THE TEXAS ANTI-SLAPP LAW AND THE TEXAS DEFAMATION MITIGATION ACT: SHUTTING THE DOOR ON CLAIMS WITH COMMUNICATIONS

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I. INTRODUCTION.

On June 17, 2011, Texas Governor Rick Perry affixed his neat signature to the new Texas anti-SLAPP[1] law, entitled the Texas Citizens Participation Act (the "TCPA"), and in so doing Texas joined 28 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.[2] As applied so far, the TCPA is arguably the broadest anti-SLAPP law in the country.

Over the last five years the TCPA has launched a new motions practice, seemingly clogging the dockets of trial and appellate courts with expensive, complicated, and time-consuming litigation. The TCPA introduces what one judge called a "draconian" motion to dismiss that places a heavy burden on the aggrieved plaintiff to prove that its suit is not frivolous at the inception of the litigation without the benefit of any meaningful discovery.[3] The Act does not clearly 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. The TCPA has been applied to a very broad array of claims that do not resemble a SLAPP case. In fact, very few of the cases currently making their way through the appellate courts could properly be characterized as a SLAPP case. So long as a defendant in a reputational or other business torts suit can characterize the suit as even remotely "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.[4]

This paper is meant to serve as a guide through the history of the TCPA, an outline of its provisions and application, and a resource for tactical and strategic considerations in its application and use, with many problems identified and discussed.

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

[1] "Strategic Lawsuits Against Public Participation."

[2] *See* TEX. CIV. PRAC. & REM. CODE § 27.001, *et seq.* (2011). The 28 other states, in addition to the District of Columbia, are Arizona, Arkansas, California, Colorado, 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.

[3] 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).

[4] TEX. CIV. PRAC. & REM. CODE § 27.003 & 27.005.

critics into silence."[5] 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."[6] According to some views, the typical SLAPP plaintiff "does not seek victory on the merits, but rather victory by attrition."[7] 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."[8] The goal of a SLAPP suit is to "stop citizens from exercising their political rights or to punish them for having done so."[9] 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 defendant with 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."[10] The developer tale is a frequently cited example of a SLAPP suit.[11]

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,

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[5] 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).*

[6] HAW. REV. STAT. § 634F-1 (2011).

[7] Sobczak, supra, at 561.

[8] *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).*

[9] *Id., citing* George W. Pring, *SLAPP: Strategic Lawsuits Against Public Participation, 7 PACE ENV'L. L. REV. 3, 5-6 (1998).*

[10] 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).*

[11] *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.*

Chapter 27 will provide a 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 to protect business and personal reputations, remains to be seen as an increasing number 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."[12]

Yet the Legislature did not discuss the applicability of existing anti-frivolous lawsuit rules and statutes,[13] 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 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.[14] Cases

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[12] House Comm. On Judiciary and Civ. Jurisprudence, *Bill Analysis*, Tex. HB 2973, 82nd Leg., R.S. (2011).

[13] *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 [14th Dist.] 2007, no pet.). Rule 13 permits the trial court to order the offending party to pay fees, expenses, and discouragement sanctions. *See also* TEX. CIV. PRAC. & REM. CODE § 9.001, *et seq.*, 10.001 *et seq.*

[14] 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

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.[15]

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,[16] the Legislature included a brief statement of 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.[17]

Since Chapter 27 is entitled "Actions Involving the Exercise of Certain Constitutional Rights," and the Legislature directed that the chapter be "construed liberally *to effectuate its purpose and intent fully,"*[18], all courts interpreting the statute must do so in service of the two stated purposes of the statute, restated and separated 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."[19]

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

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rules in conflict with the statute. TEX. CIV. PRAC. & REM. CODE § 10.006.

[15] TEX. CIV. PRAC. & REM. CODE § 9.002(a)(2).

[16] The Chapter is entitled: "ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS."

[17] *Ramsey v. Lynch*, No. 10-12-00198-CV, 2013 Tex. App. LEXIS 5554 *4 (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 [1st Dist.] 2013, pet. denied); *San Jacinto Title Services v. Kingsley Properties, LP*, 452 S.W.3d 343, 348 (Tex. App. – Corpus Christi – Edinburg April 25, 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 [14th 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*, No. 14-12-00896-CV, 2013 Tex. App. LEXIS 1898 *2 (Tex. App. – Houston [14th Dist.] January 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).

[18] TEX. CIV. PRAC. & REM. CODE § 27.011(b) (emphasis added)

[19] Tex. Civ. Prac. & Rem. Code § 27.002.

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."[20]

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. 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. A Solution in Search of a Problem: Underlying Purpose is the Protection of Media Defendants.

It still appears that the statute is 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."[21] 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."[22] 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,

[20] *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015)(emphasis added).

[21] House Comm. On Judiciary and Civ. Jurisprudence, *Bill Analysis,* Tex. HB 2973, 82nd Leg., R.S. (2011).

[22] *Id.*

[the TCPA] would allow frivolous lawsuits to be dismissed at the outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system"[23]

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")[24], represented by lawyer Laura Prather,[25] in passing the legislation. The FOIFT receives its funding principally from state and national newspaper publishers, along with other media interests.[26] Media organizations, including FOIFT, were the principal proponents of both the TCPA[27] 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.[28] 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."[29] She also states that "[t]he bill is designed to deter frivolous lawsuits directed at newsrooms and media personnel."[30]

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.[31]

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

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[23] *Id.*

[24] *See http://www.foift.org/.*

[25] Ms. Prather was with Sedgwick, and in 2012 joined the Austin office of Haynes & Boone as a partner.

[26] *See http://www.foift.org/?page_id=796* for a listing of "sponsors."

[27] *See http://www.foift.org/?page_id=1923* for FOIFT's discussion of the passage of the Act.

[28] 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.

[29] See Ms. Prather's bio at *http://haynesandboone.com/Laura-Prather/.*

[30] *Id.*

[31] *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*, 2016 Tex. LEXIS 499 (Tex., June 17, 2016)); *Shipp v. Malouf*, 439 S.W.3d 432 (Tex. App. – Dallas [5th Dist.], Jun. 24, 2014, pet. denied).

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.[32] 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."[33] 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,[34] which heard comments from several witnesses, mostly associated with the media.[35] 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." [36] 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[37] and discussed for three minutes, with no discussion beyond a basic description of the bill.[38] 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,[39] and granting to the media interlocutory appeals in the event that a media defendant's motion for summary judgment is denied.[40]

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[32] H. Research Org., Texas House of Representatives, *Bill Analysis*, Tex. H.B. 2973 (May 2, 2011).

[33] *Id.*

[34] 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.

[35] 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, 82nd Leg., R.S. 10-17 (March 28, 2011). Sixteen others registered but did not testify.

[36] The Texas Citizens Participation Act; Hearings on Tex. H.B. 2973 Before the House Comm. on Judiciary & Civ. Jurisprudence, 82nd Leg., R.S. 10-17 (March 28, 2011)(Rep. Todd Hunter).

[37] Robert Duncan (R) Lubbock, Chair.

[38] Hearing on Tex. CSHB 2973 Before the Senate Committee on State Affairs, 82nd Leg., R.S. (May 12, 2011).

[39] *See* TEX. CIV. PRAC. & REM. CODE § 73.001 *et seq.*

[40] 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

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."[41]

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,[42] which expanded the scope of interlocutory appeals from a denial of a motion to dismiss under TCPRC 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 1st, 2nd, 13th and 14th 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 TCPRC 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.[43]

H.B. 2935 was referred to the Judiciary & Civil Jurisprudence Committee, which heard testimony in favor of the bill on April 1, 2013.[44] Representative Todd Hunter introduced the bill, and then Laura Prather (on 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

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]."

[41] *Id.*

[42] Tex. H.B. 2935, 8d Leg., R.S. (2013).

[43] TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12).

[44] 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 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.

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." [45]

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."[46]

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."[47]

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."[48] 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.[49]

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,

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[45] *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).

[46] *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).

[47] *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).

[48] 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*.

[49] *Id.*

allowed the court to extend the hearing date to conduct discovery, but for no more than 120 days after service of the motion.[50]

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.[51] 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.

III. APPLICATION OF THE TCPA.

A. What is a "legal action" under the TCPA, and can even a motion to dismiss be subject to a motion to dismiss?

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***…"[52]

The law applies only to cases filed on or after June 17, 2011, the effective date of the Act, and does not apply retroactively to amended pleadings in legal actions filed before the effective date.[53] An exception to this rule is if new parties or new claims that are based on facts and events separate and apart from the pre-effective date claims are added after the effective date.[54] An amended pleading that raises a 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.[55]

Each of these highlighted concepts was defined by the Legislature very broadly. 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 or equitable relief."[56] 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…."[57] By definition, since a motion to dismiss may be filed in response to a counterclaim, it is very conceivable that the mere filing of the

[50] TEX. CIV. PRAC. & REM. CODE § 27.004(b,c).
[51] TEX. CIV. PRAC. & REM. CODE § 27.005(d).
[52] TEX. CIV. PRAC. & REM. CODE § 27.003(a)(emphasis added).
[53] *San Jacinto Title Services*, 452 S.W.3d at 350-51.
[54] *James v. Calkins*, 446 S.W.3d 135, 145 (Tex. App. – Houston [1st Dist.] 2014, pet filed).
[55] *See Schimmel v. McGregor*, 438 S.W.3d 847, 856 (Tex. App. - Houston [1st Dist.] 2014, pet. denied).
[56] TEX. CIV. PRAC. & REM. CODE § 27.001(6).
[57] TEX. CIV. PRAC. & REM. CODE § 27.001(4)(a)(ii).

counterclaim could arguably lead to a motion to dismiss.

The catch-all phrase "any other judicial pleading or filing that requests legal or equitable relief" concludes the statutory definition of "legal action" to mean "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim *or any other judicial pleading or filing that requests legal or equitable relief*."[58] (emphasis added). Some have argued that "legal action" means the same thing as "claim," which is an incorrect analysis, because the Texas Supreme Court has already defined the relevant terms, and expressly distinguishes "action" from "claim."

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."[59] "The term 'action' is generally synonymous with 'suit,' which is a demand of one's rights in court."[60] "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.'"[61] "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."[62] "Historically, 'action' referred to a judicial proceeding in a court of law, while 'suit' referred to a proceeding in a court of equity."[63]

"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.'"[64] This is "the generally accepted meaning of the term 'cause of action.'"[65] "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.'" [66]

"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."[67] 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.'"[68]

Against this backdrop, the First Court of Appeals in Houston has already determined that a TCPA motion to dismiss is a "claim for affirmative relief" that survives a nonsuit.[69] 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." [70]

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[58] TEX. CIV. PRAC. & REM. CODE § 27.001(6)

[59] *Jaster v. Comet II Construction,* 438 S.W.3d 556, 564 (Tex. 2014) (citations omitted).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] "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.

[67] *Id.* (citations omitted).

[68] *Id.* (citations omitted).

[69] *See Calkins,* 446 S.W.3d at 143-44.

[70] Tex. Civ. Prac. & Rem. Code § 27.001(6). *See also Serafine v. Blunt,* 466 S.W.3d 352, 370 (Tex. App.—Austin 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

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."[71] "[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."[72] "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."[73] Courts are to "enforce the statute 'as written' and 'refrain from rewriting text that lawmakers chose.'"[74] Courts "endeavor to read the statute contextually, giving effect to every word, clause, and sentence."[75]

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."[76]

When presented with an appeal of a TCPA motion to dismiss, the First Court of Appeals recently seemed to accept that a responsive Chapter 27 motion to dismiss a Chapter 27 motion to dismiss is permitted.[77]

Please also note that "legal action" has been construed to include Rule 202 proceedings, when properly invoked through a motion to dismiss brought under the TCPA.[78]

B. Is there a nexus required between the "legal action" and the rights protected under the TCPA?

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,[79] but instead uses the broader terms "based on, relates to, or is in response to," which has so far supported the argument for a more expansive reading of the

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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 (Pemberton, J. concurring), referring to *Hotchkin v. Bucy*, No. 02-13-00173-CV, 2014 Tex. App. LEXIS 13568 (Tex. App.—Fort Worth 2014, no pet.).

[71] *Fitzgerald v. Advanced Spine Fixation Systems*, 996 S.W.2d 864, 865 (Tex. 1999).

[72] *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015).

[73] *Id.*

[74] *Jaster*, 438 S.W.3d at 562.

[75] *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).

[76] BLACK'S LAW DICTIONARY (9TH ED).

