STATE BAR OF TEXAS
LABOR & EMPLOYMENT LAW SECTION
28th Annual
Labor and Employment
Law Institute
August 25-26, 2017
JW Marriott San Antonio
23808 Resort Parkway
San Antonio, TX 78261

Anti-SLAPP and the Defamation Mitigation Act

By Hal K. Gillespie and Jim Sanford
Gillespie Sanford LLP
Dallas, TX

I. INTRODUCTION

We start with acronyms: The TCPA[1] (Texas Citizens Participation Act) and SLAPP (strategic lawsuits against public participation). Both (relatively) new statutes are legal Jiu-Jitsu, where bad things can happen to plaintiffs, or (in the case of the TCPA) just as suddenly to defendants who try to use these new tools of legal battle. Then another acronym comes along, the DMA – the Defamation Mitigation Act.

Texas passed the TCPA to curb "strategic lawsuits against public participation" (SLAPP suits); so, the TCPA is an anti-SLAPP statute.[2] The TCPA is about "fighting back" – doing something, and something strong, to curb a defendant's proper exercise of a protected right.[3] In a way, the TCPA turns the plaintiff, very quickly, into a defendant. The DMA is connected to the TCPA in this way – like the TCPA, it assists those who write or speak (using "protected" speech). It does so by providing partial or full escape routes to writers or speakers of allegedly defamatory speech.

All employment lawyers need to learn the basics about the TCPA and the DMA, for offense and defense in a wide array of potential litigation.

---

[1] The Texas law – the TCPA – is not to be confused with the federal law with the same acronym – the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227.

[2] See *Am. Heritage Capital, LP v. Gonzales*, 436 S.W.3d 865, 868 (Tex. App.—Dallas, 2014, no pet.).

[3] *See Adams v. Starside Custom Builders, LLC*, No. 05-15-01162-CV, 2016 WL 3548013, at *4 (Tex. App.—Dallas June 28, 2016, pet. filed)(mem op).

II. THE STATUTES

A. Texas Citizens Participation Act (TCPA)

1. *Overview and warning*

The Texas Legislature passed the Texas Citizens Participation Act (the TCPA) in 2011.[4] So we start with acronyms: TCPA and SLAPP. Texas passed the TCPA to curb "strategic lawsuits against public participation" (SLAPP suits); so the TCPA is an anti-SLAPP statute.[5] But what is it really? To know the answer, one must know how it works and the real life implications of how it works.

Imagine a discussion about this new (2011) law. It starts as a casual discussion. One person says, "Oh, by the way, the TCPA has a loser pays provision." This, for anyone who thinks about access to the courts, even for "CITIZENS" who happen to not be rich, should be the mother of all red flags.

The discussion might then become less casual. The TCPA proponent might explain: this law provides for an award of attorney's fees against the plaintiff if the defendant's motion to dismiss under the TCPA is successful." The listener might say, "Huh. Does that happen if there's a finding that the complaint was frivolous or brought in bad faith?" The TCPA booster answers: "No, if the motion to dismiss is successful, even if it was a very close call, the plaintiff must pay the defendant's reasonable attorney's fees and costs. But, don't worry, the defendant who files a motion to dismiss is protected. Unless the motion to dismiss filed by the defendant is frivolous or solely intended to delay, the court cannot award attorney's fees and costs against the defendant that files a losing motion to dismiss."

The TCPA may be a well-intentioned statute. No doubt some who supported it thought it would (1) protect the little guy from retaliatory lawsuits and (2) expedite determination and disposition of unmeritorious SLAPP suits. In their Summer 2015 law review article, Laura Lee Prather and Justice Jane Bland suggested in their title that the TCPA will push back against "bullies" and safeguard constitutional rights.[6] They concluded with a hopeful note:

> By removing the threat of abusive litigation as a weapon in the battle for public opinion, the TCPA re-levels the playing field. It penalizes the deceitful player who uses the courtroom to silence a critic who is telling the truth.

---

[4] TEX. CIV. PRAC. REMEDIES, Ch. 27.

[5] *See Am. Heritage Capital, LP v. Gonzales*, 436 S.W.3d 865, 868 (Tex. App.—Dallas, 2014, no pet.).

[6] Prather and Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP In Texas*, 47 Tex. Tech L. Rev. 725 (2015).

Id. at 801. This does not mention the fact that the TCPA motion to dismiss, with its prominent pro-defendant features – stopping or truncating discovery and, at a minimum, threatening the plaintiff with financial ruin with a loser pays provision, is a two-edged sword. Abusive litigation, now by defendants armed with the TCPA's weapons --- who often are **not** the little guy, and who often have financial resources to play litigation games plaintiffs cannot afford – is a new threat. With the TCPA in place a different ox will often be gored, and access to the courts, particularly by the little guy, will be the biggest loser.

The Parker and Bland article points to a bad consequence of SLAPP suits, that they "chill public debate because they lack merit by definition, but nevertheless cost money to defend, thus presenting a hidden tax on truthful speech."[7] But the article does not mention the negative effect of the law of unintended consequences. One of the important rights of **citizens** is the right to file a lawsuit, seeking redress of alleged wrongdoing. This is a right so important that the right to a jury trial is part of the United States and Texas Constitutions.[8] Loser pays provisions, whether designed to do so or not, are sure to chill the willingness and/or ability of many citizens to file suit, regardless or the wrong suffered. The chilling effect is greater as the disparity between an impecunious would-be plaintiff and a wealthy would-be defendant increases.

Ironically, the same Lance Armstrong the article denounces for bully tactics[9] has wealth and a team of lawyers, while the Mike Anderson/personal assistant of whom they write may be able to afford litigation, but not if filing a suit as a plaintiff may subject him to a TCPA motion to dismiss and lead to a loser-pays dismissal of his lawsuit if Armstrong's lawyers can successfully argue that Anderson is somehow suing him "in response to [Armstrong's] exercise of the right of free speech, right to petition, or right of association"[10] as defined broadly by the TCPA. To the extent that defendants can file TCPA motions to dismiss in employment law cases,[11] where plaintiffs are generally viewed as "David" and employers as "Goliath," because of their enormous disparity of wealth, Texas lawmakers in 2011 may have handed Goliath a new, powerful weapon to tilt the field of battle in Goliath's favor.

