The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation.

State Bar of Texas

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I. INTRODUCTION.

On June 17, 2011, Texas Governor Rick Perry affixed his neat signature to Texas' new anti-SLAPP[1] law, entitled 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] As drafted, however, the TCPA will likely trigger significant unintended consequences, especially for persons and entities that file suit to protect their reputation and various property interests. 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] The Act does not define the shape or parameters of a SLAPP suit or distinguish between causes of action subject to or protected from the anti-SLAPP statute. So long as a defendant in a 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 *prima facie* evidence of each element of his claim, the

[1] "Strategic Lawsuits Against Public Participation."

[2] *See* TEX. CIV. PRAC. & REM. CODE §27.001, *et seq.* (2011). The 28 other states, in addition to the District of Columbia, are 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 *Cook v. Tom Brown Ministries*, et. al., County Court at Law Number 3, Cause No. 2011-DCV02792, 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. TBM, et al.,* ____ S.W.3d ____, _____, (Tex.App.--El Paso 2012, pet. filed) (related interlocutory appeal of temporary injuction).

motion to dismiss *must* be granted.[4] The potential for abuse of this newly crafted dispositive motion 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, and 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 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?

[4] TEX. CIV. PRAC. & REM. CODE §§27.003 & 27.005.

II. THE TEXAS CITIZENS PARTICIPATION ACT: WHAT IS IT?

1. Background and Enactment of the TCPA.

A. Stated Purpose: Prevent Frivolous Suits.

The Citizens Participation Act was theoretically enacted to provide an expedited procedure to dismiss retaliatory, frivolous lawsuits that chill free speech; however, the Act does not protect unlawful activities just because such activities involve speech. In adding a new chapter to the Texas Civil Practice and Remedies Code, the Legislature included a brief statement of purpose:

> The purpose of this chapter 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. By its own terms, the Act does not protect any violations of the law. The Act is not limited to common law claims that traditionally involve "speech," such as defamation, business disparagement, false light, and related actions. The Act may also apply to other business torts, such as tortious interference with contract, fraud, and negligent misrepresentation, some intentional torts, malicious prosecution, and even certain statutory actions, such as violations of the Texas Election Code.

The Act's legislative history states that it was intended to target "frivolous lawsuits aimed at silencing citizens who are participating in the free exchange of ideas" and "frivolous lawsuits aimed at retaliating against someone who exercises the person's right of association, free speech, or right of petition."[5] Yet the Legislature did not discuss the applicability of existing anti-

[5] House Comm. On Judiciary and Civil Jurisprudence, *Bill Analysis,* Tex. HB 2973*,* 82nd Leg., R.S. (2011).

frivolous lawsuit rules and statutes,[6] or how such established body of law was inadequate to curtail any perceived harm. Nothing in the legislative history of the Act discusses why the existing statutory framework for discouraging frivolous suits of all kinds was found lacking, or why Chapters 9 and 10 of the Texas Civil Practice and Remedies Code should not be amended to address an unmet need.[7] Cases involving speech and traditional First Amendment rights are not exempted from the frivolous case deterrence functions of Rule 13 and Chapters 9 and 10. In fact, Chapter 9 specifically applies to cases involving defamation and tortious interference.[8]

The Legislature did not otherwise define a frivolous lawsuit in the context of the statute, or define what constitutes a "meritorious lawsuit" that would otherwise not be subject to the anti-SLAPP motion to dismiss. Despite the stated legislative intent, the Legislature did not require that a movant prove that a suit was frivolous in order to have it dismissed under the TCPA. The

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[6] *See* TEX. R. CIV. P. 13, which provides, among other things, for sanctions to be imposed only upon "good cause, the particulars of which must be stated in the sanction order," for a pleading that is "groundless and brought in bad faith or groundless and brought for the purpose of harassment"(the common definition of a frivolous pleading). Every pleading is required to be signed, which signature is a certification that the pleading is not frivolous. A party who brings a suit knowing that it is frivolous "shall be held guilty of a contempt." "'Groundless' for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." Knowing that sanctions are available, "Courts shall presume that pleadings, motions, and other papers are filed in good faith." Accordingly, the party resisting the suit has the burden to prove that the suit is frivolous. "Bad faith is not simply bad judgment or negligence; rather, it is the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes. Improper motive is an essential element of bad faith. Harassment means that the pleading was intended to annoy, alarm, and abuse another person." *Parker v. Walton,* 233 S.W.3d 535, 539-540 (Tex. App. – Houston [14th Dist.] 2007, no pet.). Rule 13 permits the trial court to order the offending party to pay fees, expenses, and discouragement sanctions. *See also* TEX. CIV. PRAC. & REM. CODE §§9.001, *et seq.,* 10.001 *et seq.*

[7] Chapter 9 applies to "Frivolous Pleadings & Claims." TEX. CIV. PRAC. & REM. CODE §9.001, *et seq.* (enacted 1987). In enacting Chapter 10, the Legislature in 1995 went even further than Rule 13, and enumerated frivolous pleadings that could be subject to sanctions, TEX. CIV. PRAC. & REM. CODE §10.001, and spelled out the sanctions available, including fees and expenses, and sanctions to deter future conduct, TEX. CIV. PRAC. & REM. CODE §10.004. Chapter 10 provides a mechanism for a party to file a motion for sanctions or, on its own initiative, a court may issue a show cause order and direct the alleged violator to show cause why the conduct has not violated the statute. TEX. CIV. PRAC. & REM. CODE §10.002(a,b). The Legislature even prohibits the Texas Supreme Court from amending or adopting rules in conflict with the statute. *Id.* §10.006.