[77] *Paulsen v. Yarrel*, 455 S.W.3d 192, 193-95 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

[78] *See Int'l Ass'n of Drilling Contrs. V. Orion Drilling Co.*, No. 01-16-00187-CV, 2016 Tex. App. LEXIS 12892*17 (Tex. App. – Houston (1st Dist.) Dec. 6, 2016, pet. filed); *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).

[79] CA. CIV. PROC. CODE § 425.16(B)(1).

applicability of the statute.[80] However, if the statute is read in service of its dual stated purposes, it becomes clear that there is a nexus requirement.

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."[81] 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."[82]

For too long the relationship between a "legal action" and the purportedly compromised "First Amendment"[83] 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.[84] The ordinary meaning of "is based on" would mean that the right threatened would be the "main ingredient" or "fundamental part" of a suit.[85] If "relates to"[86] 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 210 Texas cases reported to date, only one, the *Kinney v. BCG* case,[87] 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

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

[81] *Cheniere Energy*, 449 S.W.3d at 216-17.

[82] *Cheniere Energy*, 449 S.W.3d at 216.

[83] 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.

[84] *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').

[85] *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 DICTIONARY 180 (10TH ED. 2014) (defining 'base' (v.) as "to use (something) as the thing from which something else is developed')."

[86] "Relate" (v.) means "to have connection, relation, or reference." *The American Heritage Dictionary of the English Language* 1472 (2000).

[87] *Kinney v. BCG Attorney Search*, No. 03-12-00579-CV, 2014 Tex. App. LEXIS 3998 (Tex. App. – Austin 2014, pet. denied).

purpose of the TCPA.[88] Reviewing causal connection language identical to that found in the TCPA, the Illinois Supreme Court correctly 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.[89] 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."[90] 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.'"[91] 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 the courts to seek a remedy for damage to reputation."[92]

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.[93] This trend in construction could give new life and meaning to Section 27.007, which provides for a request by a movant for 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."[94] Without a closer examination of the purpose of the subject legal action, there is no reason for any movant to ask for such findings. But if the movant must prove by a preponderance

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[88] 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*, No. 05-15-01162-CV, 2016 Tex. App. LEXIS 6840 *10 (Tex. App. – Dallas June 28, 2016, pet. filed). "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.*

[89] *Sandholm*, 962 N.E.2d at 430.

[90] *Id.*

[91] *Sandholm*, 962 N.E.2d at 431 (citation omitted).

[92] *Id.*

[93] *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).

[94] TEX. CIV. PRAC. & REM. CODE § 27.007(a).

of the evidence that the legal action was *solely* "based on, relates to, 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.[95]

Texas should also follow the growing trend to construe its anti-SLAPP statute in a way to allow it to be applied as intended. 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.

C. What speech rights are protected?

"'Exercise of the right of free speech' means a communication made in connection with a matter of public concern."[96] "'Communication' includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic."[97] The definition in the statute does 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."[98] 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.[99]

Additionally, the broad definitions of the communication rights in the statute 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.[100]

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[95] TEX. CIV. PRAC. & REM. CODE § 27.008(a); TEX. CIV. PRAC. & REM. CODE § 51.014(A)(12).

[96] TEX. CIV. PRAC. & REM. CODE § 27.001(3).

[97] TEX. CIV. PRAC. & REM. CODE § 27.001(1).

[98] *D Magazine Partners, L.P. v. Rosenthal*, 2017 Tex. LEXIS 296 *6 (Tex. March 17, 2017).

[99] *Id.*

[100] 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 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.

The Austin Court of Appeals recently 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.[101] The opinion, by Justice Bob Pemberton, noted that a plaintiff could offer proof of unprotected speech in his prima facie case. 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."[102] 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.

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.

[101] *Elite Auto Body*, 2017 Tex. App. LEXIS 4108 at *19-20.

[102] *Id.*

D. Public or Private? Does it matter where the speech is communicated?

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.[103] 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.

Of importance to other cases as well in which courts and litigants seek to divine meaning from this law, the Court began its opinion by emphasizing that "[a] court 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."[104] 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."[105]

Finding "that the terms 'citizen' and 'participation' contemplate a larger public purpose,"[106] one panel of the First District Court of Appeals in Houston held that the tortious interference suit did not fall within the definition of the exercise of a right of association, expressing the concern that "[o]therwise, 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

[103] *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508-09 (Tex. 2015).

[104] *Id.*

[105] *Id.*

[106] *Id.*

private suits implicating only private issues."[107]

U.S. District Judge Sam Sparks held that communications to prospective employers in response to reference checks were private communications that were not protected by the statute.[108] Many other courts do not closely scrutinize the conduct or communications in light of the "private communications" authority, and generally accept that almost any speech or conduct made the basis of the suit is covered.

We anticipate that courts will more carefully examine whether a movant meets her preponderance of the evidence burden to show that the complained-of activity falls within the speech, petition, and assembly rights protected by the statute.

E. What is a "matter of public concern?"

A "matter of public concern" is very broad and 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).

This provision does not include normal definitional terms such as "means" or "is defined as," but uses "includes" to identify subject matters that could be matters of public concern.[109] One of the significant issues at the moment is whether the Legislature fully *defined* the term "matter of public concern" to the exclusion of the longstanding analysis used in other cases, as discussed below.

What *does not* constitute a "matter of public concern" will be open to debate and litigation, undoubtedly, for some time to come. Judge Sparks also rejected a contention that the existence of an employers' qualified privilege that benefits the "public welfare" does not make all employer statements about employees "matters of public concern."[110] Another panel of the First District Court of Appeals, though, found that none of the "statutory definitions includes a requirement that the communications be made to a particular individual or entity, such as a governmental body, to constitute protected conduct."[111]

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,

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[107] *Id.*, citing *Pickens v. Cordia*, 433 S.W.3d 179, 184-85 (Tex. App. – Dallas 2014, no pet.) (holding that TCPA protection of "exercise of the right of free speech" did not apply to suit over content of blog, on which he made allegedly disparaging comments about his family members, because those communications were not matter of public concern.)

[108] *Rivers v. Johnson Custodial Home, Inc.*, No. A-14-CA-484-SS, 2014 U.S. Dist. LEXIS 117759, at *4-6 (W.D. Tex. August 22, 2014). (Judge Sparks quoted at length from *Whisenhunt's* analysis in his opinion, which denied a Chapter 27 motion to dismiss.)

[109] "Includes" and "including" generally "are terms of enlargement and not of imitation or exclusive enumeration." *See* Tex. Gov't Code §311.005(13); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, No. 03-15-00064-CV, 2017 Tex. App. LEXIS *8, n.23 (Tex. App. – Austin May 5, 2017, no pet. h.).

[110] *Rivers*, 2014 U.S. Dist. LEXIS 117759, at *5-6.

[111] *Schimmel*, 438 S.W.3d at 858 (the court did not discuss *Whisenhunt* or review whether the communications should be considered private).

courts have found a mayor's performance as a public official,[112] operation of an assisted living facility,[113] gas leaks from fracking,[114] and a lawyer's legal services, to fall under the rubric of a "good, product, or service in the marketplace"[115] and constitute a "matter of public concern."

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. Whether a communication involves a "matter of public concern" is a question of law.[116] "Deciding whether speech is of public or private concern requires us to examine the 'content, form, and context' of that speech, as revealed by the whole record."[117] "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."[118] In considering whether the article addressed a matter of public concern, the court must examine "all the circumstances of the case."[119]

Since the U.S. Supreme Court in *Snyder* adopted the *Connick* court's test 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.*"[120] 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, and his termination was not retaliatory.[121] 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

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[112] *Ramsey*, 2013 Tex. App. LEXIS 5554 *10.

[113] *Crazy Hotel*, 416 S.W.3d at 81.

[114] *In re Lipsky*, 411 S.W.3d at 537.

[115] *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.).

[116] *Klentzman v. Brady*, 456 S.W.3d 239, 257 (Tex. App. – Houston [1st Dist.] 2014, pet. granted), citing *Rankin v. McPherson*, 483 U.S. 378, 385-86 (1987).

[117] *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)(adopting test from *Connick v. Myers*, 461 U.S. 138 (1983)); *Klentzman*, 456 S.W.3d at 258.

[118] *Snyder*, 562 U.S. at 453; *Klentzman*, 456 S.W.3d at 258.

[119] *Klentzman*, 456 S.W.3d at 257.

[120] *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) (emphasis added).

[121] *Id.* at 1363.

to the public by virtue of the manager's status as an arm of the government.'"[122] "Speech is not on a matter of public concern if it is made solely in furtherance of a personal employer-employee dispute."[123] "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."[124] "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."[125]

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.'"[126] "When an employee communicates matters in the 'normal course of his duties' these matters are communicated as an employee and are not protected speech."[127] 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."[128] 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.'"[129]

Texas courts have not yet adopted a *Connick* analysis in determining what constitutes a matter of public concern. 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 *Connick* analysis offers a process by which a court can determine whether the subject speech properly falls within protected subject matters.

F. What are the rights of petition and assembly that are protected?

Unlike the definitions of speech, the statute does not explicitly limit exercise of the right of petition or association 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

[122] *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*)).
[123] *Id.* at 187.
[124] *Id.* at 188.
[125] *Fouts v. Little Cypress-Mauriceville I.S.D.*, 2004 Tex. App. LEXIS 9471, at *3 (Tex. App. – Beaumont, 2004, pet. denied).
[126] *Nero v. Hospital Auth.*, 86 F. Supp. 2d 1214, 1224 (S.D. Ga. 1998)(relying on post-*Connick* Eleventh Circuit cases).
[127] *Nero*, 86 F. Supp. at 1225, quoting *Morris v. Crow*, 142 F.3d 1379, 1382 (11th Cir. 1998).
[128] *Nero*, 86 F. Supp. at 1225.
[129] *Id.* at 1225-26, quoting *Connick*, 461 U.S. at 149.[129]

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 communication protected by the Texas or federal constitutions.[130]

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.[131] Reporting a possible crime has very recently been found to qualify as the reporting party's exercise of the right to petition.[132]

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.[133] 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 tortuously 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.[134] 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."[135] 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."[136]

The Tyler Court of Appeals recently held that the TCPA applies even to suits for false imprisonment, malicious prosecution,

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[130] TEX. CIV. PRAC. & REM. CODE § 27.001(4); *see also, Rio Grande H2O Guardian v. Robert Muller Family P'ship*, No. 04-13-00441-CV, 2014 Tex. App. LEXIS 915 (Tex. App. - San Antonio, Jan. 29, 2014, no pet.) (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).

[131] *Calkins*, 446 S.W.3d at 147.

[132] *Charalamboupoulos v. Grammer*, 2015 U.S. Dist. LEXIS 10507 (N.D. Tex. Jan. 29, 2015)(making an *Erie* guess).

[133] *Serafine v. Blunt*, 466 S.W.3d 352 (Tex. App.—Austin, June 26, 2015, no pet.).

[134] *Id.* at 364.

[135] *Id.* at 376-77.

[136] *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.

and negligence.[137] In *Murphy USA v. Rose 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.[138] 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."[139] 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.[140]

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, 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.[141]

"Exercise of the right of association" means "a communication between individuals who join together to collectively express, promoted, pursue, or defendant common interests."[142] There is no requirement that the exercise of associational rights be about "matters of public concern" as in speech cases.

Communications between members of the Combined Law Enforcement Associations of Texas ("CLEAT") concerning a former CLEAT staffer's claims were found to fall within the right of association.[143] 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 *CLEAT*, the Austin Court of Appeals held that this definition is not unconstitutionally vague.[144] 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.*[145] Notwithstanding the language of the statute, however, it is well-established in the common law that a qualified privilege

[137] *Murphy USA, Inc. v. Rose*, No. 12-15-00197-CV, 2016 Tex. App. LEXIS 10829 (Tex. App. - Tyler Oct. 5, 2016, no pet. h.)(mem. op.).
[138] *Id.* at 2016 Tex. App. LEXIS 10829 *2.
[139] *Id.* at *8. *See also Ford v. Bland*, No. 14-15-00828-CV, 2016 Tex. App. LEXIS 13285 (Tex. App. – Houston [14th Dist.] Dec. 15, 2016, no pet. h.) (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).
[140] *Id.* at *19.
[141] *Long Canyon Phase II & III HOA v. Cashion*, No. 03-15-00498-CV, 2017 Tex. App. LEXIS 1818 * 20 (Tex. App. – Austin March 3, 2017, no pet. h.).
[142] TEX. CIV. PRAC. & REM. CODE § 27.001(2).
[143] *Combined Law Enforcement Associations of Texas. v. Sheffield*, No. 03-13-00105-CV, 2014 Tex. App. LEXIS 1098 *13-15 (Tex. App. – Austin Jan. 31, 2014, pet. denied).
[144] *Id. a*t *12.
[145] *Cheniere*, 449 S.W.3d at 217-19.