We are now learning that the other side of this two-edged sword is cutting too deep and knows no apparent bounds. The TCPA is draconian in nature. and its unfettered, literal and "liberal" interpretation by the courts, and especially by The Texas Supreme Court has embraced it with a literal and "liberal" reading. Its broad language, with its very limited express exceptions, when read literally and liberally, allows defendants to file early motions

---

[7] *Id.* at 738.

[8] U.S. CONST., 7th Amendment; TEX. CONST., Art. 1, Bill of Rights.

[9] *Bullies Beware, supra,* pp. 727-29.

[10] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.003.

[11] See the discussion below of the TCPA implications in employment law.

to dismiss in a staggering array of lawsuits, shutting down discovery (or severely truncating discovery), putting plaintiffs to their proof with a higher standard (and before discovery), and providing for seemingly automatic attorney's fees and cost awards for successful movants (i.e. defendants), with a higher bar for attorney's fees awards by "successful" non-movants (i.e. plaintiffs whose cases are not dismissed early).

The "baby" is justice and the right of citizens, even those without great sums of money they can risk losing in attorney's fees and costs for trying to exercise their right to pursue a lawsuit. The "bathwater" is the risk that plaintiffs will file weak cases that will cost defendants (whether little guys or huge, wealthy corporations) time and money to defend. In real life, the TCPA threatens to throw the baby out with the bathwater – to effectively shut down access to the courts to those who seek to enforce "rights," particularly where would-be plaintiffs lack great wealth.

2. *How the TCPA works*

The starting point for the TCPA is when a plaintiff files a lawsuit. The next step, that must be done within sixty days after service of the lawsuit on the defendant, is for the defendant, if he, she, or it so decides, to file a TCPA motion to dismiss.[12] This triggers a two or three step, burden shifting process. **Step one** is proof, by a preponderance of the evidence,[13] that the plaintiff's lawsuit is "a legal action . . . based on, [relating] to, or . . . in response to [defendant's] exercise of the right of free speech, right to petition, or right of association."[14] These are defined terms, and the Texas Supreme Court has insisted that the terms are to be given their plain meaning and to be interpreted liberally.[15]

If the defendant makes this initial showing, that the TCPA applies to plaintiff's claims (or part of them), **step two** is plaintiff's opportunity to prove "a prima facie case for each essential element of the claim in question," by "clear and specific evidence." [16] The TCPA defines "evidence" as "pleadings and supporting and opposing affidavits."[17] The Fifth Circuit says the "clear and specific evidence" test, as interpreted by Texas courts, "is more like a pleading requirement than a summary-judgment standard." *Cuba v. Pylant*, 814 F.3d

[12] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.003(b).

[13] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.005(b).

[14] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.003(a).

[15] See text of TCPA – Attachment A hereto; see specifically TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.011 ("chapter shall be construed liberally"). *See also Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex.2015).

[16] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.005(c).

[17] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.006.

701,711 (5th Cir. 2016). The Texas Supreme Court has ruled that the TCPA does not require direct evidence of each essential element of the underlying claim to avoid dismissal. [18]

If the plaintiff makes the "clear and specific evidence" showing, step three may still win dismissal of the TCPA-covered claim. Here the trial court (not a jury) determines whether the moving party has established a valid defense to each essential element of nonmovant's claim by a preponderance of the evidence.[19]

Even before a defendant files a TCPA motion to dismiss, the defendant, or even a would-be defendant benefits from the chilling effect of possible TCPA litigation with its motion practice, discovery stay, and potential attorney's fees, costs and sanctions. And then by filing, the defendant gains enormous benefits by filing a TCPA motion to dismiss, with little risk. The benefits:

1. Generally filing the TCPA motion to dismiss begins a "rocket docket." With limited exceptions, the court must hear the motion no later than the 60th day after service of the motion.[20] Ninety days is the absolute limit, unless the court allows limited and specific discovery, in which case 120 days is the limit.[21]

2. Filing the motion suspends all discovery in the case immediately and until the court has ruled on the motion to dismiss.[22]

3. The court may allow "specific and limited discovery relevant to the motion" either on its own motion or a motion by a party "on a showing of good cause,"[23] but "in no event shall the hearing on the motion to dismiss occur more than 120 days after service of the motion to dismiss."[24]

4. Even if some of plaintiff's claims survive a TCPA motion to dismiss, where the motion to dismiss is successful to any claim, and award of attorney's fees is mandatory, and sanctions may also be imposed "as the court determines sufficient to deter the party who

---

[18] *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015).

[19] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.005(d).

[20] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.004(a).

[21] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.004(a) & (c).

[22] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.003(c).

[23] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.006(b).

[24] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.004(c).

brought the legal action from bringing similar actions described in this chapter."[25] The Dallas Court of Civil Appeals has ruled that the trial court does have discretion to award attorney's fees and other expenses in an amount less than or equal to the amount of attorney's fees and other expenses determined by the factfinder to be reasonable and necessary under the TCPA.[26] That said, a complete failure to award attorney's fees is grounds for reversal.[27]

The risk of filing a TCPA motion to dismiss is minimal. For starters, the coverage of the TCPA, with broad, inclusive definitions of "exercise of the right of free speech, right to petition, or right of association,"[28] and terms such as "based on" and "relates to,"[29] coupled with the requirement of liberal construction, would seem to provide colorable support to arguments that many legal actions could properly trigger a TCPA motion to dismiss.

Next, ever since TCPA's began reaching the Texas Supreme Court, the Court has shown it will give broad sweep to the statute and resist interpretations that would narrow its scope. The Court set the tone in April 2015, with its ruling in Lippincott v. Whisenhunt that the TCPA is not limited to just public communication and that email statements questioning the quality of an independent contractor's medical care were a matter of public concern.[30] The Court reasoned that the TCPA's definition of "communication" does not impose any "requirement that the form of communication be public," and that the Legislature could have easily added such language limiting language if this were its intent.[31] Recently, in *ExxonMobil Pipeline Company v. Coleman*, the Court ruled that communications that led to termination of a worker that related to health, safety, environmental, or economic concerns, even without mentioned those words, were covered by the TCPA and that the TCPA does not "require more than a 'tangential relationship' to those concerns.[32]

Beyond that, unlike the mandatory attorney's fees provision where the court grants a TCPA motion to dismiss, unsuccessful TCPA motions to dismiss enjoy a preference. Not

---

[25] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.009 (1) and (2).