[8] TEX. CIV. PRAC. & REM. CODE §9.002(a)(2).

disconnect between the statutory provisions and the anti-frivolous suit rhetoric of the legislative history suggests that we dig deeper into the history of this law in order to understand it.

B. Underlying Purpose: Protection of Media Defendants.

The legislative history of the TCPA provides little guidance as to what evidence of SLAPP lawsuits that the Legislature considered, if any. The House Committee on Judiciary and Civil Jurisprudence report was silent about whether any studies or data existed to demonstrate a particular need for the bill, other than generally stating that "abuses of the legal system have also grown, including the filing of frivolous lawsuits aimed at silencing these citizens who are participating in the free exchange of ideas."[9] There was no data suggesting that there was any widespread abuse of suits involving speech issues, nor was there any indication that the bill was intended to correct any specific case. The report did not discuss any correlation of the bill with media interests.

The legislative history of the TCPA is devoid of any scientific or statistical evidence regarding the frequency or impact of SLAPP lawsuits in Texas, or how often individuals or businesses face meritless defamation or disparagement lawsuits. According to the H.R.O, supporters of the bill argued that "SLAPP suits chill public debate because they cost money to defend, even if the person being sued was speaking the truth."[10] "Under current law, the victim of a SLAPP suit must rely on a motion for summary judgment. While summary judgment disposes of a controversy before a trial, both parties still must conduct expensive discovery. By allowing a motion to dismiss, [the TCPA] would allow frivolous lawsuits to be dismissed at the

[9] House Comm. On Judiciary and Civil Jurisprudence, *Bill Analysis,* Tex. HB 2973*,* 82nd Leg., R.S. (2011).

[10] *Id.*

outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system"[11]

Further research reveals the impetus behind the passage of the Act. Corpus Christi representative Todd Hunter was the principal designated legislative author of H.B. 2973. Representative Hunter worked with the Freedom of Information Foundation of Texas ("FOIFT")[12], represented by Laura Prather of Sedgwick, in passing the legislation. The FOIFT receives its funding principally from state and national newspaper publishers, along with other media interests.[13] Media organizations, including FOIFT, were the principal proponents of both the TCPA[14] and the 2009 adoption of the reporter's privilege, codified in TEX. CIV. PRAC. & REM. CODE §22.021 *et seq.* Apparently Prather, for the media groups, drafted the TCPA and proposed, organized, and supported its passage.[15] Given the context of the media organizations' viewpoint and their efforts to further insulate the press from legal liability for its actions, the proposal of a summary mechanism to allow media to have their counsel attempt dismissal of defamation suits without discovery may have been a logical next step. Recognizing that the media was the principal proponent of the TCPA helps us better understand the purpose of the statute.

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[11] *Id.*

[12] *See* http://www.foift.org/.

[13] *See http://www.foift.org/?page_id=796* for a listing of "sponsors."

[14] *See http://www.foift.org/?page_id=1923* for FIFT's discussion of the passage of the Act.

[15] *See Ms. Prather's news release at http://www.sdma.com/laura-prathers-efforts-lead-to-passage-of-texas-anti-slapp-law-06-12-2011/.*

In true winning legislative fashion, the media interests caused the statute to be named the "Citizens Participation Act," rather than the "Make It Harder to Sue the Media Act," which may more accurately reflects the law's true purpose.

According to the Bill Analysis and legislative records, the principal witness before the Judiciary and Civil Jurisprudence Committee was Ms. Prather, appearing for the FOIFT, the Texas Association of Broadcasters, the Better Business Bureau, and the Texas Daily Newspaper Association.[16] Despite the overarching media protection purpose, the only example of alleged abuse that House Research Organization cited in its Bill Analysis was a doctor who sued "a woman who complained to the Texas State Board of Medical Examiners about the doctor and later complained to a television station.[17] According to the H.R.O., "[t]he suit eventually was dismissed, but the television station was forced to pay $100,000 in legal expenses."[18] The H.R.O. did not give any other details about the case, or how it constituted a victory for the woman.

The legislative history does not discuss media involvement, provides no examples of media litigation, or how the First Amendment and successive generations of litigation has proved inadequate to protect the media from meritless defamation suits. Opponents argued that the TCPA, "if interpreted broadly, could be used to intimidate legitimate plaintiffs. It could stifle suits brought legitimately under libel or slander laws because the plaintiff in such suits would have to overcome motions testing its pleadings."[19]

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[16] We have requested a copy of any testimony transcript.

[17] House Research Org., Texas House of Representatives, Bill Analysis H.B. 2973 (May 2, 2011).

[18] *Id.*

[19] *Id.*

The media interests successfully cast the legislation as a protection for the average citizen, especially persons who faced larger, better-funded litigation opponents. The proponents avoided allowing a discussion of larger, well-funded media entities defending suits brought by individuals or small businesses. The proponents apparently successfully convinced the Legislature that their vote in favor of the legislation was a vote for "the little guy," since the Legislature passed the TCPA by unanimous vote in both the House and the Senate. There is no indication that the Legislature spent much time in consideration of the ramifications of the law before its passage.

2. <u>What is a SLAPP lawsuit?</u>

The apparent consensus view among commentators is that SLAPP suits are "legally meritless suits designed, from their inception, to intimidate and harass political critics into silence."[20] 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."[21] According to some views, the typical SLAPP plaintiff "does not seek victory on the merits, but rather victory by attrition."[22] 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'

[20] 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/SLAPPback: The misuse of Libel Law for Political Purposes and Countersuit Response, *7 J.L. & POL 417, 423 (1991).*

[21] HAW. REV. STAT. §634F-1 (2011).

