court costs and reasonable attorney’s fees, but only if the court finds that the motion to dismiss is “frivolous or solely intended to delay.”<sup>427</sup> Unlike the movant, the respondent cannot recover sanctions under Chapter 27’s provisions for respondents, and would have to resort to existing Texas law to recover any sanctions for frivolous pleadings. The Legislature did not disclose why the plaintiff in the civil action must prove that the motion to dismiss is frivolous, while the object of the suit, the purported defamer, need only prove the action “is based on” his claimed exercise of speech, association, and petition rights.

**R. Miscellaneous 2019 Amendments.**

The Legislature added Section 27.0075, entitled “Effect of Ruling,” which simply states that “[n]either the court’s ruling on the motion nor the fact that it made such a ruling shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by the ruling.”<sup>428</sup> There was little discussion about this section, but with the mandatory findings about sanctions, this provision means that such findings are not available to use against parties in other situations.

The Legislature also allows a trial court to award to the moving party reasonable fees incurred in defending against a compulsory counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay.<sup>429</sup> We found no discussion on why the Legislature added this portion, but presumably somebody, somewhere, with a good lobbyist came across counterclaims that were problematic.

**S. Appellate Review.**

**1. Interlocutory Appeal: Stay of Proceedings, and What is Reviewable?**

What type of appeal is available to litigants of a Chapter 27 motion to dismiss has been the primary topic of discussion and motions in the cases making their way through the appellate system. It appears that although the Legislature devoted a separate section of the statute to “Appeal,”<sup>430</sup> the scope of interlocutory appeal was limited. Although the majority of appellate issues prior to the 2013 amendments addressed what denials of motions to dismiss were subject to interlocutory appeals, a recent case found that the “statute makes no appellate provisions regarding motions for extension of time to file a motion to dismiss,” therefore depriving an appellate court of jurisdiction to hear such an appeal.<sup>431</sup>

The initial purpose of the 2013 amendments was to clearly provide for interlocutory appeals from any denial of motions to dismiss, whether by operation of law or order. The granting of a motion to dismiss, even of a portion of a case, is not subject to an interlocutory appeal.

Following the 2013 amendments, an allowable interlocutory appeal from an order denying a Chapter 27 motion to dismiss *stays all other proceedings in the trial court* pending resolution of the appeal,<sup>432</sup> joining, among other things, cases in which media defendants are involved, a signed order denying a motion for summary judgment would result in a stay of the trial, though possibly not other proceedings.<sup>433</sup> A case from the Texas Supreme Court in June, 2019, clarified the scope of the stay, and indicated that if there are extraordinary measures needed, a litigant may apply to the appellate court, not the trial court, for relief.<sup>434</sup>

Importantly, there is no statutory or judicial exception permitting an appellant to raise grounds for dismissal for the first time on appeal, and the TCPA’s dismissal process is not a fundamental right.<sup>435</sup>

**i. Denial of motion to dismiss by operation of law: interlocutory appeal is clearly available.**

Chapter 27 confers explicit statutory jurisdiction for an interlocutory appeal if the trial court does not timely rule on a motion to dismiss, so that “the motion is considered to have been denied by operation of law and the moving party may appeal.”<sup>436</sup> As noted above, without a finding that “docket conditions” required a hearing outside the thirty days, the ruling is untimely

<sup>426</sup> TEX. CIV. PRAC. & REM. CODE § 41.003.

<sup>427</sup> TEX. CIV. PRAC. & REM. CODE § 27.009(b).

<sup>428</sup> TEX. CIV. PRAC. & REM. CODE § 27.0075.

<sup>429</sup> TEX. CIV. PRAC. & REM. CODE § 27.009©.

<sup>430</sup> TEX. CIV. PRAC. & REM. CODE § 27.008.

<sup>431</sup> *Summersett v. Jaiyeola*, 438 S.W.3d 84 (Tex. App. – Corpus Christi 2013, pet. denied).

<sup>432</sup> TEX. CIV. PRAC. & REM. CODE § 51.014(b).

<sup>433</sup> TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6),(b).

<sup>434</sup> *In re Geomet Recycling LLC*, 578 S.W.3d 82, 87-88 (Tex. 2019).

<sup>435</sup> *CLEAT*, 2014 WL 411672, at \*4.

<sup>436</sup> TEX. CIV. PRAC. & REM. CODE § 27.008(a).

and Section 27.008(a) jurisdiction over the appeal exists.<sup>437</sup>

**ii. Timely written denial of motion to dismiss – an interlocutory appeal is available for any order that “denies a motion to dismiss” filed under Section 27.003.**

Resolving a significant split of authority on whether a Chapter 27 movant may take an interlocutory appeal from a written order denying the motion, the Legislature in 2013 placed the grant of interlocutory jurisdiction with the other general rules for interlocutory appeals, in Section 51.014 of the Civil Practice and Remedies Code.<sup>438</sup> Now, if there is a timely written order denying the motion to dismiss, the movant may pursue an interlocutory appeal under Section 51.014.

**iii. Mandamus.**

Now that the Legislature has resolved the issue of interlocutory appealability of denials of motions to dismiss, what significance do writs of mandamus or “other writs” have?<sup>439</sup> A mandamus is contemplated in the language of the statute: an “appellate court shall expedite an appeal *or other writ* ....”<sup>440</sup> Upon review, the appellate court will determine whether the trial court clearly abused its discretion,<sup>441</sup> and a trial court’s application of legal principles is reviewed for an abuse of discretion separately from its resolution of factual disputes.<sup>442</sup>

In the mandamus review of the trial court’s order, the court of appeals reviews the trial court’s legal determinations de novo.<sup>443</sup> “A trial court abuses its discretion if it fails to analyze the law correctly or misapplies the law to established facts.”<sup>444</sup> Further, “a trial court’s erroneous legal conclusion, even in an unsettled area of law, is an abuse of discretion.”<sup>445</sup> The court also found that whether a prima facie case has been presented is a question of law for the court.<sup>446</sup>

Still, “when the issues before the trial court necessarily require factual determinations, the court of appeals abuses its discretion when it resolves those issues in an original mandamus proceeding.”<sup>447</sup> “Absent extraordinary circumstances ... an interlocutory ruling on a motion to dismiss is incident to the ordinary trial process and should be challenged by appeal, not corrected by mandamus.”<sup>448</sup>

In determining that the homeowners in an alleged fracking pollution case had no immediate appellate remedy by interlocutory appeal, the Fort Worth Court of Appeals found that it “must carefully analyze the costs and benefits of granting mandamus relief.”<sup>449</sup> The court stated that in “consideration of whether an appellate remedy is adequate, we should consider whether mandamus review will spare litigants and the public the time and money wasted ‘enduring eventual reversal of improperly conducted proceedings.’”<sup>450</sup> Stating that the “legislature has determined that unmeritorious lawsuits subject to Chapter 27 should be dismissed early in litigation, generally before parties must engage in discovery,” mandamus relief is often involved in “cases in which the very act of proceeding to trial ... would defeat the substantive right involved.”<sup>451</sup>

The proceedings in the trial court are not suspended or stayed while the mandamus proceeds.

**2. Motion to Dismiss Timely Granted**

**i. May be appealable noninterlocutory order.**<sup>452</sup>

The respondent to a Chapter 27 motion to dismiss must prepare for an expedited appeal in the event the motion is granted. The *Wallbuilder* case suggests that an order granting a motion to dismiss under Section 27.005 may be appealable as a final judgment, or severable and appealable as a final, non-interlocutory order disposing of all issues and all parties.<sup>453</sup> This may be true if the trial court dismisses the entire case, but may not be true if the order of dismissal targets only

<sup>437</sup> *Crazy Hotel*, 416 S.W.3d at 79-80.

<sup>438</sup> See TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12).

<sup>439</sup> TEX. CIV. PRAC. & REM. CODE § 27.008(b); *Wallbuilder*, 378 S.W.3d at 524; *In re Lipsky*, 411 S.W.3d at 538 (the court of appeals earlier dismissed an appeal for want of jurisdiction, and allowed the defendants to challenge the propriety of the trial court’s order denying the dismissal actions through an original mandamus proceeding)(*Lipsky v. Range Prod. Co.*, No. 02-12-00098-CV, 2012 WL 3600014 (Tex. App. – Fort Worth Aug. 23, 2012, pet. denied)(mem. op.)).

<sup>440</sup> *In re Lipsky*, 411 S.W.3d at 552, quoting TEX. CIV. PRAC. & REM. CODE § 27.008(b).

<sup>441</sup> *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1991).

<sup>442</sup> *Id.* at 839-840.

<sup>443</sup> *In re Lipsky*, 411 S.W.3d at 539.

<sup>444</sup> *Id.* (citing *Ilf v. Ilff*, 339 S.W.3d 74, 78 (Tex. 2011); *Cook v. Tom Brown Ministries, et al.*, 385 S.W.3d at 600.

<sup>445</sup> *In re Lipsky*, 411 S.W.3d at 539, citing *In re United Scaffolding, Inc.*, 301 S.W.3d 661, 663 (Tex. 2010)(orig. proceeding).

<sup>446</sup> *In re Lipsky*, 411 S.W.3d at 539.

<sup>447</sup> *In re Thuesen*, 2013 WL 1461818, at \*2, quoting *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 716 (Tex. 1990).

<sup>448</sup> *Id.*

<sup>449</sup> *In re Lipsky*, 411 S.W.3d at 552.

<sup>450</sup> *Id.*, quoting *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008)(orig. proceeding).

<sup>451</sup> *In re Lipsky*, 411 S.W.3d at 553, quoting *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008)(orig. proceeding) (applying health care liability statute requiring sufficient expert reports to proceed with the case).

<sup>452</sup> An untimely order granting the motion to dismiss would be construed to overrule the motion as a matter of law.

<sup>453</sup> *Wallbuilder*, 378 S.W.3d at 524, citing *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 312 (Tex. 1994)

certain causes of action. Whether the dismissed causes and parties are severable for appeal will be decided on a case-by-case basis.<sup>454</sup>

One potential issue is whether an order of dismissal of the entire case should be considered a judgment for purposes of appeal, and whether it precludes the refile of suit. Does the order of dismissal act as an adjudication on the merits? The statute does not say that the dismissal is to be with or without prejudice.

When some, but not all, of the defendants in a case file motions to dismiss that are granted, and motions to sever and enter final judgment as to those defendants are pending, a court of appeals may decline to exercise mandamus jurisdiction and find that an appeal of a final judgment provides a better remedy for a claim that the trial court erred in granting motions to dismiss.<sup>455</sup> “An appeal provides more complete review of an order disposing of a party’s claims than review by petition for writ of mandamus. An appellate court may not deal with disputed matters of fact in an original mandamus proceeding.”<sup>456</sup> It appears that the court of appeals found the mandamus action premature, though it is unclear from the record whether the appellant faced expiring Chapter 27 appellate deadlines while the motion to sever was pending.