[26] *Avila v. Larrea*, 506 S.W.3d 490, 496 (Tex. App.—Dallas, 2015)(amount of attorney's fees and other expenses to award is "left to the sound discretion of the trial court").

[27] *D Magazine Partners, L.P. v. Rosenthal*, __S.W.3d__, 45 Media L. Rep. 1457 (2017).

[28] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.001(2)-(4).

[29] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.003.

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

[31] *Id.*

[32] *ExxonMobil Pipeline Company v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017).

only is there a "may" standard (not a "shall" standard), the court may only award court costs and reasonable attorney's fees to the responding party upon a finding that the motion to dismiss "is frivolous or solely intended to delay."[33]

Not only does the TCPA motion to dismiss trigger a rocket docket and stay or truncate discovery, it warps the litigation in other ways. First, the TCPA requires the trial judge to rule on the motion to dismiss no later than 30 days after the hearing.[34] In the absence of a ruling within that time, the motion to dismiss is considered denied, and the moving party may then appeal.[35] And the appeal is expedited.[36] As a practical matter, the TCPA, envisioned by some as a way to expedite litigation, has done quite the opposite, as the case seesaws back and forth on appeal and discovery waits for some or all the case to get going with discovery, discovery motions as needed, regular motions, and then maybe someday, trial.[37]

3. *Very limited exemptions*

An employment lawyer who looks for an exception to the TCPA with respect to suits under the Texas Labor Code will find nothing. There are very few exceptions to the TCPA: certain "enforcement actions,"[38] certain legal actions brought against persons primarily engaged in the business of selling goods or services, personal injury or survival actions, and legal actions brought under the Insurance Code or arising out of an insurance contract.[39]

4. *Whether the TCPA applies in federal court proceedings*

---

[33] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.005(d).

[34] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.00(7)(b).

[35] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.008(a)

[36] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.008(b).

[37] The saga of Erica Wright, "a recording artist, producer and actress professionally known as Erykah Badu" and Paul Levatino, "the general manager of Badu's business entities" illustrates how a lawsuit first filed by Badu in October 2014 against Levatino (whose lawyer sent Badu a demand letter that triggered Badu's suit for declaratory judgment), can, along with Wright's counterclaim for defamation, stand still for almost three years, with no discovery, as TCPA battles continue. *See Apple Tree Café Touring, Inc. and Erica Wright*, __S.W.3d__ (Tex. App.—Dallas 2017) (mem. Opinion pp. 1-2); *Levatino v. Apple Tree Cafe Touring, Inc*., 486 S.W.3d 724 (Tex. App.—Dallas 2016, pet denied).

[38] The enforcement action exception is narrow. *See Harper v. Best*, 493 S.W.3d 105, 111 (Tex. App.—Waco 2017).

[39] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.010.

A Fifth Circuit panel has held that as a general matter, it has jurisdiction over an interlocutory appeal from an order denying a TCPA motion to dismiss.[40] Notably, however, Judge Graves dissented in that case, writing that the TCPA does not apply in federal court, that the Fifth Circuit only assumed and not ruled that it does, and that there is a split in the federal circuit on the issue of whether state anti-SLAPP statutes such as the TCPA can be used in federal court.[41]

B. Texas Defamation Mitigation Act

The Texas Legislature took up free-speech protections again in the next legislative sessions. In 2013, the Legislature passed the Defamation Mitigation Act ("TDMA")[42] with super-majorities in both chambers, making Texas one of three states to enact a version of the Uniform Correction or Clarification of Defamation Act[43] and one of over 30 states to enact some form of retraction statute.[44] Then-Governor Rick Perry signed the bill on June 14, 2013, and the law went into effect that day.

The TDMA, located at Subchapter B ("Correction, Clarification, or Retraction by Publisher") of the Civil Practice and Remedies Code Chapter 73, follows the libel provisions in Subchapter A, and is intended to provide a method for a "person" defamed by a publication or broadcast "to mitigate any perceived damage or injury."[45] Broadly, the TDMA requires pre-suit notice of claims involving reputational caused by "the false content of a publication" to give the would-be defendant the opportunity to cure the perceived harms before forced to defend.[46]

Under the TDMA, the protected class of "person[s]" includes a laundry list of individuals, corporations, and other legal or commercial entities, but excludes the government and governmental subdivisions.[47] In addition to protecting a broad swath of

---

[40] *Cuba v. Plyant*, 184 F.3d 701, 705 (5th Cir. 2016), *citing NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 748 (5th Cir.).

[41] *Id*. at 718, fn. 1.

[42] Act 2013, 83rd Leg., R.S., Ch. 95 (H.B. 1759), eff. June 14, 2013.

[43] North Dakota and Washington are the other states. *See* "Legislative Fact Sheet – Correction or Clarification of Defamation," *available at*: http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Correction%20or%20Clarification%20of%20Defamation (last visited Aug. 17, 2017).

[44] House Research Organization Bill Analysis of CSHB 1759, at 4-5, (May 1, 2013).

[45] TEX. CIV. PRAC. REMEDIES § 73.052.

[46] TEX. CIV. PRAC. REMEDIES § 73.054.

