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Recent Developments Under the Texas Citizens Participation Act

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I. INTRODUCTION

Texas’s anti-SLAPP law, the Texas Citizens Participation Act (“TCPA”) was enacted in 2011, and is found in Chapter 27 of the Civil Practice and Remedies Code. The TCPA’s express purpose 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. The Legislature instructed that the TCPA “shall be construed liberally to effectuate its purpose and intent fully.” *See id.* § 27.011(b). Courts throughout the State—led by the Supreme Court—have broadly interpreted the Act. Indeed, while the Act only applies to three enumerated rights (speech, association, and petitioning), the statute has nonetheless been applied to a wide variety of claims not typically associated with an anti-SLAPP law.

To effectuate the statute’s purpose, the Texas Legislature has provided a two-step procedure to expedite the dismissal of claims. First, a defendant who has moved to dismiss must demonstrate by a preponderance of the evidence that each claim “is based on, relates to, or is in response to the [movant’s] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.” *Id.* § 27.005(b); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017). Once a movant makes this showing, 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.” Tex. Civ. Prac. & Rem. Code § 27.005(c); *Coleman*, 512 S.W.3d at 898. Finally, if the plaintiff satisfies the second step, the court must dismiss the action if the movant “establishes by a preponderance of the evidence each essential element of a valid defense” to a claim. Tex. Civ. Prac. & Rem. Code § 27.005(d); *Coleman*, 512 S.W.3d at 898. Until a TCPA

Motion to Dismiss has been decided, traditional discovery in the case halts. Tex. Civ. Prac. & Rem. Code § 27.003(c). The Court may allow limited discovery related to the TCPA Motion upon a showing of good cause. *Id.* § 27.006(b).

This Article analyzes recent developments in TCPA case law, beginning with a detailed discussion of the three basic rights protected by the Act: the right to free speech, the right to association, and the right to petition. The second half of this Article contemplates developments applicable to nonmovants, specifically the scope of discovery permitted while a TCPA Motion is pending and the level of evidence necessary to demonstrate a prima case by clear and specific evidence.

II. STEP ONE –TCPA COVERAGE

The first step in a TCPA Motion to Dismiss requires a movant to establish that 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).

A. Right of Association

The TCPA defines the “exercise of the right of association” as “a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.” *Id.* § 27.001(2). “‘Communication’ includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” *Id.* § 27.001(1). These communications are not required to be made in a public forum, and indeed, communications regarding a “private employment matter” may qualify for TCPA protection. *Coleman*, 512 S.W.3d at 900. Notably, while the definition of “exercise of the right of free speech” requires a communication to have been made in connection with a “matter

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