THE TEXAS ANTI-SLAPP STATUTE: ISSUES FOR BUSINESS TORT AND BILL OF RIGHTS LITIGATION

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Update: May 15, 2013

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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 has been triggering significant unintended consequences, especially for persons and entities who 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. In fact, none of the over fourteen cases currently making their way through the appellate courts could properly be characterized as a SLAPP case. 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 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. Buyer 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

[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., 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. Tom Brown Ministries*, *et al.,* 385 S.W.3d 592 (Tex.App.—El Paso 2012, pet. denied) (related interlocutory appeal of temporary injunction).

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

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?

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

A. Background and Enactment of the TCPA.

1. What is a SLAPP lawsuit?

The general consensus view among commentators is that SLAPP suits are "legally meritless suits designed, from their inception, to intimidate and harass political critics into silence."[5] 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."[6] According to some views, the typical SLAPP plaintiff "does not seek victory on the merits, but rather victory by attrition."[7] 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' grievances."[8] The goal of a SLAPP suit is to "stop citizens from exercising their political rights or to punish them for having done so."[9] None of the reported Texas decisions to date defines the scope of a SLAPP suit.

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 advantage 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."[10] The developer tale is a frequently cited example of a SLAPP suit.[11]

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[5] 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/SLAPP back: The Misuse of Libel Law for Political Purposes and Countersuit Response*, *7 J.L. & POL 417, 423 (1991).*

[6] HAW. REV. STAT. § 634F-1 (2011).

[7] Sobczak, supra, at 561.

[8] *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).*

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

[10] 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).*

[11] *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

2. 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. In adding a new chapter to the Texas Civil Practice and Remedies Code,[12] 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. This statutory provision is frequently cited as the appellate courts struggle to understand how to apply the new law.[13]

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."[14] Yet the Legislature did not discuss the applicability of existing anti-frivolous lawsuit rules and statutes,[15] or how

(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.*

[12] The Chapter is entitled: "ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS."

[13] *Ramsey v. Lynch,* No. 10-12-00198-CV, 2013 Tex. App. LEXIS 5554 *4 (Tex. App. – Waco May 2, 2013, no pet. h.)(mem. op.); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.,* No. 01-12-00581-CV, 2013 Tex. App. LEXIS 5407 *15 (Tex. App. – Houston [1st Dist.] May 2, 2013, no pet. h.); *San Jacinto Title Services v. Kingsley Properties, LP,* No. 13-12-003520CV, 2013 Tex. App. LEXIS 5081 *12 (Tex. App. – Corpus Christi – Edinburg April 25, 2013, no pet. h.); *In re Lipsky,* No. 02-12-00348-CV, 2013 Tex. App. LEXIS 4975 *11 (Tex. App. – Fort Worth April 22, 2013, orig. proceeding); *In re Thuesen,* No. 14-13-00255-CV, 2013 Tex. App. LEXIS 4636 (Tex. App. – Houston [14th Dist.] April 11, 2013, orig. proceeding); *Jain v. Cambridge Petroleum Group, Inc.,* No. 05-12-00677-CV, 2013 Tex. App. LEXIS 2088 *7 (Tex. App. – Dallas March 1, 2013, no pet. h.); *Direct Commercial Funding, Inc. v. Beacon Hill Estates,* No. 14-12-00896-CV, 2013 Tex. App. LEXIS 1898 *2 (Tex. App. – Houston [14th Dist.] January 24, 2013, no pet. h.); *Avila and Univision v. Larrea,* No. 05-11-01637-CV, 2012 Tex. App. LEXIS 10469 *12 (Tex. App. – Dallas December 18, 2012, pet. filed); *Jennings v. Wallbuilder Presentations, Inc.,* 378 S.W.3d 519 (Tex. App. – Fort Worth 2012, pet. filed).

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

[15] *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

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.[16] 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.[17]

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 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.

3. Underlying Purpose: Protection of Media Defendants.

It appears that the statute is a solution in search of a problem. The legislative history of the TCPA provides little guidance as to what evidence of SLAPP lawsuits 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."[18] 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.

"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.*

[16] 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. TEX. CIV. PRAC. & REM. CODE § 10.006.

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

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

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. The author has yet to find any such studies or research, or any published data on the frequency or significance of any SLAPP lawsuits in Texas.

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."[19] Supporters claimed: "[u]nder 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 outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system"[20]

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")[21], represented by lawyer Laura Prather,[22] in passing the legislation. The FOIFT receives its funding principally from state and national newspaper publishers, along with other media interests.[23] Media organizations, including FOIFT, were the principal proponents of both the TCPA[24] and the 2009 adoption of the reporter's privilege, codified in TEX. CIV. PRAC. & REM. CODE § 22.021 *et seq.*

Ms. Prather, for the media groups, publicly states that she drafted the TCPA and proposed, organized, and supported its passage.[25] In her most recent online biography, Ms. Prather states that she "was the lead author and negotiator for the two most significant pieces of First Amendment legislation in recent history in Texas – both the reporters' privilege and the anti-SLAPP statute."[26] She also states that "[t]he bill is designed to deter frivolous lawsuits directed at newsrooms and media personnel."[27]

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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[19] *Id.*

[20] *Id.*

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

[22] Ms. Prather was with Sedgwick, and in 2012 joined the Austin office of Haynes & Boone as a partner.

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

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

[25] 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/.* The news release was taken down after Ms. Prather joined Haynes & Boone in early June, 2012, but the Sedgwick release was virtually identical to the current Haynes& Boone biography description.

[26] See Ms. Prather's bio at *http://haynesandboone.com/Laura-Prather/.*

[27] *Id.*

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. Indeed, two of the nine reported cases to date involve media defendants as the movants to dismiss.[28]

According to the Bill Analysis and legislative records, the principal witness before the House 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. 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.[29] 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."[30] The H.R.O. did not give any other details about the case, or how it constituted a victory for the woman.

The bill was brought up for testimony on March 28, 2011 before the House Judiciary and Civil Jurisprudence Committee,[31] which heard comments from several witnesses, mostly associated with the media.[32] At the hearing, Rep. Hunter commented that "[i]t [TCPA] also provides for an expedited motion to dismiss if lawsuits like these are filed frivolously." [33] The TCPA was one of 31 bills considered by the Committee that day, and the Committee devoted 33 minutes of its schedule to the discussion of the bill. Following the Committee hearing, there is no record of any further discussion in a committee, conference, or on the floor of the House. The bill passed the House on May 4, 2011.

On May 12, 2011, the bill was considered in public hearing in the Senate Committee on State Affairs[34] and discussed for three minutes, with no discussion beyond

[28] *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.,* No. 01-12-00581-CV, 2013 Tex. App. LEXIS 5407 *15 (Tex. App. – Houston [1st Dist.] May 2, 2013, no pet. h.); *Avila and Univision v. Larrea,* No. 05-11-01637-CV, 2012 Tex. App. LEXIS 10469 *12 (Tex. App. – Dallas December 18, 2012, pet. filed).

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

[30] *Id.*

[31] Chair, Jim Jackson (R) Dist. 115; Vice Chair, Tryon Lewis (R) Dist. 81; Rep. Dwayne Bohac (R) Dist. 138; Rep. Joaquin Castro (D) Dist. 125; Rep. Sarah Davis (R) Dist. 134; Rep. Will Hartnett (R) Dist. 114; Rep. Jerry Madden (R) Dist. 67; Rep. Richard Raymond (D) Dist. 42; Rep. Connie Scott (R) Dist. 34; Rep. Senfronia Thompson (D) Dist. 141; Rep. Beverly Wooley (R) Dist. 136.

[32] Speaking for the bill: Laura Prather (Better Business Bureau, Freedom of Information Foundation of Texas, Texas Daily Newspaper Association, Texas Association of Broadcasters); Carla Main (journalist); Robin Lent (Coalition for Homeowners Association Reform); Brenda Johnson (HOA); Shane Fitzgerald (FOIFT); Joe Ellis (Texas Association of Broadcasters); and Janet Ahmad (Home Owners for Better Building). The Texas Citizens Participation Act; Hearings on Tex. H.B. 2973 Before the House Comm. on Judiciary & Civ. Jurisprudence, 82nd Leg., R.S. 10-17 (March 28, 2011). Sixteen others registered but did not testify.

[33] The Texas Citizens Participation Act; Hearings on Tex. H.B. 2973 Before the House Comm. on Judiciary & Civ. Jurisprudence, 82nd Leg., R.S. 10-17 (March 28, 2011)(Rep. Todd Hunter).

[34] Robert Duncan (R) Lubbock, Chair.

a basic description of the bill.[35] The bill passed the Senate on May 18.

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.

The Committee did not discuss why a new expedited dispositive motion or appellate review was necessary for media or other defendants, given the Legislature's codification of libel law,[36] and granting to the media interlocutory appeals in the event that a media defendant's motion for summary judgment is denied.[37]

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."[38]

The media interests successfully cast the legislation as 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 nothing in the legislative history for the statute that suggests that the Legislature considered any of the issues raised in this paper before speeding the bill through the approval process.