**ii. May be appealable interlocutory order.**

If the trial court timely grants an order dismissing claims of some, but not all, parties, the order is interlocutory and may be appealed regarding the portion denied, according to the Fourteenth Court of Appeals.<sup>457</sup> The court of appeals noted that although there was no express grant of interlocutory appellate jurisdiction from a signed order of dismissal, the court felt that the Legislatures’ command that Chapter 27 “shall be construed liberally to effectuate its purpose and intent fully”<sup>458</sup> required finding interlocutory appellate jurisdiction. The argument that the court adopted is that failing to find interlocutory appellate jurisdiction from a signed order “renders portions of subsections (b) and (c) meaningless in contravention of statutory construction precepts.”<sup>459</sup> The court looked to language in Section 27.008(b) about expediting “an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss ... or from a trial court’s failure to

rule ....”<sup>460</sup> Finding that “[i]f no interlocutory appeal is available when the trial court expressly rules on a motion to dismiss by signing an order then the phrase ‘from a trial court order on a motion to dismiss’ appearing after the phrase ‘whether interlocutory or not’ is rendered meaningless.”<sup>461</sup> Further, since subsection (c) “states that an appeal ‘must be filed on or before the 60<sup>th</sup> day after the date the trial court’s order is signed or the time prescribed by Section 27.005 expires, as applicable,’” the court of appeals found that if no signed order can be the subject of appeal, the language would be superfluous.<sup>462</sup>

The decision for the court to make will be whether the long-standing statutory construction precepts that grants of interlocutory jurisdiction are to be strictly construed, against a general statement at the end of the new statute that it is to be liberally construed in general. Since such language is commonly found in statutes, it is questionable whether it can be read to extend jurisdiction when Texas courts are historically very hesitant to decide cases without a clear grant of authority. Courts may be very reluctant to allow an expansive view of “liberal construction” to open gates to hear more cases.

**3. Deadlines for Chapter 27 Appeal or Writ.**

The appeal from the denial of a motion must be perfected under the rules for accelerated appeal.<sup>463</sup> The notice of appeal must be filed within 20 days after the denial of the motion, and the appellant must go ahead and request any reporter’s record and the clerk’s record.<sup>464</sup> The deadline for any other appeal or writ should be governed by applicable law.<sup>465</sup>

Similarly, if a motion to dismiss is granted, the date of entry of judgment will trigger the usual deadlines for appeal from a final judgment.

**4. Any Appeal or Writ From An Order On A Chapter 27 Motion to Dismiss Shall be Expedited.**

Section 27.008(b) indicates that any appeal or writ is to be expedited. The Fort Worth Court of Appeals concluded that “the plain language and meaning of subsection (b) is to require expedited consideration by an appellate court of any appeals or other writs from a trial court’s ruling on a motion to dismiss filed under

---

(recognizing that trial court may “make the judgment final for purposes of appeal by severing the causes and parties”).

<sup>454</sup> See, *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865 (Tex. App. Dallas 2014, no pet.) (holding that an unresolved claim for attorney’s fees and sanctions rendered the judgment interlocutory).

<sup>455</sup> *In re Thuesen*, 2013 WL 1461818, at \*\*2-3.

<sup>456</sup> *Id.* quoting *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990).

<sup>457</sup> *Direct Commercial Funding, Inc. v. Beacon Hill Estates*, 2013 WL 407029, at \*\*1-2.

<sup>458</sup> *Beacon Hill*, 2013 WL 407029, at \*2, quoting TEX. CIV. PRAC. & REM. CODE § 27.011(b).

<sup>459</sup> *Beacon Hill*, 2013 WL 407029, at \*3.

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> *Beacon Hill*, 2013 WL 407029, at \*4.

<sup>463</sup> Tex. R. App. P. 26.1 and 28.1

<sup>464</sup> *Id.*

<sup>465</sup> See TEX. R. APP. P. 25.1, 26.1.

Chapter 27, whether interlocutory or not.”<sup>466</sup> In other words, Section 27.008(b) “imposes a duty on the appellate courts to expedite disposition of any types of appeals or writs” from Chapter 27 motions to dismiss.<sup>467</sup> This likely means that an interlocutory appeal under Section 51.014 should be expedited.

5. Standard of Review of Interlocutory Appeal.

i. **De novo review – statutory construction.**

As Chapter 27 cases worked their way through the appellate system, the appellate courts eventually decided to review virtually all decisions *de novo*, including whether the parties met their burdens of proof.<sup>468</sup>

Any statutory construction is a question of law, which is reviewed *de novo*.<sup>469</sup> When reviewing error under a *de novo* standard, the appellate court conducts an independent analysis of the record to arrive at its own legal conclusions, does not defer to the trial court’s conclusions, and may substitute its conclusions for those made by the trial court.<sup>470</sup>

In construing a statute, standard construction rules indicate that “[w]hen the Legislature has spoken on a subject, its determination is binding upon the courts unless the Legislature has exceeded its constitutional authority.”<sup>471</sup> “The courts are not free to thwart the plain intention of the Legislature expressed in a law that is constitutional.”<sup>472</sup>

It is a cardinal rule of statutory construction that courts are to give effect to the intent of the Legislature.<sup>473</sup> If the language in a statute is unambiguous, the court must seek the intent of the legislature as found in the plain and common meaning of the words and terms used.<sup>474</sup> In other words, “[w]here text is clear, text is determinative.”<sup>475</sup> At that point, “the judge’s inquiry is at an end,” and extra textual forays are improper.<sup>476</sup>

“In applying the plain and common meaning of the language in a statute, courts may not by implication enlarge the meaning of the statute beyond its ordinary meaning; such implication is inappropriate when legislative intent may be gathered from a reasonable interpretation of the statute as it is written.”<sup>477</sup>

“This text-based approach requires us to study the language of the specific section at issue, as well as the statute as a whole.”<sup>478</sup> “Legislative intent remains the polestar of statutory construction.”<sup>479</sup> If the meaning of the statutory language is unambiguous, the court adopts, with few exceptions, the interpretation supported by the plain meaning of the provision’s words and terms.<sup>480</sup> If a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity.<sup>481</sup> “As the Texas Supreme Court said long ago: ‘[w]hen the purpose of a legislative enactment is obvious from the language of the law itself, there is nothing left to construction. In such case it is vain to ask the courts to attempt to liberate an invisible spirit, supposed to live concealed within the body of the law.’”<sup>482</sup> When a statute is unambiguous, the court’s role is to apply it as written despite its imperfections.<sup>483</sup> Ordinary citizens should be able to rely on the plain language of the statute to mean what it says.<sup>484</sup> Finally, a court is not to “interpret a statute in a manner that renders any part of the statute meaningless or superfluous.”<sup>485</sup>

Courts<sup>486</sup> have been applying a *de novo* review to the determination of whether the movant met the initial burden of proof, and whether the non-movant presented clear and specific evidence of a prima facie case.<sup>487</sup>

ii. **De Novo Review “in the light most favorable to the nonmovant” of Sufficiency of Evidence to Meet Burdens of Proof.**

When conducting a *de novo* review of the evidence and whether the parties met their burden of proof,

<sup>466</sup> *Wallbuilder*, 378 S.W.3d at 524.

<sup>467</sup> TEX. CIV. PRAC. & REM. CODE § 27.008(b).

<sup>468</sup> See *Adams*, 547 S.W.3d at 897.

<sup>469</sup> *Lippincott*, 462 S.W.3d at 509; *Railroad Comm’n of Tex. v. Tex. Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009); *Texas Mun. Power Agency v. Public Util. Comm’n*, 253 S.W.3d 184, 192 (Tex. 1997).

<sup>470</sup> See *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998).

<sup>471</sup> *Public Utility Comm’n of Texas v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988).

<sup>472</sup> *National Surety Corp. v. Ladd*, 131 Tex. 295, 115 S.W.2d 600, 603 (Tex. 1938).

<sup>473</sup> *Fleming Foods of Tex. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

<sup>474</sup> *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994).

<sup>475</sup> *In re Office of the Attorney General*, 422 S.W.3d 623, 629 (Tex. 2013) (*In re Office of the AG*), quoting *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

<sup>476</sup> *In re Office of the AG*, 422 S.W.3d at 629 (quoting *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651-52 (Tex. 2006)).

<sup>477</sup> *Sorokolit*, 889 S.W.2d at 241.

<sup>478</sup> *In re Office of the AG*, 422 S.W.3d at 629, citing *Fitzgerald v. Advanced Spine Fixation Systems*, 996 S.W.2d 864, 865-66 (Tex. 1999).

<sup>479</sup> *Fitzgerald*, 996 S.W.2d at 865-66.

<sup>480</sup> *Fitzgerald*, 996 S.W.2d at 865-66.

<sup>481</sup> *Fitzgerald*, 996 S.W.2d at 865-66.

<sup>482</sup> *Fitzgerald*, 996 S.W.2d at 865-66, quoting *Dodson v. Bunton*, 81 Tex. 655, 17 S.W. 507, 508 (Tex. 1891).

<sup>483</sup> *Stockton v. Offenbach*, 336 S.W.3d 610, 619 (Tex. 2011).

<sup>484</sup> *Fitzgerald*, 996 S.W.2d at 865, citing *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618, 88 L.Ed. 1488, 64 S.Ct. 1215 (1944).

<sup>485</sup> *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008).

<sup>486</sup> See *Calkins*, 446 S.W.3d at 147.

<sup>487</sup> *Serafine*, 466 S.W.3d at 359.

appellate court are now typically following the usual standard of review of a dispositive motion, to review the pleadings and evidence in the light most favorable to the plaintiff/non-movant.<sup>488</sup> Stated another way, “[i]n determining whether the plaintiff presented a prima facie case, [the Court is to] consider only the pleadings and evidence in favor of the plaintiff’s case.”<sup>489</sup> The First Court of Appeals has explained the standard of review of a dispositive motion:

“To determine if there is a fact issue, we review the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. We indulge every reasonable inference and resolve any doubts in the nonmovant’s favor.”<sup>490</sup>

Litigants should closely monitor the opinions of appellate courts to ensure that they apply the correct standard of review.

### **T. Does the TCPA Apply in Federal Court?**

Just before the 2019 amendments to the TCPA took effect, the Fifth Circuit decided that the statute is procedural and does not apply to diversity cases in federal courts sitting in Texas. The decision in *Klocke v. Watson*<sup>491</sup> resolved “an issue that has brewed for several years in this circuit.”<sup>492</sup>

Following an opinion by then-Circuit Judge Brett Kavanaugh,<sup>493</sup> the Fifth Circuit applied an *Erie* analysis and found that “[b]ecause the TCPA’s burden-shifting framework imposes additional requirements beyond those found in Rules 12 and 56 and answers the same question as those rules, the state law cannot apply in federal court.”<sup>494</sup> However, in coming to that conclusion, the Fifth Circuit relied heavily on the TCPA’s requirements that the trial court determine “by

a preponderance of the evidence” whether the legal action fell within the scope of the TCPA, and whether a defendant met its burden to establish a valid defense to the plaintiff’s claim.<sup>495</sup> Since the 2019 amendments to the TCPA took effect only three days after the publication of the *Klocke* opinion, such that the TCPA no longer required any determination “by a preponderance of the evidence,” it is conceivable that future litigants may once again attempt to apply the TCPA in diversity cases. We should note that the other evidentiary basis for conflict that the Fifth Circuit cited, namely, the “clear and specific evidence” requirement for proof of the elements of a plaintiff’s claim, “lies somewhere between the state’s pleading baseline and the standard necessary to prevail at trial, in any event exceeds the plaintiff’s Rule 56 burden to defeat summary judgment.”<sup>496</sup>

Our guess is that now that the Fifth Circuit examined and directly spoke about the TCPA, it will be reluctant to revisit its decision.

