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TCPA

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THE TEXAS CITIZENS PARTICIPATION ACT (TCPA)

Texas' Anti-SLAPP statute:

- Designed to curb: **S**trategic **L**awsuits **A**gainst **P**ublic **P**articipation
- Unanimously passed – 2011
- One of over 30 similar laws nationwide



TWO-STEP BURDEN SHIFTING PROCESS (STEP 1)

Party may file a motion to dismiss if:

- legal action is “based on, relates to, or in response to” the party’s exercise of:
 - right to free speech;
 - right to petition; or
 - right to association
- § 27.005(b)



TWO-STEP BURDEN SHIFTING PROCESS (STEP 2)

If TCPA applies, burden shifts to plaintiff to establish:

- By “clear and convincing evidence” a *prima facie* case for each essential element of every claim.
 - § 27.005(c) (emphasis added)
- ❖ Plaintiff’s challenge: marshal summary judgment “like” evidence at the motion to dismiss stage.



DISCOVERY SUSPENDED

Filing MTD automatically suspends all discovery. § 27.003(c)

- Limited discovery may be allowed:
 - For “good cause” or
 - By motion of court or party.



MANDATORY FEES, AND SANCTIONS

Court “shall” award prevailing movant:

- Court costs, attorneys’ fees, and other expenses.
- Sanctions sufficient to deter similar actions.
- § 27.009(c)

Court “may” award fees if motion is frivolous or “solely intended to delay.”



LIMITED EVIDENCE ON MTD

“Court shall consider”: pleadings and affidavits. § 27.006

What about other “limited discovery” allowed for “good cause”?



MOVANT'S AUTOMATIC RIGHT TO INTERLOCUTORY APPEAL

Only Movant May Appeal:

- Movant may appeal from an interlocutory order that “denies a motion to dismiss” § 27.008
- No interlocutory right to appeal if motion is granted or from fees/sanctions award unless all parties and claims are dismissed.

Appeal Stays All Proceedings in Trial Court

Appeal is “expedited”

- Is it really?



WHEN DOES THE TCPA APPLY?

Tension between the law's intent and its broad text:

- “The purpose of this chapter is to”:
 - Safeguard the constitutional rights to petition, speak freely, associate freely, and participate in government.

“Free Speech,” “Right to Association,” and “Right to Petition” defined and construed much more broadly.



FREE SPEECH

“Communication made in connection with a matter of public concern.” § 27.001(3).

- “Communication”: “making or submitting a statement or document in any form” § 27.001(1).
- Matter of Public Concern:
 - “an issue related to: (A) health or safety; (b) environmental, economic, or community well-being; (c) the government; (d) a public official or public figure; or (e) a good, product, or service in the marketplace.” § 27.001(7).



FREE SPEECH

Lippincott v. Whisenhunt, 462 S.W.3d 507, 509 (Tex. 2015)

- Defamation and tortious interference claims
- TCPA (“free speech” prong) must be construed by its “plain language.”
- Communication need not be public
- TCPA applied to **internal** company emails about Nurse anesthetist’s failure to provide proper medical care.

ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895 (Tex. 2017)

- Defamation case
- TCPA applies to private communications by supervisors about employee’s failure to complete maintenance on oil tanks.
- **What about the TCPA’s intent?**



RIGHT OF ASSOCIATION

“A communication between individuals who join together to collectively express, promote, pursue, or defend common interests.” § 27.001(2).

Elite Auto Body L.L.C. v. Autocraft Bodyworks, Inc., 520 S.W.3d 191 (Tex.App.Austin 2017)

- TCPA applied to trade secret misappropriation claim.
- No “*remaining doubts*” that protected “communications” “*are not confined solely to speech that enjoys constitutional protection.*”



KEY DECISIONS AND UNANSWERED QUESTIONS

What does “clear” and “specific” evidence mean?

- Not 100% clear.
- More than the “notice” pleading standard, but less than the burden at trial. *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015).
- “Enough detail to show the factual basis for its claims.” *Id.*
- Circumstantial evidence permitted.



KEY DECISIONS AND UNANSWERED QUESTIONS

- Does the TCPA apply in federal court?
 - The Fifth Circuit has not decided the matter.
 - Federal district courts are split.
 - Supremacy clause and the *Erie* doctrine.
 - *Rudkin v. Roger Beasley Imports, Inc.*, 2017 WL 6622561 (W.D.Tex. Dec. 28, 2017)
 - *Banik v. Tamez*, 2017 WL 1228498 (S.D.Tex. Apr. 4, 2017)
 - *Mathiew v. Susea 7 (US) LLC*, 2018 WL 1515264 (S.D.Tex. Mar. 9, 2018).



KEY DECISIONS AND UNANSWERED QUESTIONS

- Does TCPA conflict with other Texas law?
 - Chapter 305 of the Tex. Gov't Code outlines mandatory procedure for regulating lobbyists.
 - *Sullivan v. Tex. Ethics Commission*, 2018 WL 2248275 (Tex.App.Austin May 17, 2018).
 - Although lobbying is a core First Amendment right, the TCPA does not apply.
 - The TCPA undermines Chapter 305.
 - Only way to “harmonize” is to conclude that TCPA does not apply.



KEY DECISIONS AND UNANSWERED QUESTIONS

- Does TCPA conflict with the Tex. Uniform Trade Secrets Act?
 - Chapter 27 v. Chapter 134 of the Tex. Civ. Prac. Rem. Code.
 - Does the TCPA thwart the right to immediate injunctive relief under TUTSA (Chapter 134)?
 - Laws should be read in “harmony” “whenever possible.”

Balancing act:

- Before filing TRO, gather enough evidence to prove *prima facie* case.
- Wait too long, and laches may bar injunctive relief.