III. APPLICATION OF THE TCPA.

A. 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***…"[39] The law applies only to cases filed on or after June 17, 2011, the effective date of the Act, and does not apply retroactively to amended pleadings in legal actions filed before the effective date.[40] 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."[41] Since a motion to dismiss may be made regarding any "*judicial* pleading or filing" in which some relief is requested, it appears that motions to dismiss may not be filed in administrative proceedings, although administrative proceedings are clearly

[35] Hearing on Tex. CSHB 2973 Before the Senate Committee on State Affairs, 82nd Leg., R.S. (May 12, 2011).

[36] *See* TEX. CIV. PRAC. & REM. CODE §73.001 *et seq.*

[37] TEX. CIV. PRAC. & REM. CODE §51.014(6) grants an appeal from an interlocutory order that: "denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73 [of the Civil Practice and Remedies Code]."

[38] *Id.*

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

[40] *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081*18-19.

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

included within the ambit of the "exercise of the right to petition," which includes "an official proceeding, other than a judicial proceeding, to administer the law…."[42] 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."[43] "'Communication' includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic."[44]

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 full protection under the First Amendment.[45]

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

[42] TEX. CIV. PRAC. & REM. CODE § 27.001(4)(a)(ii).

[43] TEX. CIV. PRAC. & REM. CODE § 27.001(3).

[44] TEX. CIV. PRAC. & REM. CODE § 27.001(1).

[45] 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.

(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?" A "matter of public concern" can apply to almost anything. So far courts have found a mayor's performance as a public official,[46] operation of an assisted living facility,[47] gas leaks from fracking,[48] a lawyer's legal services,[49]

"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.[50]

"Exercise of the right of association" means "a communication between individuals who join together to collectively express, promoted, pursue, or defendant common interests."[51]

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[52] about a communication related to anything in commerce or government.

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.

Despite the underlying David/Goliath premise of anti-SLAPP legislation, there is no discussion or requirement in disparity of resources to invoke the TCPA.[53] Courts so far decline to affix the SLAPP label.[54]

[46] *Lynch*, 2013 Tex. App. LEXIS 5554 *10.
[47] *Crazy Hotel,* 2013 Tex. App. LEXIS 5407 *18.
[48] *Lipsky,* 2013 Tex. App. LEXIS 4975 *21.
[49] *Larrea,* 2012 Tex. App. LEXIS 10469 *19.

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

[51] TEX. CIV. PRAC. & REM. CODE § 27.001(2).

[52] And possibly administrative proceedings.

[53] 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

B. Exceptions to the TCPA.

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,[55] suits for bodily injury, wrongful death, or survival,[56] and 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."[57]

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.

C. Procedure.

1. A New Form of Dispositive Motion.

To be very clear, the TCPA's motion to dismiss is a procedure new to Texas civil jurisprudence. The TCPA does not appear to grant any substantive rights. It creates no cause of action, and the motion to dismiss is not a counterclaim. The TCPA simply creates a new procedure for summary dismissal of claims and suits based on matters outside the pleadings. 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 movant claims that it is in response to a "legal action" that is based on or relates to the exercise of free speech, petition or association[58] 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 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.

2. Deadline to File the Motion.

The motion to dismiss must be filed within 60 days following the service of the legal action.[59] The time to file the motion to dismiss may be extended on a showing of

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interfering with the constitutional rights of the defendant. In fact, it is highly questionable whether any state of mind is necessary to dismiss a lawsuit under the TCPA and similar statutes. *See, infra*, Discussion Part II.

[54] *See, e.g., San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081*2 n.1 (…we take no position on whether the underlying lawsuit in this case constitutes a SLAPP suit.").

[55] T EX. CIV. PRAC. & REM. CODE § 27.010(a).

[56] TEX. CIV. PRAC. & REM. CODE § 27.010(c).

[57] TEX. CIV. PRAC. & REM. CODE § 27.010(b).

[58] TEX. CIV. PRAC. & REM. CODE § 27.003(a).

[59] TEX. CIV. PRAC. & REM. CODE § 27.003(b).

good cause.[60] The length, or number, of extensions is not addressed in the statute.

3. Deadline for Hearing and Decision: "Set," "Rule," and Continuances.

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.[61] There is no guideline as to how long the hearing may be delayed due to the court's "docket conditions," nor does the statute define the term. "Docket conditions" found to excuse a trial court's conducting a hearing after the 30-day deadline included a delay due to the recusal of the trial court after the filing of the motion to dismiss, and until a new judge was assigned to the cause of action.[62]

Does the provision mean that the hearing must be concluded? Or may it be continued without doing violence to the mandatory deadlines? There is a split of authority on whether a continuance of a hearing complies with the deadlines or whether the ruling must still be made within 30 days of the setting of the hearing. The opinion in the *Ramsey* case does not include information on whether the trial court made a "docket conditions" finding, or whether it was simply not heard, and the "docket conditions" finding was simply made by the court of appeals. When the trial court makes no finding that the docket conditions of the court required a hearing outside the thirty days, a continuance after the hearing started to allow parties to obtain new counsel "did not stop the statutory-deadline clock," and thus motions to dismiss were denied by operation of law.[63] The Fort Worth Court of Appeals has taken a different approach than the First Court in Houston, finding that "the plain language of Section 27.004 applies to the setting, not the hearing or consideration, of a Chapter 27 motion to dismiss; if the legislature had meant to require the holding of a hearing within thirty days (or as soon as the trial court's docket allows) rather than the setting of a hearing within that time period, it knew how to say so."[64]

[60] TEX. CIV. PRAC. & REM. CODE § 27.003(a).

[61] TEX. CIV. PRAC. & REM. CODE § 27.004.

[62] *Ramsey,* 2013 Tex. App. LEXIS 5554*12.

[63] *Crazy Hotel,* 2013 Tex. App. LEXIS 5407 *14.

[64] *Lipsky,* 2013 Tex. App. LEXIS 4975 *16. The court of appeals referred to sections of the Family and Finance Codes for language regarding "holding" hearings. In this case arising from claims that fracking in the Barnett Shale caused gas contamination of water wells, the property owners (Lipskys) sued the oil and gas company (Range Production) for damages, only to be faced with counterclaims from Range Production for civil conspiracy, aiding and abetting, defamation, and business disparagement. *Id.* at *6. The Lipskys timely filed Chapter 27 motions to dismiss the counterclaims and the trial court was unable to conduct a hearing until just over two months later due to intervening docket conditions [for which there was no apparent finding, but Range concedes the issue – this was not an issue decided by the court of appeals]. The Friday before the Monday hearing Range filed a response with an appendix containing more than 1,600 documents. *Id.* at *14. The following Monday, the Lipskys sought a continuance of the hearing to digest the response. The trial court continued the hearing for about six weeks then issued an order about two weeks later denying the motions to dismiss. *Id.* The Lipskys contended that they complied with Section 27.004 because the hearing was set timely, and the statute does not require it to be heard within thirty days. *Id.* The Fort Worth Court of Appeals noted that Section 27.011(b) requires courts to construe Chapter 27 liberally to "effectuate its purpose and intent fully," and that "applying the statute's plain meaning does not lead to an absurd result because that meaning encourages trial courts to resolve a Chapter 27 motion to dismiss quickly while allowing flexibility for extending the time for hearing the motion under circumstances similar to those that relators faced in this case." *Id.* at *17.

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.[65] There is nothing in the statute to prevent the movant 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. 166-a 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.[66] The TCPA does not include any provision to allow the non-movant to file a response, or even provide any time in which to file a response, contrary to Texas and federal rules of procedure. The TCPA does not even afford the non-movant the limited time to respond to a Rule 12 motion to dismiss in federal court, or extend the time to respond.[67]

Once the hearing is set, the court must *rule* on the motion not later than 30 days following the hearing.[68] What does it mean to "rule" on the motion? Does it mean to make some ruling, such as for continuance, or to either "dismiss" or "not dismiss?" One court that directly addressed this issue found that there are only two options are described in Section 27.005, and that a court does not "rule on" a motion to dismiss for purposes of Section 27.005(a) when it enters an order to allow discovery and continue the hearing.[69]

4. Discovery Stay – for "Good Cause."

When the motion to dismiss is filed, it operates to immediately suspend all discovery in the underlying legal action until the court rules on the motion to dismiss.[70] 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. The suspension of discovery would apparently refer to all discovery, including that unrelated to communication litigation. Nor is there any provision in the statute for remedies in the event that parties attempt to conduct discovery without leave of court, or whether the discovery stay applies to the entire case, if the motion to dismiss applies only to certain causes of action.

On a showing of good cause, (very) limited discovery may be allowed on issues relevant to the motion to dismiss, based on a motion by the court or a party.[71] 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, unless the opponent refuses to waive the response times contemplated in TEX. R. CIV. P. 196.2 and 199.2(5). Since the statute provides for discovery only by order of the court, the order for discovery will have to modify

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

[66] *See* TEX. R. CIV. P. 166a(c).

[67] *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.

[68] TEX. CIV. PRAC. & REM. CODE § 27.005(a)(emphasis added).