Still, because of the reliance on the “preponderance of the evidence” burden in *Klocke*, it remains worth mentioning that the argument for TCPA application in federal courts sitting in Texas looks mostly to a 2009 Fifth Circuit case that reviewed a Louisiana anti-SLAPP statute, which did not conduct an *Erie* analysis.<sup>497</sup> Yet in 2017 the Fifth Circuit in another Louisiana case stated that “[t]he applicability of state anti-SLAPP statutes in federal court is an important and unresolved issue in this circuit,” and suggested that the court had simply assumed the applicability of the Louisiana statute in order to dispose of an appellate jurisdiction issue.<sup>498</sup>

With the question of applicability of Chapter 27 in Texas federal courts now likely resolved, the prudent federal court practitioner who wants to apply the TCPA

<sup>488</sup> See *Robert B. James, DDS, Inc. v. Elkins*, 553 S.W.3d 596, 603 (Tex. App. – San Antonio 2018, pet. filed); *Cheniery Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 214-15 (Tex. App. – Houston [1st Dist.] 2014, no pet.); *Brugger v. Swinford*, No. 14-16-00069-CV, 2016 Tex. App. LEXIS 9155, 2016 WL 4444036, at \*3 (Tex. App. – Houston [14th Dist.] Aug. 23, 2016, no pet.) (finding: movant failed to meet initial burden of proof); *Epperson v. Mueller*, No. 01-15-00231, 2016 Tex. App. LEXIS \*23, 2016 WL 4253978 (Tex. App.—Houston [1st Dist.] Aug. 11, 2016, no pet.).

<sup>489</sup> *Fawcett v. Grosu*, 498 S.W.3d 650, 661 (Tex. App. – Houston [14th Dist.] 2016, pet. denied).

<sup>490</sup> *CBS Outdoor, Inc. v. Potter*, No. 01-11-00650-CV, 2013 Tex. App. LEXIS 645, at \*8, 2013 WL 269091 (Tex. App. – Houston [1st Dist.] Jan. 24, 2013, pet. denied)(mem. op.).

<sup>491</sup> *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019).

<sup>492</sup> *Klocke*, 936 F.3d at 242; see *Diamond Consortium, Inc. v. Hammervold*, 733 Fed. Appx 151, 154 n.3; 2018 WL 2077910, at \*3 n.3 (5th Cir. May 3, 2018)(“we follow previous panels in assuming without deciding that Texas’s anti-SLAPP statute applies in federal court); *Block v.*

*Tanenhaus*, 867 F.3d 585, 589 (5th Cir. 2017)(“[t]he applicability of state anti-SLAPP statutes in federal court is an important and unresolved issue in this circuit); *Cuba v. Pylant*, 814 F.3d 701, 706 (5th Cir. 2016); *Culbertson v. Lykos*, 790 F.3d 608, 631 (5th Cir. 2015)(“[w]e have not specifically held that the TCPA applies in federal court; at most we have assumed without deciding its applicability).

<sup>493</sup> *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-34 (D.C. Cir. 2015); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010)..

<sup>494</sup> *Klocke*, 936 F.3d at 245.

<sup>495</sup> *Id.* at 246.

<sup>496</sup> *Id.*

<sup>497</sup> *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168-169 (5th Cir. 2009).

<sup>498</sup> *Block v. Tanenhaus*, 867 F.3d 585, 589, n. 2 (5th Cir. 2017)(apply Louisiana law)(also finding that whether the statute applied in federal court was not an issue preserved for appeal, so the Fifth Circuit assumed, without deciding, that it did apply).



should carefully consider whether to remove the case to federal court.

#### **U. Constitutional Issues.**

##### **1. Does the TCPA violate the Open Courts provision of the Texas Constitution?**

With the 2019 amendments eliminating “preponderance of the evidence” trial court review, expansion of scheduling, availability of discovery, discretionary sanctions with required findings, and the earlier the determination that “clear and specific evidence” did not create an elevated evidentiary standard, most discussions about Open Courts challenges to the TCPA are likely resolved.<sup>499</sup>

---

<sup>499</sup> Ms. Prather, writing for the Texas Daily Newspaper Association, gave her detailed explanation of the TCPA, including her view of what constitutes “clear and specific evidence.” She wrote: “**What is the “clear and specific” standard?** As many of you may recall, it is the standard already used by the courts in reporter’s privilege cases and is a more significant burden than establishing something by a preponderance of the evidence but not as heavy a burden as requiring proof by clear and convincing evidence.” <http://www.sdma.com/texas-newsrooms-will-benefit-from-anti-slapp-law-07-15-2011/>. A “clear and specific showing” to obtain a reporter’s source information is very different from meeting a burden of proof on a recognized tort common law cause of action.

Likewise, imposing a higher standard of proof in response to a motion to dismiss would seem to impose a higher burden than is required to defeat a no-evidence motion for summary judgment, which requires the respondent only to produce more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements. TEX. R. CIV. P. 166a(i); *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003). A non-movant produces more than a scintilla when the evidence “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *Ford Motor Co. v. Ridgeway*, 135 S.W.3d 598, 601 (Tex. 2004).

There is a very large body of law that describes for courts and practitioners what level of proof is necessary to sustain or defeat a no-evidence motion for summary judgment, none of which is deemed frivolous. The case law refers to a burden on the non-movant to “produce” such evidence. The TCPA requires the non-movant to “establish” the evidence. Considering the introduction of other standards in the statute, a movant could argue that “establish” also means more than “produce,” perhaps rising to the level of evidence required to sustain a directed verdict. This also makes no sense and overwhelms any notion of fairness and harmony with existing law. Existing rules for summary judgment and against frivolous suits, when applied by even-handed jurists, provide a more than adequate framework for sorting out meritless suits involving some sort of speech.

<sup>500</sup> At least one media party, relying only upon pieced together definitions of “clear” and “specific,” argued that “clear and specific” is an intermediate burden of proof that is greater than the preponderance of the evidence. Brief of Univision,

But it bears repeating for future legislative sessions the history of this notion to create a burden of proof in response to a motion to dismiss that is higher than is required for a plaintiff to prevail at trial, or that creates significant cost burdens that may implicate the Open Courts provisions.<sup>500</sup>

The Open Courts provision of the Texas Constitution is found in Article I, Section 13 of the Texas Constitution.<sup>501</sup> This provision ensures that “a person bringing a well-established common-law cause of action will not suffer unreasonable or arbitrary denial

*Virgilio Avila and Univision Television Group, Inc. v. Larrea*, No. 05-11-01637, Court of Appeals of Dallas, Texas.

<sup>501</sup> The “open courts provision” of the Texas Constitution provides that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST. art. I, § 13; *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994). “It includes at least three separate constitutional guarantees: 1) courts must actually be operating and available; 2) the Legislature cannot impede access to the courts through unreasonable financial barriers, and 3) meaningful remedies must be afforded, ‘so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants’ constitutional right of redress.’” *Trinity River Auth.*, 889 S.W.2d at 262. “The open courts provision specifically guarantees all litigants the right to redress their grievances – to use a popular and correct phrase, the right to their day in court.” *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986). Pursuant to the open courts provision, “[a] statute or ordinance that unreasonably abridges a justiciable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process under article I, section 13, and is, therefore, void.” *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex. 1983). Thus, the open courts provision is violated when a well-established cause of action is restricted, and the restriction is unreasonable and arbitrary when balanced against the purpose of the statute. *Smith v. Smith*, 126 S.W.3d 660, 664 (Tex.App.—Houston [14<sup>th</sup> Dist.] 2004, no pet.), citing *Sax*, 648 S.W.2d at 666. Clearly, causes of action for defamation, business disparagement, tortious interference, fraud, malicious prosecution, violations of consumer statutes, and other common-law and statutory actions are well-established. The TCPA may unreasonably and arbitrarily restrict well-established causes of action, by imposing a higher standard of proof than would ordinarily be required for the plaintiff to prevail at trial. Moreover, the TCPA’s limitation on discovery may also violate the open courts provision. *See In re Hinterlong*, 109 S.W.3d 611 (Tex.App.—Fort Worth 2003)(orig. proceeding) (crime-stoppers statutory privilege violated the open courts provision of the Texas Constitution, because it unreasonably and arbitrarily restricted plaintiff’s ability to prosecute his malicious prosecution, defamation, and negligence claims, by precluding discovery of the identity and other information about his accuser).

of access to the courts.”<sup>502</sup> To prevail on an Open Courts challenge, the party urging the violation must show that it has a recognized common-law cause of action that is being restricted and that the restriction is unreasonable when balanced against the Legislature’s actual purpose in enacting the challenged statute.<sup>503</sup>

The most detailed discussion of this issue in the TCPA context was in the *C.L.E.A.T. v. Sheffield* case, in which the Austin Court of Appeals rejected an open courts challenge on three theories, first, that the TCPA imposed a higher standard of proof; second, that restrictions on discovery violated the Open Courts provision; and third, that fee awards are mandatory and unreasonable.<sup>504</sup>

The Austin Court in *CLEAT* did not believe that the discovery stay and related restrictions were unreasonable. The court also decided that fee awards were not mandatory, and so “do not violate the open-courts guarantees on their face.”<sup>505</sup> That of course left the door open on whether a mandatory award of fees would violate the Open Courts provisions.

The First Court of Appeals in 2016 relied only upon *CLEAT* to reject an open courts challenge.<sup>506</sup> What the First Court of Appeals did not discuss was the 2016 Texas Supreme Court decision in *Sullivan v. Abraham*, in which the court declared “that discretion, under the TCPA, does not also specifically include considerations of justice and equity.”<sup>507</sup> The trial court awarded just \$6,500 of over \$67,000 in attorneys’ fees requested by the lawyers for Michael Quinn Sullivan, a prominent and well-funded activist. The trial court also denied the request for sanctions. The trial court cited “justice and equity” as the reason for the reduced amount awarded.<sup>508</sup> The Amarillo Court of Appeals affirmed, but the Texas Supreme Court disagreed, finding that the trial court could consider only whether the requested fees were “reasonable,” and not apply other factors<sup>509</sup> (presumably such as the losing party’s lack of resources, whether the suit was a SLAPP, and similar equitable considerations).

After *Sullivan v. Abraham*, the third prong of the Austin Court of Appeals analysis in the *CLEAT* case is at the very least called into question. According to *Sheffield*, the central reason why the TCPA does not violate the Open Courts provision of the Texas

Constitution is that a trial court has the ability to reduce the amount of fees awarded in order to ameliorate the harsh results of the mandatory fee awards.

Yet the Texas Supreme Court rejected that reasoning, holding that “the TCPA requires an award of ‘reasonable attorney’s fees’ to the successful movant” and that “discretion, under the TCPA, does not also specifically include considerations of justice and equity.”<sup>510</sup> In other words, trial courts cannot reduce the amount of fees and expenses awarded just to reduce the sting or burden of losing a TCPA motion to dismiss, explicitly contrary to the reason to reject an Open Courts challenge in *Sheffield*. No Texas appellate court has re-examined *Sheffield* in light of the holdings in *Sullivan v. Abraham*, but that central premise is now contrary to Texas law.

A prudent practitioner who opposes the application of the TCPA should consider an open courts challenge, to include the considerations of mandatory attorneys’ fees awards without consideration of equitable factors to reduce the fee award.

