

**PRESENTED AT****25<sup>th</sup> Annual Labor and Employment Law Conference****May 10–11, 2018****Austin, TX****The Texas Anti-SLAPP Statute and its Growing Importance for Employment Lawyers***The Texas Citizens Participation Act and its Role in Employment Litigation***Sean M. Becker  
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The Texas Citizens Participation Act (“TCPA”), TEX. CIV. PRAC. & REM. CODE § 27.001 – 27.011, was enacted in 2011 in order to curtail lawsuits aimed at chilling individuals’ constitutionally protected activities. But the plain language of the TCPA, and courts’ recent interpretations of it, has given the statute an expansive reach. As a result, the TCPA has increased plaintiffs’ pleading burdens, and created opportunities for the early dismissal of many claims. This paper considers the TCPA’s history and its application for employment lawyers.

## I. LEGISLATIVE HISTORY

The TCPA is an “anti-SLAPP” statute. ““SLAPP’ is an acronym for ‘Strategic Lawsuits Against Public Participation,’ which are suits filed against politically and socially active individuals—not with the goal of prevailing on the merits but, instead, of chilling those individuals’ First Amendment activities.” *Cheniere Energy, Inc. v. Lofti*, 449 S.W.3d 210, 212 (Tex. App.—Houston [1st Dist.] 2014, no pet.); see also 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) (“SLAPP suits are “legally meritless suits designed, from their inception, to intimidate and harass political critics into silence.”). The TCPA’s stated goal is 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

Today, 28 states, the District of Columbia, and Guam have “anti-SLAPP” statutes, each with a common theme of prohibiting litigation intended to chill constitutionally-protected expression.<sup>1</sup> The TCPA’s legislative history demonstrates that a protection of First Amendment rights was a primary goal of the Texas statute as well. The bill’s legislative sponsors emphasized particular concerns in protecting citizens who were petitioning government, writing news articles, and making public commentary about the quality of businesses.<sup>2</sup> Those who testified in favor of the statute included members of the press fighting to protect their sources and stories from injunctions and defamation claims,<sup>3</sup> a Texas resident who had been sued after petitioning her homeowners’ association,<sup>4</sup> a journalist who had been sued by a developer after writing a book critical of eminent domain,<sup>5</sup> and a consumer advocate who was sued after protesting a homebuilder’s decision to build housing on a World War II bombing range.<sup>6</sup>

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<sup>1</sup> Anti-SLAPP Statutes and Commentary, MEDIA LAW RESOURCE CENTER, available at <http://www.medialaw.org/topics-page/anti-slapp?tmpl=component&print=1> (last visited Apr. 6, 2018).

<sup>2</sup> See Senate Comm. On State Affairs, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011), available at <https://goo.gl/6PQ4MR> (last visited Feb. 19, 2018) (“Citizen participation is the heart of our democracy. . . . Yet frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of our democracy.”); see also House Comm. On Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011), available at <https://goo.gl/fnU8wB> (last visited Feb. 19, 2018).

<sup>3</sup> See Texas Citizens Participation Act: Hearing on Tex. H.B. 2973 Before the H. Comm. on Judiciary & Civil Jurisprudence, 82d Leg., R.S. (Mar. 28, 2011) (hereafter “TPCA Hearings”) (statements of Joe Ellis and Shane Fitzgerald), available at <https://goo.gl/HZJLr4> (last visited February 16, 2018).

<sup>4</sup> See, e.g., TCPA Hearings, *supra* note 3 (statement of Brenda Johnson).

<sup>5</sup> See TCPA Hearings, *supra* note 3 (statement of Carla Main).

<sup>6</sup> See TCPA Hearings, *supra* note 3 (statement of Janet Ahmad).

The statute, as ultimately drafted and applied, protected this public petitioning activity. But it has also taken on a broader scope and become a tool for the early dismissal of claims that have little or nothing to do with constitutionally-protected activity.

## II. THE TCPA MOTION TO DISMISS

### A. Deadlines and Timing

“If a legal action 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, that party may file a motion to dismiss the legal action.” TEX. CIV. PRAC. & REM. CODE § 27.003(a). Because the TCPA is designed to stop litigation before attorneys’ fees and costs escalate, a TCPA motion to dismiss must be filed early in a case—“not later than the 60th day after the date of service of the legal action.” *Id.* § 27.003(b).

Once a motion to dismiss is filed, discovery is suspended until the court rules on the motion. However, the court may, on its own motion or the motion of any party, “allow specified and limited discovery relevant to the motion” on a showing of good cause. *Id.* §§ 27.003(c), 006(b). The statute requires that a hearing be set within 60 days, “unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties.” *Id.* § 27.004(a). The court may only extend the deadline beyond the 60-day window for a maximum of 30 additional days or, if the court allows discovery, an additional 60 days (a total of 120 days from the date of the motion) to allow the parties to conduct that discovery. *Id.* § 27.004(b), (c).

The court must rule on the motion to dismiss within 30 days of the hearing. *Id.* § 27.005(a). If the court fails to rule within this time period, the motion is considered “denied by operation of law.” *Id.* § 27.008(a). In the event the court denies the motion, the moving party may make an interlocutory appeal of that decision within 15 days of the order. *Id.* § 51.014(a)(12), (f). Any appeal of the court’s decision, whether interlocutory or not, must be expedited by the appellate court. *Id.* § 27.008(b).

### B. Grounds for the Motion and Available Remedies

To prevail on a TCPA motion to dismiss, the movant must make an initial showing that “the legal action is based on, relates to, or is in response to the [moving] party’s exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.” *Id.* § 27.005(b). The burden then shifts to the non-movant to present “clear and specific evidence” of a *prima facie* case for each essential element of his or her claim. *Id.* § 27.005(c).<sup>7</sup> If the non-movant is successful, the burden then shifts back to the movant to “establish[] by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim.” *Id.* § 27.005(d).

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<sup>7</sup> A non-movant may also plead one of the few exemptions to the law, if applicable. By statute, the following claims are not subject to a TCPA motion to dismiss: enforcement actions brought by certain governmental officials; claims for personal injury or wrongful death, survival actions; actions brought under the Insurance Code or arising out of an insurance contract; and certain legal actions brought against persons primarily engaged in the business of selling goods or services, if the statement or conduct at issue arises out of the sale or lease of goods or services or out of a commercial transaction in which the intended audience is an actual or potential buyer or customer. *Id.* § 27.010(a)–(d).

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