[69] *Larrea,* 2012 Tex. App. LEXIS 10469 *21-23.

[70] TEX. CIV. PRAC. & REM. CODE § 27.003(c).

[71] TEX. CIV. PRAC. & REM. CODE § 27.006(b).

normal discovery deadlines. 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 deny any discovery that could affect the hearing date.[72]

There is no provision for when a motion for discovery may be brought, whether a movant is entitled to hearing, what information or evidence may be considered, or how the court may respond to such a motion. There does not appear to be any authority for a trial court to extend hearing deadlines in order to permit discovery for reasons unique to the parties, such as illness, incarceration, or any other reason that would normally constitute "good cause." What constitutes "good cause" is unclear.[73]

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.

[72] *See* TEX. CIV. PRAC. & REM. CODE § 27.004. *See also Larrea,* 2012 Tex. App. LEXIS 10469 *10-11, 21-22 (finding an order allowing limited discovery and providing for a continuation of the hearing did not constitute a "ruling" to comply with the 30-day deadline, therefore resulting in the motion to dismiss being overruled by operation of law).

[73] The Waco Court of Appeals did not discuss reasons for requested discovery, but only noted that the "trial court concluded that there was no good cause for discovery…." *Ramsey,* 2013 Tex. App. LEXIS 5554 *11.

D. Standards and Burdens of Proof/Actions by Court.

1. 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."[74] The TCPA does not clearly indicate whether the hearing is evidentiary, or whether the trial court may consider live testimony or take up the motion by submission. Although the Act specifically refers to affidavits and pleadings that must be considered, the Legislature does not prohibit live testimony or documents offered at hearing. The statute is silent about the admission of live testimony and other evidence at the hearing. The Legislature is quite capable of using qualifying language such as "only consider" if it intended to prohibit a full evidentiary hearing. Yet the language of the statute may leave open an argument to a movant 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. One media defendant has argued that the hearing is non-evidentiary.[75] At least one case discusses testimony and evidence introduced at the hearing without complaint that the hearing is non-evidentiary.[76] The hearing must be at least partially evidentiary, to the extent that the trial court will have to consider evidence on what constitutes "reasonable attorney's

[74] TEX. CIV. PRAC. & REM. CODE § 27.006(a).

[75] *See Larrea,* 2012 Tex. App. LEXIS 10469 *10 (counsel for Univision objected to an email being admitted into evidence at hearing "because the statute makes it quite clear that this is not to be an evidentiary hearing.").

[76] *See Ramsey,* 2013 Tex. App. LEXIS 5554*7.

fees, and other expenses."[77] The statute makes no other provision for how the trial court is to determine such amounts, which may be contested, other than to be heard with the motion to dismiss. If the hearing is evidentiary on fees and costs, a record will still be necessary, so there is no logical reason why the court could not consider evidence in addition to the pleadings and affidavits on the merits of the motion.

There is no time limit for the hearing. Nor does the statute provide for any continuance of the hearing once it commences.

2. 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 speech; (2) the right to petition; or (3) the right of association."[78] 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.

There is nothing in the statute that permits a trial court to consider, at this stage, any affirmative defenses or other dilatory pleas.

3. Burden of Proof on the Respondent.

Once the movant files a verified motion that merely asserts 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."[79] What does that mean? What must a respondent do to defeat a motion to dismiss?

Importantly, the statute does not say that the respondent must meet any burden of proof or address any affirmative defenses or other dilatory pleadings. Yet in one recent decision, the Dallas Court of Appeals reviewed the evidence in light of the media defendant's affirmative defense of "substantial truth" of the broadcast.[80] The court of appeals did not explain why, under the two-pronged analysis, there should be any discussion of an affirmative defense, when the respondent's burden relates to a "prima facie case for each essential element of the claim in question."[81] By definition, an affirmative defense is not an "essential element" of any claim. While an affirmative defense is properly considered in a summary

[77] TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1).
[78] *Id.* § 27.005(b).
[79] *Id.* § 27.005(c) (emphasis added).
[80] *Larrea,* 2012 Tex. App. LEXIS 10469 *25-27, *passim.*
[81] TEX. CIV. PRAC. & REM. CODE § 27.005(c).

judgment, it has no place in the analysis of a Chapter 27 motion to dismiss.

There is a two-step analysis in the motion to dismiss: first, whether the movant meets the burden of proving that the legal action is based on, relates to, or is in response to the exercise of certain speech rights;[82] and if so, the second inquiry is whether the respondent produces the requisite level of proof of a "prima facie case for each essential element of the claim in question."[83] There simply is no statutory basis for a summary judgment review of affirmative defenses.

i. "Clear and specific evidence" is undefined in Texas civil litigation burden of proof.

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 of that standard with "clear and convincing evidence," which is the highest civil evidentiary standard to meet with a long history of interpretation.[84] 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.

The Chapter 27 cases reported to date often refer to the phrase, but do not define it.[85] None of the reported cases have yet addressed a challenge to the use or definition of the phrase, though one notes that the statute does not define "what sort of evidence satisfies the 'clear and specific' qualitative standard…."[86] The question should be what "quantum," and not "type," of proof satisfies the standard.

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

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**

[82] TEX. CIV. PRAC. & REM. CODE § 27.005(b).
[83] TEX. CIV. PRAC. & REM. CODE § 27.005(c).
[84] TEX. CIV. PRAC. & REM. CODE § 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.

[85] The Dallas Court of Appeals noted that "[t]he TCPA does not define 'clear and specific evidence.'" *Larrea,* 2012 Tex. App. LEXIS 10469 *27.
[86] *In re Lipsky,* 2013 Tex. App. LEXIS 4975 *12.

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."[87] 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.

At least one media party, relying only upon pieced together definitions of "clear" and "specific," argues that "clear and specific" is an intermediate burden of proof that is greater than the preponderance of the evidence.[88] Other briefing struggles to find a workable definition of the term.

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.[89] 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.[90] The statute in question clearly applies to many established common law causes of action, and if Ms. Prather's view as non-legislative 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.

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

[88] Brief of Univision, *Virgilio Avil and Univision Television Group, Inc. v. Larrea,* No. 05-11-01637, Court of Appeals of Dallas, Texas.

[89] 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, orig. proceeding) (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).

[90] *See Jennings v. Wallbuilder Presentations, Inc.,* 378 S.W.3d 519 (Tex. App.—Fort Worth, 2012, pet. filed) (appeal of order denying motion dismissed for lack of jurisdiction).

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 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.[91] A non-movant 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."[92] 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 non-movant to "produce" such evidence. The TCPA requires the non-movant 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, provide a more than adequate framework for sorting out meritless suits involving some sort of speech.

iii. 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."[93] In this context, "prima facie" appears to refer to some evidence on the elements of the cause of action. The statute does not clarify what it means by "a prima facie case for each essential element of the claim in question."

In considering Chapter 27 motions to dismiss, the courts that have discussed the term "prima facie case" have looked to standard definitions. The First District Court of Appeals recently said that the term "implies a minimal factual burden: '[a] prima facie case represents the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true.'"[94] The Fort Worth Court of Appeals defines "prima facie" evidence as "the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'"[95] Most civil courts will be familiar with a prima facie case in the context of evidence to support an application for a temporary injunction, in which the applicant must make a prima facie case, but need not prove that he will ultimately prevail.[96]

Ms. Prather likewise described to readers of her articles the origin of the prima

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

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

[93] *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).

[94] *Crazy Hotel,* 2013 Tex. App. LEXIS 5407 *16, quoting *Rodriguez v. Printone Color Corp.,* 982 S.W.2d 69, 72 (Tex. App. – Houston [1st Dist.] 1998, pet. denied).

[95] *In re Lipsky,* 2013 Tex. App. LEXIS 4975 *12, quoting *In re E.I. DuPont de Nemours & Co.,* 136 S.W.3d 218, 223 (Tex. 2004)(orig. proceeding)(citing *Tex. Tech Univ. Health Science Ctr. v. Apodaca,* 876 S.W.2d 402, 407 (Tex. App. – El Paso 1994, writ denied)).

[96] *See Henson v. Denison,* 546 S.W.2d 898, 901 (Tex. Civ. App. – Fort Worth 1977, no writ).

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."[97]

Ms. Prather's comment does not address a cause of action, or the elements of a cause of action in civil litigation, 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.

It is probably more useful to practitioners to look for authority to non-media cases, particularly temporary injunction opinions to better understand what may constitute a prima facie case.

iv. What about non-communication claims joined in the same lawsuit?

Another unanswered question is whether the motion to dismiss applies only to causes of action in a legal action based on a communication, or applies as well to non-communication causes of action. In business litigation, for example, conduct that gives rise to a breach of contract may precede emotionally based communications that form the basis of defamation or other torts. Since, under joinder rules,[98] and in the interest of judicial economy, an aggrieved party usually sues for all applicable causes of action against the offending party, the entire "legal action" could be the subject of the motion, regardless of whether each cause of action is based on speech rights.