[47] TEX. CIV. PRAC. REMEDIES § 73.053 (defining "person" to mean "an individual, corporation, business trust, estate, trust, partnership, association, joint venture, or other

individuals and entities, the TDMA protects a broad class of claims—namely those, *however characterized*, for damages "arising out of harm to personal reputation" caused by the false statement—and to all publications in any form, including "writings, broadcasts, oral communications, electronic transmissions, or other forms of transmitting information."[48]

Under the TDMA, a person must make a **"timely and sufficient"** request for "correction, clarification, or retraction" of the defamatory material before filing a defamation suit.[49] A defendant in a TDMA-covered suit who does not receive a written correction, clarification, or retraction request may file a verified plea in abatement within 30 days of filing its original answer.[50] The suit is automatically abated—without a court order—beginning on the 11th day after the plea in abated is filed if it remains uncontroverted.[51] The suit remains abated until the 60th day after the date that a written request is served or a later date agreed upon by the parties.[52]

A TDMA request is "timely" if made during the one-year limitation period for defamation claims.[53] However, a plaintiff who does not request a correction, clarification, or retraction ***within 90 days*** "after receiving knowledge of the publication" ***may not recover exemplary damages***.[54] At least one federal court has interpreted the "receiving knowledge" trigger to mean knowledge of the specific contents of a defamatory publication and not just the fact of the publication.[55]

---

legal or commercial entity" and excluding "a government or governmental subdivision, agency, or instrumentality.").

[48] TEX. CIV. PRAC. REMEDIES § 73.054(a)-(b); *but see In re InduSoft, Inc.*, 03-16-00677-CV, 2017 WL 160918, *4 (Tex. Ct. App.—Austin Jan. 10, 2017)(denying mandamus relief after denial of a plea in abatement and concluding that the TDMA did not apply to the alleged statements because—while threatening other companies not to do business with the plaintiffs—they were not alleged to be false).

[49] TEX. CIV. PRAC. REMEDIES § 73.055(a)("A person may maintain an action for defamation only if….").

[50] TEX. CIV. PRAC. REMEDIES § 73.062(a).

[51] TEX. CIV. PRAC. REMEDIES § 73.062(b).

[52] TEX. CIV. PRAC. REMEDIES § 73.062(c).

[53] TEX. CIV. PRAC. REMEDIES § 73.055(b); *see also* TEX. CIV. PRAC. REM. §16.002(a)("A person must bring suit for … libel, slander… not later than one year after the day the cause of action accrues.").

[54] TEX. CIV. PRAC. REMEDIES § 73.055(c).

[55] *See Bancpass, Inc. v. Highway Toll Admin., LLC*, No. A-14-CA-1062-SS, 2016 WL 4491736, **8-9 (W.D. Tex. Aug. 25, 2016)(holding that the 90-day limitations ran from the date that the plaintiff received the defamatory letters in discovery—and thereby learned the contents—and not from the date that it learned that the defendant had sent the letters to vendors).

A TDMA request is "sufficient" if it:

a. is served on the publisher;
b. is in a writing that reasonably identifies the person making the request and that is signed by the individual claiming to have been defamed or an authorized representative;
c. states with particularity the allegedly false and defamatory statement, and—to the extent known—the time and place of publication;
d. alleges the statement's defamatory meaning; and
e. specifies the circumstances causing the statement to be defamatory if it arises from something other than the express language.[56]

A "sufficient" request sets out each of these details.[57] A defendant who intends to challenge the sufficiency or timeliness of a TDMA request must file a motion to declare the request insufficient or untimely served not later than the 60th day after the citation is served.[58]

In response to a TDMA request, the defendant may ask the plaintiff to provide reasonably available information regarding the falsity of the allegedly defamatory statement.[59] The plaintiff must provide the requested information within 30 days. If a correction, clarification, or retraction is not made, a person who—without good cause—fails to disclose the requested information may not recover exemplary damages without showing actual malice.[60]

Any correction, clarification, or retraction is "timely" if it is made not later than the 30th day after receiving (a) the request, or (b) the information requested under § 73.056(a).[61] The correction, clarification, or retraction is "sufficient" if published in the same manner and medium as the original publication or, if that is not possible, with a "prominence" and in a manner and medium reasonably likely to reach substantially the same audience as the complained of publication *and* includes at least one of four additional categories of disavowal (e.g., is an acknowledgement of the erroneous statement).[62] Essentially, in addition to its

---

[56] TEX. CIV. PRAC. REMEDIES § 73.055(d).

[57] TEX. CIV. PRAC. REMEDIES § 73.055(c); *see generally Neely v. Wilson*, 418 S.W.3d 52, 63 (Tex. 2013).

[58] TEX. CIV. PRAC. REMEDIES § 73.058(c).

[59] TEX. CIV. PRAC. REMEDIES § 73.056(a).

[60] TEX. CIV. PRAC. REMEDIES § 73.056(b).

[61] TEX. CIV. PRAC. REMEDIES § 73.057(a).

[62] TEX. CIV. PRAC. REMEDIES § 73.057(b).

prominence and manner of distribution, a sufficient correction, clarification, or retraction must "disavow the accusations … initially levied …."[63] The TDMA further defines the "prominence" requirement for internet and other publications.[64]

Since 1985, Texas's libel statute has listed "any public apology, correction, or retraction" as a mitigating factor in determining "the extent and source of actual damages and … exemplary damages."[65] The TDMA provides a mechanism for the publisher of allegedly defamatory material to attempt to minimize or offset the actual or perceived injury. Meanwhile, the statute forces the defamation plaintiff to engage in this back-and-forth both procedurally—through automatic abatement—and substantively—by barring exemplary damages absent a timely retraction demand.[66] Accordingly, if a TDMA-compliant correction, clarification, or retraction is made—whether the plaintiff requests it or not—the plaintiff ***may not recover exemplary damages absent a showing of actual malice.***[67]

By comparison, Washington's retraction statute—arguably hewing closer to the Uniform Correction or Clarification of Defamation Act—bars reputational and presumed damages altogether if a timely and sufficient retraction is made and counts the filing of the lawsuit itself a sufficient retraction request.[68]

In addition, the TDMA provides procedures for challenging the timeliness and sufficiency of both the request for correction, clarification, and retraction and the correction, clarification, and retraction itself.[69] Neither the request for correction, clarification, or retraction nor the offer of a correction, clarification, or retraction is admissible at trial.[70] The fact that a correction, clarification, or retraction has been made is *only* admissible in mitigation of damages under § 73.003(a)(3). If the correction, clarification, or retraction is admitted into evidence, the plaintiff's request may also be received into evidence.[71]

III. THE BIG CASES DEALING WITH THE NEW STATUTES

A. Texas Citizens Participation Act Cases

---

[63] *Hammond v. United States, et al.*, 5:15-cv-00579-RP, 2016 WL 9049578, *2 (W.D. Tex. May 2, 2016).