## 2. Does the TCPA Violate the Right to Due Process?

There is a related argument, that the TCPA violates the right to due process. Cross-examination is so fundamental to the truth-seeking function delegated to fact-finders that its elimination implicates due process concerns under both the Texas and United States constitutions.<sup>511</sup> Again, the removal of the requirement that the trial court weigh evidence on a preponderance standard may answer due process challenges, but it is worthwhile to the practitioner to repeat the arguments here.

There is an argument that the TCPA imposes at least three unreasonable restrictions on a respondent’s access to Texas courts.

First, the statute precludes a respondent from engaging in the fundamental and powerful truth-seeking function of cross-examination. “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”<sup>512</sup> The TCPA’s insistence that the trial court review only affidavits or declarations and pleadings in making a finding by the “preponderance of the evidence” unreasonably deprives

<sup>502</sup> *Yancy v. United Surgical Partners Int, Inc.*, 236 S.W.3d 778, 783 (Tex. 2007).

<sup>503</sup> *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex. 1983).

<sup>504</sup> *CLEAT*, No. 03-13-00105-CV, 2014 WL 411672, at \*9.

<sup>505</sup> *Id.* at \*11 (“A trial court may decide that justice and equity do not require that costs, fees, or expenses be awarded and may determine that no sanctions are needed to deter the plaintiff from bringing similar actions. These provisions do not mandate an award and do not violate the open-courts guarantees on their face.”)

<sup>506</sup> *Robinson v. KTRK Television, Inc.*, 01-14-00880-CV, 2016 WL 1267990, at \*3 (Tex. App.—Houston [1st Dist.] Mar. 31, 2016, pet. denied)

<sup>507</sup> *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).

<sup>508</sup> *Id.* at 295-296.

<sup>509</sup> *Id.* at 299.

<sup>510</sup> *Sullivan*, 488 S.W.3d at 299.

<sup>511</sup> *Davidson v. Great Nat’l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987) (citing *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970)); U.S. CONST amend XIV; TEX. CONST art. I, § 19.

<sup>512</sup> *Goldberg*, 397 U.S. at 269.

the right of cross-examination to the non-movant (responding party). The TCPA not only asks the trial court to determine whether the movant’s evidence could meet the preponderance standard, but asks whether the movant has in fact met that standard. Yet, the trial court must conduct this trial “[o]n a cold [TCPA] record, without having observed a single witness.”<sup>513</sup>

Second, the TCPA prevents a plaintiff, or non-movant, from obtaining discovery, or limited discovery under very limited circumstances, while facing the possibility of a dismissal with prejudice. Unlike any other civil lawsuit, the filing of a TCPA motion to dismiss automatically suspends any discovery “in the legal action” until the court rules on the motion to dismiss.<sup>514</sup>

Third, the TCPA requires courts to enter an award of costs, attorney’s fees, and sanctions, and allows courts to enter an award of other expenses, against a plaintiff or non-movant who is not completely successful in opposing a TCPA motion. This is an unreasonable restriction and burden on a party’s ability to seek legal redress. The Texas Supreme Court instructed that Texas law should allow litigants to introduce some evidence to mitigate punitive damages, and that allowing such evidence also provides an important safeguard to minimize the risk of unjust punishment.<sup>515</sup> Here, the attorneys’ fees mandated by the TCPA are punitive in nature.<sup>516</sup> Notwithstanding, the TCPA—by limiting discovery, depriving the opportunity to confront and cross-examine witnesses, and providing for automatic sanctions and assessment of fees and expenses—impermissibly strips away appropriate substantive and procedural safeguards to minimize the risk of unjust punishment.

There are no appellate courts that have examined this argument yet.

3. Does the Act Violate the Right to a Trial by Jury?

One of the hot topics before the Legislature in 2019 was whether the TCPA violates the Texas Constitution’s guarantee of the right to a trial by jury.<sup>517</sup> The right to a trial by jury means that a jury—not a court— weighs the evidence.<sup>518</sup> The Texas Supreme Court admonishes us that the right to a jury trial is one of our most precious rights, holding “a sacred place in English and American history.”<sup>519</sup> “Restrictions placed on the right to a jury trial shall be subjected to the utmost scrutiny because denial of that right is such a grave matter.”<sup>520</sup> The issue does not come up often, but is a matter of great concern.<sup>521</sup>

The argument in favor of this view is that the TCPA violates the right to a trial by jury by calling for courts—rather than juries—to evaluate evidence by “a preponderance.”<sup>522</sup> The TCPA does not define the term, but a preponderance of the evidence means “the greater weight of the credible evidence.”<sup>523</sup> The TCPA requires the trial court—rather than a fact-finder—to determine which evidence is “credible” and which is entitled to “greater weight.”<sup>524</sup>

At least one court (in Massachusetts) recognized that an anti-SLAPP statute violates constitutional jury-trial rights by requiring a judge to make evaluations based on a “preponderance of the evidence.”<sup>525</sup> The gist of the argument is that a statute cannot require the trial court to weigh evidence and make credibility determinations.

The former version of the TCPA charged the trial court with deciding, based on a “preponderance of [that] evidence,” whether the TCPA covers a case. The trial court is, therefore, required to determine which witnesses are credible and which are not, to weigh the competing affidavits/declarations, and to do all of this

<sup>513</sup> *Huckabee*, 19 S.W.3d at 422; TCPA § 27.006(a).

<sup>514</sup> TEX. CIV. PRAC. & REM. CODE §27.003(c).

<sup>515</sup> See *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 40 (Tex. 1998) (internal citation and quotation marks omitted); see also *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16-17 (Tex.1994) (stating that “like criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment”).

<sup>516</sup> See *Malone*, 972 S.W.2d at 39–40 (stating that “[p]unitive damages are not designed or intended to compensate or enrich individual victims”).

<sup>517</sup> TEX. CONST. art. I, § 15; art. V, § 10.

<sup>518</sup> See *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 450 (Tex. 1997) (“[T]he Constitution allocates [weighing evidence] to the jury[.]”); accord, *Huckabee v. Time Warner Entm’t Co.*, 19 S.W.3d 413, 422 (Tex. 2000) (discussing constitutional “demarcation between fact-finder and judge”).

<sup>519</sup> *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex.1997) (quoting *White v. White*, 108 Tex. 570, 196 S.W. 508, 512 (1917)).

<sup>520</sup> *Bell Helicopter Textron, Inc., v. Abbott*, 863 S.W.2d 139, 141 (Tex.App.—Texarkana 1993, writ denied).

<sup>521</sup> See, e.g., *Collins v. Cleme Manor Apartments*, 37 S.W.3d 527, 533 (Tex. App.—Texarkana 2001, no pet.) (finding jury request made less than thirty days prior to trial date timely in forcible-detainer action, and FED rule violated right to jury trial; court abused discretion by denying continuance and a shortened time to answer discovery).

<sup>522</sup> TEX. CIV. PRAC. & REM. CODE § 27.005(b).

<sup>523</sup> *Murff v. Pass*, 249 S.W.3d 407, 409 n.1 (Tex. 2008) (citation omitted).

<sup>524</sup> See *id.*

<sup>525</sup> See *Hi-Tech Pharms., Inc. v. Cohen*, 208 F. Supp. 3d 350, 355 & n.4 (D. Mass. 2016) (holding that anti-SLAPP preponderance-of-the-evidence standard violates Seventh Amendment right to trial by jury) (citing *Davis v. Cox*, 183 Wash. 2d 269, 351 P.3d 862, 864 (2015)); see also *Opinion of the Justices*, 138 N.H. 445, 621 A.2d 1012, 1015 (1994).

“[o]n a cold [TCPA] record, without having observed a single witness.”<sup>526</sup> The argument is that the Legislature’s attempt to assign these fact-finding functions to courts, instead of juries, violates the Texas Constitution’s guarantee of the right to a trial by jury.<sup>527</sup>

The problem was particularly acute when a movant asked for dismissal under the former “valid defense” provisions, which required the trial court to dismiss and award sanctions and fees “if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim.”<sup>528</sup> This is very different than a summary judgment, in which the trial court’s only function is to determine whether a genuine issue of material fact exists.<sup>529</sup> For that reason, summary judgment procedures do not appropriate a jury function to the court. The Legislature had this in mind when changing the affirmative defense proof requirement to “as a matter of law.”<sup>530</sup>

4. Does the Act Conflict with the Supreme Court’s Rule-Making Authority?

Since the TCPA creates new motion procedures that conflict with existing dispositive motions by rule, a practitioner could question whether it may violate the separation of powers between the Legislature and the rulemaking authority of the Texas Supreme Court. The Supreme Court derives its rule-making authority initially from the Texas Constitution, which specifically and separately empowers the Supreme Court to promulgate rules of civil procedure.<sup>531</sup> The Constitution authorized the Legislature to delegate to the Supreme Court other rulemaking power.<sup>532</sup> The Supreme Court’s statutorily conveyed power is plenary, because the Rules of Practice Act provides: “[s]o that the Supreme Court has full rulemaking power in civil actions, a rule adopted by the Supreme Court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed.”<sup>533</sup> If, under the *Boulter* analysis, the Texas anti-SLAPP statute is procedural, it would seem to be subject to the Texas Rules of Civil Procedure.<sup>534</sup>

<sup>526</sup> *Huckabee*, 19 S.W.3d at 422.

<sup>527</sup> The TCPA cannot be saved by severing Section 27.005(b). Section 27.005(b) is a threshold requirement of the TCPA, and the TCPA collapses without it. The Court cannot re-write Section 27.005(b) to provide an alternate trigger. *See Glyn-Jones v. Bridgestone/Firestone, Inc.*, 857 S.W.2d 640, 643 (Tex. App.—Dallas 1993) (“If [a constitutional] interpretation is not possible, however, then the constitution must prevail over the statute.”), *aff’d on other grounds* 878 S.W.2d 132 (Tex. 1994).

<sup>528</sup> TEX. CIV. PRAC. & REM. CODE § 27.005(d).

<sup>529</sup> *E.g.*, *Huckabee*, 19 S.W.3d at 422 (“[A] trial court’s only duty at the summary judgment stage is to determine if a material fact question exists.”).

<sup>530</sup> TEX. CIV. PRAC. & REM. CODE § 27.005(d).

The Texas Rules of Civil Procedure share a history of adoption similar to the Federal Rules. TEX. R. CIV. P. 2, adapted from FED. R. CIV. P. 1 in 1940, provides in pertinent part that “[t]hese rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated.” TEX. R. CIV. P. 1 provides:

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

The Texas Rules of Civil Procedure have not been amended to provide any exceptions for the TCPA dismissal motion. Rule 2 makes no provision for such a statutory procedure to apply in lieu of the Rules of Procedure.

The Texas Supreme Court originally looked to the Federal Rules of Civil Procedure in the adoption of the Texas summary judgment rule, TEX. R. CIV. P. 166a. The rule was adopted by order of October 12, 1949, effective March 1, 1950, and designated as the new Rule 166-a.<sup>535</sup> The Texas Bar Journal published the Texas Supreme Court’s order adopting and amending several rules, which cited its source as “Federal Rule 56, as originally promulgated, except ...[with minor wording differences].”<sup>536</sup>

It is beyond the scope of this paper to thoroughly explore the issue of whether the anti-SLAPP motion to dismiss is consistent with the Court’s rule-making authority under the Texas Constitution, but this is a serious question to consider. It would certainly seem that at the very least, the Texas Supreme Court could, by order, repeal the motion procedure in Section 27.001 *et seq.*

<sup>531</sup> TEX. CONST. art. V, § 31(b): “The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.”