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."[146] 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.

In addition to the few cases in which courts have held that the movant failed to produce sufficient evidence to show that the plaintiff's claim arose from the exercise of this right,[147] a recent case from the Texas Supreme Court via the Dallas Court of Appeals struggled with taking the right of association to its logical extremes if applied simply as written.[148] 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's 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." 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."[149] 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.

We will be looking closely at subsequent cases to see if the court backs off its very strict construction, which is perhaps leading to absurd results.

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."[150]

G. Exceptions to the TCPA.

Perhaps recognizing the overbroad nature of the statutory definitions, the

[146] *Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 92 (Tex. App.—Dallas 1996, writ denied).

[147] *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.).

[148] *ExxonMobil Pipeline Co. v. Coleman*, ___ S.W.3d ___, 2017 Tex. LEXIS 215 *12-13 (Tex. – Feb. 24, 2017).

[149] *ExxonMobil*, 2017 Tex. LEXIS 215 * 11.

[150] *Serafine*, 466 S.W.3d at 377.

proponents provided three general categories of exemptions from the application of the statute, including government enforcement actions,[151] suits for bodily injury, wrongful death, or survival,[152] 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."[153] The party asserting the exemption bears the burden of proving its applicability.[154]

It is this last exception, the commercial speech exception, that has been occupying 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.[155]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?

The insurance industry, at least, has paid close attention to the commercial speech exception and sought clarification. In the last session, the Legislature added another exemption, namely "legal actions brought under the Insurance Code or arising out of an insurance contract."[156] 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.

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 last noted 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.

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

[151] TEX. CIV. PRAC. & REM. CODE § 27.010(a).

[152] TEX. CIV. PRAC. & REM. CODE § 27.010(c).

[153] TEX. CIV. PRAC. & REM. CODE § 27.010(b)(emphasis added).

[154] *Schimmel,* 438 S.W.3d at 855-56, citing *Crazy Hotel,* 416 S.W.3d at 89.

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

[156] 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.

which the BBB attempts to sell membership services.[157]

By contrast, a law firm was not successful in fending off allegations that the commercial speech exception applied to its advertisements.[158] Making an "*Erie* guess" the United States Court of Appeals for the Fifth Circuit held that the commercial speech exception 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).[159] The El Paso Court of Appeals recently 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.[160]

By contrast, 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.[161] 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.[162]

A fascinating, and sure to be controversial, case came from the Amarillo Court of Appeals in April, 2017.[163] The Amarillo Court of Appeals rejected the holding of *Newspaper Holdings* and later cases, and said that the plain language of Section 27.010(b) did not require the speech to be in an attempt to win business for the speaker to fall within the commercial speech exception.[164] The court said that "we cannot rewrite the statute to include elements or language the Texas Legislature excluded."[165] In the context of what the commercial speech exception should mean, the case is absurd and goes too far, but it illustrates the inherent problems of strict interpretation of the statute without consideration of its stated purposes.

H. Procedure.

1. A New Form of Threshold Dispositive Motion.

To be very clear, the TCPA's motion to dismiss is a procedure new to Texas civil jurisprudence. The TCPA does not appear to grant any substantive rights. It creates no cause of action, and the motion to dismiss is not a counterclaim. The TCPA simply creates a new procedure for summary dismissal of claims and suits based on matters outside the pleadings, plus setting aside long-standing rules by using the pleadings as evidence. As a dispositive

[157] *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 and Radio Advertising, LLC v. Better Bus. Bureau of Metro. Dallas, Inc.*, No. 05-11-01337-CV, 2013 Tex. App. LEXIS 7348 *5-6 (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).

[158] *Kool Smiles*, 745 F.3d at 748.

[159] *Id*. at 749.

[160] *Miller Weisbrod LLC v. Llamas-Soforo*, No. 08-12-00278-CV, 2014 Tex. App. LEXIS 12745 *22 (Tex. App. – El Paso Nov. 25, 2014, no pet.).

[161] *Pena v. Perel*, 417 S.W.3d 552 (Tex. App.—El Paso 2013, no pet.).

[162] *Id*.

[163] *Castleman v. Internet Money Ltd.*, No. 07-16-00320-CV, 2017 Tex. App. LEXIS 3496 *7-11 (Tex. App. – Amarillo April 19, 2017, no pet. h.).

[164] *Id.*

[165] *Id.* At *10.

motion, it is very different from any motion for summary judgment or even a Federal Rule 12 motion to dismiss.

The only prerequisite for filing the motion is that the movant claims that it is in response to a "legal action" that is based on or relates to the exercise of free speech, petition or association.[166] The defendant/movant need not wait to file a motion for summary judgment and need not conduct any discovery, or allow any discovery to be conducted, before filing. The motion to dismiss does not mirror or track federal prompt disposition motions under FED. R. CIV. P. 12. The motion is not required to be sworn, but it may be supported by affidavits, and, presumably, documents and publications.

Filing a motion to dismiss, and stating that such motion is being filed pursuant to the provisions of the TCPA, does not mean that the TCPA has been properly invoked. In one case, the court held that because the statements that were allegedly wrongful were not made by the party seeking the motion to dismiss under the TCPA, the TCPA did not apply and therefore the reviewing court did not have jurisdiction to hear the appeal of the motion to dismiss.[167] The dissent would have affirmed the trial court's ruling denying the motion to dismiss, on the basis that the statute's plain language confers jurisdiction on a reviewing court to consider an appeal from an interlocutory order that denies a motion to dismiss.[168]

2. Deadline to File the Motion.

The motion to dismiss must be filed within 60 days following the service (or voluntary appearance) of the legal action.[169] The time to file the motion to dismiss may be extended on a showing of good cause.[170] The length, or number, of extensions is not addressed in the statute.

3. Deadline for Hearing and Decision: "Set," "Rule," and Continuances.

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

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[166] TEX. CIV. PRAC. & REM. CODE § 27.003(a).

[167] A chemical company sued former employees and the spin-off chemical company they created for various trade secrets and misappropriation claims. The attorney for the chemical company communicated with a client of the spin-off company seeking an agreement not to do business with the spin-off on the basis that to do so would "be tantamount to participating in . . . misappropriation . . . ." The former employees and the spin-off entity filed defamation, business disparagement, and tortious interference claims against the vice president of the chemical company, who then filed a motion to dismiss under the TCPA on the grounds that the claims against him were based on the exercise of his rights to petition and of association. The court held that it lacked jurisdiction over the interlocutory appeal because the alleged wrongful communications were from the attorney on behalf of the chemical company, not from or on behalf of the vice president. As a result, no rights of the vice president could have been violated, and the TCPA did not apply. The court dismissed for lack of jurisdiction. *Jardin*, 431 S.W.3d at 774.

[168] The dissent noted that a movant is the "master of his motion" and the proper remedy is to affirm the dismissal, not to conclude a lack of jurisdiction to hear the appeal of the dismissal. *Id*. at 775.

[169] TEX. CIV. PRAC. & REM. CODE § 27.003(b); *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.

[170] 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.

agreement of the parties.[171] 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.[172]

The extensions are not to take the hearing further than 90 days after service of the dismissal motion, except where discovery is allowed.[173] The 2013 amendments also allow the trial court to 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.[174]

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.[175]

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? This scenario has been one way for trial courts to attempt to accommodate the strict deadlines while allowing some discovery. The 2013 amendments do not address these issues.

There is 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.[176]

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."[177]

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[171] TEX. CIV. PRAC. & REM. CODE § 27.004(a). This provision was 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).

[172] *Ramsey*, 2013 Tex. App. LEXIS 5554*12.

[173] TEX. CIV. PRAC. & REM. CODE § 27.004(a).

[174] TEX. CIV. PRAC. & REM. CODE § 27.004(b).

[175] TEX. CIV. PRAC. & REM. CODE § 27.004(c).

[176] *Crazy Hotel*, 416 S.W.3d at 79.

[177] *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 27 motions to dismiss the counterclaims and the trial court was unable to

The 2013 amendment that permits delay for good cause is a welcome change. Other than good cause and agreement, there is no provision to allow the trial court to allow the respondent additional time to respond, for whatever reason. There is also no provision that requires more than the standard default three days' notice of the hearing.[178] There is nothing in the statute to prevent the movant from filing the motion and setting it for hearing with minimum notice under Rule 21. The 21-day notice provision of TEX. R. CIV. P. 166-a does not apply. Even with summary judgment motions, trial courts have long been permitted to alter the hearing date "on leave of court," which does not necessarily mean good cause.[179] The TCPA does not include any provision to allow the non-movant to file a response, or even provide any time in which to file a response, contrary to Texas and federal rules of procedure. The TCPA does not even afford the non-movant the limited time to respond to a Rule 12 motion to dismiss in federal court, or extend the time to respond.[180]

Once the hearing is set, the court must *rule* on the motion not later than 30 days following the hearing.[181] 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.[182] 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.[183]

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.[184] This appears to be 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

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.*

[178] TEX. R. CIV. P. 21.

[179] *See* TEX. R. CIV. P. 166a(c).

[180] *See, e.g.*, FED. R. CIV. P. 12(b); Local Rule CV-7(d), United States District Court, Western District of Texas (establishing 11-day time for response); FED. R. CIV. P. 6(b) provides for extension of time for good cause, with few exceptions.

[181] TEX. CIV. PRAC. & REM. CODE § 27.005(a)(emphasis added).

[182] *Larrea*, 394 S.W.3d at 656.

[183] *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).

[184] TEX. CIV. PRAC. & REM. CODE § 27.003(c).

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.

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.[185] 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).[186]

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.[187] One recent case 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."[188] 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.[189]

The effective result of a discovery stay is to take reputational tort suits out of the mainstream of civil litigation. A discovery stay that leaves to the discretion of the trial court whether any discovery will occur arguably means that a reputational tort plaintiff, unlike all other plaintiffs, must

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[185] TEX. CIV. PRAC. & REM. CODE § 27.006(b).

[186] *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).

[187] 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 Tex. App. LEXIS 5554 *11; *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. 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."),

[188] *In re D.C.*, 2013 Tex. App. LEXIS 10006 at *3.

[189] *Id.*

have all evidence in admissible form on every element of every cause of action before filing suit. If so, this turns civil litigation on its head. The Texas Rules of Civil Procedure permit parties to make alternative claims for relief or defense,[190] 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."[191] 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. Why, then, have the reputational torts been singled out for such extraordinary treatment in the TCPA?

A plaintiff may argue that such denial of discovery, especially coupled with the expedited minimum notice dispositive motion, may very well violate the open courts provision of the Texas Constitution, as discussed below.

I. Standards and Burdens of Proof/Actions by Court.

1. What type of evidence may be considered?

"In determining whether a legal action should be dismissed under [the TCPA], the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."[192] The TCPA does not clearly indicate whether the hearing is evidentiary, or whether the trial court may consider live testimony or take up the motion by submission. Although the Act specifically refers to affidavits and pleadings that must be considered, the Legislature does not prohibit live testimony or documents offered at hearing. The statute is silent about the admission of live testimony and other evidence at the 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 may leave open an argument to a movant that a respondent is limited to affidavit testimony, although a plaintiff resisting the motion to dismiss may very well desire to bring live testimony at the hearing, because of the discovery limitations. One media defendant has argued that the hearing is non-evidentiary.[193]

Although pleadings are not usually considered as evidence, the TCPA not only authorizes, but expressly requires the trial court to consider the pleadings in a case. A prudent practitioner must now carefully weigh the merits of "notice pleadings" against pleading more specifically to defend against a TCPA motion to dismiss. The Texas Supreme Court recently addressed the issue of what constitute sufficiently specific pleadings in TCPA motions. The Court reminded us that, "under notice pleading, a plaintiff is not required to 'set out in his

[190] TEX. R. CIV. P. 48.

[191] TEX. R. CIV. P. 192.3(a).

[192] TEX. CIV. PRAC. & REM. CODE § 27.006(a).

[193] *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.").

pleadings the evidence upon which he relies to establish his asserted cause of action.'"[194] 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."[195] 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."[196]

In any cases in which the TCPA is invoked, we need to shed the "only notice pleadings are required" doxology of our training, and re-examine our pleadings for sufficient specificity. 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. The Texas Supreme Court has now provided us with a pleading blueprint for a successful resistance to a TCPA motion to dismiss, and practitioners should utilize all tools at their disposal.