[64] TEX. CIV. PRAC. REMEDIES § 73.057(d).

[65] TEX. CIV. PRAC. REMEDIES § 73.003.

[66] TEX. CIV. PRAC. REMEDIES §§ 73.055(c), 73.062.

[67] TEX. CIV. PRAC. REMEDIES § 73.059.

[68] *See* Wash. Rev. Code Ann. §§ 7.96.040(4), .050(2), .060.

[69] TEX. CIV. PRAC. REMEDIES § 73.058(b)-(c).

[70] TEX. CIV. PRAC. REMEDIES § 73.061(a), (c).

[71] TEX. CIV. PRAC. REMEDIES § 73.061(b).

In its short life, the TCPA, as one might expect with a statute that permits immediate interlocutory appeals, and where the stakes are high, has generated many appeal court decisions and more than its share of decisions by the Texas Supreme Court. Here are the Texas Supreme Court cases so far, in temporal order:

1. *In re Lipsky,* 460 S.W.3d 579 (Tex.2015).

This case is about a series of claims and counterclaims under the TCPA between plaintiff landowner Lipsky and defendant Range, an oil and gas operating company, due to the plaintiff's contaminated water well. The Supreme Court of Texas dismissed the Plaintiff's claims against defendant as an improper collateral attack; determined the defendant's counterclaim for business disparagement could not survive because damages were not sufficiently shown, and permitted the defendant's counterclaim for defamation because the statements made by the plaintiff were defamation per se.

The Court explains that under the TCPA, part of the protection of citizens who petition or speak out on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them is a special motion to dismiss, on expedited consideration. The trial court must dismiss a suit that appears to stifle the defendant's communication on a matter of public concern unless "clear and specific evidence" establishes the plaintiff's prima facie case." TEX. CIV. PRAC. & REM. CODE § 27.005(c). The Court ruled that circumstantial as well as direct evidence is relevant when considering a TCPA motion to dismiss.

Lipsky discovered the presence of gas in his well water on his property. He investigated the matter and determined Range, the oil and gas operator closest to his property, had some responsibility for contaminating the water. Lipsky blamed Range in the media for contaminating the water despite the Railroad Commission's conclusion that Range's operations were not the source of the contamination. Lipsky sued Range alleging its fracking operations near their property were negligent, grossly negligent, and a nuisance. Range answered and moved to dismiss all claims as an improper collateral attack on the Railroad Commission's ruling and filed a counterclaim (the subject of the TCPA motion to dismiss) alleging defamation and business disparagement.

The Texas Supreme Court explained that the TCPA requires clear and specific evidence, including circumstantial evidence, when considering a motion to dismiss. The Court therefore affirmed the appellate court's decision to consider circumstantial evidence in the motion to dismiss Lipsky's claims. Moving to the counterclaims, the Court determined Range's claim for business disparagement could not survive because of the lack of specific evidence proving direct pecuniary and economic loss from such disparagement. To support this claim, Range provided an affidavit from its vice president with general averments of direct economic loss and lost profits but failing to satisfy the minimum requirements of the TCPA. However, proving such damages was not required for a defamation claim where the party shows the harm is defamation per se. With such a finding, general damages like mental anguish and loss of reputation are presumed. Range was able to show Lipsky's statements were defamatory per se, so the trial court correctly denied Lipsky's motion to dismiss the defamation claim.

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

This per curiam decision, issued the same day as *In re Lipsky*, is about two administrators whom made negative remarks about an independent contractor and the subsequent invocation of the TCPA against the independent contractor's claims of defamation, tortious interference of contract, and civil conspiracy. This appeal to the Texas Supreme Court involved the issues of communication and matter of public concern.

The Texas Supreme Court held that the TCPA is not limited to just public communication and that the email statements questioning the quality of the independent contractor's medical care were of a matter of public concern. The emails specifically alleged that a nurse anesthetist (1) failed to provide adequate pediatric coverage; (2) administered a different drug than the one ordered in pre-op without patient consent; (3) falsified records; (4) and violated sterile protocol.

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

Travis Coleman, a terminal technician, sued ExxonMobil Pipeline Company (EMPCo) and two EMPCo employees for defamation based on statements among supervisors and an investigator about his alleged failure to record the volume of petroleum products and additives in storage tanks. Judge Tobolowsky of the 298th Judicial District Court in Dallas denied defendants' TCPA motion to dismiss, and the Dallas Court of Appeals affirmed, ruling, among other things, that the fact that the statements did not specifically mention health, safety, environmental, or economic concerns was not a problem.

Per the Texas Supreme Court, the TCPA does not require more than a tangential relationship to such concerns. The Court remanded for the district court to test Coleman's clear and specific evidence of a prima facie case for each essential element of his claim.

4. *D Magazine Partners, L.P. v. Rosenthal*, __S.W.3d__ (Tex. Mar. 17, 2017).

Janay Rosenthal, a citizen, filed suit against D Magazine after it published an article describing her government benefits and allegedly accusing her of welfare fraud. The trial court granted D Magazine's TCPA motion to dismiss as to Ms. Rosenthal's claims under the Texas Deceptive Trade Practices Act (DTPA) and the Identity Theft Enforcement and Protection Act (ITEPA), but denied the motion to dismiss as to her defamation claim. The Dallas Court of Appeals affirmed.

The Texas Supreme Court affirmed the ruling that let Ms. Rosenthal's defamation claim go forward, finding she established a prima facie case of the magazine's negligence in publishing the article. The Court reversed the trial court ruling to the extent that it failed to award attorney's fees to D Magazine as to the claims the trial court did dismiss. Looking at the definitions within the act (Section 27.009(a)(1), the Court held that each claim constituted a "legal action," and that D Magazine was entitled to an award of reasonable attorney's fees. The Court left to the trial court's discretion the way the continuation of the defamation claim affects the proper amount of such a fee.

5. *Hersh v. Tatum*, __S.W.3d__ (Tex. June 30, 2017).

