THE TEXAS ANTI-SLAPP LAW AND THE TEXAS DEFAMATION MITIGATION ACT: A BLACK HOLE FOR CLAIMS WITH COMMUNICATIONS.

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I. INTRODUCTION.

On June 17, 2011, Texas Governor Rick Perry affixed his neat signature to the new Texas anti-SLAPP[1] law, entitled the Texas Citizens Participation Act (the "TCPA"), and in so doing Texas joined 27 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 currently interpreted and applied, the TCPA is arguably the broadest anti-SLAPP law in the country. There have been no other states that have enacted anti-SLAPP legislation since Texas.

Over the last six years the TCPA has launched a new and very expensive motions practice, clogging the dockets of trial and appellate courts with expensive, complicated, and time-consuming litigation, that often result in fee awards in the hundreds of thousands of dollars. [3] The TCPA introduces what one judge called a "draconian" motion to dismiss that places a heavy burden on the aggrieved plaintiff to prove that his suit is not frivolous at the inception of the litigation without the benefit of any meaningful discovery.[4]

The Act does not attempt to define the shape or scope of a true SLAPP suit or distinguish between causes of action subject to or protected from the anti-SLAPP statute. Instead, the TCPA has been applied to a very broad array of claims that do not resemble a SLAPP case, including UCC-1 financing statements,[5] theft of trade secrets,[6] breaches of nondisclosure agreements,[7] and

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[1] "Strategic Lawsuits Against Public Participation."

[2] *See* TEX. CIV. PRAC. & REM. CODE § 27.001 *et seq.* The 27 other states, in addition to the District of Columbia, are Arizona, Arkansas, California, 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. Colorado recognizes similar protection through common law.

[3] $624,000 in fees and costs awarded in February, 2017, and $60,000 in fees and sanctions in July, 2017. *See* John C. Council, *Litigator of the Week: The King of Texas' Animal Anti-Slapp Kingdom*, Texas Lawyer (Aug. 3, 2017), available at http://www.texaslawyer.com/id=1202794690875/Litigator-of-the-Week-The-King-of-Texas-Animal-Anti-SLAPP-Kingdom; $350,000 in fees and $250,000 in sanctions against Schlumberger, August 2014. *See* Jeremy Heallen, *Schlumberger Fined, Trade Secrets Suit Against Ex-Atty Gutted*, Law360 (Aug. 27, 2014), available at https://www.law360.com/articles/571752/schlumberger-fined-trade-secrets-suit-against-ex-atty-gutted; $124,000 in fees awarded, to be increased. *See* John C. Council, *Video: Winning Attorney Fees Under Texas' Anti-Slapp Statute (and then some?)*, Texas Lawyer (Feb. 4, 2015), available at http://www.texaslawyer.com/id=1202717046749/Video-Winning-Attorney-Fees-Under-Texas-AntiSLAPP-Statute-and-then-some.

[4] 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 author of this paper was counsel for the plaintiff in that case, and received a rude introduction to the TCPA in one of its first applications. *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).

[5] *See Quintanilla v. West,* No. 04-16-00533-CV, 2017 WL 1684832 (Tex. App.—San Antonio April 26, 2017, pet. filed).

[6] *See Elite Auto Body LLC v. Autocraft Bodywerks, Inc.,* No. 03-15-00064-CV, 2017 Tex. App. LEXIS 4108 (Tex. App.—Austin May 5, 2017, pet. filed).

[7] *See Elliott v. S&S Emergency Training Solutions,* No. 05-16-01373-CV, 2017 WL 2118787 (Tex. App.—Dallas May 16, 2017, pet. filed).

a host of other business, commercial and personal disputes. In fact, very few of the cases currently making their way through the appellate courts could properly be characterized as a SLAPP case. So long as a defendant in a suit that involves a communication can characterize the suit as even tangentially "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, with mandatory fees and sanctions assessed.[8]

Our research also shows that, when confronted with a TCPA motion to dismiss, plaintiffs are almost certain to lose all or part of their cases to dismissal. Although there are no reported statistics on the number of TCPA motions to dismiss granted at the trial level, we do have a record of results on appeal. Since only the movant whose motion to dismiss is denied is entitled to an interlocutory appeal,[9] a review of results on appeal shows that more than 70% of appealed cases conclude with the motion to dismiss being granted in whole or in part.[10]

[8] TEX. CIV. PRAC. & REM. CODE § 27.003 & 27.005.
[9] TEX. CIV. PRAC. & REM. CODE § 27.008.
[10] Mario Franke, in our office, reviewed the cases appealed since the inception of the statute, and counted a case once in instances of more than one opinion.

SUMMARY OF FINDINGS:

2017

For 2017, there are a total of 37 reported cases on WestLaw.
Of these, 27 of the reported cases granted the TCPA motion to dismiss at issue (either whole or in part). This constitutes a 72.97% percentage success rate for TCPA motions in reported cases for 2017.
Notably, to date, there have been already four (4) Supreme Court cases (*Hersh v. Tatum*; *Bedford v. Spassof*; *D Magazine Partners, L.P. v. Rosenthal*; and *ExxonMobil Pipeline Co. v. Coleman*) addressing TCPA motions.

2016

For 2016, there are a total of 40 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).
Of these, 22 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 55.00% percentage success rate for TCPA motions in reported cases for 2016.

2015

For 2015, there are a total of 37 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).
Of these, 26 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 70.27% percentage success rate for TCPA motions in reported cases for 2015.

2014

For 2014, there are a total of 21 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).
Of these, 14 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 66.66% percentage success rate for TCPA motions in reported cases for 2014.

2013

For 2013, there are a total of 13 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).
Of these, 10 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 76.92% percentage success rate for TCPA motions in reported cases for 2013.

Notably, the vast majority of denials for TCPA motions are procedural nature (i.e., tardy appeals; movants not fulfilling the first prong the TCPA and therefore the Court of Appeals failing to have jurisdiction to address the merits of the claims).

However, once the reviewing courts do address the claims set forth by the non-movant in a particular

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