THE DEVELOPING JURISPRUDENCE OF THE TEXAS CITIZENS PARTICIPATION ACT*

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I. INTRODUCTION

Courts, scholars, and free speech advocates have dubbed meritless lawsuits that target the legitimate exercise of the right to engage in truthful speech, lawful petitioning, or legal association as "Strategic Lawsuits Against Public Participation" (SLAPP suits).[1] A SLAPP suit is the offensive use of a legal proceeding to prevent, or retaliate against, persons lawfully exercising First Amendment rights.[2]

SLAPP suits seek to prevent the named defendants from exercising a lawful right, such as testifying at a city council meeting,[3] complaining to a medical board about a doctor,[4] investigating fraud in our education system,[5] or participating in a political campaign.[6] These suits chill First Amendment activities by subjecting those who exercise constitutional rights to the intimidation and expense of defending against a lawsuit that lacks merit.[7] While meritorious lawsuits seek to right a legal wrong, often the primary motivation behind a SLAPP suit is to stop lawful speech in a strategy to win a political or social battle.[8] In response to a rise in SLAPP litigation, at least thirty-two states, the District of Columbia, and the United States territory of Guam have passed some form of anti-SLAPP legislation.[9] The Texas

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1. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 8–10 (Temple Univ. Press 1996). Professors Pring and Canan, of the University of Denver, are two of the primary scholars who analyzed this legal phenomenon and coined the term "SLAPP." *See id.* at 3.

2. *See* Chad Baruch, *"If I Had a Hammer": Defending SLAPP Suits in Texas*, 3 TEX. WESLEYAN L. REV. 55, 56–58, 62–63 (1996).

3. *See* Means v. ABCABCO, Inc., 315 S.W.3d 209, 214–15 (Tex. App.—Austin 2010, no pet.).

4. *See* Lewis v. Garraway, No. D-1-GN-06-001397 (201st Dist. Ct., Travis County, Tex. Dec. 19, 2006).

5. *See* Williams v. Cordillera Commc'ns, Inc., No. 2:13-CV-124, 2014 WL 2611746, at *3–4 (S.D. Tex. June 11, 2014).

6. *See* Farias v. Antuna, No. 2006-CI-16910 (408th Dist. Ct., Bexar County, Tex. Dec. 5, 2006).

7. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

8. *See* Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 30 (1989).

9. *See* ARIZ. REV. STAT. ANN. §§ 12-751–12-752 (West 2006); ARK. CODE ANN. §§ 16-63-501–16-63-508 (West 2005); CAL. CIV. PROC. CODE §§ 425.16–425.18 (West 2015); 2017 Conn. Acts 17 (Reg. Sess.); DEL. CODE ANN. tit. 10, § 8136 (West 1992); D.C. CODE ANN. §§ 16-5501–5505 (West 2011); FLA. STAT. ANN. §§ 720.304(4), 768.295 (West 2010); GA. CODE ANN. § 9-11–11.1 (West 2016); HAW. REV. STAT. ANN. §§ 634F-1–634F-4 (West 2002); 735 ILL. COMP. STAT. ANN. 110/15 (West 2007); IND. CODE ANN. § 34-7-7-1–34-77-10 (West 1998.); KAN. STAT. ANN. § 60-5320 (West 2016); LA. CODE CIV. PROC. ANN. art. 971 (2012); ME. REV. tit. 14, § 556 (2011); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2010); MASS. GEN. LAWS ANN. ch. 231, § 59H (1996); MINN. STAT. ANN. §§ 554.01–554.05 (West 1994) (subsequently held unconstitutional by Leiendecker v. Asian Women United of Minn., 895 N.W.2d

Legislature took note of this trend and, in 2011, it enacted the Texas Citizens Participation Act.[10]

II. WHAT IS THE TEXAS CITIZENS PARTICIPATION ACT AND WHY WAS IT ENACTED?

A. Its History and Purpose

In addition to targeting the lawful exercise of First Amendment rights, "[t]he hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned."[11] To defend against the suit, the party who has been targeted must hire lawyers, answer petitions, file motions, and respond to burdensome discovery requests.[12] Rather than protracted litigation, the defendant may agree to retire from speaking out on the subject.[13] Some SLAPP filers eventually drop their claims, having achieved their goal of silencing dissent.[14] Summary judgment may provide for dismissal of a SLAPP suit, but often not until the defendant has incurred considerable expense during the discovery process.[15] Oftentimes, the speaker has been silenced by the very cost of defending the suit.[16] "Because of the cost that it entails, the threat of lengthy litigation becomes vital to a SLAPP's effectiveness. Plaintiffs rarely win in court but often realize their ultimate goal: to devastate the defendant financially and chill the defendant's public involvement."[17]