This case involves a suit for intentional infliction of emotional distress brought against an author, based on her alleged encouragement of a columnist to criticize the obituary of their son who committed suicide for not mentioning the suicide. The author denied making the alleged communication. 68th Judicial District Judge Hoffman granted the TCPA motion to dismiss. The Dallas Court of Appeals reversed and remanded.

The Texas Supreme Court ruled that the TCPA applied despite the author's denial of making the alleged communications. The Court ruled that in order to shift the burden to the plaintiff, the movant merely needs to show from the plaintiff's pleadings that the action is covered by the TCPA. The Court agreed that the alleged communication was not extreme and outrageous, as required by plaintiff's cause of action.

B. Texas Defamation Mitigation Act Cases

There is little authority so far interpreting and applying the TDMA. Thus far, at least three open questions are making their way through the appellate courts.

Open Question: Is a "timely and sufficient" TDMA request a condition precedent to a defamation claim?

Perhaps the key open question about the TDMA is whether it establishes a condition precedent for a defamation suit, or whether non-compliance merely impacts the remedies available. The question largely turns on the meaning of §73.055(a)'s language that "[a] person *may maintain* an action for defamation *only* if" the person makes a "timely and sufficient" retraction request and complies with the statute's technical requirement.[72] To date, the Fifth Circuit Court of Appeals, in a non-published opinion, is the lone court to treat the TDMA request as a condition precedent,[73] while the Dallas Court of Appeals recently reached the opposite conclusion.[74]

In January 2017, the Fifth Circuit affirmed summary judgment against flight attendant Charlotte Tubbs on her defamation and other tort claims.[75] Tubbs claimed that Nicol, a passenger on a flight on which Tubbs worked, libeled her in an email to United Airlines's CEO in which Nicols complained about Tubbs and accused her of "criminal activities."[76]

---

[72] TEX. CIV. PRAC. REMEDIES § 73.055(a)("A person may maintain an action for defamation only if….").

[73] *See Tubbs v. Nicol*, 675 Fed. Appx. 437, 439 (5th Cir. Jan. 12, 2017).

[74] *See Hardy v. Comm. Workers of Am. Local 6215 AFL-CIO*, No. 05-16-00829-CV, 2017 WL 1192800 (Tex. Ct. App.—Dallas Mar. 31, 2017, pet. filed).

[75] *Tubbs*, 675 Fed. Appx. at 439.

[76] *Id.* at 438.

Tubbs conceded that she never requested a correction, clarification, or retraction, and the district court granted summary judgment for that reason.[77] The Fifth Circuit affirmed in a per curiam but unpublished opinion, with little analysis of the TDMA and apparently assuming that the request is a condition precedent.[78]

Two months later the Fifth Court of Appeals in Dallas reached the opposite conclusion after a deeper statutory analysis. In *Hardy v. Comm. Workers of Am. Loc. 6215 AFL-CIO*, the unsuccessful candidate for a county district-court clerk position, Tarsha Hardy, sued the union and its vice president for defamation.[79] The defendants moved for summary judgment due to Hardy's failure to request a correction, clarification, or retraction of the union vice president's allegedly defamatory statement to a local television station.[80] The trial court granted summary judgment, but the 5th Court of Appeals reversed and remanded.[81]

As a matter of first impression in the Texas appellate courts, the court held that dismissal was not the proper remedy for the failure to seek a timely and sufficient TDMA retraction.[82] Viewing the statute as a whole, and reading it to give effect to all of its provisions, the Texas court concluded that a defamation suit in which the plaintiff failed to make a timely and sufficient retraction request is "not subject to dismissal based solely on" that failure but rather is subject to abatement upon a timely-filed motion and further subject to potentially narrowed remedies (i.e., no exemplary damages).[83]

Whether the failure to comply leads to dismissal or merely provides for abatement and limited remedies obviously is more than a technical question. As an example—and possibly a cautionary tale—of the import of this open question, the defendant-ex-wife sued for defamation in *Zoanni v. Hogan* is challenging on appeal a $2.1m verdict in part because her plaintiff-ex-husband, she contends, failed to make a TDMA-compliant retraction request concerning the majority of the allegedly defamatory statements submitted to the jury.[84] The First Court of Appeals has not yet set oral argument in *Zoanni*.

How other Texas appellate courts and someday the Texas Supreme Court will come out on this question is unclear, although the 5th Court of Appeal's opinion is the more

---

[77] *Id.* at 439.

[78] *Id.*

[79] *Hardy v. Comm. Workers of Am. Loc. 6215 AFL-CIO*, __ S.W.3d __, 2017 WL 1192800 at 1-2 (Tex. Ct. App.—Dallas Mar. 31, 2017, pet. filed).

[80] *Id.* at *1. The statements related to Hardy's employment with, and recent termination from, the CWA local. Hardy alleged that the statement caused her to lose the election.

[81] *Id.* at *8.

[82] *Id.*

[83] *Id.*

[84] *See* Appellant's Br., *Zoanni v. Hogan*, No. 01-16-00584-CV, at __ (Tex. Ct. App.—Houston [1st Dist.] Apr. 20, 2017).

rigorous in its statutory interpretation and thoughtful in its analysis and conclusions. As that court notes, "if a defendant who did not receive a request for correction, clarification, or retraction could simply seek dismissal of the action, there would be no need for either the limitation of damages or abatement provisions … and the purpose of the statute would be frustrated."[85] *Tubb* may well prove an outlier.

Open Question: What impact does the TDMA's automatic abatement have on the TCPA's deadlines?

A second TDMA question is currently percolating in the 14th Court of Appeals in Houston. Appellee's brief is due August 21, 2017, and the Houston appeals court may eventually decide what effect, if any, the TDMA's "automatic" abatement provision has on the TCPA's 60-day filing deadline (as well, presumably, as other similar deadlines beyond the TDMA). *Hearst Newspapers, LLC, et al. v. Status Lounge Incorporated* (No. 14-17-00310-CV), apparently involves a defamation claim arising from an article posted on the Houston Chronicle's website reporting on a police report of a shooting a nightclub. The plaintiff named the Chronicle's parent company, a local TV station, and several journalists in the defamation action but never issued a TDMA request for retraction, either before suit or during the abatement period. The defendants then moved to dismiss under the TCPA, but the district court denied the motions as untimely. The threshold issue on appeal is the overlap between the TCPA's 60-day filing deadline and the TDMA's 60-day abatement period, which by statute stays the suit "automatically …, in its entirety."[86]

Open Question: Is the written TDMA request protected activity under the TCPA?

