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The TCPA: Still Crazy After All These (Seven) Years

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I. Introduction

A new defense recently emerged for Texas defendants who have been accused of trade-secret misappropriation, breach of nondisclosure agreements, and related torts. Some courts of appeals have concluded that these trade-secret defendants may now file a motion to dismiss under the Texas Citizens Participation Act ("TCPA"), forcing the plaintiffs to stay all discovery and quickly present their prima facie case as to all elements of their challenged claims within an expedited period of time.

The TCPA's expedited dismissal process can create an insurmountable burden for a prosecuting trade-secret owner. Trade-secret cases are usually proven circumstantially and require investigation, often forensic; they typically involve testifying experts, and they tend to involve complex theories of recovery and damages. Further, evidence of misappropriation often rests in the hands of a competing company or former employee and requires discovery of information that the defendants may claim as their own highly sensitive property. This article seeks to provide further insight to the current TCPA doctrine related to trade-secret cases, and to offer strategic advice to litigants on both sides of those disputes.

But trade secrets may not be included within the TCPA's grasp for long. Some members of the Texas Legislature are finally beginning to respond to some appellate justices' requests for a narrowing of the statute's scope. Regardless of how the 2019 legislative session turns out, however, the TCPA itself is not disappearing anytime soon. All litigants should understand the statute's past and current scope in order to interpret past precedent and to find ways to take advantage of—and defend against—TCPA motions.

II. Background:

A. The TCPA's Passage and Stated Goal

The TCPA, known as an "anti-SLAPP" statute, was passed in 2011. 'SLAPP' is an acronym for 'Strategic Lawsuits Against Public Participation,' or "retaliatory lawsuits that seek to intimidate or silence [citizens] on matters of public concern." *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (citing House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011).)

The TCPA's stated goal was to "encourage and safeguard constitutional rights of persons to petition, speak freely, associate freely, and otherwise associate 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. Texas, as one of 32 states that have passed an anti-SLAPP statute,[1] was a response to the public's and courts' concern that the threat of litigation has a chilling effect on public discourse. *See New York Times Co. v. Sullivan*, 376 U.S. at 279 (1964) ("would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."); *Gaskamp* (Jennings, J., dissenting) (citing S. Comm. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011)) (quoting TCPA's bill sponsor explaining that "frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of our democracy."). The Supreme Court's doctrine requiring proof of malice in defamation-related cases created a substantive barrier to recovering damages in such cases, but did not "protect speakers from the similarly-chilling cost and burden of defending such tort claims." *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 167 (5th Cir. 2009).

Anti-SLAPP statutes therefore are meant to fill this gap by shifting fees to plaintiffs who file meritless suits concerning this public discourse. *Id.* ("a number of state legislatures have created a novel method for better striking the balance between interests in individual reputation and freedom of speech.").

B. The TCPA's Dismissal Mechanism

In Texas, the vehicle for this protection is the TCPA motion to dismiss, which must be filed early in the case and ruled on quickly. Specifically, the TCPA creates a burden-shifting procedure, also known as "zig-zagging burdens of proof," in three steps. *Kawcak v. Antero Res. Corp.*, 02-18-00301-CV, 2019 WL 761480, at *4 (Tex. App.—Fort Worth Feb. 21, 2019, pet. filed):

(1) In the first step, the defendant must show by a preponderance of the evidence that the legal action "is based on, relates to, or is in response to" his "exercise of the right of free speech, right to petition, or right of association." TEX. CIV. PRAC. & REM. CODE § 27.005(b).

(2) If the defendant does so, the burden shifts to the plaintiff to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* §§ 27.003(a); 27.005(b)–(c). Unless the plaintiff satisfies her burden, the case must be dismissed.

[1] *See* Brief of Amici Curiae The Reporters Committee For Freedom Of The Press And 39 Media Organizations In Support Of Defendant-Appellant Urging Reversal, *Roger Beasley Imports, Inc. v. Rudkin,* 18-50157 (5th Cir. Sep. 5, 2018) (citing Laura Lee Prather & Justice Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 TEX. TECH L. REV. 633, 635 (2018).

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