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623 (Minn. 2017)); MO. REV. STAT. ANN. § 537.528 (West 2012); NEB. REV. STAT. ANN. §§ 25-21, 243 (West 1994); NEV. REV. STAT. ANN. §§ 41.635–.670 (West 1997.); N.M. STAT. ANN. § 38-2-9.1-2 (West 2001); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 1992); N.Y. C.P.L.R. 3211(g) (McKinney 2006); OKLA. STAT. ANN. tit. 12, §§ 1430–40 (West 2014); OR. REV. STAT. ANN. § 31.150 (West 2009); 27 PA. CONS. STAT. §§ 7707, 8301-3 (West 2000); 9 R.I. GEN. LAWS ANN. §§ 9-33-1–9-33-4 (West 1993); TENN. CODE ANN. § 4-21-1001–21-1004 (West 1997); TEX. CIV. PRAC. & REM. CODE ANN. § 27 (West 2017); UTAH CODE ANN. §§ 78B-6-1401–78B-6-1405 (West 2008); VT. STAT. ANN. tit. 12, § 1041 (West 2005); VA. CODE ANN. § 8.01-223.2 (West 2017); WASH. REV. CODE ANN. § 4.24.500–525 (West 2010); 7 GUAM CODE ANN. § 17104 (1998).

10. *See* TEX. CIV. PRAC. & REM. CODE ch. 27.

11. Metabolic Research, Inc. v. Ferrell, 693 F.3d 795, 796 n.1 (9th Cir. 2012) (citing United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 970 (9th Cir. 1999)).

12. *See generally* Laura Lee Prather, *Anti-SLAPP Statutes Spread across the Nation*, LEXOLOGY (Nov. 10, 2011), http://www.lexology.com/library/detail.aspx?g=524d57b0-d6d0-4726-9a33-37a51122ea1d/ (analyzing the Texas anti-SLAPP statutes and reasons for adoption).

13. *See generally id.* (discussing the chilling effect of lawsuits).

14. *See* PRING & CANAN, *supra* note 1, at 1–2; Lori Potter, *Strategic Lawsuits against Public Participation and Petition Clause Immunity*, 31 ENVTL. L. REP. 10852, 10854 (July 2001).

15. *See* Prather, *supra* note 12 (commenting on the litigation costs of SLAPP suits).

16. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011).

17. *See* Tom Wyrwich, *A Cure for a "Public Concern": Washington's New Anti-SLAPP Law*, 86 WASH. L. REV. 663, 666–67 (2011).

The United States Court of Appeals for the Ninth Circuit[18] has identified two predominant risks associated with unfettered SLAPP litigation:

> 1) there is a danger that men and women will be chilled from exercising their rights to petition the government by fear of the costs and burdens of resulting litigation; and 2) that unscrupulous lawyers and litigants will be encouraged to use meritless lawsuits to discourage the exercise of [F]irst [A]mendment rights.[19]

Whether petitioning the government, writing a traditional news article, or commenting on the quality of a consumer business, citizen involvement in the marketplace of ideas benefits our society.[20] Citizen participation is at the heart of our democracy, and meritless lawsuits aimed at silencing that participation have become an increasingly common obstacle to that participation.[21]

Several notable cases prompted legislative action to curb such suits.[22] Take the scandal surrounding Texas resident Lance Armstrong.[23] Armstrong rose to cycling fame as the seven-time winner of the Tour de France, but rumors of performance-enhancing drug use plagued him throughout his career.[24] In response to public allegations that he used performance-enhancing drugs, Armstrong filed lawsuit after lawsuit in an effort to silence those who spoke out against him and sought to reveal the truth.[25] Many of those lawsuits concluded with costly settlements.[26] After

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18. *See id.* at 669. The Ninth Circuit has had more experience interpreting anti-SLAPP statutes than any other circuit because Washington passed the first anti-SLAPP statute in 1989 (and revised the statute in 2010). *Id.* Shortly thereafter, California passed an anti-SLAPP statute that many think is the preeminent anti-SLAPP legislation in the nation. *See id.* at 671. Both California's and Washington's anti-SLAPP statutes are subject to interpretation by the Ninth Circuit. *Map of the Ninth Circuit*, U.S. CTS. FOR THE NINTH CIR., https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135 (last visited Feb. 17, 2018).