[22] Sobczak, supra, at 561.

grievances."[23] The goal of a SLAPP suit is to "stop citizens from exercising their political rights or to punish them for having done so."[24]

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. The concept assumes that the SLAPP plaintiff enjoys a great disparity 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 development plans or other goal."[25] The developer tale is a frequently cited example of a SLAPP suit.[26] There is no discussion or requirement in disparity of resources to invoke the TCPA.[27]

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[23] *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).*

[24] *Id., citing* George W. Pring, SLAPPs: Strategic Lawsuits Against Public Participation, *7 PACE ENV'L. L. REV. 3, 5-6 (1998).*

[25] Richard J. Yurko and Shannon C. Choy, Legal Analysis: Reconciling the anti-Slapp Statute With Abuse of Process and Other Litigation-Based Torts, *51 B.B.J. 15, 15 (2007).*

[26] *See* John G. Osborn and Jeffrey A. Thaler, Feature: Maine's Anti-SLAPP Law: Special Protection against improper lawsuits targeting free speech and petitioning, *23 MAINE BAR J. 32,32-33 (2008).* A powerful developer files a frivolous defamation lawsuit against a group of outspoken homeowners that oppose the developer's plans to build an industrial facility in their backyard.The developer's complaint "is sufficiently drafted to survive… [a] motion to dismiss, and the developer then embarks upon a course of oppressive discovery and motion practice, forcing the defendants to engage in extensive document production and a seemingly endless string of depositions." "After years of litigation, the defendants prevail at summary judgment or trial--but the victory is, in fact, the developer's. The cost, stress and time involved in defending against the suit has fractured the community group, sapped the energy and financial resources of the group's members, diverted their efforts from actually opposing the industrial plant and chilled the likelihood of future opposition to similar projects because of the toll the lawsuit took on the group and its members." *Id.*

[27] Importantly, neither the TCPA nor other anti-SLAPP statutes contain a requirement that the defendant be economically disadvantaged as compared to the plaintiff, and most states do not require that the plaintiff have the improper motive of interfering with the constitutional rights of the defendant. In fact, it is highly questionable

III. APPLICATION OF THE TCPA.

1. What claims are covered?

The TCPA applies to "a ***legal action*** [that] 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***…"[28] Each of these concepts was defined by the Legislature very broadly. A "legal action" "means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." [29] Since a motion to dismiss may be made regarding any "*judicial* pleading or filing" in which some relief is requested, it appears that administrative proceedings may not be subject to the Act. Clearly, though, a motion to dismiss may be filed in response to any sort of pleading or filing in a judicial matter, including, conceivably, motions to dismiss.

"Exercise of the right of free speech" means a communication made in connection with a matter of public concern."[30] "'Communication' includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic."[31]

Importantly, the broad definitions of the First Amendment rights in the statute suggest that a movant may file a motion to dismiss even if the speech or communication is not afforded

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whether any state of mind is necessary to dismiss a lawsuit under the TCPA and similar statutes. *See, infra*, Discussion Part II.

[28] TEX. CIV. PRAC. & REM. CODE §27.003(a)(emphasis added).

[29] TEX. CIV. PRAC. & REM. CODE §27.001(6).

[30] *Id.* §27.001(3).

[31] *Id.* §27.001(1).

full protection under the First Amendment. It seems that a motion to dismiss can be filed to protect communications that are not afforded full First Amendment protection.[32]

A "matter of public concern" is very broad and subject to different interpretations, since it "includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace."

TEX. CIV. PRAC. & REM. CODE §27.001(7).

What *does not* constitute a "matter of public concern" will be open to debate and litigation, undoubtedly, for some time to come. In private enterprise, is there anything that is not "a good, product, or service in the marketplace?"

[32]A number of categories of speech receive little or no First Amendment protection. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73 (1942). Obscenity enjoys no First Amendment protection and may be banned simply because a legislature concludes that banning it protects "the social interest in order and morality." *Roth v. United States,* 354 U.S. 476, 485 (1957). Child pornography is not protected by the First Amendment. *Osborne v. Ohio*, 495 U.S. 103 (1990). Advocacy directed to inciting or producing imminent lawless action and is likely to incite or produce such action is also not protected by the First Amendment. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Other categories of speech receive limited protection under the First Amendment. "Commercial speech" receives less First Amendment protection, and *false* commercial speech receives none. *P&G v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001). Importantly, commercial speech may relate to a matter of "public concern," but it nonetheless receives limited First Amendment protection as commercial speech if the motivation of the speaker is primarily economic. *Id.* at 556. Misleading commercial speech receives no First Amendment protection. *Goodman v. Ill. Dep't of Fin.& Prof'l Reg.*, 430 F.3d 432, 438 (7th Cir. 2005). Content-neutral restrictions, such as time, place, or manner restrictions, as well as incidental restrictions on speech, also enjoy less First Amendment protection. *Vincenty v. Bloomberg*, 476 F.3d 74, 84 (2nd Cir. 2007). Defamation is clearly an exception to the First Amendment, in which greater protection is afforded to public officials and figures.

"Exercise of the right of petition" means any of the following: (1) a communication "in or pertaining to" a judicial, administrative, executive, legislative, or public proceeding, including all types of public hearings and meeting before any governmental body, (2) a communication "in connection with" an issue under consideration or review by a legislative, executive, judicial, or other governmental body, (3) a communication that is "reasonably likely to encourage consideration or review of an issue by any governmental body, (4) a communication "reasonably likely to enlist public participation" in an effort to effect consideration of an issue by any governmental body, and, (5) any communication protected by the Texas or federal constitutions.[33]

"Exercise of the right of association" means "a communication between individuals who join together to collectively express, promoted, pursue, or defendant common interests."[34]

Although the Legislature went to great pains to define "free speech," "petition," "association," and "communication," it did not specify what it means by "based on, relates to, or is in response to…." Broadly stated, the Act applies to any judicial proceeding about a communication related to anything in commerce or government.