At least one case discusses testimony and evidence introduced at the hearing without complaint that the hearing is non-evidentiary.[197] The hearing must be at least partially evidentiary, to the extent that the trial court will have to consider evidence on what constitutes "reasonable attorney's fees, and other expenses."[198] The statute makes no other provision for how the trial court is to determine such amounts, which may be contested, other than to be heard with the motion to dismiss. If the hearing is evidentiary on fees and costs, a record will still be necessary, so there is no logical reason why the court could not consider evidence in addition to the pleadings and affidavits on the merits of the motion. This has not been a significant issue on appeal lately, and the appeals are replete with transcripts of testimony in addition to affidavits and documents. There is no time limit for the hearing. Nor does the statute provide for any continuance of the hearing once it commences.

2. Burden of Proof on the Movant – Preponderance of the Evidence.

The standard for the defendant bringing the motion to dismiss is "preponderance of the evidence." The movant need only show by a preponderance of the evidence "that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association."[199] Whether the movant meets that burden has been reviewed de novo as an application of law to facts.[200]

Although litigants are very familiar with the "preponderance of the evidence" standard in civil cases, it appears that in the

[194] *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) ("*Lipsky II*").
[195] *Id.* at 591.
[196] *Id.*

[197] *See Ramsey*, 2013 Tex. App. LEXIS 5554*7.
[198] TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1).
[199] *Id.* § 27.005(b).
[200] *John Moore Services*, 441 S.W.3d at 353.

upside-down world of the TCPA, the "precise meaning of the phrase 'preponderance of the evidence' within the TCPA's procedural framework remains unclear, as do the standards by which appellate courts are to review these 'preponderance-of-the-evidence determinations by trial courts."[201]

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.

3. 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."[202] What does that mean? What must a respondent do to defeat a motion to dismiss?

i. "Clear and specific evidence" – a measure of quality of proof.

It is still not clear what the Legislature meant by "clear and specific evidence," as there is no such recognized standard under Texas law for any cause of action.[203] Fortunately the Texas Supreme Court finally weighed in to resolve disputes among the courts of appeals[204] and clarify that "clear and specific evidence" "does not impose an elevated evidentiary standard or

[201] *Elite Auto Body*, 2017 Tex. App. LEXIS 4108 *6.
[202] *Id.* § 27.005(c) (emphasis added).

[203] *Lipsky II*, 460 S.W.3d at 589. (Clear and specific evidence is not a recognized evidentiary standard.)
[204] 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 (11th ed. 2003), and BLACK'S LAW DICTIONARY 287 (9th ed. 2009)("unambiguous," sure," or "free from doubt."). Five days earlier, the same court looked to the 8th edition of BLACK'S LAW DICTIONARY for the same definitions. *KTRK Television, Inc. v. Robinson,* 409 S.W.3d 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 Tex. App. LEXIS 915 at *5.

categorically reject circumstantial evidence. In short, it does not impose a higher burden of proof than that required of the plaintiff at trial."[205]

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.[206] The standard should not mean anything other than *some* evidence of each element; otherwise, the Act impose 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. TEX. CIV. PRAC. & REM. CODE § 22.024. 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."[207] The Court states that "clear and specific" evidence describes the clarity (of evidence) required to avoid dismissal.[208]

"Clear" means "unambiguous, sure, or free from doubt.[209]

"Specific" means explicit or relating to a particular named thing.[210]

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.'"[211] "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."[212] Instead, "opinions must be based on demonstrable facts and a reasoned basis."[213] 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.[214]

Similarly, an affidavit from neighbor Blunt describing an alleged interference with his contractor lacked details, did not attach a contract, failed to attach prior

[205] *Lipsky II*, 460 S.W.3d at 590-91.

[206] 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.

[207] *Id.* at *15.

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Serafine*, 466 S.W.3d at 358 n.2 (quoting *Black's Law Dictionary* 351 (10th ed. 2014)).

[212] *Lipsky II*, 460 S.W.3d at 592.

[213] *Id.*

[214] *Id.*

emails or correspondence, and did not rise to "clear and specific evidence."[215]

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,"[216] and is not defined in the TCPA, the Texas Supreme Court in *Lipsky II* 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."[217] "It is the 'minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true."[218] 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.[219] 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.

Ms. Prather likewise described to readers of her articles the origin of the prima facie case language: "**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."[220]

Ms. Prather's comment does not address a cause of action, or the elements of a cause of action in civil litigation, and does not explain what proof of need for access to information has in common with proof of a cause of action consistent with due process.

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[215] *Serafine,* 466 S.W.3d at 361-62.

[216] *Hinojosa v. Columbia/St. David's Healthcare System, L.P.*, 106 S.W.3d 380, (Tex. App.—Austin 2003, no pet.), citing *Coward v. Gateway Nat'l Bank,* 525 S.W.2d 857, 859 (Tex. 1975).

[217] *Lipsky II*, 460 S.W.3d at 590.

[218] *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)).

[219] *See Henson v. Denison,* 546 S.W.2d 898, 901 (Tex. Civ. App. – Fort Worth 1977, no writ).

[220] *http://www.sdma.com/texas-newsrooms-will-benefit-from-anti-slapp-law-07-15-2011/.*

It is probably more useful to practitioners to look for authority to non-media cases, particularly temporary injunction opinions to better understand what may constitute a prima facie case.

Since the respondent is required to provide "prima facie case for each essential element of the claim in question"[221] in response to the motion to dismiss, and will have to specifically brief on appeal the evidence supporting each element,[222] the prudent business disputes litigator should be familiar with the elements of defamation,[223] business disparagement,[224] fraud,[225] negligent misrepresentation,[226] and tortious interference,[227] at least.

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[221] TEX. CIV. PRAC. & REM. CODE § 27.005(b)(c).

[222] *Wholesale TV,* 2013 Tex. App. LEXIS 7348 *8-10.

[223] 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*, 2016 Tex. LEXIS 499 (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).

[224] 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.*

[225] 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).

[226] "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.).

[227] To establish a cause of action for tortious interference with a contract, a plaintiff must prove that (1) a contract subject to 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

iii. What about circumstantial evidence?

On April 24, 2015, the Texas Supreme Court in *Lipsky II* resolved a conflict among the courts of appeals and held that "clear and specific evidence under the Act includes relevant circumstantial evidence."[228] In so doing, the Court rejected some lower court opinions that interpreted the TCPA to require a heightened evidentiary standard, unaided by inferences.[229] "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."[230] "It is admissible unless the connection between the fact and the inference is too weak to be of help in deciding the case."[231] 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."[232]

It has long been the rule in Texas that "[a]ny ultimate fact may be proved by circumstantial evidence,"[233] and that "[b]oth direct and circumstantial evidence may be used to establish any material fact."[234] 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.[235]

Whether circumstantial evidence and the inferences to be drawn from it can be considered in response to a motion to dismiss is a principal issue in the appeal of Schlumberger's suit against its former IT Deputy General Counsel, Charlotte Rutherford.[236] Schlumberger sued Rutherford for misappropriation of trade secrets, breach of fiduciary duty, breach of contract, and violation of the Texas Theft Liability Act, after she went to work for Acacia, which acquired patents and sued Schlumberger for patent violations. Rutherford filed a TCPA motion to dismiss, but the parties were allowed to conduct some discovery. In granting Rutherford's motion in large part, the trial court ruled that it could not consider circumstantial evidence under the "clear and specific" standard, and assessed $250,000 in sanctions and $350,000 in fees against Schlumberger.

On appeal, Schlumberger argued that "clear and specific evidence" does not preclude the use of circumstantial evidence, which position Rutherford opposes.

A federal district judge recently ruled that "the party bringing the legal action must itself produce, or must cite elsewhere in the record, a minimum quantum of clear and specific evidence that,

469, 475 (Tex. App. – Houston [1st Dist.] 2006, pet. denied).

[228] *Lipsky II*, 460 S.W.3d at 584.

[229] *Id.* at *10-11.

[230] *Id.* at *13-14.

[231] *Id.* at *13-14.

[232] *Id.* at *13-14.

[233] *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993).

[234] *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004).

[235] *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*, 2016 Tex. LEXIS 480 (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.")..

[236] *Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

unaided by inferences, would establish each essential element of the claim in question if no contrary evidence were offered."[237] Following the language in *Rehak*, the court stated that "it appears that the principal difference between a prima facie case established by clear and specific evidence and a mine-run prima facie case is that a prima facie case established by clear and specific evidence must be made without the benefit of rational inferences drawn from the evidence presented."[238]

We will all have to review cases on appeal and those in the process of litigation in order to apply the clarified definitions of "clear and specific evidence" to include circumstantial evidence.

iv. Does the TCPA violate the Open Courts provision of the Texas Constitution?

Now that the Texas Supreme Court settled the question of whether "clear and specific evidence" created an elevated evidentiary standard, most of our discussions linking an elevated evidentiary standard to Open Courts challenges to the TCPA have been resolved.[239] 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 that is required for a plaintiff to prevail at trial, or that creates significant cost burdens that may implicate the Open Courts provisions. [240] There are a few cases

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[237] *Grammer*, 2015 U.S. Dist. LEXIS 10507 *47.

[238] *Id.*

[239] 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 then 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.

[240] 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, *Virgilio Avila and Univision Television Group, Inc. v. Larrea*, No. 05-11-01637, Court of Appeals of Dallas, Texas.

in which the constitutionality of the imposition of a higher burden of proof in response to a motion to dismiss has been challenged.[241]

The Open Courts provision of the Texas Constitution is found in Article I, Section 13 of the Texas Constitution.[242] The most detailed discussion of this issue so far was in the *CLEAT 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.[243]

The author confesses that he has focused mainly on the standard of proof issue, along with the few courts to review the issue. Without any analysis of the term's meaning or background, the Austin court stated that "'clear and specific' does not alter the burden or cause it to exceed a preponderance of the evidence."[244] The court implicitly recognized that if "clear and specific" refers to a *quantity*, and not *quality*, of proof, it may run afoul of the Open Courts provision. Instead, the court glossed over the term and stated that if "the defendant shows by a preponderance of the evidence that the legal action impinges on a specified right, the TCPA requires only that the claimant produce evidence that establishes a prima facie case." [245]

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[241] *See Jennings v. Wallbuilder Presentations, Inc.*, 378 S.W.3d 519 (Tex. App.—Fort Worth, 2012, pet. denied) (appeal of order denying motion dismissed for lack of jurisdiction). In another case, the First District Court of Appeals found that the respondent waived the argument due to failure to present it to the trial court. *John Moore Services*, 441 S.W.3d at 352 n.1.

[242] 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 [14th 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).

[243] *CLEAT*, No. 03-13-00105-CV, 2014 Tex. App. LEXIS 1098 *27-28.

[244] *Id.*

[245] *Id.*

The Austin Court in *CLEAT* also 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."[246] 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.[247] 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." [248] 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.[249] 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[250] (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. 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.

v. 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,[251] 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. "Legal action" does refer to "cause of action" in addition to "lawsuit …, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief"[252] but the statute does not limit its applicability to causes of action.

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[246] *Id.* at *29-31.

[247] *Robinson v. KTRK Television, Inc.*, No. 01-14-0880-CV, 2016 Tex. App. LEXIS 3345 * 8-9 (Tex. App. – Houston [1st Dist.] March 31, 2016, pet. denied).

[248] *Sullivan v. Abraham,* 488 S.W.3d 294, 299 (Tex. 2016).

[249] *Id* at 295-296.

[250] *Id.* at 299.

[251] TEX. R. CIV. P. 51.

[252] TEX. CIV. PRAC. & REM. CODE § 27.001(6).

The issue is made more difficult to resolve in light of the statute's provisions suspending "all discovery in the legal action,"[253] requiring dismissal of "a legal action,"[254] 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. As in Example 2, the remaining doctors seeking to preserve the protected health information of their patients may very well see their injunctive relief dissolved and the suit dismissed, and fees and sanctions awarded against them, even though the injunctive relief was clearly the proper remedy.

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 the same suit. By the same token, such parties should consider whether to seek to sever[255] 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[256] and whether "actions involving a common question of law or fact" should be consolidated[257] or proceed in separate trials.[258]

4. Affirmative Defenses May Now 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."[259] As we previously observed, prior to this amendment, the statute did not say that the respondent must meet any burden of proof, or address, any affirmative defenses or other dilatory pleadings. Yet in one recent decision, the Dallas Court of Appeals reviewed the evidence in light of the media defendant's affirmative defense of "substantial truth" of the broadcast.[260] The court of appeals did not explain why, under the two-pronged analysis, there should be any discussion of an affirmative defense, when the respondent's burden relates to a "prima facie case for each essential element of the claim in question."[261] By definition, an affirmative defense is not an "essential element" of any claim. It is unclear why this provision was added to the statute.