This seems like a straight-forward question with an easy answer. If the written TDMA request for correction, clarification, or retraction is required to preserve the full array of remedies, it stands to reason that the request should be protected petitioning activity under the TCPA. However, the 5th Court of Appeals in March 2016 held that a pre-suit demand letter claiming defamation and asking for a public retraction or correction was neither protected associational activity nor protected petitioning activity.[87] The court concluded that, "the ordinary meaning of 'a judicial proceeding' is an actual, pending judicial proceeding" and that preliminary activities before suit were not protected.[88]

---

[85] *Id.* at *7.

[86] TEX. CIV. PRAC. REMEDIES § 73.062(b), (d)("All statutory and judicial deadlines under the Texas Rules of Civil Procedure relating to a suit abated under Subsection (b), other than those provided in this section, will be stayed during the pendency of the abatement period under this section.").

[87] *Levatino v. Apple Tree Café Touring, Inc., et al.*, 486 S.W.3d 724, 726-27 (Tex. Ct. App.—Dallas Mar. 11, 2016, pet. denied).

[88] *Id.* at 728-29.

The Austin Court of Appeals in March 2017 agreed that the TCPA's use of "judicial proceeding" refers to "actual, pending judicial proceeding[s]," citing *Levatino*.[89] It went on to hold that the mandatory pre-suit notice letter required by the Texas Property Code did not "pertain to" a "judicial proceeding" so as to be an "exercise of the right to petition" under the TCPA." As a pre-suit demand, there was yet no "judicial proceeding."

So far, *Long Canyon* is in line with *Levatino*. Interestingly, the Austin court then held that the pre-suit letter *was* protected petitioning activity under the TCPA's subsection concerning "any other communication that falls within the protection of the right to petition government under the Constitution …."[90] The court recognized that the "established understanding under First Amendment jurisprudence, both now and at the time of the TCPA's enactment, was that presuit demand letters generally fall within the 'right to petition.'"[91] The court therefore held that the statutory presuit notice letter *was* petitioning activity protected by the TCPA.[92]

Defamation plaintiffs may find themselves disadvantaged on two sides depending on the answer to this question. On the one hand, the TDMA mandates a presuit notice letter on penalty of abatement and narrowed remedies. On the other, if the mandated notice is not protected activity under the TCPA, it may be only a matter of time before a declaratory judgment action with a claim for fees and costs—giving the would-be defendant the procedural and tactical upper hand—is the standard response tactic.[93] It is said that the road to hell is paved with good intentions, and the Legislature's well-meaning attempt to mitigate and diffuse defamation claim, may well spark new forms of litigation and even more bitter disputes.

IV. THOUGHTS ABOUT APPLICATION OF THE NEW STATUTES IN EMPLOYMENT LAW CASES

A. Texas Citizens Participation Act Implications

1. *Impact on traditional plaintiffs*

Travis Coleman, the plaintiff in *ExxonMobil Petroleum Co. v. Coleman*, 512 S.W.3d 898 (2017) was not a traditional plaintiff. He sued his former employer for statements that led to his termination. But he "could have been" a traditional plaintiff, if the statements led

[89] *Long Canyon Phase II and II Homeowners Assoc., Inc., v. Cashion, et al.*, 517 S.W.3d 212, 220-21 (Tex. Ct. App.—Austin Mar. 3, 2017, no pet.).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 221-22; *accord Moricz v. Long*, No. 06-17-00011-CV, 2017 WL 3081512, *4 (Tex. Ct. App.—Texarkana Jul. 20, 2017, no pet. h.).

[93] *See, e.g., Levatino* 486 S.W.3d at 726.

to his termination and those statements tied to the purported non-discriminatory business reason cited by his former employer in a suit for unlawful employment discrimination.

By "traditional plaintiffs" I mean plaintiffs with cause of action such as age, race, gender and disability discrimination or breach of contract. I do not mean plaintiffs bringing defamation, interference with contract, or intentional infliction of emotional distress claims.

We do not yet know how much, if any, the TCPA will affect litigation of suits brought by traditional plaintiffs. From the standpoint of traditional employment law plaintiffs, there is a concerning potential for serious delay, multiplication of proceedings, and damage of rights if employers successfully argue that communications[94] leading to termination are matters of public concern,[95] so that TCPA motions to dismiss are proper, stop discovery, trigger hearings, rulings and appeals on motions to dismiss, and threaten loser-pays sanctions. The solution may be to urge courts to accept a common sense reading of the TCPA centered on the "Purpose" clause in the TCPA,[96] or to seek amendment of the statute to add one or more exemptions protect the rights of traditional employment law plaintiffs to pursue their claims with normal, fair discovery, and without the risk of loser pays attorney's fee awards.[97]

2. *Impact on traditional defendants*

The impact of the TCPA on traditional employment law defendants seems to be negligible. The "Purpose" clause of the TCPA points away from its use in traditional employment law matters. An employer who seeks to expand the TCPA to respond to a plaintiff's claim or age or gender discrimination, for example, would run the risk of spending money on an additional level of motions and briefings, and risk an award of attorney's fees with an unsuccessful motion. By in large, traditional defendants who seek to apply the TCPA

---

[94] '"Communication' includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.001(1).

[95] "'Exercise of the right of free speech'" is "a communication made in connection with a matter of public concern;" and a "matter of public concern" includes issues **related** to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace." TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.001(3) and (7)(emphasis added).

[96] TEX. CIV. PRAC. REMEDIES, Ch. 27, §27.002.