It would certainly be more sensible for a motion to dismiss to target only the portions of a lawsuit related to the protected speech. "Legal action" does refer to "cause of action" in addition to "lawsuit …, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief"[99] but the statute does not limit its applicability to causes of action.

The issue is made more difficult to resolve in light of the statute's provisions suspending "all discovery in the legal action,"[100] requiring dismissal of "a legal action,"[101] and permitting limited rights of appeal and writ of "a trial court order on a motion to dismiss a legal action" could certainly be interpreted by a trial court to halt discovery and require dismissal of even non-communication claims.

A real trap for the practitioner lies in the ambiguity of the scope of dismissal contemplated by the statute. 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. 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 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

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

[98] TEX. R. CIV. P. 51.

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

[100] TEX. CIV. PRAC. & REM. CODE §27.003(c).

[101] TEX. CIV. PRAC. & REM. CODE §27.005(b)(c).

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.

In light of the passage of the TCPA, and in the appropriate case, the prudent practitioner who represents the plaintiff, or defendant on a counterclaim, may consider whether to avoid joining related claims in the same suit. By the same token, such parties should consider whether to seek to sever[102] certain claims after the filing of a Chapter 27 motion to dismiss to preserve them and continue with discovery. The same practitioners should refresh their knowledge of the rules on compulsory and permissive counterclaims[103] and whether "actions involving a common question of law or fact" should be consolidated[104] or proceed in separate trials.[105]

4. Ruling by the Court – Dismissal Mandatory.

If the movant/defendant meets her modest 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.

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 movant makes no request for any findings under Section 27.007, 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.[106] 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 non-suits the case. Normally counterclaims and certain requests for sanctions survive a non-suit, but the motion to dismiss is not a counterclaim for damages, nor is it a motion for sanctions. The non-suit is effective as soon as the plaintiff files a motion for non-suit.[107] At

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

[103] TEX. R. CIV. P. 97.

[104] TEX. R. CIV. P. 174(a).

[105] TEX. R. CIV. P. 174(b).

[106] TEX. CIV. PRAC. & REM. CODE §27.007(a,b).

[107] *Epps v. Fowler,* 351 S.W.3d 862, 868 (Tex. 2011).

the same time, a non-suit does not affect any pending claim for affirmative relief or motion for attorney's fees or sanctions. *Id.;* TEX. R. CIV. P. 162. A non-suit renders the merits of the case moot.[108] 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 non-suit renders the motion to dismiss moot.[109]

E. 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."[110] 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, while Texas law provides a strict, high standard of proof to recover exemplary damages.[111] The legislative history and bill analyses do not discuss why the Legislature chose sanctions over punitive damages.

It appears that the amount of fees awarded will be reviewed in the usual manner, and that, absent controverting testimony, the fee award will withstand legal and factual sufficiency challenges.[112]

F. 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/respondent 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."[113] Unlike the movant, the respondent cannot recover sanctions under Chapter 27, 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.

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[108] *UTMB v. Estate of Blackmon,* 195 S.W.3d 98, 101 (Tex. 2006).

[109] The only non-suit issue to arise so far in a reported opinion was raised by a litigant in a mandamus proceeding, but the issue was not reached because the Fourteenth District Court of Appeals determined that an appeal from a final judgment, rather than mandamus, was appropriate. *In re Theusen,* 2013 Tex. App. LEXIS 4636*3-5.

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

[111] TEX. CIV. PRAC. & REM. CODE § 41.003.

[112] *See Ramsey,* 2013 Tex. App. LEXIS 5554*7.

[113] TEX. CIV. PRAC. & REM. CODE § 27.009(b).

G. Appellate Review.

1. Interlocutory Appeal: What is Reviewable?

What type of appeal is available to litigants of a Chapter 27 motion to dismiss is the primary topic of discussion and motions in the cases making their way through the appellate system. It appears that although the Legislature devoted a separate section of the statute to "Appeal,"[114] the scope of interlocutory appeal is limited.

During the interlocutory appeal from the trial court's failure to rule on the motion to dismiss, the trial is not stayed and court proceedings are not suspended.[115] Ironically, in cases in which media defendants are involved, their interlocutory appeal of a Chapter 27 denial by operation of law does not result in a stay of the case, whereas a signed order denying a motion for summary judgment would result in a stay of the trial, though possibly not other proceedings.[116]

i. Denial of motion to dismiss by operation of law: interlocutory appeal is clearly available.

Chapter 27 confers explicit statutory jurisdiction for an interlocutory appeal if the trial court does not timely rule on a motion to dismiss, so that "the motion is considered to have been denied by operation of law and the moving party may appeal."[117] As noted above, without a finding that "docket conditions" required a hearing outside the thirty days, the ruling is untimely and Section 27.008(a) jurisdiction over the appeal exists.[118]

ii. Timely written denial of motion to dismiss – split of authority on whether interlocutory appeal available.

There is a significant split of authority on whether a Chapter 27 movant may take an interlocutory appeal from a written order denying the motion, if the order is signed after the 30-day deadline to rule on the motion.[119]

a. Cases finding no jurisdiction to hear interlocutory appeal from untimely written order denying motion to dismiss.

The Fort Worth Court of Appeals decided that interlocutory appeals lie only for motions to dismiss overruled by operation of law, and not where a timely written order overruling the Chapter 27 motion to dismiss exists,[120] finding that "the interlocutory appeal statutorily authorized by subsection (a) is limited to situations in which a trial court has failed to timely rule on a timely-filed motion to dismiss, and the

[114] TEX. CIV. PRAC. & REM. CODE § 27.008.

[115] TEX. CIV. PRAC. & REM. CODE §51.014(b).

[116] TEX. CIV. PRAC. & REM. CODE §51.014(a)(6),(b).

[117] TEX. CIV. PRAC. & REM. CODE § 27.008(a).

[118] *Crazy Hotel,* 2013 Tex. App. LEXIS 5407*14-15.

[119] *See* TEX. CIV. PRAC. & REM. CODE § 27.005(a).

[120] *Jennings v. Wallbuilder Presentations, Inc.,* 378 S.W.3d 519 (Tex. App.—Ft. Worth 2012, pet. filed) (dismissing appeal for lack of jurisdiction); *see also Lipsky v. Range Production Co., et al.,* No. 02-12-00098-CV, 2012 Tex. App. LEXIS 7059 (Tex. App.—Fort Worth Aug. 23, 2012, pet. filed)(mem. op.)(dismissing appeal for want of jurisdiction for same reason, but granting motion to consider the proceeding as a petition for writ of mandamus).

motion to dismiss is therefore considered to have been denied by operation of law."[121]

Appellate courts generally have jurisdiction only over final judgments unless a statute authorizes an interlocutory appeal.[122] Jurisdiction of a court of appeals is controlled by the constitution and by statutory provisions; an interlocutory order is not appealable unless a statute explicitly provides for appellate jurisdiction.[123] "'Jurisdiction over an interlocutory order when not expressly authorized … by statute is jurisdictional fundamental error.'"[124]

The Fort Worth Court of appeals correctly noted that "[s]tatutes authorizing interlocutory appeals are strictly construed because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable.[125] A TCPA order of dismissal is not among the types of actions for which an interlocutory appeal is available under TEX. CIV. PRAC. & REM. CODE §51.014. Section 27.008's specific grant of right to appeal refers only to denial of the motion to dismiss by operation of law only, and permits appeal only by the moving party.[126]

Although Section 27.008(b) refers to expediting an appeal "from a trial court order on a motion to dismiss a legal action," the statute does not explicitly state that the granting of a motion permits an interlocutory appeal. The Fort Worth Court of Appeals correctly noted that the Legislature did not use any language creating a right of interlocutory appeal in the event that an order was signed.[127] Section 27.008(b) does not use the type of language found in other statutes creating interlocutory appeals, and it does not state that a party may appeal or is entitled to appeal.[128]

b. Cases finding there is jurisdiction to hear interlocutory appeal from untimely written order denying motion to dismiss.

One case so far has held that Section 27.008 "permits an interlocutory appeal when the trial court denies the defendant's motion by written order."[129] Although the Corpus Christi Court of Appeals held that the TCPA did not apply to an amended petition in a suit that predated the effective date of the TCPA, and therefore did not apply to the instant suit,[130] the court engaged in a lengthy analysis of interlocutory jurisdiction from a Chapter 27 order denying a motion to dismiss.[131] Rather than determining first that the TCPA did not

[121] *Wallbuilder,* 378 S.W.3d at 524.

[122] *Wallbuilder,* 378 S.W.3d at 522, citing TEX. CONST. art. V, § 6; *CMH Homes v. Perez,* 340 S.W.3d 444, 447-48 (Tex. 2011).

[123] *Stary v. DeBord,* 967 S.W.2d 352, 352-353 (Tex. 1998); *Wallbuilder,* 378 S.W.3d at 522.

[124] *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081*7, quoting *N.Y. Underwriters Ins. Co. v. Sanchez,* 799 S.W.2d 677, 679 (Tex. 1990). Although the Corpus Christi Court of Appeals found that interlocutory appellate jurisdiction existed over a timely written order denying a motion to dismiss, such finding is probably *dicta* and of little precedential value, since the court found that the TCPA did not retroactively apply to the suit. *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081*18.