<sup>532</sup> TEX. CONST. art. V, § 31(c).

<sup>533</sup> TEX. GOV’T CODE § 22.004(c). *See also*, Nathan L. Hecht & E. Lee Parsley, Procedural Reform: Whence and Whither (Sept. 1997).

<sup>534</sup> Unlike TEX. CIV. PRAC. & REM. CODE § 9.003, the anti-SLAPP law contains no savings provision that it does not alter the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.

<sup>535</sup> 12 TEX. B. J. 531 (1949); TEX. R. CIV. P. 166-a.

<sup>536</sup> *Id.*

5. Does the Statute Conflict With Texas' Constitutional Protection of Rights to Sue for Reputational Torts?

This is still one of the strongest challenges to the TCPA still available. Since the Chapter 27 motion to dismiss is directed squarely at claims based on communications, at least many of which would be brought as reputational torts, there is a significant question whether the statute fatally conflicts with longstanding Texas law protecting the right to sue for reputational damages as guaranteed in the Texas Free Expression Clause.

The Texas Supreme Court affirmed that “[t]he common law has long allowed a person to recover for damage to her reputation occasioned by the publication of false and defamatory statements.”<sup>537</sup> Justice Guzman’s opinion thoughtfully referred to Chief Justice Rehnquist’s note that Shakespeare “penned the rationale for the cause of action in Othello:

Good name in man and woman, dear my lord,  
Is the immediate jewel of their souls.  
Who steals my purse steals trash;  
‘Tis something, nothing;  
‘Twas mine, ‘tis his, and has been slave to  
thousands;  
But he that filches from me my good name  
Robs me of that which not enriches him,  
And makes me poor indeed.<sup>538</sup>

“Although we have recognized that the Texas Constitution’s free speech guarantee is in some cases broader than the federal guarantee, we have also recognized that ‘broader protection, if any, cannot come at the expense of a defamation claimant’s right to redress.’”<sup>539</sup> “Unlike the United States Constitution, the Texas Constitution twice expressly guarantees the right to bring reputational torts.”<sup>540</sup> The Texas Supreme Court declared that “[t]he Texas Constitution’s free speech provision guarantees everyone the right to ‘speak, write or publish his opinions on any subject, *being responsible for abuse of that privilege.*’”<sup>541</sup> In the *Turner* case, Chief Justice Phillips also relied upon the open courts provision: “the Texas Constitution’s open courts provision guarantees that ‘all courts shall be

open, and every person for an injury done him, in his lands, goods, person *or reputation*, shall have remedy by due course of law.”<sup>542</sup>

We previously discussed the perils of the adoption of an undefined, and possibly higher, burden of proof than the general civil standard of preponderance of the evidence on the basis that a heightened standard of proof violates the Texas constitution’s open courts provisions.<sup>543</sup> Beyond the issue of standards of proof, from a more basic statutory construction framework, the well-established case law supporting Texans’ constitutional rights to seek redress for reputational damages provides ample reason for litigants to carefully review the use of a Chapter 27 motion to dismiss.

The *Neely* decision should be read closely, as it reviews and affirms defenses and privileges to defamation claims, and additional protections afforded to media defendants by the Texas Legislature, the United States Supreme Court, and the Texas Supreme Court.<sup>544</sup> Justice Guzman’s opinion aptly notes that “we are reluctant to afford greater constitutional protection to members of the print and broadcast media than to ordinary citizens” because the “*First Amendment* affords equal dignity to freedom of speech and freedom of the press.”<sup>545</sup> Among the additional, special protections crafted for media defendants are a requirement that the plaintiff must prove the defamatory statements were false when made by a media defendant, along with official/judicial proceedings privilege, the fair comment privilege, and a due care provision (without mentioning interlocutory appeals for certain media cases, and journalist’s privilege in Chapter 22 of the Civil Practice and Remedies Code). The Court even referenced the Defamation Mitigation Act<sup>546</sup> as recent legislation that affects the ability of defamation plaintiffs to recover.<sup>547</sup>

Whether the *Neely* opinion can be interpreted as an opening for a constitutional challenge to the TCPA is an open question, but the careful practitioner should be mindful of this case when addressing Chapter 27 motions to dismiss.

If you consider a constitutional challenge for violation of guaranteed rights to sue for reputational torts, consider this argument.

The TCPA is arguably unconstitutional on its face

<sup>537</sup> *Neely*, 418 S.W.3d at 60, citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990).

<sup>538</sup> *Neely*, 418 S.W.3d at 60, quoting WILLIAM SHAKESPEARE, *OTHELLO*, act 3 sc. 3, *quoted in Milkovich*, 497 U.S. at 12.

<sup>539</sup> *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116-117 (Tex. 2000), (quoting *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989)).

<sup>540</sup> *Neely*, 418 S.W.3d at 60, 2013 Tex. LEXIS 511\*12, *Turner*, 38 S.W.3d at 117 (citing TEX. CONST. art. I, §§ 8, 13; *Casso*, 776 S.W.2d at 556; *Ex parte Tucci*, 859 S.W.2d 1, 19-23 (Tex. 1993) (Phillips, C.J., concurring)).

<sup>541</sup> *Turner*, 38 S.W.3d at 117 (citing TEX. CONST. art. I, § 8 (emphasis added)).

<sup>542</sup> *Turner*, 38 S.W.3d at 117 (citing TEX. CONST. art. I, § 13 (emphasis added)).

<sup>543</sup> *Supra*, Section III.D.3.ii.

<sup>544</sup> *Neely*, 418 S.W.3d at 60-63, 2013 Tex. LEXIS 511\*18-19.

<sup>545</sup> *Id.*, quoting *Casso*, 776 S.W.2d at 554.

<sup>546</sup> Discussed at length in Section VI, *infra*.

<sup>547</sup> *Neely*, 418 S.W.3d at 62-63, 2013 Tex. LEXIS 511, at \*21.

when applied to suits for reputational torts in Texas, if the causal connection phrase “based on, relates to, or is in response to” is construed to mean “anything remotely touching on” rather than, consistent with the TCPA’s stated purposes, a more restrictive “solely based on” interpretation. Under the less restrictive interpretation, the TCPA would encompass all suits for reputational torts. If the statute does not separate SLAPP cases from the body of reputational tort litigation, it violates Texans’ rights – guaranteed in writing in their Constitution – to sue for reputational torts, a right deemed so important it was separately guaranteed.<sup>548</sup>

The central point of the issue is that “the TCPA is supposed to protect citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern.”<sup>549</sup> “Its purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights . . . .”<sup>550</sup> It bears repeating that the Texas Supreme Court has made it clear that the statute is *not* to be used to “dismiss meritorious lawsuits.”<sup>551</sup>

The TCPA’s expedited, draconian procedures and mandatory sanctions take suits for reputational torts out of the mainstream of Texas jurisprudence. Unlike any other civil lawsuit, the filing of a motion to dismiss automatically suspends any discovery “in the legal action” until the court rules on the motion to dismiss. Tex. Civ. Prac. & Rem. Code §27.003(c). If a court finds that a plaintiff, upon filing suit and facing a motion to dismiss within 60 days, without the ability to conduct discovery, and who at that time may have some evidence, but perhaps not sufficient evidence to constitute a “prima facie” case<sup>552</sup> to go to a jury on even one element of a cause of action, then the legal action *must* be dismissed. This is not a process for determining whether a lawsuit bears the meritless, delay characteristics of a SLAPP case, but simply a “gotcha” early review of the evidence accumulated to date in an ordinary lawsuit. That result is inconsistent with the express purpose of the statute.

<sup>548</sup> “A facial constitutional challenge requires a showing that a statute is always unconstitutional in every application.” *In the Interest of C.M.D.*, 287 S.W.3d 510, 514 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995) (stating that “[u]nder a facial challenge . . . the challenging party contends that the statute, by its terms, always operates unconstitutionally.”)

<sup>549</sup> *Lipsky*, 460 S.W.3d at 586.

<sup>550</sup> *Bedford v. Spasoff*, 485 S.W.3d 641, 645-46 (Tex. App.—Fort Worth Feb. 11, 2016) (citing TEX. CIV. PRAC. & REM. CODE § 27.002), pet. granted, *judgm’t reversed by* 520 S.W.3d 901 (Tex. June 09, 2017).

<sup>551</sup> *In re Lipsky*, 460 S.W.3d at 589.

<sup>552</sup> A “‘prima facie case’ has a traditional legal meaning. It refers to evidence sufficient as a matter of law to establish a

#### **IV. UNINTENDED CONSEQUENCES.**

##### **A. Overbroad Application and Chilling Effect on Meritorious Business Tort Actions.**

Whether the lawsuit is actually frivolous is irrelevant to a motion to dismiss under the TCPA. While the Act was not enacted to legalize illegal activity, or to provide a safe harbor for violations of Texas law, it may have this unintended consequence.

Abuse of anti-SLAPP statutes has been reported in other states, such as Maine and California.<sup>553</sup> A Maine commentator reports that, “[n]ot surprisingly, entities are beginning to find ways to use anti-SLAPP statutes for less legitimate purposes. One example is the trend of corporate defendants’ use of special motions to dismiss under anti-SLAPP statutes as a delaying tactic in the face of legitimate consumer protection or product liability lawsuits.”<sup>554</sup> “Absent a fee-shifting disincentive, defendants are filing largely futile special motions to dismiss and the engaging in interlocutory appeals of the inevitable denials of those motions.”<sup>555</sup> Similarly, a California commentator reports that “legal seminars are continually encouraging corporations to employ the anti-SLAPP Statute motion as a new litigation weapon by filing it in otherwise ordinary personal injury and products liability cases.”<sup>556</sup> The authors understand that some counsel are urging entities involved any suits involving communications to file the motion to dismiss in each case.

Texas’ exemptions fall short of narrowing the application of the TCPA to true SLAPP cases, particularly since there is no requirement that there be a finding that the lawsuit was frivolous, and that there is a gross disparity in resources among the litigants in which the alleged defamer is at a disadvantage.

Moreover, certain causes of action can always be categorized as “based on” speech, particularly common law torts of defamation, disparagement, tortious interference, fraud, negligent misrepresentation, and even statutory claims concerning communications and misrepresentations.

given fact if it is not rebutted or contradicted.” *In re Lipsky*, 460 S.W.3d at 590. “It is the ‘minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.’” *Id.*

<sup>553</sup> John G. Osborn & Jeffrey A. Thaler, *Feature: Maine’s Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 MAINE BAR J. 32 (2008).

<sup>554</sup> *Id.*

<sup>555</sup> *Id.*

<sup>556</sup> Joshua L. Baker, *Review of Selected 2003 California Legislation: Civil: Chapter 338: Another New Law, Another SLAPP in the Face of California Business*, 35 MCGEORGE L. REV. 409 (2004).