2. <u>Exceptions to the TCPA</u>.

Perhaps recognizing the overbroad nature of the statutory definitions, the proponents provided three general categories of exemptions from the application of the statute, including government enforcement actions,[35] suits for bodily injury, wrongful death, or survival,[36] and

[33] TEX. CIV. PRAC. & REM. CODE §27.001(4).

[34] *Id.* §27.001(2).

[35] *Id.* §27.010(a).

[36] *Id.* §27.010(c).

actions brought against a "person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer."[37]

Yet these statutory exemptions fall short of curing the potential for abuse of the TCPA, and actually create a disparate impact on certain businesses. For example, the last noted exemption applies to actions brought *against* a "person primarily engaged in the business of selling or leasing goods or services," which would include entities such as a new or used car dealer. That is, the motion to dismiss is not available to a car dealer that defends a DTPA suit over alleged misrepresentations about sale or service, because that would be an action "against" the dealer, and because it "arises out of the sale or lease of goods." In Example 1, Car Dealer cannot avail itself of the motion to dismiss in response to the DTPA suit by Customer, although the Customer can bring a motion to dismiss against Car Dealer in response to its counterclaim.

3. <u>Procedure.</u>

A. A New Form of Dispositive Motion.

The TCPA's motion to dismiss is a procedure new to Texas civil jurisprudence. As a dispositive motion, it is very different from any motion for summary judgment or even a federal Rule 12 motion to dismiss. The only prerequisite for filing the motion is that the movants claims that it is in response to a "legal action" that are based on or relate to the exercise of free speech, petition or association[38] The defendant/movant need not wait to file a motion for summary judgment and need not conduct any discovery, or allow any discovery to be conducted, before

[37] *Id.* §27.010 (b).

[38] *Id.* §27.003 (a).

filing. The motion to dismiss does not mirror or track federal prompt disposition motions under FED. R. CIV. P. 12. The motion is not required to be sworn, but it may be supported by affidavits, and, presumably, documents and publications.

B. Deadline to File the Motion.

The motion to dismiss must be filed within 60 days following the service of the legal action. The time to file the motion to dismiss may be extended on a showing of good cause.[39] The length, or number, of extensions is not addressed in the statute.

C. Deadline for Hearing and Decision.

The hearing on the motion must be set not later than 30 days after the date of service of the motion, unless the court's docket conditions require a later hearing.[40] There is no guideline as to how long the hearing may be delayed due to the court's "docket conditions." Importantly, there is no provision for a trial court to permit the hearing to be delayed for good cause, unlike the extension available to file the motion. There is no provision to allow the trial court to allow the respondent additional time to respond, for whatever reason. There is also no provision that requires more than the standard default three days' notice of the hearing.[41] There is nothing in the statute to prevent the movants from filing the motion and setting it for hearing with minimum notice under Rule 21. The 21-day notice provision of TEX. R. CIV. P. 166a does not apply. Even with summary judgment motions, trial courts have long been permitted to alter the hearing date "on leave of court," which does not necessarily mean good cause. The TCPA does not include any provision to allow the nonmovant to file a response, or even provide any time in which to

[39] *Id.* §27.003 (a).

[40] *Id.* §27.004.

[41] TEX. R. CIV. P. 21.

file a response, contrary to Texas and federal rules of procedure. The TCPA does not even afford the nonmovant the limited time to respond to a Rule 12 motion to dismiss in federal court, or extend the time to respond.[42]

Once the hearing is set, the court must rule on the motion not later than 30 days following the hearing.[43]

D. Discovery Stay.

When the motion is filed, it operates to immediately suspend all discovery in the underlying legal action until the court rules on the motion to dismiss.[44] This appears to be an automatic suspension that requires no further order of the court. There is no requirement in the statute that the motion to dismiss include a notice to court and parties about the discovery suspension.

(Very) limited discovery may be allowed on issues relevant to the motion to dismiss, based on a motion by the court or a party.[45] Since the motion must be heard within 30 days of the service of the motion, and the new statute does not address whether the deadlines in the Rules of Civil Procedure may be modified, discovery is likely limited to depositions, possibly with production of some record production. The statute is silent on any modification of hearing deadlines due to the need to conduct some discovery, but since the statute does not provide for discovery as an exception to the 30-day hearing rule, courts may very likely deny any discovery

[42] *See, e.g.,* FED. R. CIV. P. 12(b); Local Rule CV-7(d), United States District Court, Western District of Texas (establishing 11-day time for response); FED. R. CIV. P. 6(b) provides for extension of time for good cause, with few exceptions.

[43] TEX. CIV. PRAC. & REM. CODE §27.005 (a).

[44] *Id.* §27.003 (c).

[45] *Id.* §27.006 (b).

that could affect the hearing date.[46] There is no provision for when a motion for discovery may be brought, whether a movant is entitled to hearing, or how the court may respond to such a motion. The effective result of a discovery stay is to prevent virtually all discovery except at hearing, in response to subpoena, much like a contested temporary injunction hearing. This denial of discovery, especially coupled with the expedited minimum notice dispositive motion, may very well violate the open courts provision of the Texas Constitution, as discussed below.

