

**THE TEXAS ANTI-SLAPP LAW AND
THE TEXAS DEFAMATION MITIGATION ACT:
ESSENTIAL NAVIGATION CHARTS.**

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I. INTRODUCTION.

*The “general right of an individual to be let alone ... is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed.”*¹

*“Unlike the United States Constitution, the Texas Constitution twice expressly guarantees the right to bring reputational torts.”*²

With the stroke of his pen on June 17, 2011, Texas Governor Rick Perry approved the new Texas anti-SLAPP³ 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.⁴ As currently interpreted and applied, the TCPA is arguably the broadest anti-SLAPP law in

the nation. The Texas statute was one of 11 anti-SLAPP statutes enacted in 2010-2011.⁵ Only Oklahoma (2014) and Kansas (2016) have enacted anti-SLAPP legislation since 2011.⁶

Over the last seven 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.⁷ In 2017 there were 4 opinions from the Texas Supreme Court, and 22 from the courts of appeals. In the first six months of 2018, there were 8 opinions from the Texas Supreme Court, and 36 from the courts of appeals. 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.⁸

¹ Louis D. Brandeis and Samuel D. Warren, *The Right to Privacy*, 4 HARV. LAW REV. 193, 205 (1890).

²

³ “Strategic Lawsuits Against Public Participation.”

⁴ 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.

⁵ See Reports of the Public Participation Project, www.anti-slapp.org.

⁶ *Id.*

⁷ \$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 Guttied*, Law360 (Aug. 27, 2014), available at <https://www.law360.com/articles/571752/schlumberger-fined-trade-secrets-suit-against-ex-atty-guttied>; \$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>.

⁸ 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

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,⁹ theft of trade secrets,¹⁰ breaches of nondisclosure agreements,¹¹ and 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.¹²

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,¹³ 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.¹⁴ Coupled

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).

⁹ See *Quintanilla v. West*, No. 04-16-00533-CV, 2017 WL 1684832 (Tex. App.—San Antonio April 26, 2017, pet. filed).

¹⁰ See *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 203-04 (Tex. App. — Austin 2017, pet. dismissed).

¹¹ See *Elliott v. S&S Emergency Training Solutions*, No. 05-16-01373-CV, 2017 WL 2118787 (Tex. App.—Dallas May 16, 2017, pet. granted).

¹² TEX. CIV. PRAC. & REM. CODE § 27.003 & 27.005.

¹³ TEX. CIV. PRAC. & REM. CODE § 27.008.

¹⁴ 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. Spasoff*; *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

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