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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.