More recently, the Austin Court of Appeals rendered a post-2013 amendments

[253] TEX. CIV. PRAC. & REM. CODE § 27.003(c).

[254] TEX. CIV. PRAC. & REM. CODE § 27.005(b)(c).

[255] TEX. R. CIV. P. 41.

[256] TEX. R. CIV. P. 97.

[257] TEX. R. CIV. P. 174(a).

[258] TEX. R. CIV. P. 174(b).

[259] TEX. CIV. PRAC. & REM. CODE § 27.005(d).

[260] *Larrea*, 394 S.W.3d at 657.

[261] TEX. CIV. PRAC. & REM. CODE § 27.005(c).

decision that addressed, among other things, whether affirmative defenses were to be considered in the motion to dismiss and response.[262] This case was the second of two suits filed by BCG against Kinney, a legal recruiter, related to a prior employment relationship between the two and some later online comments by Kinney about BCG. The first suit was filed in California and resulted in Kinney obtaining $45,000 in fees and expenses against BCG under California's anti-SLAPP law.[263] Facing a subsequent suit in Texas arising from the same facts, Kinney moved to dismiss under Chapter 27 and sought sanctions, and asserted that the claim was barred by res judicata. The court of appeals agreed, and curiously declined to determine whether the 2013 amendments applied retroactively, instead finding that Section 27.006's requirement that the trial court consider "the pleadings and supporting and opposing affidavits stating the facts on which the liability *or defense* is based…"[264] could serve as the basis for consideration of affirmative defenses. No other cases or commentators have suggested that the statute could be so interpreted. Whether such a strained reading of the provision will affect any other cases in the appellate process remains to be seen, but it must be noted here.

For the defendant/movant to be able to invoke the "valid defense" as a basis to dismiss a suit or claims, the defendant/movant must first establish that the TCPA applies. In other words, the movant still has to meet all burdens of proof to show that there is a "legal action" with the required nexus with the exercise of rights of speech, petition, or association. Failure to do so results in an inability to have the trial court consider the Chapter 27 motion to dismiss based on a "valid defense."

5. 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 decision nondiscretionary, so long as the nonmovant does not "establish" "clear and specific evidence" on *some* element of *any* cause of action.

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. If the movant makes no request for any findings under Section 27.007, the trial court does not have to issue any. At the request of the movant, but not the respondent, the court "shall issue" findings about whether the legal action was brought for improper purposes, and must issue the findings not later than 30 days following the request.[265] The Legislature does not provide a time limitation or end date on the request, and does not indicate whether the request should be made before or after a ruling, or if the request can be made months or years later. The Legislature does not explain why the party bringing the legal action is not entitled to ask for such specific findings in the event that the trial court rules that the legal action should be dismissed. More importantly, the Legislature did not address what relevance, if any, such findings would have to the trial

[262] *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).
[263] *Id.*, 2013 Tex. App. LEXIS 10481 *3-5.
[264] *Kinney*, 2013 Tex. App. LEXIS 10481 *21 (emphasis added by court).
[265] TEX. CIV. PRAC. & REM. CODE § 27.007(a,b).

court or to an appellate court. If it is not an element of the motion that there be a finding that the lawsuit was brought for an improper purpose, then why is the movant permitted to request such findings? The motion can and must be granted so long as the other elements are met. If the Legislature intended such findings to assist in the determination of sanctions by the trial court, and the review of such award by the appellate court, such intent is less than clear from the text of the statue.

6. Request for Ch. 27 Sanctions Probably Survive Nonsuit or Amended Petition Dropping Some Claims.

Another issue of concern is whether the trial court must rule on the motion if the plaintiff non-suits 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. The non-suit is effective as soon as the plaintiff files a motion for non-suit.[266] 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. *Id.;* TEX. R. CIV. P. 162. A non-suit renders the merits of the case moot.[267]

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, at some Texas appellate courts have held 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. [268]

The practitioner should be very careful to read a January 2013 decision from the Texas Supreme Court, which held that an engineer's motion to dismiss a case under Chapter 150 of the Texas Civil Practice and Remedies Code was a claim for affirmative relief that survived a nonsuit.[269]

Recent cases have found that a Chapter 27 motion to dismiss did survive a nonsuit, 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).[270] The Fourteenth Court recently held that a Chapter 27 motion to dismiss survived amendment of counterclaims.[271]

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[266] *Epps v. Fowler,* 351 S.W.3d 862, 868 (Tex. 2011).

[267] *UTMB v. Estate of Blackmon,* 195 S.W.3d 98, 101 (Tex. 2006).

[268] *Calkins*, 446 S.W.3d at 141-42; see also, *In re Thuesen,* 2013 Tex. App. LEXIS 4636*3-5 (in the context of a mandamus 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). .

[269] *CTL/Thompson Texas, LLC v. Starwood Homeowner's Ass'n,* 390 S.W.3d 299, 301 (Tex. 2013).

[270] *Calkins*, 446 S.W.3d at 143, citing *Villafani v. Trejo,* 251 S.W.3d 466, 470-471 (Tex. 2008); *Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC,* No. 05-14-00299-CV, 2015 Tex. App. LEXIS 3209 *6-7 (Tex. App. – Dallas April 1, 2015, pet. denied).

[271] *Bland,* 2016 Tex. App. LEXIS 13285 *5.

J. Mandatory, Not Discretionary, Award of Fees and Sanctions for Movant Upon Dismissal of Legal Action.

If the court dismisses a legal action, again the court has no discretion, but "*shall* award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter."[272] As witnessed in the *Schlumberger* case, those numbers can be very large.

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 and assess sanctions, which discretion has long been given to courts.[273] Even a suit with significant merit can result in fees and sanctions assessed if the court does not think that there is "clear and specific evidence."

There is an interesting divergence on whether a trial court has discretion to not award fees despite the mandatory language. As noted above, and without reference to any authority, the Austin Court of Appeals in the *CLEAT v. Sheffield* case decided that fees awards were not mandatory under the TCPA, and that 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."[274] The court of appeals offered that conclusion, without reference to any cited authorities, in deciding that the "mandatory" fee award provisions did not violate the Open Courts provisions of the Texas Constitution.[275]

We discussed above the *Sullivan v. Abraham* case in the context of an Open Courts challenge, and outlined how the Texas Supreme Court holds that a court can only consider "reasonableness," not "justice and equity," in making a fee award.[276] The *Sullivan* court did not address the prior holding in *CLEAT*, but they are clearly in conflict.

The *CLEAT* decision is contrary to the Texas Code Construction Act, which has a section devoted to describing the differences between mandatory and discretionary language. The Legislature declared that the "following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute: (1) 'May' creates discretionary authority or grants permission or a power; (2) 'Shall' imposes a duty."[277] Since this is the usual construction of the term "shall" in statutory construction, Texas courts construing the request for fees and sanctions as mandatory, even going so far as to require trial courts to give a movant additional chances to prove up attorney's fees until they get it right, because "[the movant] is

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[272] TEX. CIV. PRAC. & REM. CODE § 27.009(a)(emphasis added).

[273] *But see, CLEAT*, 2014 Tex. App. LEXIS 1098 at *27-28 (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.

[274] *CLEAT*, 2014 Tex. App. LEXIS 1098 at *30.

[275] *Id.*

[276] *Sullivan*, 488 S.W.3d at 299.

[277] TEX. GOV'T CODE § 311.016.

statutorily entitled to an award of attorney's fees…."[278]

Chapter 27 sanctions also differ from those available under Rule 13 or Chapter 10 of the Civil Practice and Remedies Code, since Chapter 27 order does not expressly require the trial court to explain how it reached its determination.[279] There is nothing in the legislative history to explain why, in virtually all other civil litigation, a litigant is entitled to an explanation of the reason for the sanctions, but a plaintiff in a suit who receives a Section 27.009 does not.

The Austin Court of Appeals has found no abuse of discretion in the award of $75,000 in sanctions, without any evidence of the amount of time or fees charged, and with no finding that a lesser sanction would not have served the purpose of deterrence.[280] It was obvious that both the trial court and court of appeals were heavily influenced by the resolution of the California litigation in favor of Kinney with $45,000 in sanctions,[281] but it is unclear whether the $75,000 was essentially a double recovery for the California litigation.[282] Although the Austin Court of Appeals made a slight attempt to harmonize their support of the large sanctions award with prior case law under Chapter 10, the Texas Supreme Court has made it clear in reviewing sanctions across a wide spectrum, including Tex. R. Civ. P. 215, that "a sanction cannot be excessive nor should it be assessed without appropriate guidelines."[283] The more prudent approach for a movant seeking sanctions would be to provide evidence and briefing consistent with the developed body of Texas sanctions law.

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 damages.[284] The legislative history and bill analyses do not discuss why the Legislature chose sanctions over punitive damages.

It appears that the amount of fees awarded will be reviewed in the usual manner,[285] and will still require documentation of services performed in sufficient detail.[286]

K. 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

[278] *Schimmel,* 438 S.W.3d at 863; citing *Alphonso v. Deshotel,* 417 S.W.3d 194, 202 (Tex. App. – El Paso 2013, no pet.).

[279] TEX. CIV. PRAC. & REM. CODE § 10.005 requires that 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. R. CIV. P. 13 directs that "[n]o sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order."

[280] *Kinney,* 2013 Tex. App. LEXIS 10481 * 30-35.

[281] *Kinney,* 2013 Tex. App. LEXIS 10481 * 31-34.

[282] The court of appeals noted that "there was sufficient evidence of the economic impact to Kinney of the sanctionable conduct of BCG over the course of litigation in two states to serve as a 'guidepost' for the amount of the sanction." *Kinney,* 2013 Tex. App. LEXIS 10481 * 33-34.

[283] *Low v. Henry,* 221 S.W.3d 609, 620 (Tex. 2007).

[284] TEX. CIV. PRAC. & REM. CODE § 41.003.

[285] *See Ramsey,* 2013 Tex. App. LEXIS 5554*7.

[286] *Sullivan,* 488 S.W.3d at 299- 300.

the court finds that the motion to dismiss is "frivolous or solely intended to delay."[287] 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 "relates to" his claimed exercise of speech, association, and petition rights.

Nevertheless, a trial lawyer for a responding party should consider filing a Chapter 27 motion to dismiss the initial motion to dismiss. We will provide more details on "slippery slope" arguments and responses, but if a motion to dismiss a motion to dismiss is indeed permissible, then the burden of proof for the responsive MTD is low, and the award of fees and sanctions against the initial movant are mandatory.

What better way is there to deter the filing of SMACs than to subject them to the mandatory fees and sanctions of the Chapter 27 motion to dismiss?

L. Appellate Review.

1. Interlocutory Appeal: 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,"[288] 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.[289]

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,[290] 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.[291]

Although generally "courts presume that the legislature intends statutes and amendments to operate prospectively unless they are expressly made retroactive,"[292] the Austin Court of Appeals found that the amendment to the statute does not apply

[287] TEX. CIV. PRAC. & REM. CODE § 27.009(b).

[288] TEX. CIV. PRAC. & REM. CODE § 27.008.

[289] *Summersett v. Jaiyeola*, 438 S.W.3d 84 (Tex. App. – Corpus Christi 2013, pet. denied).

[290] TEX. CIV. PRAC. & REM. CODE § 51.014(b).

[291] TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6),(b).

[292] *Kinney*, 2013 Tex. App. LEXIS 10481 * 11, citing TEX. GOV'T CODE § 311.022; *City of Austin v. Whittington*, 384 S.W.3d 766, 790 (Tex. 2012).

when it "is procedural, remedial, or jurisdictional because such statutes generally do not affect vested rights."[293] Since the amendments add rights of interlocutory appeal, and do not take away or impair vested rights, the Austin Court of Appeals found that they should be applied in cases pending when the statute is enacted, and therefore applied to the appeal.[294] Although the ruling will have limited application, the reasoning about current application of the amendments bears closer scrutiny for those cases currently making their way through the courts.

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 dismiss process is not a fundamental right.[295]

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."[296] As noted above, without a finding that "docket conditions" required a hearing outside the thirty days, the ruling is untimely and Section 27.008(a) jurisdiction over the appeal exists.[297]

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 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.[298] Now, if there is a timely written order denying the motion to dismiss, the movant may pursue an interlocutory appeal under Section 51.014. It is unclear why the Legislature permitted written orders denying motions to dismiss to be appealed under Section 51.014, while leaving motions overruled by operation of law appealable only under Section 27.008.

Since the 2013 legislative amendments were primarily meant to allow interlocutory appeals of all orders denying motions to dismiss, the development of the split of authority still warrants a review.

a. Cases finding no jurisdiction to hear interlocutory appeal from untimely written order denying motion to dismiss.