For example, the Texas Election Code provides that candidates and officeholders who are the objects of illegal campaign contributions have the right to seek damages against the person or persons who knowingly violate the Code.<sup>557</sup> The Code also provides that “[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.”<sup>558</sup> Thus, a candidate or officeholder who is harmed by illegal contributions can sue for damages and injunctive relief. But campaign contributions necessarily “relate to” or are “based on” the “exercise of free speech.”<sup>559</sup> As a result of the enactment of the TCPA, any political candidates suing for damages and to enjoin violations the Code must be ready to survive an anti-SLAPP motion.

A critical problem with determining the applicability of the statute was the use of the terms “related to” and “based on.” What does “related to” mean? Does it mean more than “is engaged in?” Or more than “arising from?” Had the Legislature retained the phrase in 2019, it would have continued to support and extremely expansive application. As previously drafted, the statute conceivably applies to almost any type of dispute between parties, and is not limited to traditional press communications, or communications with governmental entities. The very low threshold for success in a motion to dismiss means that anytime a blogger, or other person, decides that he is going to make a business’ life miserable, he can do so with virtual impunity so long as he claims he is exercising his First Amendment rights. If a person repeatedly writes or emails vitriolic views about a business, in a way that is damaging to the business, is it not proper to sue to stop the damage? If a person’s website, or Face book, or Twitter comments otherwise violate state defamation law, why shouldn’t a party sue for such conduct? We can easily see that theft of confidential information, trade secrets, statutory actions, other misappropriation actions, can be the subject of anti-SLAPP motions to dismiss. It is a very simple matter to predict that creative lawyers will invoke the TCPA’s provisions in virtually every applicable case.

Suits for business disparagement, tortious interference, defamation, and related torts are a staple of tactics to restrain unethical practices, and to restrain persons with defective moral compasses from engaging in deleterious behavior. The tort system generally works well to temper the bad conduct of businesses, customers, and the public. The vast majority of business tort suits would likely not be characterized as frivolous

SLAPP suits. As a practical matter, most people do not want to spend the money to prosecute a meritless case. The medicine is probably worse than the illness sought to be cured.

#### **B. Justice Delayed is Justice Denied.**

Doubtless many litigants in business tort suits will try out the new TCPA. For a defendant, such as the disparaging blogger, or illegal advertiser, to promptly file a motion to dismiss, with an affidavit claiming that the activity was protected, is not a difficult matter. That defendant/movant would know that he is not likely subject to sanctions under the statute, and that filing the motion causes the case to grind to a halt, the discovery stops, and the plaintiff/respondent has to defend without the benefit of even basic discovery. In many cases a plaintiff does not have the specific proof on every element of her cause of action, and will be able to prove the case with some evidence from the target defendant. That opportunity is denied in the process of the expedited motion to dismiss.

By the time that an expedited appeal is decided, precious time is lost and the expense of meritorious litigation mounts. We will leave it up to the reader to determine the probability of a plaintiff securing fees and expenses from the defendant/movant in such litigation in response to the motion to dismiss.

We will also leave it up to the reader to determine whether the statute in fact operates to deter frivolous SLAPP suits, or has cast the net so far as to ensnare a much greater class of cases in which the parties need access to the courts to resolve their disputes.

#### **C. When The Texas Attorney General Must Be Invited to the Party.**

The passage of the TCPA also reflects a lack of consideration about the interaction of the statute with other statutory notice requirements. Since the communications made the basis of the motion to dismiss are likely claimed to be constitutionally protected, if the suit is based at least in part on statutory grounds that the movant challenges on constitutional grounds, the state Attorney General must be timely notified and given an opportunity to participate. Similarly, if a respondent challenges a motion to dismiss on constitutional grounds, notice must be timely provided to the Texas Attorney General.

Pursuant to Section 402.010 of the Texas Government Code (new 2011 statute), the Texas Attorney General must be notified before any ruling by the trial court is made under Chapter 27. Such statute provides that the Texas Attorney General *must* be

<sup>557</sup> TEX. ELEC. CODE § 253.131(a).

<sup>558</sup> TEX. ELEC. CODE § 273.081.

<sup>559</sup> Whether campaign contributions are actually considered constitutionally protected free speech is a question beyond the

scope of this paper. However, it is fair to say that campaign contributions are always necessarily *related* to the exercise of free speech.

notified of any challenge to the constitutionality of a Texas statute, whether such challenge be by “petition, motion or other pleading,” and 45-days’ notice required.<sup>560</sup> Also, pursuant to Section 37.006 of the Texas Civil Practice and Remedies Code, in a declaratory judgment action, when the constitutionality of a Texas statute is drawn into question, the Texas Attorney General “*must* be served with a copy of the proceeding and is entitled to be heard.”<sup>561</sup>

The difficulty lies in the expedited nature of the hearing on the motion to dismiss. How can there be a hearing within 30 days of the filing of the motion to dismiss, and at the same time serve notice on the Attorney General and allow the Attorney General’s participation? The trial court that finds a statute unconstitutional, whether as applied or facially, runs the risk of having the ruling overturned as void if the Attorney General has insufficient notice. Once a challenge to the constitutionality of the TCPA and the Chapter 27 motion to dismiss are made, how does an appellate court review the trial court’s denial of the motion by order or operation of law?

The practitioner is encouraged to promptly explore appropriate motions and notices to the trial court and Texas Attorney General in the event that the subject matter of the dispute becomes a matter of concern to the Attorney General.

## **V. THE TCPA – CONCLUSIONS DRAWN.**

While the objective of protecting First Amendment rights in the age of the internet is laudable, and conscientious lawyers are mindful of the need to pursue meritorious litigation, the TCPA has a number of flaws that may likely restrain the filing of legitimate suits, rather than restrict frivolous cases. The TCPA includes many flaws and inconsistencies that can serve as trial and appeal traps for the unwary lawyer. Since the TCPA clearly encompasses far more than SLAPP cases, practitioners should thoroughly examine this new law’s applications and defenses in a wide variety of cases. Business and constitutional tort lawyers should carefully review the statute and prepare for litigating it before making claims relating to communications made about..., well, just about anything at all.

## **VI. THE “MULLIGAN BILL”: THE TEXAS DEFAMATION MITIGATION ACT.**

Our discussion of the TCPA would be incomplete without a very brief overview of another law affecting reputation tort litigation, the Defamation Mitigation Act, popularly known as the “Mulligan Bill.” H.B. 1759 added a new subchapter B to Chapter 73 of the Civil Practice and Remedies Code, to impose significant pre-suit conditions on defamation lawsuit filings and limitation of some damages.<sup>562</sup> As of January 9, 2020, there were only 11 Texas state cases that even cited this act, and none were from the Texas Supreme Court.<sup>563</sup>

### **A. Legislative History.**

On February 25, 2013, Rep. Todd Hunter filed H.B. 1759, “relating to a correction, clarification, or retraction of incorrect information published.”<sup>564</sup> The bill, referred to as the Defamation Mitigation Act, was “based on uniform legislation adopted by the Uniform Law Commission . . . to encourage the prompt and thorough correction, clarification, or retraction of published information that is alleged to be defamatory and to provide for the early resolution of disputes arising from such a publication.”<sup>565</sup> H.B. 1759 required a “timely and sufficient” request for a correction, clarification, or retraction of published material in order to maintain a defamation claim.

Governor Perry signed the bill into law, effective immediately, on June 14, 2013. The legislative history of H.B. 1759 indicates that primarily media representatives advocated for its passage though the stated purpose of the legislation is “to provide a method for a person who has been defamed by a publication or broadcast to mitigate any perceived damage or injury.”<sup>566</sup>

The bill was referred to the Judiciary & Civil Jurisprudence Committee, which heard testimony in favor of the bill on April 1, 2013.<sup>567</sup> Rep. Hunter introduced the bill, and then Judge David Peebles (on behalf of his self), Brad Parker (on behalf of the Texas Trial Lawyers Association), Jerry Martin (on behalf of KPRC-TV and the Texas Association of Broadcasters), Shane Fitzgerald (on behalf of the Freedom of Information Foundation of Texas), Debbie Hiott (on behalf of herself, the Austin American-Statesman, and Texas Press Association), and Laura Prather (on behalf

<sup>560</sup> TEX. GOV’T CODE § 402.010.

<sup>561</sup> TEX. CIV. PRAC. & REM. CODE § 37.006.

<sup>562</sup> As of February 6, 2015, there were no published cases interpreting the statute, other than the reference in *Neely* to the inapplicability of this statute.

<sup>563</sup> See *Hardy v. Comm’n Workers of Am.*, 536 S.W.3d 38 (Tex. App. – Dallas 2017, pet. denied).

<sup>564</sup> Tex. H.B. 1759, 83d Leg., R.S. (2013).

<sup>565</sup> See H. Comm. on Judiciary & Civ. Jurisprudence, *Bill Analysis*, TEX. H.B. 1759, 83d Leg., R.S., No. 83R 23145, at

1 (Tex. 2013), available at <http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/HB01759H.pdf#navpanes=0>.

<sup>566</sup> See TEX. CIV. PRAC. & REM. CODE § 73.052.

<sup>567</sup> The video recording of testimony before the Judiciary & Civ. Jurisprudence Comm. regarding Tex. H.B. 2935 also contains Tex. H.B. 1759 testimony, which begins at 1:41:10 and ends at 2:04:14.



of herself, the Freedom of Information Foundation of Texas, Texas Press Association, and Texas Association of Broadcasters) testified with all testifying in favor of the bill except Parker, who testified on the bill.

Peeples gave three points in support of the bill. First, he said defamation is different from other types of injuries because it can be corrected, retracted, or clarified “and much of the damage can be undone.” Second, Peeples testified that H.B. 1759 encourages such repair by implementing a set of procedures to encourage retractions, clarifications, or corrections. Finally, Peeples testified the bill would promote early closure of lawsuits.<sup>568</sup>

Parker countered Peeples’ testimony by describing defamation as “one of the most damaging injuries [one] can suffer.” He testified regarding his concerns about the bill, as it was written, in that it created a “precondition to a lawsuit” and the retraction process could possibly be used later in an evidentiary manner. “We don’t want to create too much of a retraction process that it creates a black hole,” said Parker. “An abatement black hole, if you will, that it is so tedious to comply with the retraction issues that we ...just never get out of it.”<sup>569</sup>

Martin testified he supports the bill because it would provide a framework and timeframe to mitigate any issues, noting for the media it is “almost impossible to get everything right, every single day, every single year.”<sup>570</sup>

Fitzgerald testified, “This law provides incentive for the media to make corrective action quickly and in a timely manner. The law also provides incentive for those who feel they’ve been wronged to come forward instead of just filing suit.”<sup>571</sup>

Hiott echoed the testimony of both Martin and Fitzgerald stating, “Good journalists really do everything they can to avoid a mistake, but when they do make a mistake, they want to correct the record quickly for the credibility of the paper, but also for their own credibility with their sources as journalists. That’s hard to do when the subject of an error fails to inform a

publication of a problem, and even more frustrating if those subjects go straight to the courts in search of a financial answer rather than a correction.”<sup>572</sup>

Prather testified Texas was among a minority of states that did not have a retraction statute, noting statutes dating back as far as 1882 are in force in 38 other states. Prather testified the bill would provide a “cooling off period” and encourage a “prompt restoration of reputation,” rather than a lengthy and contentious lawsuit. Based on a question a Committee member asked regarding cases involving actual malice, Prather stated the bill would not allow one to “retract around actual malice,” meaning if the defamation is based in actual malice, then a retraction would not block the defamed party from filing a lawsuit and seeking exemplary damages. Furthermore, in response to a question regarding whether the bill was directed toward only the media and public figures, Prather testified the uniform law from which H.B. 1759 was based applied to all types of publications, media or non-media generated, and all individuals—both public and private figures.<sup>573</sup>

The Committee revised the bill, adding an abatement section that outlines a procedure for publishers to file a plea in abatement if a written request for a correction, clarification, or retraction is not received.<sup>574</sup>

In a 145-0-2 vote, the House passed H.B. 1759 on May 2, 2013. In the Senate, the bill was referred to the Committee on State Affairs, which heard testimony on May 13, 2013.<sup>575</sup> Senator Rodney Ellis introduced the bill, and then Patti Smith (on behalf of KVUE-TV, Belo Corporation, and the Texas Association of Broadcasters) and Jeff Cohen (on behalf of the *Houston Chronicle*, Hearst Newspapers, and the Texas Press Association) testified in favor of the bill. Smith said, “We’re in favor of house bill 1759 because it establishes that framework for prompt resolution of disputes. It does not let a broadcaster or publisher off the hook for

<sup>568</sup> See *Hearing on Tex. H.B. 1759 Before the H. Comm. on Judiciary & Civ. Jurisprudence* at 1:43:01, 2013 Leg., 83d Sess. (Tex. 2013), available at <http://www.house.state.tx.us/video-audio/committee-broadcasts/committee-archives/player/?session=83&committee=330&ram=13040114330> (testimony of David Peeples on behalf of his self).

