

**THE TEXAS ANTI-SLAPP LAW: TEX. CIV. PRAC. & REM. CODE CH. 27 -
AND THE MULLIGAN LAW – THE DEFAMATION MITIGATION ACT
WHAT REMAINS OF TEXAS REPUTATIONAL TORTS?**

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**University of Texas School of Law
40th Annual Page Keeton Civil Litigation Conference
October 27 – 28, 2016
Austin, TX**

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I. INTRODUCTION.

On June 17, 2011, Texas Governor Rick Perry affixed his neat signature to Texas' new anti-SLAPP¹ law, ironically named 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 The TCPA is the broadest anti-SLAPP law in the country.

Over the last five years the TCPA has triggered significant unintended consequences, especially for persons and entities who file suit to protect their reputations and property interests. Motions to dismiss under the TCPA appear to be the fastest growing motions practice in Texas. 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 Of the over

160 cases reported under the TCPA to date, none but one or two could be characterized as a SLAPP case. The very broad application of the TCPA captures a very broad variety of claims that do not resemble a SLAPP case. So long as a defendant in a reputational or other 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 "clear and specific" evidence of a prima facie case of each element of his claim, the motion to dismiss must be granted.⁴

The potential for extension of this dispositive motion far beyond the prevention of SLAPP suits 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

¹ "Strategic Lawsuits Against Public Participation."

² See TEX. CIV. PRAC. & REM. CODE § 27.001, *et seq.* The 28 other states, in addition to the District of Columbia, were 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 authors of this

paper were counsel for the plaintiff in that case. 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.

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 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 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

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).

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First appeared as part of the conference materials for the
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