The principal case that led to the 2013 legislative amendments was an opinion of the Fort Worth Court of Appeals, which decided that interlocutory appeals lie only for motions to dismiss overruled by operation of law, and not where a timely

[293] *Whittington*, 384 S.W.3d at 790.
[294] *Kinney*, 2013 Tex. App. LEXIS 10481 * 12-13.
[295] *CLEAT*, 2014 Tex. App. LEXIS 1098 at *12.
[296] TEX. CIV. PRAC. & REM. CODE § 27.008(a).
[297] *Crazy Hotel*, 416 S.W.3d at 79-80.
[298] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12).

written order overruling the Chapter 27 motion to dismiss exists,[299] finding that "the interlocutory appeal statutorily authorized by subsection (a) is limited to situations in which a trial court has failed to timely rule on a timely-filed motion to dismiss, and the motion to dismiss is therefore considered to have been denied by operation of law."[300]

Appellate courts generally have jurisdiction only over final judgments unless a statute authorizes an interlocutory appeal.[301] Jurisdiction of a court of appeals is controlled by the constitution and by statutory provisions; an interlocutory order is not appealable unless a statute explicitly provides for appellate jurisdiction.[302] "'Jurisdiction over an interlocutory order when not expressly authorized … by statute is jurisdictional fundamental error.'"[303]

The Fort Worth Court of appeals correctly noted that "[s]tatutes authorizing interlocutory appeals are strictly construed because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable.[304] A TCPA order of dismissal is not among the types of actions for which an interlocutory appeal was then available under TEX. CIV. PRAC. & REM. CODE § 51.014. Section 27.008's specific grant of right to appeal refers only to denial of the motion to dismiss by operation of law only, and permits appeal only by the moving party.[305]

Although Section 27.008(b) refers to expediting an appeal "from a trial court order on a motion to dismiss a legal action," the statute still does not explicitly state that the denial of a motion permits an interlocutory appeal. The Fort Worth Court of Appeals correctly noted that the Legislature did not use any language in Chapter 27 creating a right of interlocutory appeal in the event that an order was signed.[306] Section 27.008(b) does not use the type of language found in other statutes creating interlocutory appeals, and it does not state that a party may appeal or is entitled to appeal.[307] Without intervention by the Legislature in 2013, the Fort Worth Court of Appeals' analysis was formidable.

b. Cases finding there is jurisdiction to hear interlocutory appeal from untimely written order denying motion to dismiss.

More recent cases have held that Section 27.008 "permits an interlocutory appeal when the trial court denies the defendant's motion by written order."[308]

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[299] *Jennings v. Wallbuilder Presentations, Inc.*, 378 S.W.3d 519 (Tex. App.—Ft. Worth 2012, pet. denied) (dismissing appeal for lack of jurisdiction); *see also Lipsky v. Range Production Co., et al.*, No. 02-12-00098-CV, 2012 Tex. App. LEXIS 7059 (Tex. App.—Fort Worth Aug. 23, 2012, pet. denied)(mem. op.) (dismissing appeal for want of jurisdiction for same reason, but granting motion to consider the proceeding as a petition for writ of mandamus).

[300] *Wallbuilder*, 378 S.W.3d at 524.

[301] *Wallbuilder*, 378 S.W.3d at 522, citing TEX. CONST. art. V, § 6; *CMH Homes v. Perez*, 340 S.W.3d 444, 447-48 (Tex. 2011).

[302] *Stary v. DeBord*, 967 S.W.2d 352, 352-53 (Tex. 1998); *Wallbuilder*, 378 S.W.3d at 522.

[303] *San Jacinto Title Services*, 452 S.W.3d at 347, quoting *N.Y. Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 679 (Tex. 1990). Although the Corpus Christi Court of Appeals found that interlocutory appellate jurisdiction existed over a timely written order denying a motion to dismiss, such finding is probably *dicta* and of little precedential value, since the court found that the TCPA did not retroactively apply to the suit. *San Jacinto Title Services*, 452 S.W.3d at 350.

[304] *Wallbuilder*, 378 S.W.3d at 522., quoting *CMH Homes*, 340 S.W.3d at 447.

[305] TEX. CIV. PRAC. & REM. CODE § 27.008(a).

[306] *Wallbuilder*, 378 S.W.3d at 525.

[307] *Wallbuilder*, 378 S.W.3d at 525.

[308] *San Jacinto Title Services*, 452 S.W.3d at 349.

Although the Corpus Christi Court of Appeals held that the TCPA did not apply to an amended petition in a suit that predated the effective date of the TCPA, and therefore did not apply to the instant suit,[309] the court engaged in a lengthy analysis of interlocutory jurisdiction from a Chapter 27 order denying a motion to dismiss.[310] Rather than determining first that the TCPA did not apply to the case, the court stated that the movants "perfected this interlocutory appeal challenging the trial court's denial of their motion to dismiss."[311]

The court's analysis is perplexing, because if the TCPA does not apply to the case, then any limited grant of interlocutory appeal would not apply, either. The court quoted the proper authorities on limited interlocutory appellate jurisdiction, but did not discuss how the court could exercise jurisdiction if the TCPA did not apply. The court's opinion is likely of very little precedential value, since the discussion in the abstract of jurisdiction most likely must be considered *dicta.*

The analysis of the court of appeals focused on giving meaning to language in Section 27.008(b) and (c), much the same as the Fourteenth Court of Appeals in the *Beacon Hill* case, discussed below.[312] The court correctly noted that "'courts are not empowered to 'fix" the mistake [in legislation] by disregarding direct and clear statutory language that does not create an absurdity.'"[313] The court believed that no allowing an interlocutory of written orders granting or denying a motion to dismiss "creates an absurdity by drawing an artificial distinction within the class of defendants the TCPA was designed to protect regardless of whether they suffered the harm for (sic) which the legislature addressed by enacting the TCPA."[314] Finally, the court of appeals felt that it could depart from the general rule that "statutes conferring interlocutory appeals are strictly construed"[315] because of the legislature's instruction "to liberally construe the TCPA in order 'to effectuate its purpose and intent fully.'"[316]

The Corpus Christi Court of Appeals has been joined by the First, Fourteenth, and Fifth Courts of Appeals in reaching the conclusion that, prior to the statutory amendments, Section 27.008 permitted an interlocutory appeal from a trial court's written order denying a Chapter 27 motion to dismiss.[317]

Without action by the Legislature there existed a conflict among the courts of appeals that would likely have permitted the Texas Supreme Court to exercise conflicts jurisdiction[318] to decide the scope of interlocutory appeal.

iii. Mandamus.

Now that the Legislature has resolved the issue of interlocutory appealability of denials of motions to

[309] *San Jacinto Title Services,* 452 S.W.3d at 351.
[310] If the TCPA did not apply to the case, then how does appellate jurisdiction exist under the TCPA?
[311] *San Jacinto Title Services,* 452 S.W.3d at 346.
[312] *See Direct Commercial Funding, Inc. v. Beacon Hill Estates,* 2013 Tex. App. LEXIS 1898, discussed in Section III.G.2.i, *infra.*
[313] *San Jacinto Title Services,* 452 S.W.3d at 348.
[314] *San Jacinto Title Services,* 452 S.W.3d at 349.
[315] *San Jacinto Title Services,* 452 S.W.3d at 349, quoting *CMH Homes,* 340 S.W.3d at 447.
[316] *San Jacinto Title Services,* 452 S.W.3d at 349, quoting TEX. CIV. PRAC. & REM. CODE § 27.011(b). In a footnote, the Corpus Christi Court stated that the court of appeals in *Jennings v. Wallbuilder* "did not address the legislature's direction to liberally construe the TCPA." *San Jacinto Title Services,* 452 S.W.3d at 349, n.7.
[317] *See John Moore Services,* 441 S.W.3d at 352; *KTRK Television,* 409 S.W.3d at 688; *BH DFW,* 402 S.W.3d 299.
[318] TEX. GOV'T CODE § 22.001(a)(2).

dismiss, what significance do writs of mandamus or "other writs" have?[319] A mandamus is contemplated in the language of the statute: an "appellate court shall expedite an appeal *or other writ* …."[320] Upon review, the appellate court will determine whether the trial court clearly abused its discretion,[321] and a trial court's application of legal principles is reviewed for an abuse of discretion separately from its resolution of factual disputes.[322]

In the mandamus review of the trial court's order, the court of appeals reviews the trial court's legal determinations de novo.[323] "A trial court abuses its discretion if it fails to analyze the law correctly or misapplies the law to established facts."[324] Further, "a trial court's erroneous legal conclusion, even in an unsettled area of law, is an abuse of discretion."[325] The court also found that whether a prima facie case has been presented is a question of law for the court.[326]

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."[327] "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."[328]

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."[329] 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.'"[330] 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.'"[331]

The proceedings in the trial court are not suspended or stayed while the mandamus proceeds.

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[319] *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 Tex. App. LEXIS 7059 (Tex. App. – Fort Worth Aug. 23, 2012, pet. denied)(mem. op.)).

[320] *In re Lipsky*, 411 S.W.3d at 552, quoting TEX. CIV. PRAC. & REM. CODE § 27.008(b).

[321] *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1991).

[322] *Id.* at 839-840.

[323] *In re Lipsky*, 411 S.W.3d at 539.

[324] *Id*. (citing *Ilff v. Ilff*, 339 S.W.3d 74, 78 (Tex. 2011); *Cook v. Tom Brown Ministries, et al.*, 385 S.W.3d at 600.

[325] *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).

[326] *In re Lipsky*, 411 S.W.3d at 539.

[327] *In re Thuesen*, 2013 Tex. App. LEXIS 4636*5-6, quoting *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 716 (Tex. 1990).

[328] *In re Thuesen*, 2013 Tex. App. LEXIS 4636*6.

[329] *In re Lipsky*, 411 S.W.3d at 552.

[330] *Id.*, quoting *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008)(orig. proceeding).

[331] *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).

2. Motion to Dismiss Timely Granted -

i. May be appealable noninterlocutory order.[332]

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.[333] This may be true if the trial court dismisses the entire case, but may not be true if the order of dismissal targets only certain causes of action. Whether the dismissed causes and parties are severable for appeal will be decided on a case-by-case basis.[334]

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 refiling 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.[335] "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."[336] 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, according to the Fourteenth Court of Appeals.[337] 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'"[338] 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)

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[332] An untimely order granting the motion to dismiss would be construed to overrule the motion as a matter of law.

[333] *Wallbuilder*, 378 S.W.3d at 524, citing *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 312 (Tex. 1994) (recognizing that trial court may "make the judgment final for purposes of appeal by severing the causes and parties").

[334] See, *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865 (Tex. App. Dallas July 1, 2014, no pet.) (holding that an unresolved claim for attorney's fees and sanctions rendered the judgment interlocutory)..

[335] *In re Thuesen*, 2013 Tex. App. LEXIS 4636*5-6.

[336] *In re Thuesen*, 2013 Tex. App. LEXIS 4636*5-6, quoting *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990).

[337] *Direct Commercial Funding, Inc. v. Beacon Hill Estates*, 2013 Tex. App. LEXIS 1898*8-9.

[338] *Beacon Hill*, 2013 Tex. App. LEXIS 1898*6, quoting TEX. CIV. PRAC. & REM. CODE § 27.011(b).

meaningless in contravention of statutory construction precepts."[339] 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 …."[340] 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."[341] Further, since subsection (c) "states that an appeal 'must be filed on or before the 60th 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.[342]

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.

Finally, to the extent that the TCPA is applicable in federal court, the United States Court of Appeals for the Fifth Circuit has held that it had jurisdiction to hear an appeal of an order denying an anti-SLAPP motion under the collateral order doctrine. The collateral order doctrine confers limited appellate jurisdiction when three conditions are met: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue completely separate from the merits of the case; and (3) the order must be effectively unreviewable on appeal from a final judgment.[343] The Fifth Circuit applied this test to the TCPA and found that the denial of the motion to dismiss meets the three prongs because (1) it is "conclusive as to the right to avoid the burden of litigation" and it is unlikely the district court would review the order; (2) the motion to dismiss procedure has a distinct purpose from the merits of the underlying suit; and (3) the motion to dismiss is designed to avoid the burden of trial, and relief after trial is too late.[344]

3. Deadlines for Chapter 27 Appeal or Writ.

Either party has 60 days after the court's order is signed or overruled by operation of law[345] to actually file the appeal or writ, not just a notice of appeal, if the appeal or other writ is brought "under this section."[346] The deadline for any other appeal or writ should be governed by applicable law.[347]

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[339] *Beacon Hill,* 2013 Tex. App. LEXIS 1898*8.