<sup>569</sup> See *id.* at 1:45:01 (testimony of Brad Parker on behalf of the Texas Trial Lawyers Association).

<sup>570</sup> See *id.* at 1:51:09 (testimony of Jerry Martin on behalf of KPRC-TV and the Texas Association of Broadcasters).

<sup>571</sup> See *id.* at 1:52:30 (testimony of Shane Fitzgerald on behalf of the Freedom of Information Foundation of Texas).

<sup>572</sup> See *id.* at 1:55:13 (testimony of Debbie Hiott on behalf of herself, the Austin American-Statesman, and Texas Press Association).

<sup>573</sup> See *id.* at 1:57:28 (testimony of Laura Prather on behalf of herself, the Freedom of Information Foundation of Texas, Texas Press Association, and Texas Association of Broadcasters).

<sup>574</sup> See H. Comm. on Judiciary & Civ. Jurisprudence, *Bill Analysis*, TEX. H.B. 1759, 83d Leg., R.S., No. 83R 23145, at 6 (Tex. 2013), available at <http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/HB01759H.pdf#navpanes=0>.

<sup>575</sup> A video recording of the testimony is available for viewing at <http://www.senate.state.tx.us/75r/senate/commit/c570/c570.htm>. Click on the “Part I” link next to May 13, 2013. Testimony relating to Tex. H.B. 1759 begins 9:00 minutes into the recording and ends at 17:44.

libel.”<sup>576</sup> Cohen testified about the media’s desire to correct mistakes quickly, and he emphasized that similar legislation has worked well in other states. Laura Prather was in attendance as a resource witness, but did not testify.<sup>577</sup>

The Senate amended the plea in abatement portion of H.B. 1759 to allow an abatement to continue beyond 60 days after a written request is served if agreed to by the parties.<sup>578</sup>

**B. Application of the Defamation Mitigation Act: Prerequisites to Filing Defamation Suit, Request and Response, Abatement.**

The Act establishes a timely and sufficient demand for correction, clarification, or retraction as a prerequisite to filing an action for defamation by a natural person or an organization.<sup>579</sup> A request for correction, clarification, or retraction is timely if made within the limitations period for defamation.<sup>580</sup>

What constitutes a “sufficient” request? Section 73.055 (d) sets out five specific requirements, which include being served on the publisher, made in writing and signed, describes with particularity the statement, alleges the defamatory meaning or specifies the circumstances causing a defamatory meaning of the statement.<sup>581</sup>

How does the alleged wrongdoer respond? First, the respondent can ask the person making the retraction request for information about the falsity of the alleged defamatory statement not later than 30 days after receiving the retraction request.<sup>582</sup>

What retraction is sufficient and timely? The statute offers no easy definitions or solutions, but a retraction is timely if made within 30 days after receipt of the demand.<sup>583</sup> The retraction is sufficient if generally published in the same manner as the original publication in a manner and medium reasonably likely to reach substantially the same audience as the original objectionable publication, and (1) acknowledges that the prior statement is erroneous; (2) is an allegation that the defamatory meaning arises from other than the

express language of the publication and the publisher disclaims an intent to communicate that meaning or to assert its truth; (3) is a statement attributed to another person whom the publisher identifies and the publisher disclaims an intent to assert the truth of the statement; or (4) is publication of the requestor’s statement of the facts, as set forth in a request for correction, clarification, or retraction, or a fair summary of the statement, exclusive of any portion that is defamatory of another, obscene, or otherwise improper for publication.<sup>584</sup>

The new statute goes on to deal more specifically with two or more statements as defamatory,<sup>585</sup> describe how the retraction is published with sufficient prominence,<sup>586</sup> and internet publication.<sup>587</sup>

There are additional procedures for a defendant in a lawsuit to disclose intention to rely on a retraction,<sup>588</sup> and for a plaintiff to challenge the timeliness of a retraction.<sup>589</sup>

Determination of the sufficiency of demands and responses for retracting are a question of law, and the trial court “shall” make a ruling “at the earliest appropriate time before trial.”<sup>590</sup>

The request for retraction, and response, are not admissible at trial, but that fact of such request and response may be admissible in mitigation of damages under Section 73.003(a)(3).<sup>591</sup>

In a procedure similar to abatements under the Texas Deceptive Trade Practices – Consumer Protection Act,<sup>592</sup> the Defamation Mitigation Act also permits a defamation defendant who did not timely receive a written request for retraction to file a plea in abatement within 30 days after answering the suit.<sup>593</sup> The suit is automatically abated in its entirety beginning 11 days after the plea in abatement is filed if the plea is verified and not controverted by affidavit of the plaintiff before the 11<sup>th</sup> day.<sup>594</sup> If abated, the abatement continues until 60 days after the date the written request is served, or some later date as agreed.<sup>595</sup> If the plea is controverted, a hearing on the plea in abatement “will take place as soon as practical considering the court’s docket.”<sup>596</sup> All

<sup>576</sup> See *Hearing on Tex. H.B. 1759 Before the Sen. Comm. on State Affairs* at 00:10:50, 2013 Leg., 83d Sess. (Tex. 2013), available at

<http://www.senate.state.tx.us/75r/senate/commit/c570/c570.htm> (testimony of Patti Smith on behalf of KVUE-TV, Belo Corporation, and the Texas Association of Broadcasters).

<sup>577</sup> See *id.* at 00:13:58.

<sup>578</sup> Sen. Amendments Section-by-Section Analysis, TEX. H.B. 1759, 83d Leg., R.S., No. 13.140.359, at 7 (Tex. 2013), available at

<http://www.capitol.state.tx.us/tlodocs/83R/senateamendana/pdf/HB01759A.pdf#navpanes=0>.

<sup>579</sup> TEX. CIV. PRAC. & REM. CODE § 73.055(a); “person” defined at TEX. CIV. PRAC. & REM. CODE § 73.053.

<sup>580</sup> TEX. CIV. PRAC. & REM. CODE § 73.055(b).

<sup>581</sup> TEX. CIV. PRAC. & REM. CODE § 73.055(d).

<sup>582</sup> TEX. CIV. PRAC. & REM. CODE § 73.056(a).

<sup>583</sup> TEX. CIV. PRAC. & REM. CODE § 73.057(a).

<sup>584</sup> TEX. CIV. PRAC. & REM. CODE § 73.057(b).

<sup>585</sup> TEX. CIV. PRAC. & REM. CODE § 73.057(c).

<sup>586</sup> TEX. CIV. PRAC. & REM. CODE § 73.057(d).

<sup>587</sup> TEX. CIV. PRAC. & REM. CODE § 73.057(e).

<sup>588</sup> TEX. CIV. PRAC. & REM. CODE § 73.058(a).

<sup>589</sup> TEX. CIV. PRAC. & REM. CODE § 73.058(b).

<sup>590</sup> TEX. CIV. PRAC. & REM. CODE § 73.058(d).

<sup>591</sup> TEX. CIV. PRAC. & REM. CODE § 73.061(a,b).

<sup>592</sup> TEX. BUS. & COM. CODE § 17.01 *et seq.*

<sup>593</sup> TEX. CIV. PRAC. & REM. CODE § 73.062(a).

<sup>594</sup> TEX. CIV. PRAC. & REM. CODE § 73.062(b).

<sup>595</sup> TEX. CIV. PRAC. & REM. CODE § 73.062(c).

<sup>596</sup> TEX. CIV. PRAC. & REM. CODE § 73.062(c).

statutory and judicial deadlines under the Rules of Procedure relating to an abated suit are stayed during the pendency of the abatement.<sup>597</sup>

If more than a year has passed, then the remedy is dismissal, rather than abatement.<sup>598</sup>

### **C. Limitations of Damages.**

In order to be able to recover exemplary damages, the plaintiff must make the demand for retraction within 90 days of receiving knowledge of the offending publication.<sup>599</sup> If the plaintiff fails to disclose the alleged falsity, the plaintiff cannot recover exemplary damages unless the publication was made with actual malice.<sup>600</sup>

Exemplary damages are not recoverable if the retraction is sufficient and timely, unless the publication was made with actual malice.<sup>601</sup>

The statute does not make provision for any limitation of actual damages.

### **D. Harmonizing (or Conflicting) With Texas Citizens Participation Act.**

It is unclear whether the abatement provided for in Section 73.062 applies to motions to dismiss under the TCPA. It is more than conceivable that a Chapter 27 motion to dismiss that must be brought within 60 days of service of a defamation suit will conflict with a plea in abatement brought within 30 days of filing an answer, since both statutes address the same types of causes of action. There are no provisions in either statute that address the other. There are no provisions in the TCPA that allow for an extension of any deadlines in the event that the defendant also avails itself of the abatement procedure under TEX. CIV. PRAC. & REM. CODE § 73.062. It is arguable that Section 73.062(d)'s statement that "all statutory and judicial deadlines under the Texas Rules of Civil Procedure relating to a suit abated ..." does not apply to motions to dismiss brought under Chapter 27.

A defendant who is sued for a reputational tort may have to face a choice about whether to abate the action or file a motion to dismiss and waive the benefits of Chapter 73 abatement.

However, a defendant in a defamation suit who has received no TDMA pre-suit demand may argue, as an affirmative defense, that the plaintiff is precluded from recovering any exemplary damages.

As usual, there are sufficient issues and inconsistencies in the new legislation affecting reputation injury suits to keep litigators busy for quite some time.

---

<sup>597</sup> TEX. CIV. PRAC. & REM. CODE § 73.062(d).

<sup>598</sup> *Zoanni v. Hogan*, 555 S.W.3d 321, at \*\*326-28, 2018 WL 34688863, at \*5 (Tex. App. – Houston [1st Dist.] July 19, 2018, pet. filed 10/2/18).