4. <u>Standards and Burdens of Proof/Actions by Court.</u>

A. What evidence may be considered?

"In determining whether a legal action should be dismissed under [the TCPA], the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."[47] The TCPA does not clearly indicate whether the hearing is evidentiary, or whether the trial court should consider live testimony or take up the motion by submission. Although the Act specifically refers to affidavits and pleadings to be considered, the Legislature does not prohibit live testimony. Yet the language of the statute may leave open an argument to a movants that a respondent is limited to affidavit testimony, although a plaintiff resisting the motion to dismiss may very well desire to bring live testimony at the hearing, because of the discovery limitations. There is no time limit for the hearing.

B. Burden of Proof on the Movant.

The standard for the defendant bringing the motion to dismiss is "preponderance of the evidence." The movant need only show by a preponderance of the evidence "that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free

[46] *See id.* §27.004.

[47] *Id.* §27.006(a).

speech; (2) the right to petition; or (3) the right of association."[48] In order to require a dismissal of the underlying legal action, there is no requirement that the movant obtain any finding that the action against him was frivolous or groundless and brought in bad faith or for purposes of harassment, despite the avowed intent of the statute, or otherwise was brought for the purpose of harassing or maliciously inhibiting the free exercise of First Amendment rights. Importantly, the Legislature did not condition the application of the TCPA on a finding of improper motive by the plaintiff. There is no *mens rea* requirement that the intent of the lawsuit be to chill free speech, petition or association. Nor is there a requirement under the statute that the trial court take into consideration any disparity in the resources available to the parties.

C. Burden of Proof on the Respondent.

The Legislature does not clarify the order of proof or shifting of burdens of proof, but once the movant files a verified motion that merely makes the statutory allegations, the burden of proof shifts to the plaintiff/respondent. There are crucial questions about what the burden of proof on the respondent is and how it is met. The court "may not dismiss a legal action under this section if the party bringing the legal action establishes by ***clear and specific*** evidence a prima facie case for each essential element of the claim in question."[49] What does that mean? What must a respondent do to defeat a motion to dismiss?

i. "Clear and specific evidence" is undefined and, if it is meant to be a higher standard of proof than "preponderance of the evidence," may very well violate the Open Courts provision of the Texas Constitution.

[48] *Id.* §27.005(b).

[49] *Id.* §27.005(c) (emphasis added).

It is not clear what the Legislature meant by "clear and specific evidence," as there is no such recognized standard under Texas law for any cause of action. We anticipate immediate confusion with "clear and convincing evidence," which is a high standard to meet with a long history of interpretation.[50] The standard should not mean anything other than some evidence of each element; otherwise, the Act would impermissibly impose a higher burden of proof that would ultimately be required of a plaintiff at the trial of the legal action. Yet this is exactly what the drafter intended.

"Clear and specific evidence" is evidently derived from the reporter's privilege codified in 2009 in the "Journalists' Qualified Testimonial Privilege in Civil Proceedings" in TEX. CIV. PRAC. & REM. CODE CHAPTER 22, SUBCHAPTER C, in which a party seeking to compel information from a reporter must make a "clear and specific showing" about the need to obtain the information. TEX. CIV. PRAC. & REM. CODE § 22.024. The "clear and specific showing" does not apply to any cause of action, or a burden of proof for any right of action for damages. Ms. Prather, writing for the Texas Daily Newspaper Association, gave her detailed explanation of the TCPA, including her view of what constitutes "clear and specific evidence." She wrote: "**What is the "clear and specific" standard?** As many of you may recall, it is the standard already used by the courts in reporter's privilege cases and is a more significant burden then establishing something by a preponderance of the evidence but not as heavy a burden as requiring proof by clear and convincing evidence."[51] A "clear and specific showing" to obtain a reporter's source information is very different from meeting a burden of proof on a recognized tort common law cause of action.

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[50] *See, e.g. id.* §41.001(2): "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

[51] http://www.sdma.com/texas-newsrooms-will-benefit-from-anti-slapp-law-07-15-2011/.

If indeed "clear and specific evidence" is supposed to represent a "more significant burden" than a "preponderance of the evidence," the statute may very well run afoul of the open courts provisions of Article I, Section 13 of the Texas Constitution.[52] There is at least one case pending on appeal in which the constitutionality of the imposition of a higher burden of proof in response to a motion to dismiss has been challenged.[53] The statute in question clearly applies to many established common law causes of action, and if Ms. Prather's view as author of the statute is correct, a party must meet a higher burden of proof to defeat a motion to dismiss filed at the outset of a case without discovery than the preponderance standard required to prove the case at trial. Preponderance of the evidence is the long-standing burden of proof in most common-law and many statutory causes of action.

Likewise, imposing a higher standard of proof in response to a motion to dismiss would seem to impose a higher burden than is required to defeat a no-evidence motion for summary