[340] *Id.*

[341] *Id.*

[342] *Beacon Hill,* 2013 Tex. App. LEXIS 1898*10.

[343] *Kool Smiles*, 745 F.3d at 747-48.

[344] *Id*.

[345] TEX. CIV. PRAC. & REM. CODE § 27.008(a)(A failure to timely rule is treated as a denial by operation of law to trigger the appellate deadline.); *see also Jain,* 395 S.W.3d at 396-397 (finding that deadlines and extension for perfecting an appeal under TEX. R. APP. P. 26 do not apply when a statute provides the times for perfecting appeal).

[346] TEX. CIV. PRAC. & REM. CODE § 27.008(c).

[347] *See* TEX. R. APP. P. 25.1, 26.1.

The statute is unclear as to what appeals or writs would be brought "under this section." Clearly an interlocutory appeal from a failure to rule on the motion is brought under Section 27.008(a). If a party files a petition for writ of mandamus, is it considered "under this section" for purposes of the filing deadline? Chapter 27 does not expand the jurisdiction of any appellate court. Since a mandamus action is an original proceeding, a strong argument can be made that the practitioner should look to and follow the existing deadlines under the Texas Rules of Appellate Procedure.[348] This deadline issue has not yet been addressed.

What is the deadline to appeal if the motion to dismiss is granted, and an order disposing of all parties and claims is entered? Is that considered a final judgment, for which a notice of appeal must be filed within 30 days of the order, [349] or does the 60-day filing of the appeal itself, regardless of notice, apply under TEX. CIV. PRAC. & REM. CODE § 27.008? These questions are not addressed, let alone answered, in the statute, but a prudent practitioner should look first to the standard shorter notice of appeal deadlines. The question would be whether an appeal of an order of dismissal would be considered brought "under this section" for purposes of filing the appeal. Since any appeal is expedited, it is conceivable that the 60-day filing deadline may apply to actually filing the appeal of an order granting the motion. Presumably the reference in Section 27.008 (c) to "the trial court's order" is the order on the motion to dismiss, not another order, such as one on a motion to sever. The statute does not reconcile the expedited 60-day deadline with any other orders to render the trial court's order non-interlocutory and appealable.

[348] *See* TEX. R. APP. P. 52; TEX. GOV'T CODE §§ 22.002, 22.221.

[349] TEX. R. APP. P. 26.1.

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 Chapter 27, whether interlocutory or not."[350] 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.[351] This likely means that an interlocutory appeal under Section 51.014 should be expedited.

5. Standard of Review of Interlocutory Appeal.

The statute does not discuss the standard of review of the trial court's ruling on the motion to dismiss and for fees and sanctions. Although a trial court's resolution of questions turning on the application of legal standards is a de novo review, it is unclear whether the court's determination of whether the respondent met its burden of proof will be reviewed for an abuse of discretion[352] or legal and factual sufficiency.[353] No appellate courts have so far reviewed the trial court findings on an abuse of discretion standard in other than mandamus proceedings.

[350] *Wallbuilder*, 2012 Tex. App. LEXIS 6834 *10.

[351] TEX. CIV. PRAC. & REM. CODE § 27.008(b).

[352] *See In re Doe*, 19 S.W.3d 249 (Tex. 2000).

[353] *See, e.g., King Ranch, Inc. v. Chapman,* 118 S.W.3d 742 (Tex. 2003).

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.

Any statutory construction is a question of law, which is reviewed *de novo*.[354] 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.[355]

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."[356] "The courts are not free to thwart the plain intention of the Legislature expressed in a law that is constitutional."[357]

It is a cardinal rule of statutory construction that courts are to give effect to the intent of the Legislature.[358] 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.[359] In other words, "'[w]here text is clear, text is determinative.'"[360] At that point, "'the judge's inquiry is at an end,' and extra textual forays are improper."[361]

"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."[362]

"This text-based approach requires us to study the language of the specific section at issue, as well as the statute as a whole."[363] "Legislative intent remains the polestar of statutory construction."[364] 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.[365] If a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity.[366] "As the Texas Supreme Court said long ago: '[w]hen the purpose of a legislative

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[354] *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).

[355] *See Quick v. City of Austin,* 7 S.W.3d 109, 116 (Tex. 1998).

[356] *Public Utility Comm'n of Texas v. Cofer,* 754 S.W.2d 121, 124 (Tex. 1988).

[357] *National Surety Corp. v. Ladd*, 131 Tex. 295, 115 S.W.2d 600, 603 (Tex. 1938).

[358] *Fleming Foods of Tex. v. Rylander,* 6 S.W.3d 278, 284 (Tex. 1999).

[359] *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994).

[360] *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).

[361] *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).

[362] *Sorokolit*, 889 S.W.2d at 241.

[363] *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).

[364] *Fitzgerald*, 996 S.W.2d at 865-66.

[365] *Fitzgerald*, 996 S.W.2d at 865-66.

[366] *Fitzgerald*, 996 S.W.2d at 865-66.

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.'"[367] When a statute is unambiguous, the court's role is to apply it as written despite its imperfections.[368] Ordinary citizens should be able to rely on the plain language of the statute to mean what it says.[369] Finally, a court is not to "interpret a statute in a manner that renders any part of the statute meaningless or superfluous." [370]

Courts[371] 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.[372] The stated reason for the de novo review of evidence of whether the movant and non-movants met there burdens of proof have been justified as statutory construction. There have been no recent challenges to this review standard.

ii. *De Novo* Review of Sufficiency of Evidence to Meet Burdens of Proof.

Whether the movant met his initial very modest initial burden of proof or the respondent met the shifted burden of proof requires some analysis of the evidence, which might consist of a legal sufficiency of evidence review on at least the first question.[373]

However, courts have uniformly applied a *de novo* review of the evidence and whether the parties met their burden of proof. Following the usual standard of review of a dispositive motion, courts are to review the pleadings and evidence in the light most favorable to the plaintiff/non-movant. [374] 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."[375] The First Court of Appeals has explained the standard of review of a dispositive motion:

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[367] *Fitzgerald*, 996 S.W.2d at 865-66, quoting *Dodson v. Bunton*, 81 Tex. 655, 17 S.W. 507, 508 (Tex. 1891).

[368] *Stockton v. Offenbach*, 336 S.W.3d 610, 619 (Tex. 2011).

[369] *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).

[370] *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008).

[371] *See Calkins*, 446 S.W.3d at 147.

[372] *Serafine*,466 S.W.3d at 359 .

[373] *See City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005). When reviewing a legal sufficiency issue, the Waco Court of Appeals stated that the court "must consider evidence favorable to the finding if a reasonable fact finder could and disregard evidence contrary to the finding unless a reasonable fact finder could not." *Ramsey*, 2013 Tex. App. LEXIS 5554*3, citing *City of Keller*, 168 S.W.3d at 827. A no-evidence legal sufficiency standard is used to evaluate evidence supporting the fact finder's determination of an issue on which the appellant did not have the burden of proof. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). A no-evidence challenge will be sustained if (1) there is no evidence supporting the challenged element, (2) the evidence offered to prove the challenged element is no more than a mere scintilla, (3) the evidence establishes the opposite of the challenged element, or (4) the court is barred by law or rules of evidence from considered the only evidence offered to prove the challenged element. *Service Corp. v. Guerra*, 348 S.W.3d 221, 228 (Tex. 2011).

[374] *Cheniere 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 *4 (Tex. App. – Houston [14th Dist.] Aug. 25, 2016, no pet. h.)(finding movant failed to meet initial burden of proof); *Epperson*, 2016 Tex. App. LEXIS,*23.

[375] *Fawcett v. Grosu*, No. 14-15-00542-CV, 2016 Tex. App. LEXIS 7183 *18 (Tex. App. – Houston [14th Dist.] July 7, 2016, pet. filed).

"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."[376]

Litigants should closely monitor the opinions of appellate courts to ensure that they apply the correct standard of review.

M. Does the TCPA Apply in Federal Court?

Conflicting authorities leave unsettled the question of whether a defendant in federal court in Texas may file a TCPA motion to dismiss. Under traditional *Erie* analysis, recent authority suggests that the Texas anti-SLAPP dismissal motion may be unavailable in federal court sitting under either diversity or federal question jurisdiction.

In a very thorough and well-reasoned opinion, a U.S. District Court sitting in the District of Columbia recently held that a very similar anti-SLAPP statute of the District of Columbia[377] attempts to answer the same questions that Federal Rules 12[378] and 56[379] cover, and therefore cannot be applied in a federal court sitting in diversity.[380] In so finding, Judge Robert Wilkins stated that the "history and practice culminating in the 1946 Amendments clearly demonstrates that the framers intended that Rules 12 and 56 provide the exclusive means for challenging the merits of a plaintiff's claim based on a defense either on the face of the pleadings or on matters outside the pleadings."[381] He stated, "[m]oreover, like the rest of the Federal Rules of Civil Procedure, Rules 12 and 56 automatically apply in "all civil actions and proceedings in the United States district courts."[382]

The analysis was whether the federal rule, fairly construed, answers or covers the question in dispute.[383] If the federal rule answers the question, the state law does not apply.[384] In that case, the court determined that Federal Rules 12 and 56 answered the question in dispute, which was "whether this Court may dismiss 3M's claims with prejudice on a preliminary basis based on the pleadings or on matters outside the pleadings merely because 3M has not 'demonstrated that the claim is likely to succeed on the merits.'"[385] Judge Wilkins observed that the D.C. "special motion to dismiss under the Anti-SLAPP Act operates greatly to a defendant's benefit by altering the procedure otherwise set forth in Rules 12 and 56 for determining a challenge to the merits of a plaintiff's claim and by setting a higher standard upon the plaintiff to avoid

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[376] *CBS Outdoor, Inc. v. Potter,* No. 01-11-00650-CV, 2013 Tex. App. LEXIS 645, at *8 (Tex. App. – Houston [1st Dist.] Jan. 24, 2013, pet. denied)(mem. op.).

[377] D.C. CODE §§ 16-5501-5505, enacted in 2010, effective in the District of Columbia on March 31, 2011.

[378] FED. R. CIV. P. 12.

[379] FED. R. CIV. P. 56.

[380] *3M Co. v. Boulter,* 842 F. Supp. 2d 85, 102 (D. D.C. 2012). In this case, 3M sued U.K. defendants in federal court for blackmail, tortious interference, business disparagement, and related claims. The defendants filed motions to dismiss under the new D.C. anti-SLAPP statute.

[381] *Id.* at *47.

[382] *Id.*, citing *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S.Ct. 1431, 1437, 176 L.Ed.2d 311(2010), and FED. R. CIV. P. 1.

[383] *Boulter,* 842 F.Supp. 2d at 95-96; *Shady Grove,* 130 S.Ct. at 1437.

[384] *See Shady Grove,* 130 S.Ct. at 1437.

[385] *Boulter,* 842 F.Supp. 2d at 89.

dismissal.[386] The *Boulter* opinion rejected opinions from the First[387] and Ninth[388] Circuit Courts of Appeals, finding them distinguishable or failing to apply the proper analysis.

In a recent, second, *Boulter* opinion, the same district court declined to vacate its prior decision at the request of the District of Columbia, finding "that the application of the D.C. Anti-SLAPP in federal court raises serious policy questions."[389] Instead, the court found that it serves the public interest to keep on the books an opinion "that may contribute to the necessary and healthy debate of those questions."[390] The court pointed out that "the D.C. Anti-SLAPP Act requires the trial court to dismiss claims, with prejudice, and prior to conducting discovery, unless 'the person claiming defamation can demonstrate a likelihood of success on the merits.'"[391] The District Court found that "[t]his method of adjudicating, whereby the trial court weighs the evidence and dismisses a claim with prejudice that appears factually weak at the outset of the litigation, is alien to the federal courts."[392] The court believed that there "is no way to reconcile such a scheme with the Supreme Court's explanation that 'when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.'"[393] Importantly, the court found that "the Supreme Court has held that, even where a defendant asserts qualified immunity, lower courts cannot require plaintiffs to meet a heightened burden of proof to defeat summary judgment, in part because such a special procedural rule conflicts with the Federal Rules of Civil Procedure."[394]

Other federal district courts have not agreed, and instead found other state anti-SLAPP statutes applicable in federal court.[395]

Another very recent case raised significant questions about the applicability of the TCPA in federal court. A U.S. District Court sitting in eastern North

[386] *Id*. at 102.

[387] *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010).

[388] *United States v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999).

[389] *3M Co. v. Boulter*, 290 F.R.D. 5, 11 (D. D.C. 2013) (*Boulter II).*

[390] *Id.*

[391] *Id*.

[392] *Id*.