<sup>599</sup> TEX. CIV. PRAC. & REM. CODE § 73.055(c).

<sup>600</sup> TEX. CIV. PRAC. & REM. CODE § 73.056(b).

<sup>601</sup> TEX. CIV. PRAC. & REM. CODE § 73.059.



# **Addendum A - H.B. 2730**



By: Leach, Price, Moody, Burrows, Meyer

H.B. No. 2730

Substitute the following for H.B. No. 2730:

By: Meyer

C.S.H.B. No. 2730

A BILL TO BE ENTITLED

AN ACT

1 relating to civil actions involving the exercise of certain  
2 constitutional rights.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

4 SECTION 1. Sections 27.001(2), (6), and (7), Civil Practice  
5 and Remedies Code, are amended to read as follows:

6 (2) "Exercise of the right of association" means to ~~to~~  
7 ~~communication between individuals who~~ join together to  
8 collectively express, promote, pursue, or defend common interests  
9 relating to a governmental proceeding or a matter of public  
10 concern.

11 (6) "Legal action" means a lawsuit, cause of action,  
12 petition, complaint, cross-claim, or counterclaim or any other  
13 judicial pleading or filing that requests legal, declaratory, or  
14 equitable relief. The term does not include:

15 (A) a procedural action taken or motion made in  
16 an action that does not amend or add a claim for legal, equitable,  
17 or declaratory relief;

18 (B) alternative dispute resolution proceedings;  
19 or

20 (C) post-judgment enforcement actions.

21 (7) "Matter of public concern" means a statement or  
22 activity regarding:

23 (A) a public official, public figure, or other  
24

C.S.H.B. No. 2730

1 person who has drawn substantial public attention due to the  
 2 person's official acts, fame, notoriety, or celebrity;  
 3 (B) a matter of political, social, or other  
 4 interest to the community; or  
 5 (C) a subject of concern to the public [~~includes~~  
 6 ~~an issue related to:~~  
 7 ~~[(A) health or safety,~~  
 8 ~~[(B) environmental, economic, or community~~  
 9 ~~well-being,~~  
 10 ~~[(C) the government,~~  
 11 ~~[(D) a public official or public figure, or~~  
 12 ~~[(E) a good, product, or service in the~~  
 13 ~~marketplace].~~

14 SECTION 2. Section 27.003, Civil Practice and Remedies  
 15 Code, is amended by amending Subsections (a) and (b) and adding  
 16 Subsections (d) and (e) to read as follows:

17 (a) If a legal action is based on~~[, relates to,]~~ or is in  
 18 response to a party's exercise of the right of free speech, right to  
 19 petition, or right of association or arises from any act of that  
 20 party in furtherance of the party's communication or conduct  
 21 described by Section 27.010(b), that party may file a motion to  
 22 dismiss the legal action. A party under this section does not  
 23 include a government entity, agency, or an official or employee  
 24 acting in an official capacity.

25 (b) A motion to dismiss a legal action under this section  
 26 must be filed not later than the 60th day after the date of service  
 27 of the legal action. The parties, upon mutual agreement, may



C.S.H.B. No. 2730

1 extend the time to file a motion under this section or the court may  
2 extend the time to file a motion under this section on a showing of  
3 good cause.

4 (d) The moving party shall provide written notice of the  
5 date and time of the hearing under Section 27.004 not later than 21  
6 days before the date of the hearing unless otherwise provided by  
7 agreement of the parties or an order of the court.

8 (e) A party responding to the motion to dismiss shall file  
9 the response, if any, not later than seven days before the date of  
10 the hearing on the motion to dismiss unless otherwise provided by an  
11 agreement of the parties or an order of the court.

12 SECTION 3. Sections 27.005(a), (b), and (d), Civil Practice  
13 and Remedies Code, are amended to read as follows:

14 (a) The court must rule on a motion under Section 27.003 not  
15 later than the 30th day following the date ~~[of]~~ the hearing on the  
16 motion concludes.

17 (b) Except as provided by Subsection (c), on the motion of a  
18 party under Section 27.003, a court shall dismiss a legal action  
19 against the moving party if the moving party demonstrates ~~[shows by~~  
20 ~~a preponderance of the evidence]~~ that the legal action is based on ~~[~~  
21 ~~relates to,~~] or is in response to:

22 (1) the party's exercise of:

23 (A) ~~[(1)]~~ the right of free speech;

24 (B) ~~[(2)]~~ the right to petition; or

25 (C) ~~[(3)]~~ the right of association; or

26 (2) the act of a party described by Section 27.010(b).

27 (d) Notwithstanding the provisions of Subsection (c), the

C.S.H.B. No. 2730

1 court shall dismiss a legal action against the moving party if the  
2 moving party establishes an affirmative defense or other grounds on  
3 which the moving party is entitled to judgment as a matter of law  
4 ~~[by a preponderance of the evidence each essential element of a~~  
5 ~~valid defense to the nonmovant's claim].~~

6 SECTION 4. Section 27.006(a), Civil Practice and Remedies  
7 Code, is amended to read as follows:

8 (a) In determining whether a legal action is subject to  
9 ~~[should be dismissed under]~~ this chapter, the court shall consider  
10 the pleadings, evidence a court could consider under Rule 166a,  
11 Texas Rules of Civil Procedure, and supporting and opposing  
12 affidavits stating the facts on which the liability or defense is  
13 based.

14 SECTION 5. Section 27.007(a), Civil Practice and Remedies  
15 Code, is amended to read as follows:

16 (a) If the court awards sanctions under Section 27.009(b)  
17 ~~[At the request of a party making a motion under Section 27.003],~~  
18 the court shall issue findings regarding whether the legal action  
19 was brought to deter or prevent the moving party from exercising  
20 constitutional rights and is brought for an improper purpose,  
21 including to harass or to cause unnecessary delay or to increase the  
22 cost of litigation.

23 SECTION 6. Chapter 27, Civil Practice and Remedies Code, is  
24 amended by adding Section 27.0075 to read as follows:

25 Sec. 27.0075. EFFECT OF RULING. Neither the court's ruling  
26 on the motion nor the fact that it made such a ruling shall be  
27 admissible in evidence at any later stage of the case, and no burden

C.S.H.B. No. 2730

1 of proof or degree of proof otherwise applicable shall be affected  
2 by the ruling.

3 SECTION 7. Section 27.009, Civil Practice and Remedies  
4 Code, is amended by amending Subsection (a) and adding Subsection  
5 (c) to read as follows:

6 (a) Except as provided by Subsection (c), if [If] the court  
7 orders dismissal of a legal action under this chapter, the court  
8 ~~[shall award to the moving party]:~~

9 (1) shall award to the moving party court costs and [r]  
10 reasonable attorney's fees~~[, and other expenses]~~ incurred in  
11 defending against the legal action ~~[as justice and equity may~~  
12 ~~require]~~; and

13 (2) may award to the moving party sanctions against  
14 the party who brought the legal action as the court determines  
15 sufficient to deter the party who brought the legal action from  
16 bringing similar actions described in this chapter.

17 (c) If the court orders dismissal of a compulsory  
18 counterclaim under this chapter, the court may award to the moving  
19 party reasonable attorney's fees incurred in defending against the  
20 counterclaim if the court finds that the counterclaim is frivolous  
21 or solely intended for delay.

22 SECTION 8. Section 27.010, Civil Practice and Remedies  
23 Code, is amended to read as follows:

24 Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply  
25 to:

26 (1) an enforcement action that is brought in the name  
27 of this state or a political subdivision of this state by the

C.S.H.B. No. 2730

1 attorney general, a district attorney, a criminal district  
2 attorney, or a county attorney;

3 (2) [–

4 [~~(b) This chapter does not apply to~~] a legal action brought  
5 against a person primarily engaged in the business of selling or  
6 leasing goods or services, if the statement or conduct arises out of  
7 the sale or lease of goods, services, or an insurance product,  
8 insurance services, or a commercial transaction in which the  
9 intended audience is an actual or potential buyer or customer;

10 (3) [–

11 [~~(c) This chapter does not apply to~~] a legal action seeking  
12 recovery for bodily injury, wrongful death, or survival or to  
13 statements made regarding that legal action;

14 (4) [–

15 [~~(d) This chapter does not apply to~~] a legal action brought  
16 under the Insurance Code or arising out of an insurance contract;

17 (5) a legal action arising from an officer-director,  
18 employee-employer, or independent contractor relationship that:

19 (A) seeks recovery for misappropriation of trade  
20 secrets or corporate opportunities; or

21 (B) seeks to enforce a non-disparagement  
22 agreement or a covenant not to compete;

23 (6) a legal action filed under Title 1, 2, 4, or 5,  
24 Family Code, or an application for a protective order under Chapter  
25 7A, Code of Criminal Procedure;

26 (7) a legal action brought under Chapter 17, Business  
27 & Commerce Code, other than an action governed by Section 17.49(a)

C.S.H.B. No. 2730

1 of that chapter;

2 (8) a legal action in which a moving party raises a  
3 defense pursuant to Section 160.010, Occupations Code, Section  
4 161.033, Health and Safety Code, or the Health Care Quality  
5 Improvement Act of 1986 (42 U.S.C. 11101 et seq.);

6 (9) an eviction suit brought under Chapter 24,  
7 Property Code;

8 (10) a disciplinary action brought under Chapter 81,  
9 Government Code, or the Texas Rules of Disciplinary Procedure;

10 (11) a legal action brought under Chapter 554,  
11 Government Code; or

12 (12) a legal action based on a common law fraud claim.

13 (b) Notwithstanding Subsections (a)(2), (7), and (12), this  
14 chapter applies to:

15 (1) a legal action against a person arising from any  
16 act of that person, whether public or private, related to the  
17 gathering, receiving, posting, or processing of information for  
18 communication to the public, whether or not the information is  
19 actually communicated to the public, for the creation,  
20 dissemination, exhibition, advertisement, or other similar  
21 promotion of a dramatic, literary, musical, political,  
22 journalistic, or otherwise artistic work, including audio-visual  
23 work regardless of the means of distribution, a motion picture, a  
24 television or radio program, or an article published in a  
25 newspaper, website, magazine, or other platform, no matter the  
26 method or extent of distribution; and

27 (2) a legal action against a person related to the

C.S.H.B. No. 2730

1 communication, gathering, receiving, posting, or processing of  
2 consumer opinions or commentary, evaluations of consumer  
3 complaints, or reviews or ratings of businesses.

4 (c) This chapter applies to a legal action against a victim  
5 or alleged victim of family violence or dating violence as defined  
6 in Chapter 71, Family Code, or an offense under Chapter 20, 20A, 21,  
7 or 22, Penal Code, based on or in response to a public or private  
8 communication.

9 SECTION 9. If any provision of this Act or its application  
10 to any person or circumstance is held invalid, the invalidity does  
11 not affect other provisions or applications of this Act that can be  
12 given effect without the invalid provision or application, and to  
13 this end the provisions of this Act are declared to be severable.

14 SECTION 10. Chapter 27, Civil Practice and Remedies Code,  
15 as amended by this Act, applies only to an action filed on or after  
16 the effective date of this Act. An action filed before the  
17 effective date of this Act is governed by the law in effect  
18 immediately before that date, and that law is continued in effect  
19 for that purpose.

20 SECTION 11. This Act takes effect September 1, 2019.