[97] While *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978), might and should protect traditional employment law plaintiffs from mandatory attorney's fee awards, the chilling effect of the threat of such awards violates public policy, and in employment litigation, rulings before discovery would essentially amount to repeal of civil rights laws. *Cf. Sierra Club v. Energy Future Holdings Corporation*, __F.Supp. 2d__, 2014 WL 12690022 (W.D. Tex. 2014)(holding that the *Christianburg* standard applies before a defendant in a federal Clean Air Act matter can recover attorney's fees against the unsuccessful plaintiff).

tool to employment law cases will be struggling to pound a square peg into a round hole. Or so the authors hope.

B. Texas Defamation Mitigation Act Implications

1. *Impact on traditional plaintiffs*

The impact of the TDMA on the workplace remains to be seen. The employer's qualified privilege to criticize employees already provides ample protection against defamation suits brought by current or former employees.[98] The TCPA adds a layer of protection for certain workplace communications,[99] but the TDMA itself in most situations will be little more than a procedural option (abatement). Employees generally must already prove actual malice to prevail on a defamation claim against an employer or supervisor.[100]

Beyond the workplace, the TDMA appears to be a mixture of good news-bad news for individuals pursuing claims for reputational harm.

On the one hand, the TDMA imposes new tripwires for the unwary defamation plaintiff and potentially puts the defamation plaintiff at risk of being sued preemptively (and without the TCPA's protection). Of the potential down-side implications for defamation plaintiffs, the TDMA:

- Compels pre-suit communication that may be unprotected by the TCPA.[101]
    - "It's a trap." – Admiral Ackbar, *Star Wars: Episode VI - Return of the Jedi*.
        - → Mandatory presuit notice without TCPA protections may lead to a rash of preemptive declaratory judgment actions, in which the would-be defendant turns the table to become the plaintiff.
- Provides for automatic abatement absent a timely and sufficient notice, and builds in additional delay.
- Sets up several ways in which a claim for punitive damages may be eliminated or subject to a heightened burden.
- Creates a new, shortened limitations period (90 days from knowledge).
- Requires a back-and-forth process, forcing plaintiff to show (some of) her cards even before filing (and without the benefit of full discovery).

---

[98] *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995).

[99] *See Exxonmobile Pipeline Co., et al., v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017).

[100] *Randall's Food Markets*, 891 S.W.2d at 646.

[101] *Compare Levatino*, 486 S.W.3d at 726 *with Long Canyon*, 517 S.W.3d at 220-21.

On the other hand, time will tell if the TDMA offers new advantages to the defamation plaintiff:

- The initial back-and-forth may aid in formulating a TCPA motion response, in that the plaintiff will have to do more homework early on.

- Lighting could strike: the dialogue could prompt the defendant to do what the statute intends—correct, clarify, or retract the defamatory publication—thereby mitigating the harm already done.

2. ***Impact on traditional defendants***

The impact on potential defamation defendants seems more clearly to provide an overall net advantage. The TDMA gives defamation defendants new mechanisms to put the plaintiff to her proof earlier in the case, to potentially minimizes exposure, and event to eliminate a category of damages.

On one hand, the TDMA:

- Offers defendants a form of presuit discovery "discovery" (i.e., request for information regarding falsity - § 73.056).

- Allows the defendant to obtain a preview of the plaintiff's TCPA motion response—on the issue of falsity—before filing.

- Grants an automatic right to abate the entire lawsuit until the plaintiff makes a TDMA request.

- Allows the defendant an opportunity to limit the scope of exposure through a TDMA retraction.

- Risks the plaintiff's punitive-damages claim or raises the plaintiff's burden due to non-compliance

ADDENDUM: TIMETABLE FOR THE TDMA PROCESS

Step	Action	Rule	Deadline	Due	Done
1	"Timely and sufficient" <u>request</u>	§ 73.055(b)-(c)	"during the [SOL]" (i.e., w/in one year); w/in 90 days of "knowledge" to preserve punitive damages		
2.a	***If Step 1 request made: Option 1*** Request for "reasonably available" info. re: defamatory statement(s) "Any information requested" to be provided *NOTE: failure to provide requested info. w/o good cause bars exemplary damages (unless actual malice)*	§ 73.056(a) § 73.056(a)	"not later than the 30th day" after receipt of request "not later than the 30th day" after the info. request		
2.b	***If Step 1 request made: Option 2*** Defendant can challenge the Step 1 requests sufficiency or timeliness → Motion to declare the request insuff. or untimely *NOTE: the court "shall rule, as a matter of law," at the "earliest appropriate time before trial"*	§ 73.058(c)	Served "not later than the 60th day after" citation is served		
2.c	"Timely and sufficient" correction, clarification, or retraction	§ 73.057(a)	"not later than the 30th day after receipt of" → - the request in Step 1; or		

			- the info. request in Step 2.a		
2.d	***If correction, clarification, or retraction made:*** Defendant's notice of intent to rely upon it *NOTE: the correction, clarification, or retraction is "timely" unless the Plaintiff files a challenge by motion (see Step 2.e)*	§ 73.058(a)	"on the later of" → - the 60th day after service of the citation; or - the 10th day after the correction, clarification, or retraction		
2.e	***If correction, clarification, or retraction made: "timely" unless challenged*** Plaintiff's "challenge" Plaintiff's motion to declare insufficient or untimely	§ 73.058(b) § 73.058(b)	"not later than the 20th day" after notice under Step 2.c is served the later of: - the 30th day after notice under Step 2.c is served		
3.a	***If no Step 1 request made:*** Defendant's plea in abatement	§ 73.062(a)	"not later than the 30th day after" the original answer is filed		

3.b	***If verified plea in abatement filed:*** Plaintiff's controverting affidavit If no controverting affidavit: Automatic abatement	 § 73.062(b) § 73.062(c)	 "before the 11th day after" the plea in abatement "continues until the 60th day after" the written request served *or* a later date agreed to by the parties		
3.c	***Return to Step 2.a –*** **Request for correction, clarification, and retraction process**				
3.d	***If no Step 1 request made, whether abated or not:*** Defendant's unilateral correction, clarification, or retraction *NOTE: Exemplary damages barred absent actual malice* (§ 73.059)	***Return to Step 2.d –*** **Notice of intent to rely on the correction, clarification, or retraction**			