[125] *Wallbuilder,* 378 S.W.3d at 522., quoting *CMH Homes v. Perez,* 340 S.W.3d 444, 447 (Tex. 2011).

[126] TEX. CIV. PRAC. & REM. CODE § 27.008(a).

[127] *Wallbuilder,* 378 S.W.3d at 525.

[128] *Wallbuilder,* 378 S.W.3d at 525.

[129] *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081 *15.

[130] *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081 *19.

[131] If the TCPA did not apply to the case, then how does appellate jurisdiction exist under the TCPA?

apply to the case, the court stated that the movants "perfected this interlocutory appeal challenging the trial court's denial of their motion to dismiss."[132]

The court's analysis is perplexing, because if the TCPA does not apply to the case, then any limited grant of interlocutory appeal would not apply, either. The court quoted the proper authorities on limited interlocutory appellate jurisdiction, but did not discuss how the court could exercise jurisdiction if the TCPA did not apply. The court's opinion is likely of very little precedential value, since the discussion in the abstract of jurisdiction most likely must be considered *dicta.*

The analysis of the court of appeals focused on giving meaning to language in Section 27.008(b) and (c), much the same as the Fourteenth Court of Appeals in the *Beacon Hill* case, discussed below.[133] The court correctly noted that "'courts are not empowered to 'fix" the mistake [in legislation] by disregarding direct and clear statutory language that does not create an absurdity.'"[134] The court believed that no allowing an interlocutory of written orders granting or denying a motion to dismiss "creates an absurdity by drawing an artificial distinction within the class of defendants the TCPA was designed to protect regardless of whether they suffered the harm for (sic) which the legislature addressed by enacting the TCPA."[135] Finally, the court of appeals felt that it could depart from the general rule that "statutes conferring interlocutory appeals are strictly construed"[136] because of the legislature's instruction "to liberally construe the TCPA in order 'to effectuate its purpose and intent fully.'"[137]

Regardless of other precedential value questions, there may exist a conflict among the courts of appeals that would permit the Texas Supreme Court to exercise conflicts jurisdiction[138] to decide the scope of interlocutory appeal.

iii. Timely written denial of motion to dismiss – mandamus may be available.

If the TCPA does not create a right to interlocutory appeal if the trial judge follows the law and timely denies the motion to dismiss, the movant is not without recourse to the appellate courts. If the trial court timely signs an order denying the motion to dismiss, the movant may be able to proceed with a petition for writ of mandamus, alleging that the trial court abused its discretion when required to dismiss the action.[139] A mandamus is contemplated in the language of the statute:

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[132] *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081 *5.

[133] *See Direct Commercial Funding, Inc. v. Beacon Hill Estates,* 2013 Tex. App. LEXIS 1898, discussed in Section III.G.2.i, *infra.*

[134] *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081 *12.

[135] *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081 *13.

[136] *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081 *15, quoting *CMH Homes,* 340 S.W.3d at 447.

[137] *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081 *15, quoting TEX. CIV. PRAC. & REM. CODE § 27.011(b). In a footnote, the Corpus Christi Court stated that the court of appeals in *Jennings v. Wallbuilder* "did not address the legislature's direction to liberally construe the TCPA." *San Jacinto Title Services,* 2013 Tex. App. LEXIS 5081 *15, n.7.

[138] TEX. GOV'T CODE § 22.001(a)(2).

[139] *Wallbuilder,* 378 S.W.3d at 524; *In re Lipsky,* 2013 Tex. App. LEXIS 4975*9 (the court of appeals earlier dismissed an appeal for want of jurisdiction, and allowed the defendants to challenge the propriety of the trial court's order denying the dismissal actions through an original mandamus proceeding)(*Lipsky v. Range Prod. Co.,* No. 02-12-00098-CV, 2012 Tex. App. LEXIS 7059 (Tex. App. – Fort Worth Aug. 23, 2012, pet. filed)(mem. op.)).

an "appellate court shall expedite an appeal *or other writ ....*"[140] Upon review, the appellate court will determine whether the trial court clearly abused its discretion,[141] and a trial court's application of legal principles is reviewed for an abuse of discretion separately from its resolution of factual disputes.[142]

In the mandamus review of the trial court's order, the court of appeals reviews the trial court's legal determinations de novo.[143] "A trial court abuses its discretion if it fails to analyze the law correctly or misapplies the law to established facts."[144] Further, "a trial court's erroneous legal conclusion, even in an unsettled area of law, is an abuse of discretion."[145] The court also found that whether a prima facie case has been presented is a question of law for the court.[146]

Still, "when the issues before the trial court necessarily require factual determinations, the court of appeals abuses its discretion when it resolves those issues in an original mandamus proceeding."[147] "Absent extraordinary circumstances … an interlocutory ruling on a motion to dismiss is incident to the ordinary trial process and should be challenged by appeal, not corrected by mandamus."[148]

In determining that the homeowners in an alleged fracking pollution case had no immediate appellate remedy by interlocutory appeal, the Fort Worth Court of Appeals found that it "must carefully analyze the costs and benefits of granting mandamus relief."[149] The court stated that in "consideration of whether an appellate remedy is adequate, we should consider whether mandamus review will spare litigants and the public the time and money wasted 'enduring eventual reversal of improperly conducted proceedings.'"[150] Stating that the "legislature has determined that unmeritorious lawsuits subject to chapter 27 should be dismissed early in litigation, generally before parties must engage in discovery," mandamus relief is often involved in "'cases in which the very act of proceeding to trial … would defeat the substantive right involved.'"[151]

The proceedings in the trial court are not suspended or stayed while the mandamus proceeds.

2. Motion to Dismiss Timely Granted -

i. May be appealable noninterlocutory order.[152]

[140] *In re Lipsky,* 2013 Tex. App. LEXIS 4975*51, quoting TEX. CIV. PRAC. & REM. CODE § 27.008(b).
[141] *Walker v. Packer,* 827 S.W.2d 833, 839 (Tex. 1991).
[142] *Id.* at 839-840.
[143] *In re Lipsky,* 2013 Tex. App. LEXIS 4975*10.
[144] *In re Lipsky,* 2013 Tex. App. LEXIS 4975*10, citing *Ilff v. Ilff,* 339 S.W.3d 74, 78 (Tex. 2011); *Cook v. Tom Brown Ministries, et al.,* 385 S.W.3d at 600.
[145] *In re Lipsky,* 2013 Tex. App. LEXIS 4975*10-11, citing *In re United Scaffolding, Inc.,* 301 S.W.3d 661, 663 (Tex. 2010)(orig. proceeding).
[146] *In re Lipsky,* 2013 Tex. App. LEXIS 4975*13.
[147] *In re Thuesen,* 2013 Tex. App. LEXIS 4636*5-6, quoting *Brady v. Fourteenth Court of Appeals,* 795 S.W.2d 712, 716 (Tex. 1990).
[148] *In re Thuesen,* 2013 Tex. App. LEXIS 4636*6.
[149] *In re Lipsky,* 2013 Tex. App. LEXIS 4975 * 51.
[150] *Id.,* quoting *In re Team Rocket, L.P.,* 256 S.W.3d 257, 262 (Tex. 2008)(orig. proceeding).
[151] *In re Lipsky,* 2013 Tex. App. LEXIS 4975 * 52, quoting *In re McAllen Med. Ctr., Inc.,* 275 S.W.3d 458, 465 (Tex. 2008)(orig. proceeding)(applying health care liability statute requiring sufficient expert reports to proceed with the case).
[152] An untimely order granting the motion to dismiss would be construed to overrule the motion as a matter of law.

The respondent to a Chapter 27 motion to dismiss must prepare for an expedited appeal in the event the motion is granted. The *Wallbuilder* case suggests that an order granting a motion to dismiss under Section 27.005 may be appealable as a final judgment, or severable and appealable as a final, non-interlocutory order disposing of all issues and all parties.[153] This may be true if the trial court dismisses the entire case, but may not be true if the order of dismissal targets only certain causes of action. Whether the dismissed causes and parties are severable for appeal will be decided on a case-by-case basis.

When some, but not all, of the defendants in a case file motions to dismiss that are granted, and motions to sever and enter final judgment as to those defendants are pending, a court of appeals may decline to exercise mandamus jurisdiction and find that an appeal of a final judgment provides a better remedy for a claim that the trial court erred in granting motions to dismiss.[154] "An appeal provides more complete review of an order disposing of a party's claims than review by petition for writ of mandamus. An appellate court may not deal with disputed matters of fact in an original mandamus proceeding."[155] It appears that the court of appeals found the mandamus action premature, though it is unclear from the record whether the appellant faced expiring Chapter 27 appellate deadlines while the motion to sever was pending.

We anticipate that an appeal of a final order will be reviewed for legal sufficiency.[156]

ii. May be appealable interlocutory order.