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[52] The "open courts provision" of the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I § 13; *Trinity River Auth. v. URS Consultants, Inc.,* 889 S.W.2d 259, 262 (Tex. 1994). "It includes at least three separate constitutional guarantees: 1) courts must actually be operating and available; 2) the Legislature cannot impede access to the courts through unreasonable financial barriers, and 3) meaningful remedies must be afforded, 'so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress.'" *Trinity River Auth.,* 889 S.W.2d at 262. Pursuant to the open courts provision, "[a] statute or ordinance that unreasonably abridges a justiciable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process under article I, section 13, and is, therefore, void." *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex. 1983). Thus, the open courts provision is violated when a well-established cause of action is restricted, and the restriction is unreasonable and arbitrary when balanced against the purpose of the statute. *Smith v. Smith*, 126 S.W.3d 660, 664 (Tex.App.--Houston [14th Dist.] 2004, no pet.), citing *Sax*, 648 S.W.2d at 666. Clearly, causes of action for defamation, business disparagement, tortious interference, fraud, malicious prosecution, violations of consumer statutes, and other common-law and statutory actions are well-established. The TCPA may unreasonably and arbitrarily restrict well-established causes of action, by imposing a higher standard of proof than would ordinarily be required for the plaintiff to prevail at trial. Moreover, the TCPA's limitation on discovery may also violate the open courts provision. *See In re Hinterlong*, 109 S.W.3d 611 (Tex.App.--Fort Worth 2003, no pet.) (crime-stoppers statutory privilege violated the open courts provision of the Texas Constitution, because it unreasonably and arbitrarily restricted plaintiff's ability to prosecute his malicious prosecution, defamation, and negligence claims, by precluding discovery of the identity and other information about his accuser).

[53] *See Jennings, et al. v. Wallbuilder Presentations and David Barton, et al.,* No. 2-12-047-CV, In the Court of Appeals for the Second District of Texas, Fort Worth.

judgment, which requires the respondent only to produce more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements.[54] A nonmovant produces more than a scintilla when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions."[55] There is a very large body of law that describes for courts and practitioners what level of proof is necessary to sustain or defeat a no-evidence motion for summary judgment, none of which is deemed frivolous. The case law refers to a burden on the nonmovant to "produce" such evidence. The TCPA requires the nonmovant to "establish" the evidence. Considering the introduction of other standards in the statute, a movant could argue that "establish" also means more than "produce," perhaps rising to the level of evidence required to sustain a directed verdict. This also makes no sense and overwhelms any notion of fairness and harmony with existing law. Existing rules for summary judgment and against frivolous suits, when applied by even-handed jurists, provides a more than adequate framework for sorting out meritless suits involving some sort of speech.

ii. What is a "prima facie case?"

"The term '*prima facie* evidence' is ambiguous at best; it sometimes entitles the producing party to an instructed verdict, absent contrary evidence, and sometimes means that a party has produced sufficient evidence to go to the trier of fact on the issue." *Hinojosa v. Columbia/St. David's Healthcare System, L.P.,* 106 S.W.3d 380, (Tex. App. – Austin 2003, no pet.), citing *Coward v. Gateway Nat'l Bank,* 525 S.W.2d 857, 859 (Tex. 1975). In this context, "prima facie" appears to refer to some evidence on the elements of the cause of action. The

[54] TEX. R. CIV. P. 166a(i); *Forbes, Inc. v. Granada Biosciences, Inc.,* 124 S.W.3d 167, 172 (Tex. 2003).

[55] *Ford Motor Co. v. Ridgeway,* 135 S.W.3d 598, 601 (Tex. 2004).

statute does not clarify what it means by "a prima facie case for each essential element of the claim in question."

Ms. Prather likewise described to readers of her articles the origin of the prima facie case language: "**Where did the prima facie establishment of the elements of the claim come from?** This is the test Texas courts currently use in determining whether someone has a valid claim to access information about an anonymous speaker. It only makes sense to apply the same test to all forms of speech — anonymous and non-anonymous, and Texas courts are used to applying this test in speech-related cases."[56]

Ms. Prather's comment does not address a cause of action, or the elements of a cause of action, and does not explain what proof of need for access to information has in common with proof of a cause of action consistent with due process.

D. Ruling by the Court - Dismissal.

If the movant/defendant meets that burden, the court has no discretion, but "*shall dismiss*" the legal action brought against the movant/defendant. This is an important provision, as it seems to make the trial court's decision nondiscretionary so long as the nonmovant does not "establish" "clear and specific evidence" on some element of any cause of action.

Most good practitioners make alternative allegations in their lawsuits, most of which are supported by known evidence, and some of which are believed will be supported by the evidence adduced during discovery. A real trap for the practitioner lies in the ambiguity of the scope of dismissal contemplated by the statute. If the defendant moves to dismiss the entire suit, which includes all theories alleged and remedies sought, including extraordinary remedies, a movant may very well persuade the trial court to dismiss the entire lawsuit even if only one element of

[56] http://www.sdma.com/texas-newsrooms-will-benefit-from-anti-slapp-law-07-15-2011/.

one of the causes of action is not clearly supported by evidence. As in Example 2, the remaining doctors seeking to preserve the protected health information of their patients may very well see their injunctive relief dissolved and the suit dismissed, and fees and sanctions awarded against them, even though the injunctive relief was clearly the proper remedy.

Unlike the provisions in Rule 13 and Chapters 9 and 10 of the Civil Practice and Remedies Code, there is no statutory requirement of any written finding in support of the trial court's ruling. If the movants makes no request for any findings, the trial court does not have to issue any. At the request of the movant, but not the respondent, the court "shall issue" findings about whether the legal action was brought for improper purposes, and must issue the findings not later than 30 days following the request. The Legislature does not provide a time limitation or end date on the request, and does not indicate whether the request should be made before or after a ruling, or if the request can be made months or years later. The Legislature does not explain why the party bringing the legal action is not entitled to ask for such specific findings in the event that the trial court rules that the legal action should be dismissed. More importantly, the Legislature did not address what relevance, if any, such findings would have to the trial court or to an appellate court. If it is not an element of the motion that there be a finding that the lawsuit was brought for an improper purpose; then why is the movant permitted to request such findings? The motion can and must be granted so long as the other elements are met. If the Legislature intended such findings to assist in the determination of sanctions by the trial court, and the review of such award by the appellate court, such intent is less than clear from the text of the statue.