[393] *Id.*, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 n. 8, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

[394] *Boulter II*, 290 F.R.D. at 11 (citing *Crawford-El v. Britton*, 523 U.S. 574, 594, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998)).

[395] After the second *Boulter* opinion, Judge Walton, sitting in the United States District Court for the District of Columbia, found that the D.C. Anti-Slapp Act applied to diversity actions in federal court. *See Boley v. Atl. Monthly Grp*., 950 F. Supp. 2d 249, 254 (D.D.C. 2013) (Walton, J.) (finding three federal Courts of Appeals cases persuasive and adopting their reasoning while stating the first *3M Co*. opinion "conflicts with the weight of authority").

Similarly, in *Forras v. Rauf*, the court explained that "since *3M Co*. three other D.C. District Court judges have found that the Anti-SLAPP Act applies to diversity actions in federal court. 39 F. Supp. 3d 45, 52 (D.D.C. 2014) (citing *Boley*, 950 F. Supp. 2d at 254 (D.D.C. 2013); *Farah v. Esquire Magazine, Inc*., 863 F. Supp. 2d 29, 36 n. 10 (D.D.C. 2012) (Collyer, J.) *aff'd sub nom. Farah v. Esquire Magazine*, 736 F.3d 528, 407 U.S. App. D.C. 208 (D.C. Cir. 2013) ("it was certainly the intent of the D.C. Council and the effect of the law—dismissal on the merits—to have substantive consequences"); *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 10-11(D.D.C. Sept. 27, 2013) (Sullivan, J.) (same)).

Carolina reviewed the statute, but did not decide for conflicts of laws purposes whether a Chapter 27 motion to dismiss could be brought in federal court.[396]

A few recent Texas federal court cases addressed the applicability of the TCPA in federal court. In the first case, the court assumed, without deciding, that the TCPA applied, though it did not necessarily find that it was bound by the statutory time limits.[397] In the second case, the court addressed the merits of the anti-SLAPP motion, but only because the appellee's substantive argument as to the statute's inapplicability in federal court was waived for failure to raise it at the intermediate appellate level.[398] The Fifth Circuit held that although the appellee raised the issue that the TCPA conflicts with Federal Rules of Civil Procedure 8, 9, and 12 at the district court level, its further argument at the appellate level that there was conflict with Rules 12(d) and Federal Rule of Appellate Procedure 4, had been waived due to the failure to provide a "precise discussion of the specific federal rule at issue" in the district court.[399]

In June, 2014, U.S. District Judge Nelva Ramos, sitting in the Corpus Christi Division of the Southern District of Texas, granted a media company's Ch. 27 motion to dismiss complaints regarding 2014 broadcasts, after the court granted summary judgment on the 2013 broadcasts.[400] Without applying a detailed *Erie* analysis, the court found that there was no material difference between the Louisiana and Texas anti-SLAPP laws, and are enforceable in federal court.

More recently, other federal district judges have reviewed and ruled on Chapter 27 motions to dismiss, but there was no discussion about a challenge to the applicability of the statute in federal court.[401]

The issue is still not resolved in the Fifth Circuit. In a dissent in February, 2016, Justice James E. Graves, Jr. concluded that the TCPA does not apply in federal court, after applying a proper *Erie* analysis.[402]

With the question of applicability of Chapter 27 in federal court still alive, the prudent federal court practitioner should carefully consider whether to brave federal sanctions before bringing a Chapter 27 motion to dismiss, and whether to initially challenge its application.

N. Does the Act Conflict with the Supreme Court's Rule-Making Authority?

Since the new statute creates new motion procedures that conflict with existing dispositive motions by rule, we should 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

[396] *Ascend Health Corp. v. Wells*,4:12-CV-00083-BR, 2013 U.S. Dist. LEXIS 35237 (E.D.N.C. March 14, 2013).
[397] *Culbertson v. Lykos*, 2013 U.S. Dist. LEXIS 129538 (S.D. Tex. Sept. 11, 2013).
[398] *Kool Smiles*, 745 F.3d at 748.
[399] *Id*.
[400] *Williams v. Cordillera Communications, Inc.*, 2014 U.S. Dist. LEXIS 79584 (S.D. Tex. June 11, 2014).
[401] *Rivers*, 2014 U.S. Dist. LEXIS 117759; *Grammer*, 2015 U.S. Dist. LEXIS 10507.; *Lamons Gasket Co. v. Flexitallic L.P.*, 9 F. Supp. 3d 709 (S.D. Tex. 2014).
[402] *Cuba v. Pylant*, 814 F.3d 701, 718 (5th Cir. 2016).

procedure.[403] The Constitution authorized the Legislature to delegate to the Supreme Court other rulemaking power.[404] 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."[405] 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.[406]

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.[407] 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]."[408]

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.*

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[403] 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."

[404] TEX. CONST. art. V, § 31(c).

[405] TEX. GOV'T CODE § 22.004(c). *See also*, Nathan L. Hecht & E. Lee Parsley, Procedural Reform: Whence and Whither (Sept. 1997).

[406] 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.

[407] 12 TEX. B. J. 531 (1949); TEX. R. CIV. P. 166-a.

[408] *Id.*

O. Does the Statute Conflict With Texas' Constitutional Protection of Rights to Sue for Reputational Torts?

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 very recently 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."[409] 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.[410]

"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.'"[411] "Unlike the United States Constitution, the Texas Constitution twice expressly guarantees the right to bring reputational torts."[412] 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*.'"[413] 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.'"[414]

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

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[409] *Neely v. Wilson*, 2013 Tex. LEXIS 511 *11, 56 Tex. Sup. Ct. J. 766 (June 28, 2013), citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990).

[410] *Neely*, 2013 Tex. LEXIS 511*12, quoting WILLIAM SHAKESPEARE, OTHELLO, act 3 sc. 3, *quoted in Milkovich*, 497 U.S. at 12.

[411] *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)).

[412] *Neely*, 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).

[413] *Turner*, 38 S.W.3d at 117 (citing TEX. CONST. art. I, § 8 (emphasis added).

[414] *Turner*, 38 S.W.3d at 117 (citing TEX. CONST. art. 1, § 13 (emphasis added).

courts provisions.[415] 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 recent *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.[416] 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."[417] 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[418] as recent legislation that affects the ability of defamation plaintiffs to recover.[419]

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 clearly unconstitutional on its face 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. [420]

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."[421] "Its purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights . . .."[422] It bears repeating that the

[415] *Supra*, Section III.D.3.ii.

[416] *Neely*, 2013 Tex. LEXIS 511*18-19.

[417] *Id.*, quoting *Casso*, 776 S.W.2d at 554.

[418] Discussed at length in Section VI, *infra.*

[419] *Neely*, 2013 Tex. LEXIS 511*21.

[420] "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.")

[421] *Lipsky*, 460 S.W.3d at 586.

[422] *Bedford v. Spassoff*, No. 02-15-00045-CV, 2016 Tex. App. LEXIS 1465 (Tex. App.—Fort Worth Feb.

Texas Supreme Court has made it clear that the statute is *not* to be used to "dismiss meritorious lawsuits."[423]

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[424] 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.

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.[425] A Maine commentator reports that, "[n]ot surprisingly, entities are beginning to find ways to use anti-SLAPP statues 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."[426] "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."[427] 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."[428] 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

11, 2016, no pet. h.) (citing Tex. Civ. Prac. & Rem. Code § 27.002).

[423] *In re Lipsky*, 460 S.W.3d at 589.

[424] A "'prima facie case' has a traditional legal meaning. It refers to evidence sufficient as a matter of law to establish a 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.*

[425] 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).

[426] *Id.*

[427] *Id.*

[428] 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).

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 "relating to" or "based on" speech, particularly common law torts of defamation, disparagement, tortious interference, fraud, negligent misrepresentation, and even statutory claims concerning communications and misrepresentations.

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.[429] 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."[430] 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."[431] 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 is 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?" As 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.

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[429] TEX. ELEC. CODE § 253.131(a) (2010).

[430] TEX. ELEC. CODE § 273.081.

[431] 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.

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 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.[432] 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."[433]

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

[432] TEX. GOV'T CODE § 402.010 (new 2011 statute) (2012).

[433] TEX. CIV. PRAC. & REM. Code § 37.006.

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.[434] As of January 20, 2016, there were no cases citing this act.

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."[435] 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."[436] 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."[437]

The bill was referred to the Judiciary & Civil Jurisprudence Committee, which

[434] 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.

[435] Tex. H.B. 1759, 83d Leg., R.S. (2013).

[436] *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.

[437] *See* TEX. CIV. PRAC. & REM. CODE § 73.052 (2013).

heard testimony in favor of the bill on April 1, 2013.[438] Rep. Hunter introduced the bill, and then Judge David Peeples (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 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.[439]

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."[440]

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."[441]

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."[442]

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

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[438] 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.

[439] *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).

[440] *See id.* at 1:45:01 (testimony of Brad Parker on behalf of the Texas Trial Lawyers Association).

[441] *See id.* at 1:51:09 (testimony of Jerry Martin on behalf of KPRC-TV and the Texas Association of Broadcasters).

[442] *See id.* at 1:52:30 (testimony of Shane Fitzgerald on behalf of the Freedom of Information Foundation of Texas).

courts in search of a financial answer rather than a correction."[443]

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.[444]

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.[445]

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.[446] 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 libel."[447] 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.[448]

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.[449]

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[443] *See id.* at 1:55:13 (testimony of Debbie Hiott on behalf of herself, the Austin American-Statesman, and Texas Press Association).

[444] *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).

[445] *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.

[446] 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.

[447] *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).

[448] *See id.* at 00:13:58.

[449] 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.

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.[450] A request for correction, clarification, or retraction is timely if made within the limitations period for defamation.[451]

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.[452]

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.[453]

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.[454] 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.[455]

The new statute goes on to deal more specifically with two or more statements as defamatory,[456] describe how the retraction is published with sufficient prominence,[457] and internet publication.[458]

There are additional procedures for a defendant in a lawsuit to disclose intention to rely on a retraction,[459] and for a plaintiff to challenge the timeliness of a retraction.[460]

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."[461]

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).[462]

In a procedure similar to abatements under the Texas Deceptive Trade Practices –

[450] TEX. CIV. PRAC. & REM. CODE § 73.055(a); "person" defined at TEX. CIV. PRAC. & REM. CODE § 73.053.
[451] TEX. CIV. PRAC. & REM. CODE § 73.055(b).
[452] TEX. CIV. PRAC. & REM. CODE § 73.055(d).
[453] TEX. CIV. PRAC. & REM. CODE § 73.056(a).
[454] TEX. CIV. PRAC. & REM. CODE § 73.057(a).
[455] TEX. CIV. PRAC. & REM. CODE § 73.057(b).
[456] TEX. CIV. PRAC. & REM. CODE § 73.057(c).
[457] TEX. CIV. PRAC. & REM. CODE § 73.057(d).
[458] TEX. CIV. PRAC. & REM. CODE § 73.057(e).
[459] TEX. CIV. PRAC. & REM. CODE § 73.058(a).
[460] TEX. CIV. PRAC. & REM. CODE § 73.058(b).
[461] TEX. CIV. PRAC. & REM. CODE § 73.058(d).
[462] TEX. CIV. PRAC. & REM. CODE § 73.061(a,b).

Consumer Protection Act,[463] 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.[464] 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 11th day.[465] If abated, the abatement continues until 60 days after the date the written request is served, or some later date as agreed.[466] If the plea is controverted, a hearing on the plea in abatement "will take place as soon as practical considering the court's docket."[467] All statutory and judicial deadlines under the Rules of Procedure relating to an abated suit are stayed during the pendency of the abatement.[468]

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.[469] If the plaintiff fails to disclose the alleged falsity, the plaintiff cannot recover exemplary damages unless the publication was made with actual malice.[470]

Exemplary damages are not recoverable if the retraction is sufficient and timely, unless the publication was made with actual malice.[471]

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.

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[463] TEX. BUS. & COM. CODE § 17.01 et seq.
[464] TEX. CIV. PRAC. & REM. CODE § 73.062(a).
[465] TEX. CIV. PRAC. & REM. CODE § 73.062(b).
[466] TEX. CIV. PRAC. & REM. CODE § 73.062(c).
[467] TEX. CIV. PRAC. & REM. CODE § 73.062(c).
[468] TEX. CIV. PRAC. & REM. CODE § 73.062(d).
[469] TEX. CIV. PRAC. & REM. CODE § 73.055(c).
[470] TEX. CIV. PRAC. & REM. CODE § 73.056(b).
[471] TEX. CIV. PRAC. & REM. CODE § 73.059.