If the trial court timely grants an order dismissing claims of some, but not all, parties, the order is interlocutory and may be appealed, according to the Fourteenth Court of Appeals.[157] The court of appeals noted that although there was no express grant of interlocutory appellate jurisdiction from a signed order of dismissal, the court felt that the Legislatures' command that Chapter 27 "'shall be construed liberally to effectuate its purpose and intent fully'"[158] required finding interlocutory appellate jurisdiction. The argument that the court adopted is that failing to find interlocutory appellate jurisdiction from a signed order "renders portions of subsections (b) and (c) meaningless in contravention of statutory construction precepts."[159] The court looked to language in Section 27.008(b) about expediting "an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss … or from a trial court's failure to rule …."[160] Finding that "[i]f no interlocutory appeal is available when the trial court expressly rules on a motion to dismiss by signing an order then the phrase 'from a trial court order on a motion to dismiss' appearing after the phrase 'whether interlocutory or not' is rendered meaningless."[161] Further, since subsection (c) "states that an appeal 'must

[153] *Wallbuilder,* 378 S.W.3d at 524, citing *Martinez v. Humble Sand & Gravel, Inc.,* 875 S.W.2d 311, 312 (Tex. 1994) (recognizing that trial court may "make the judgment final for purposes of appeal by severing the causes and parties").

[154] *In re Thuesen,* 2013 Tex. App. LEXIS 4636*5-6.

[155] *In re Thuesen,* 2013 Tex. App. LEXIS 4636*5-6, quoting *Brady v. Fourteenth Court of Appeals,* 795 S.W.2d 712, 714 (Tex. 1990).

[156] *See City of Keller v. Wilson,* 168 S.W.3d 802 (Tex. 2005).

[157] *Direct Commercial Funding, Inc. v. Beacon Hill Estates,* 2013 Tex. App. LEXIS 1898*8-9.

[158] *Beacon Hill,* 2013 Tex. App. LEXIS 1898*6, quoting TEX. CIV. PRAC. & REM. CODE § 27.011(b).

[159] *Beacon Hill,* 2013 Tex. App. LEXIS 1898*8.

[160] *Id.*

[161] *Id.*

be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by section 27.005 expires, as applicable,'" the court of appeals found that if no signed order can be the subject of appeal, the language would be superfluous.[162]

This appears to be the principal countervailing argument to *Wallbuilder* in favor of interlocutory appellate jurisdiction over Chapter 27 motions, in which there is a written order granting or denying the motion. The Texas Supreme Court has requested briefing on the merits in *Wallbuilder,* and if the court accepts the case it will likely work to clarify the scope of interlocutory appellate jurisdiction.

The decision for the court to make will be whether the long-standing statutory construction precepts that grants of interlocutory jurisdiction are to be strictly construed, against a general statement at the end of the new statute that it is to be liberally construed in general. Since such language is commonly found in statutes, it is questionable whether it can be read to extend jurisdiction when Texas courts are historically very hesitant to decide cases without a clear grant of authority. Courts may be very reluctant to allow an expansive view of "liberally construction" to open gates to hear more cases.

3. Deadlines for Chapter 27 Appeal or Writ.

Either party has 60 days after the court's order is signed or overruled by operation of law[163] to actually file the appeal or writ, not just a notice of appeal, if the appeal or other writ is brought "under this section."[164] The deadline for any other appeal or writ should be governed by applicable law.[165]

The statute is unclear as to what appeals or writs would be brought "under this section." Clearly an interlocutory appeal from a failure to rule on the motion is brought under Section 27.008(a). If a party files a petition for writ of mandamus, is it considered "under this section" for purposes of the filing deadline? Chapter 27 does not expand the jurisdiction of any appellate court. Since a mandamus action is an original proceeding, a strong argument can be made that the practitioner should look to and follow the existing deadlines under the Texas Rules of Appellate Procedure.[166] This deadline issue has not yet been addressed.

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, [167] or does the 60-day filing of the appeal itself, regardless of notice, apply under TEX. CIV. PRAC. & REM. CODE § 27.008? These questions are not addressed, let alone answered, in the statute, but a prudent practitioner should look first to the standard shorter notice of appeal deadlines. The question would be whether an appeal of an order of dismissal would be considered brought "under this section" for purposes of filing the appeal.

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[162] *Beacon Hill,* 2013 Tex. App. LEXIS 1898*10.

[163] TEX. CIV. PRAC. & REM. CODE § 27.008(a)(A failure to timely rule is treated as a denial by operation of law to trigger the appellate deadline.); *see also Jain,* 2013 Tex. App. LEXIS 2088*5-6 (finding that deadlines and extension for perfecting an appeal under TEX. R. APP. P. 26 do not apply when a statute provides the times for perfecting appeal).

[164] TEX. CIV. PRAC. & REM. CODE § 27.008(c).

[165] *See* TEX. R. APP. P. 25.1, 26.1.

[166] *See* TEX. R. APP. P. 52; TEX. GOV'T CODE §§ 22.002, 22.221.

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

Since any appeal is expedited, it is conceivable that the 60-day filing deadline may apply to actually filing the appeal of an order granting the motion. Presumably the reference in Section 27.008 (c) to "the trial court's order" is the order on the motion to dismiss, not another order, such as one on a motion to sever. The statute does not reconcile the expedited 60-day deadline with any other orders to render the trial court's order non-interlocutory and appealable.

4. Any Appeal or Writ From An Order On A Chapter 27 Motion to Dismiss Shall be Expedited.

Section 27.008(b) indicates that any appeal or writ is to be expedited. The Fort Worth Court of Appeals concluded that "the plain language and meaning of subsection (b) is to require expedited consideration by an appellate court of any appeals or other writs from a trial court's ruling on a motion to dismiss filed under Chapter 27, whether interlocutory or not."[168] In other words, Section 27.008(b) "imposes a duty on the appellate courts to expedite disposition of any types of appeals or writs" from Chapter 27 motions to dismiss.[169]

5. Standard of Review of Interlocutory Appeal.

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. Although a trial court's resolution of questions turning on the application of legal standards is a de novo review, it is unclear whether the court's determination of whether the respondent met its burden of proof will be reviewed for an abuse of discretion[170] or legal and factual sufficiency.[171] No appellate courts have so far reviewed the trial court findings on an abuse of discretion standard in other than mandamus proceedings.

i. De novo review – statutory consruction.

As Chapter 27 cases work their way through the appellate system, they will confront questions as to whether the several parts of the statute are ambiguous or unambiguous, and how the law is to be construed. Most Chapter 27 statutory construction issues to date have addressed appellate jurisdictional issues.

Any statutory construction is a question of law, which is reviewed de novo.[172] When reviewing error under a de novo standard, the appellate court conducts an independent analysis of the record to arrive at its own legal conclusions, does not defer to the trial court's conclusions, and may substitute its conclusions for those made by the trial court.[173] In construing a statute, standard construction rules indicate that "[w]hen the Legislature has spoken on a subject, its determination is binding upon the courts unless the Legislature has exceeded its constitutional authority."[174] "The courts are not free to thwart the plain

[168] *Wallbuilder,* 2012 Tex. App. LEXIS 6834 *10.

[169] TEX. CIV. PRAC. & REM. CODE § 27.008(b).

[170] *See In re Doe,* 19 S.W.3d 249 (Tex. 2000).

[171] *See, e.g., King Ranch, Inc. v. Chapman,* 118 S.W.3d 742 (Tex. 2003).

[172] *Railroad Comm'n of Tex. v. Tex. Citizens for a Safe Future and Clean Water,* 336 S.W.3d 619, 624 (Tex. 2011); *Entergy Gulf States, Inc. v. Summers,* 282 S.W.3d 433, 437 (Tex. 2009); *Texas Mun. Power Agency v. Public Util. Comm'n,* 253 S.W.3d 184, 192 (Tex. 1997).

[173] *See Quick v. City of Austin,* 7 S.W.3d 109, 116 (Tex. 1998).

[174] *Public Utility Comm'n of Texas v. Cofer,* 754 S.W.2d 121, 124 (Tex. 1988).

intention of the Legislature expressed in a law that is constitutional."[175]

It is a cardinal rule of statutory construction that courts are to give effect to the intent of the Legislature.[176] If the language in a statute is unambiguous, the court must seek the intent of the legislature as found in the plain and common meaning of the words and terms used.[177] In other words, "'[w]here text is clear, text is determinative.'"[178] At that point, "'the judge's inquiry is at an end,' and extra textual forays are improper."[179]

"In applying the plain and common meaning of the language in a statute, courts may not by implication enlarge the meaning of the statute beyond its ordinary meaning; such implication is inappropriate when legislative intent may be gathered from a reasonable interpretation of the statute as it is written."[180]

"This text-based approach requires us to study the language of the specific section at issue, as well as the statute as a whole."[181] "Legislative intent remains the polestar of statutory construction."[182] If the meaning of the statutory language is unambiguous, the court adopts, with few exceptions, the interpretation supported by the plain meaning of the provision's words and terms.[183] If a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity.[184] "As the Texas Supreme Court said long ago: '[w]hen the purpose of a legislative enactment is obvious from the language of the law itself, there is nothing left to construction. In such case it is vain to ask the courts to attempt to liberate an invisible spirit, supposed to live concealed within the body of the law.'"[185] When a statute is unambiguous, the court's role is to apply it as written despite its imperfections.[186] Ordinary citizens should be able to rely on the plain language of the statute to mean what it says.[187] Finally, a court is not to "interpret a statute in a manner that renders any part of the statute meaningless or superfluous." [188]

ii. Legal sufficiency review.

