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The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation

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I. INTRODUCTION.

On June 17, 2011, Texas Governor Rick Perry affixed his neat signature to Texas' new anti-SLAPP¹ 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 drafted, however, the TCPA will likely trigger significant unintended consequences, especially for persons and entities who file suit to protect their reputation and various property interests. 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 define the shape or parameters of a SLAPP suit or distinguish between causes of action subject to or protected from the anti-SLAPP statute. So long as a defendant in a business torts suit can characterize the suit as "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.⁴ The potential for abuse of this newly crafted dispositive motion is significant. Here are two hypothetical examples:

Example 1: Disgruntled Vocal Car Buyer: Car Dealer sells a new car to a customer who is dissatisfied, and takes her dissatisfaction to the internet and consumer protection agencies. Buyer expresses views that accuse the dealership not only of misrepresentations about worthiness of the vehicle, but that the dealer engages in fraud, illegal kickback schemes, and violations of state and federal advertising laws, some of which carry criminal penalties, and organizes a boycott. Customer sues Car Dealer under the DTPA. Dealer counterclaims for tortious interference and business disparagement, and seeks injunctive relief. How does the TCPA apply?

Example 2: Medical Group Divorce: When Doctor A leaves the practice over the weekend, he takes lists of all patients of the clinic, not just his own, along with all medical files A-K, prior to obtaining any patient consents. Over the weekend Doctor A calls a number of patients and informs them that Doctors B and C are currently under investigation by the Texas Medical Board and are about to lose their licenses because of "rampant allegations" of improper contact with female patients, and urges the patients to leave the clinic to become his patients, and

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 *Cook v. Tom Brown Ministries*, et. al., 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 authors of this paper were counsel for the plaintiff in that case. See *Cook v. TBM*, et al., ____ S.W.3d ____, 2012 Tex. App. LEXIS 1318 (Tex.App.—El Paso Feb. 17, 2012, pet. filed) (related interlocutory appeal of temporary injunction).

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

call all their friends and tell them the same thing. When Doctors B and C find out, they file suit against Dr. A seeking injunctive relief for the return of patient files and protected health information, to prevent Dr. A from continuing his communications, and for damages for defamation, business disparagement, and tortious interference. How does the TCPA apply?

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

A. Background and Enactment of the TCPA.

1. What is a SLAPP lawsuit?

The general consensus view among commentators is that SLAPP suits are “legally meritless suits designed, from their inception, to intimidate and harass political 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

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. 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

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/SLAPPback: 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, *SLAPPs: 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

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