Another issue of concern is whether the trial court must rule on the motion if the plaintiff nonsuits the case. Normally counterclaims and certain requests for sanctions survive a nonsuit,

but the motion to dismiss is not a counterclaim for damages, nor is it a motion for sanctions. The nonsuit is effective as soon as the plaintiff files a motion for nonsuit. *Epps v. Fowler,* 351 S.W.3d 862, 868 (Tex. 2011). At the same time, a nonsuit does not affect any pending claim for affirmative relief or motion for attorney's fees or sanctions. *Id.;* TEX. R. CIV. P. 162. A nonsuit renders the merits of the case moot. *UTMB v. Estate of Blackmon,* 195 S.W.3d 98, 101 (Tex. 2006). Since the TCPA motion to dismiss is predicated on a review of the merits of the lawsuit, does the motion constitute a claim for affirmative relief or sanctions? Arguably the nonsuit renders the motion to dismiss moot.

5. Mandatory, Not Discretionary, Award of Fees and Sanctions for Movant Upon Dismissal of Legal Action.

If the court dismisses a legal action, again the court has no discretion, but "shall award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter."[57] There is no explanation in the legislative history or the statute why the trial court has been stripped of the discretion to award fees and assess sanctions, which discretion has long been given to courts. Even a suit with significant merit can result in fees and sanctions assessed if the court does not think that there is "clear and specific evidence."

The Legislature did not follow the lead of some other states and allow for the recovery of exemplary or punitive damages. An award of sanctions is reviewed for an abuse of discretion,

[57] TEX. CIV. PRAC. & REM. CODE §27.009(a).

while Texas law provides a strict, high standard of proof to recover exemplary damages.[58] The legislative history and bill analyses do not discuss why the Legislature chose sanctions over punitive damages.

6. Award of Fees, Not Sanctions, for Respondent/Plaintiff – Predicated on Frivolous Motion.

In contrast to the broad recovery favoring the subject of the legal action, the only recovery that a plaintiff in the action may obtain in responding to a motion to dismiss would be for court costs and reasonable attorney's fees, but only if the court finds that the motion to dismiss is "frivolous or solely intended to delay."[59] Unlike the movant, the respondent cannot recover sanctions under the statute, and would have to resort to existing Texas law to recover any sanctions for frivolous pleadings. The Legislature did not disclose why the plaintiff in the civil action must prove that the motion to dismiss is frivolous, while the object of the suit, the purported defamer, need only prove the action "relates to" his claimed exercise of speech, association, and petition rights.

7. Interlocutory Appellate Review.

Either party has 60 days after the court's order is signed to file an appeal, not just a notice of appeal.[60] A failure to timely rule is treated as a denial by operation of law to trigger the appellate deadline.[61] The Act provides deadlines for the parties to file "other writs," but does not indicate what other writs are contemplated. A petition for writ of mandamus would be

[58] *Id.* §41.003.

[59] *Id.* §27.009(b).

[60] *Id.* §27.008(c).

[61] *Id.* §27.008(a).

superfluous, given the available interlocutory appeal. The TCPA does not state that the movant may appeal when the court expressly denies the motion within the required 30-day deadline.

What is the deadline to appeal if the motion to dismiss is granted, and an order disposing of all parties and claims is entered? Is that considered a final judgment, for which a notice of appeal must be filed within 30 days of the order, [62] or does the 60-day filing of the appeal itself, regardless of notice, apply under TEX. BUS. & COM. CODE §27.008? These questions are not addressed in the statute.

The statute does not discuss the standard of review of the trial court's ruling on the motion to dismiss and for fees and sanctions. The statute does not make any express provision for an "abuse of discretion" standard of review of the filings. Based on the mandatory language in the Act, it is unclear whether the trial court's rulings will be reviewed de novo.

IV. UNINTENDED CONSEQUENCES.

1. Overbroad Application and Chilling Effect on Meritorious Business Tort Actions.

Whether the lawsuit is actually frivolous is irrelevant to a motion to dismiss under the TCPA. While the Act was not enacted to legalize illegal activity, or to provide a safe harbor for violations of Texas law, it may have this unintended consequence.[63]

Abuse of anti-SLAPP statutes has been reported in other states, such as Maine and California.[64] A Maine commentator reports that, "[n]ot surprisingly, entities are beginning to find ways to use anti-SLAPP statues for less legitimate purposes. One example is the trend of

[62] TEX. R. APP. P. 26.1.

[63] The Act became effective on June 17, 2011 and there is no case law interpreting it or applying it. Under the Code Construction Act, it is proper to consider legislative history and the object sought to be obtained by the Legislature when construing and applying any statute. *See* TEX. GOV'T CODE § 311.023.

[64] John G. Osborn & Jeffrey A. Thaler, Featue: Maine's Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning, *23 Maine Bar J. 32, 39 (2008).*

corporate defendants' use of special motions to dismiss under anti-SLAPP statutes as a delaying tactic in the face of legitimate consumer protection or product liability lawsuits."[65] "Absent a fee-shifting disincentive, defendants are filing largely futile special motions to dismiss and the engaging in interlocutory appeals of the inevitable denials of those motions."[66] Similarly, a California commentator reports that "legal seminars are continually encouraging corporations to employ the anti-SLAPP Statute motion as a new litigation weapon by filing it in otherwise ordinary personal injury and products liability cases."[67] The authors understand that some counsel are urging entities involved any suits involving communications to file the motion to dismiss in each case.