Whether the movant met his initial very modest initial burden of proof or the respondent met the shifted burden of proof requires some analysis of the evidence, which likely consists of a legal sufficiency of evidence review on at least the first question.[189] When reviewing a legal sufficiency issue, the Waco Court of

[175] *National Surety Corp. v. Ladd,* 131 Tex. 295, 115 S.W.2d 600, 603 (Tex. 1938).
[176] *Fleming Foods of Tex. v. Rylander,* 6 S.W.3d 278, 284 (Tex. 1999).
[177] *Sorokolit v. Rhodes,* 889 S.W.2d 239, 241 (Tex. 1994).
[178] *In the Supreme Court of Texas,* ___ S.W.3d ___, 2013 Tex. LEXIS 180 *14, 56 Tex. Sup. Ct. J. 360 (2013), quoting *Entergy Gulf States, Inc. v. Summers,* 282 S.W.3d 433, 437 (Tex. 2009).
[179] *In the Supreme Court of Texas,* 2013 Tex. LEXIS 180*15, quoting *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson,* 209 S.W.3d 644, 651-52 (Tex. 2006).
[180] *Sorokolit,* 889 S.W.2d at 241.
[181] *In the Supreme Court of Texas,* 2013 Tex. LEXIS 180 *14, citing *Fitzgerald v. Advanced Spine Fixation Systems,* 996 S.W.2d 864, 865-66 (Tex. 1999).
[182] *Fitzgerald,* 996 S.W.2d at 865-66.
[183] *Fitzgerald,* 996 S.W.2d at 865-66.
[184] *Fitzgerald,* 996 S.W.2d at 865-66.
[185] *Fitzgerald,* 996 S.W.2d at 865-66, quoting *Dodson v. Bunton,* 81 Tex. 655, 17 S.W. 507, 508 (Tex. 1891).
[186] *Stockton v. Offenbach,* 336 S.W.3d 610, 619 (Tex. 2011).
[187] *Fitzgerald,* 996 S.W.2d at 865, citing *Addison v. Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 618, 88 L.Ed. 1488, 64 S.Ct. 1215 (1944).
[188] *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue,* 271 S.W.3d 238, 256 (Tex. 2008).
[189] *See City of Keller v. Wilson,* 168 S.W.3d 802 (Tex. 2005).

Appeals stated that the court "must consider evidence favorable to the finding if a reasonable fact finder could and disregard evidence contrary to the finding unless a reasonable fact finder could not."[190] A no-evidence legal sufficiency standard is used to evaluate evidence supporting the fact finder's determination of an issue on which the appellant did not have the burden of proof.[191] A no-evidence challenge will be sustained if (1) there is no evidence supporting the challenged element, (2) the evidence offered to proved the challenged element is no more than a mere scintilla, (3) the evidence establishes the opposite of the challenged element, or (4) the court is barred by law or rules of evidence from considered the only evidence offered to prove the challenged element. [192]

In determining whether the nonmovant met its burden to present a prima facie case, the court reviews the pleadings and the evidence in a light favorable to the nonmovant.[193]

iii. Factual sufficiency review.

Considering that factual sufficiency review is available only in the courts of appeals,[194] it is unclear The Waco Court of Appeals also said that when "reviewing a challenge that the evidence is factually insufficient to support a finding, a reviewing court will set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, the court determines that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside."[195]

The prudent practitioner should challenge the trial court's findings on both legal and factual sufficiency grounds until the scope of factual sufficiency review of findings on a Chapter 27 motion to dismiss is finally determined.

H. Does the TCPA Apply in Federal Court?

Although it is unsettled whether a defendant in federal court in Texas may file a TCPA motion to dismiss, recent authority suggests that the Texas anti-SLAPP dismissal motion may be unavailable in federal court sitting under either diversity or federal question jurisdiction. In a very thorough and well-reasoned opinion, a U.S. District Court sitting in the District of Columbia recently held that a very similar anti-SLAPP statute of the District of Columbia[196] attempts to answer the same questions that Federal Rules 12[197] and 56[198] cover, and therefore cannot be applied in a federal court sitting in diversity.[199] In so

[190] *Ramsey,* 2013 Tex. App. LEXIS 5554*3, citing *City of Keller,* 168 S.W.3d at 827.
[191] *See Croucher v. Croucher,* 660 S.W.2d 55, 58 (Tex. 1983).
[192] *Service Corp. v. Guerra,* 348 S.W.3d 221, 228 (Tex. 2011).
[193] *Crazy Hotel,* 2013 Tex. App. LEXIS 5407*17, citing *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 227 (Tex. 2004).
[194] *See Golden Eagle Archery, Inc. v. Jackson,* 113 S.W.3d 757, 761 (Tex. 2003)(but the Supreme Court can determine whether the court of appeals applied the correct standard in conducting factual-sufficiency review).
[195] *Ramsey,* 2013 Tex. App. LEXIS 5554*3, citing *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635 (Tex. 1986)(op. on reh'g).
[196] D.C. CODE §§ 16-5501-5505, enacted in 2010, effective in the District of Columbia on March 31, 2011.
[197] FED. R. CIV. P. 12.
[198] FED. R. CIV. P. 56.
[199] *3M Co. v. Boulter,* 2012 U.S. Dist. LEXIS 12860 *44 (D. D.C. 2012). In this case, 3M sued U.K. defendants in federal court for blackmail, tortious interference, business disparagement, and related

finding, Judge Robert Wilkins stated that the "history and practice culminating in the 1946 Amendments clearly demonstrates that the framers intended that Rules 12 and 56 provide the exclusive means for challenging the merits of a plaintiff's claim based on a defense either on the face of the pleadings or on matters outside the pleadings."[200] He stated, "[m]oreover, like the rest of the Federal Rules of Civil Procedure, Rules 12 and 56 automatically apply in "all civil actions and proceedings in the United States district courts."[201]

The analysis was whether the federal rule, fairly construed, answers or covers the question in dispute.[202] If the federal rule answers the question, the state law does not apply.[203] In that case, the court determined that Federal Rules 12 and 56 answered the question in dispute, which was "whether this Court may dismiss 3M's claims with prejudice on a preliminary basis based on the pleadings or on matters outside the pleadings merely because 3M has not 'demonstrated that the claim is likely to succeed on the merits.'"[204] Judge Wilkins observed that the D.C. "special motion to dismiss under the Anti-SLAPP Act operates greatly to a defendant's benefit by altering the procedure otherwise set forth in Rules 12 and 56 for determining a challenge to the merits of a plaintiff's claim and by setting a higher standard upon the plaintiff to avoid dismissal.[205] The *Boulter* opinion rejected opinions from the First[206] and Ninth[207] Circuit Courts of Appeals, finding them distinguishable or failing to apply the proper analysis.

In a recent second *Boulter* opinion, the same district court declined to vacate its prior decision at the request of the District of Columbia, finding "that the application of the D.C. Anti-SLAPP in federal court raises serious policy questions."[208] Instead, the court found that it serves the public interest to keep on the books an opinion "that may contribute to the necessary and healthy debate of those questions."[209] The court pointed out that "the D.C. Anti-SLAPP Act requires the trial court to dismiss claims, with prejudice, and prior to conducting discovery, unless 'the person claiming defamation can demonstrate a likelihood of success on the merits.'"[210] The District Court found that "[t]his method of adjudicating, whereby the trial court weighs the evidence and dismisses a claim with prejudice that appears factually week at the outset of the litigation, is alien to the federal courts."[211] The court believed that there "is no way to reconcile such a scheme with the Supreme Court's explanation that 'when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.'"[212] Importantly, the court found

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claims. The defendants filed motions to dismiss under the new D.C. anti-SLAPP statute.

[200] *Id.* at *47.

[201] *Id.,* citing *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.,* 559 U.S. 393, 130 S.Ct. 1431, 1437, 176 L.Ed.2d 311(2010), and FED. R. CIV. P. 1.

[202] *Boulter,* 2012 U.S. Dist. LEXIS 12860 *25; *Shady Grove,* 130 S.Ct. at 1437.

[203] *See Shady Grove,* 130 S.Ct. at 1437.

[204] *Boulter,* 2012 U.S. Dist. LEXIS 12860 *6.

[205] *Boulter,* 2012 U.S. Dist. LEXIS 12860 *44.

[206] *Godin v. Schencks,* 629 F.3d 79 (1st Cir. 2010).

[207] *United States v. Lockheed Missiles & Space Co.,* 190 F.3d 963, 972 (9th Cir. 1999).

[208] *3M Co. v. Boulter,* 2013 U.S. Dist. LEXIS 40789*20 (D. D.C. March 22, 2013)(*Boulter II).*

[209] *Id.*

[210] *Boulter II,* 2013 U.S. Dist. LEXIS 40789*17-18.

[211] *Boulter II,* 2013 U.S. Dist. LEXIS 40789*18.

[212] *Boulter II,* 2013 U.S. Dist. LEXIS 40789*18, quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 563 n. 8, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

that "the Supreme Court has held that, even where a defendant asserts qualified immunity, lower courts cannot require plaintiffs to meet a heightened burden of proof to defeat summary judgment, in part because such a special procedural rule conflicts with the Federal Rules of Civil Procedure."[213]

Another very recent case raised significant questions about the applicability of the TCPA in federal court. A U.S. District Court sitting in eastern North Carolina reviewed the statute, but did not decide for conflicts of laws purposes whether a Chapter 27 motion to dismiss could be brought in federal court.[214]

This issue may prove to be fertile ground for disputes in federal courts, and may include more in-depth reviews of the various states' anti-SLAPP laws to determine whether they are substantive or procedural. Based on the wording of the TCPA, the federal court practitioner should carefully consider whether to brave federal sanctions before bringing a Chapter 27 motion to dismiss.

I. Does the Act Conflict with the Supreme Court's Rule-Making Authority?

Since the new statute creates new motion procedures that conflict with existing dispositive motions by rule, we should question whether it may violate the separation of powers between the Legislature and the rulemaking authority of the Texas Supreme Court. The Supreme Court derives its rule-making authority initially from the Texas Constitution, which specifically and separately empowers the Supreme Court to promulgate rules of civil procedure.[215] The Constitution authorized the Legislature to delegate to the Supreme Court other rulemaking power.[216] The Supreme Court's statutorily conveyed power is plenary, because the Rules of Practice Act provides: "[s]o that the Supreme Court has full rulemaking power in civil actions, a rule adopted by the Supreme Court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed."[217] If, under the *Boulter* analysis, the Texas anti-SLAPP statute is procedural, it would seem to be subject to the Texas Rules of Civil Procedure.[218]

The Texas Rules of Civil Procedure share a history of adoption similar to the Federal Rules. TEX. R. CIV. P. 2, adapted from FED. R. CIV. P. 1 in 1940, provides in pertinent part that "[t]hese rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated." TEX. R. CIV. P. 1 provides:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under

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[213] *Boulter II,* 2013 U.S. Dist. LEXIS 40789*19, citing *Crawford-El v. Britton,* 523 U.S. 574, 594, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).

[214] *Ascend Health Corp. v. Wells,* 2013 U.S. Dist. LEXIS 35237* (E. D. N.C. March 14, 2013).

[215] TEX. CONST. art. V, § 31(b): "The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts."

[216] TEX. CONST. art. V, § 31(c).

[217] TEX. GOV'T CODE § 22.004(c). *See also,* Nathan L. Hecht & E. Lee Parsley, Procedural Reform: Whence and Whither (Sept. 1997).

[218] Unlike TEX. CIV. PRAC. & REM. CODE § 9.003, the anti-SLAPP law contains no savings provision that it does not alter the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.

> established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

The Texas Rules of Civil Procedure have not been amended to provide any exceptions for the TCPA dismissal motion. Rule 2 makes no provision for such a statutory procedure to apply in lieu of the Rules of Procedure.

The Texas Supreme Court originally looked to the Federal Rules of Civil Procedure in the adoption of the Texas summary judgment rule, TEX. R. CIV. P. 166a. The rule was adopted by order of October 12, 1949, effective March 1, 1950, and designated as the new Rule 166-a.[219] The Texas Bar Journal published the Texas Supreme Court's order adopting and amending several rules, which cited its source as "Federal Rule 56, as originally promulgated, except …[with minor wording differences]."[220]

It is beyond the scope of this paper to thoroughly explore the issue of whether the anti-SLAPP motion to dismiss is consistent with the Court's rule-making authority under the Texas Constitution, but this is a serious question to consider. It would certainly seem that at the very least, the Texas Supreme Court could, by order, repeal the motion procedure in Section 27.001 *et seq*.

[219] 12 TEX. B. J. 531 (1949); TEX. R. CIV. P. 166-a.

[220] *Id.*

J. Does the Statute Conflict With Texas' Constitutional Protection of Rights to Sue for Reputational Torts?

Since the Chapter 27 motion to dismiss is directed squarely at claims based on communications, at least many of which would be brought as reputational torts, there is a significant question whether the statute fatally conflicts with longstanding Texas law protecting the right to sue for reputational damages as guaranteed in the Texas Free Expression Clause. "Although we have recognized that the Texas Constitution's free speech guarantee is in some cases broader than the federal guarantee, we have also recognized that 'broader protection, if any, cannot come at the expense of a defamation claimant's right to redress.'"[221] "Unlike the United States Constitution, the Texas Constitution expressly guarantees the right to bring reputational torts."[222] The Texas Supreme Court declared that "[t]he Texas Constitution's free speech provision guarantees everyone the right to 'speak, write or publish his opinions on any subject, *being responsible for abuse of that privilege*.'"[223] In the *Turner* case, Chief Justice Phillips also relied upon the open courts provision: "the Texas Constitution's open courts provision guarantees that 'all courts shall be open, and every person for an injury done him, in his lands, goods, person

[221] *Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 116-117 (Tex. 2000), (quoting *Casso v. Brand,* 776 S.W.2d 551, 556 (Tex. 1989)).

[222] *Turner,* 38 S.W.3d at 117 (citing TEX. CONST. art. I, §§ 8, 13; *Casso,* 776 S.W.2d at 556; *Ex parte Tucci*, 859 S.W.2d 1, 19-23 (Tex. 1993) (Phillips, C.J., concurring).

[223] *Turner,* 38 S.W.3d at 117 (citing TEX. CONST. art. I, § 8 (emphasis added)).

or reputation, shall have remedy by due course of law.'"[224]

We previously discussed the perils of the adoption of an undefined, and possibly higher, burden of proof than the general civil standard of preponderance of the evidence on the basis that a heightened standard of proof violates the Texas constitution's open courts provisions.[225] Beyond the issue of standards of proof, from a more basic statutory construction framework, the well-established case law supporting Texans' constitutional rights to seek redress for reputational damages provides ample reason for litigants to carefully review the use of a Chapter 27 motion to dismiss.

IV. UNINTENDED CONSEQUENCES.

A. 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.[226]

Abuse of anti-SLAPP statutes has been reported in other states, such as Maine and California.[227] 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 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."[228] "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."[229] 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."[230] 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 common law

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[224] *Turner,* 38 S.W.3d at 117 (citing TEX. CONST. art. 1, § 13 (emphasis added).

[225] *Supra,* Section III.D.2.ii.

[226] 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.

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

[228] *Id.*

[229] *Id.*

[230] 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).

torts of defamation, disparagement, tortious interference, fraud, negligent misrepresentation, and even statutory claims concerning communications and misrepresentations.

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.[231] The Code also provides that "[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring."[232] 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."[233] 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 Face book, 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.

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.

B. 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/movant

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

[232] TEX. ELEC. CODE § 273.081.

[233] 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.

would know that he is not likely subject to sanctions under the statute, and that filing the motion causes the case to grind to a halt, the discovery stops, and the plaintiff/respondent 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 process of the expedited motion to dismiss.

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/movant in such litigation in response to the motion to dismiss.

We will also leave it up to the reader to determine whether the statute in fact operates to deter frivolous SLAPP suits, or has cast the net so far as to ensnare a much greater class of cases in which the parties need access to the courts to resolve their disputes.

C. 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. Similarly, if a respondent challenges a motion to dismiss on constitutional grounds, notice must be timely provided to the Texas Attorney General.

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.[234] 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."[235]

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 and allow the Attorney General's participation? 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. Once a challenge to the constitutionality of the TCPA and the Chapter 27 motion to dismiss are made, how does an appellate court review the trial court's denial of the motion by order or operation of law?

The practitioner is encouraged to promptly explore appropriate motions and notices to the trial court and Texas Attorney General in the event that

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

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

D. Appendices.

We will highlight in an Appendix select cases making their way through the courts, with a view to updating this analysis as courts struggle with the application and interpretation of the anti-SLAPP law. We also attach a chart[236] that illustrates critical differences between the anti-SLAPP motion to dismiss and a Texas no-evidence motion for summary judgment.

V. CONCLUSION.

While the objective of protecting First Amendment rights in the age of the internet is laudable, and conscientious lawyers are mindful of the need to pursue meritorious litigation, the TCPA has a number of flaws that may likely restrain the filing of legitimate suits, rather than restrict frivolous cases. The TCPA includes many flaws and inconsistencies that can serve as trial and appeal traps for the unwary lawyer. Since the TCPA clearly encompasses far more than SLAPP cases, practitioners should thoroughly examine this new law's applications and defenses in a wide variety of cases. Business and constitutional tort lawyers should carefully review the statute and prepare for litigating it before making claims relating to communications made about…, well, just about anything at all.

[236] With special thanks to Thomas Williams, of the Haynes & Boone office in Fort Worth, for his thoughts and effort in preparing the chart.