Texas' exemptions fall short of narrowing the application of the TCPA to true SLAPP cases, particularly since there is no requirement that there be a finding that the lawsuit was frivolous, and that there is a gross disparity in resources among the litigants in which the alleged defamer is at a disadvantage.

Moreover, certain causes of action can always be categorized as "relating to" or "based on" speech, particularly defamation, disparagement, tortious interference, misrepresentations, and even statutory claims concerning communications. For example, the Texas Election Code provides that candidates and officeholders who are the objects of illegal campaign contributions have the right to seek damages against the person or persons who knowingly violate the Code.[68] The Code also provides that "[a] person who is being harmed or is in danger of being harmed by

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[65] *Id.*

[66] *Id.*

[67] Joshua L. Baker, Review of Selected 2003 California Legislation: Civil: Chapter 338: Another New Law, Another SLAPP in the Face of California Business, *35 McGeorge L. Rev. 409 (2004).*

[68] TEX. ELEC. CODE ANN. § 253.131(a) (2010).

a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring."[69] Thus, a candidate or officeholder who is harmed by illegal contributions can sue for damages and injunctive relief. But campaign contributions necessarily "relate to" or are "based on" the "exercise of free speech."[70] As a result of the enactment of the TCPA, any political candidates suing for damages and to enjoin violations the Code must be ready to survive an anti-SLAPP motion.

A critical problem with determining the applicability of the statute is the use of the terms "related to" and "based on." What does "related to" mean? Does it mean more than "is engaged in?" Or more than "arising from?" As drafted, the statute conceivably applies to almost any type of dispute between parties, and is not limited to traditional press communications, or communications with governmental entities. The very low threshold for success in a motion to dismiss means that anytime a blogger, or other person, decides that he is going to make a business' life miserable, he can do so with virtual impunity so long as he claims he is exercising his First Amendment rights. If a person repeatedly writes or emails vitriolic views about a business, in a way that is damaging to the business, is it not proper to sue to stop the damage? If a person's website, or Facebook, or Twitter comments otherwise violate state defamation law, why shouldn't a party sue for such conduct? We can easily see that theft of confidential information, trade secrets, statutory actions, other misappropriation actions, can be the subject of anti-SLAPP motions to dismiss. It is a very simple matter to predict that creative lawyers will invoke the TCPA's provisions in virtually every applicable case.

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[69] *Id.* § 273.081.

[70] Whether campaign contributions are actually considered constitutionally protected free speech is a question beyond the scope of this paper. However, it is fair to say that campaign contributions are always necessarily *related* to the exercise of free speech.

Suits for business disparagement, tortious interference, defamation, and related torts are a staple of tactics to restrain unethical practices, and to restrain persons with defective moral compasses from engaging in deleterious behavior. The tort system generally works well to temper the bad conduct of businesses, customers, and the public. The vast majority of business tort suits would likely not be characterized as frivolous SLAPP suits. As a practical matter, most people do not want to spend the money to prosecute a meritless case. The medicine is probably worse than the illness sought to be cured.

2. Justice Delayed is Justice Denied.

Doubtless many litigants in business tort suits will try out the new TCPA. For a defendant, such as the disparaging blogger, or illegal advertiser, to promptly file a motion to dismiss, with an affidavit claiming that the activity was protected, is not a difficult matter. That defendant would know that he is not subject to sanctions under the statute, and stands to lose only and the case grinds to a halt, the discovery stops, and the plaintiff has to defend without the benefit of even basic discovery. In many cases a plaintiff does not have the specific proof on every element of her cause of action, and will be able to prove the case with some evidence from the target defendant. That opportunity is denied in the expedited motion to dismiss process.

By the time that an expedited appeal is decided, precious time is lost and the expense of meritorious litigation mounts. We will leave it up to the reader to determine the probability of a plaintiff securing fees and expenses from the defendant/movants in such litigation in response to the motion to dismiss.

3. When The Texas Attorney General Must Be Invited to the Party.

The passage of the TCPA also reflects a lack of consideration about the interaction of the statute with other statutory notice requirements. Since the communications made the basis of the

motion to dismiss are likely claimed to be constitutionally protected, if the suit is based at least in part on statutory grounds that the movant challenges on constitutional grounds, the state Attorney General must be timely notified and given an opportunity to participate. Pursuant to Section 402.010 of the Texas Government Code (new 2011 statute), the Texas Attorney General must be notified before any ruling by the trial court is made under Chapter 27. Such statute provides that the Texas Attorney General *must* be notified of any challenge to the constitutionality of a Texas statute, whether such challenge be by "petition, motion or other pleading," and 45-days' notice required.[71] Also, pursuant to Section 37.006 of the Texas Civil Practice and Remedies Code, in a declaratory judgment action, when the constitutionality of a Texas statute is drawn into question, the Texas Attorney General "*must* be served with a copy of the proceeding and is entitled to be heard."[72]

The difficulty lies in the expedited nature of the hearing on the motion to dismiss. How can there be a hearing within 30 days of the filing of the motion to dismiss, and at the same time serve notice on the Attorney General? The trial court that finds a statute unconstitutional, whether as applied or facially, runs the risk of having the ruling overturned as void if the Attorney General has insufficient notice.

V. CONCLUSION.

While the objective of protecting First Amendment rights in the age of the internet is laudable, the TCPA has a number of flaws that may likely restrain legitimate suits, rather than restrict frivolous cases. Business tort lawyers should carefully review the statute and prepare for

[71] TEX. GOV'T CODE §402.010 (new 2011 statute) (2012).

[72] TEX. CIV. PRAC. & REM. Code §37.006.

litigating it before filing suits relating to communications made by the defendant about…, well, just about anything at all.