19. *See* Metabolic Research, Inc., v. Ferrell 693 F.3d 795, 799–800 (9th Cir. 2012) (citing John v. Douglas Cty. Sch. Dist., 219 P.3d 1276, 1282 (Nev. 2009)).

20. *See generally* PRING & CANAN, *supra* note 1, at 1–2.

21. *See id.*

22. *See* Potter, *supra* note 14, at 1.

23. *See* Juliet Macur, *End of the Ride for Lance Armstrong*, N.Y. TIMES (Mar. 1, 2014), http://www.nytimes.com/2014/03/02/sports/cycling/end-of-the-ride-for-lance-armstrong.html.

24. *See id.*

25. *See id.*

26. *See, e.g.*, Mike Anderson, *My Life with Lance Armstrong*, OUTSIDE (Aug. 31, 2012), http://www.outsideonline.com/outdoor-adventure/biking/road-biking/my-life-with-lance-armstrong.html (describing the suit against Armstrong's personal assistant, Mike Anderson, and the settlement after Anderson disclosed his discovery of performance-enhancing drugs in Armstrong's apartment); Charles Miranda, *British Journalist David Walsh Says the Sunday Times Wants Money Back after Being Sued by Lance Armstrong*, HERALD SUN (Jan. 19, 2013), http://www.news.com.au/sport/cycling/british-journalist-david-walsh-says-the-sunday-times-will-wants-money-back-after-settling-with-lance-armstrong/news-story/b5ec5f4dcd531f95d51a0fa4deaf67e5 (detailing a 2004 lawsuit against the *Sunday Times* of London for libel in which it spent more than one million dollars in legal fees and paid $500,000 to settle the suit); Mary Pilon, *Armstrong Aide Talks of Doping and Price Paid*, N.Y. TIMES (Oct. 12, 2012), http://www.

the United States Doping Agency found that he violated anti-doping rules, Armstrong admitted not only to doping, but also to using litigation as a tool to "bully" and silence those who sought to expose the truth about his cheating.[27]

Similarly, when Carla Main wrote the book *Bulldozed: "Kelo" Eminent Domain, and the American Lust for Land*, "little did she know she would be 'bulldozed' into court.[28] In the book, Main [criticized] cities' use of eminent domain to gain property for private development.[29] Dallas developer H. Walker Royall sued Main and a local Texas newspaper that reviewed the book."[30] Among other tactics, "Royall kept the non-diverse defendants in the suit for one year and one day—long enough to increase [their litigation] costs and destroy diversity jurisdiction."[31] After the trial court initially denied Main and her publisher's motion for summary judgment, the Dallas Court of Appeals largely reversed and rendered judgment on appeal, but not before the defendants incurred significant litigation costs to defend the suit.[32] "In another instance, after his car was towed from his own apartment complex, Western Michigan University student Justin Kurtz began a Facebook group entitled 'Kalamazoo Residents against T & J Towing,' . . . the towing company [then sued] him for $750,000.[33] T & J Towing also asked the court [to issue] a restraining order against him."[34]

These stories, and others like it, inspired laws aimed at dismissing, in the early stages, unfounded lawsuits that target citizens who speak out truthfully on matters of public concern.[35] In 2011, the Texas Legislature passed H.B. 2973, the Texas Citizens Participation Act (TCPA), to address

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nytimes.com/2012/10/13/sports/cycling/lance-armstrong-aide-talks-of-doping-and-price-paid.html (discussing the lawsuit against Emma O'Reilly, Armstrong's former soigneur, and settlement after she publicly described his doping).

27. *Highlights of Lance's Interview, Part 1*, ESPN (Jan. 18, 2013), http://espn.go.com/sports/endurance/story/_/id/8854829/situation-was-one-big-lie; Debra Cassens Weiss, *Was Lance Armstrong a Lawsuit Bully? Cyclist Admits 'Major Flaw'*, ABA J. (Jan. 18, 2013, 12:38 PM), http://www.abajournal.com/news/article/lance_armstrong _admits_to_lawsuit_bullying/.

28. *See* Main v. Royall, 348 S.W.3d 381, 383–84 (Tex. App.—Dallas 2011, no pet.); *see also* CARLA T. MAIN, BULLDOZED: "KELO," EMINENT DOMAIN, AND THE AMERICAN LUST FOR LAND 1–11 (Encounter Books 2007) (discussing the use of eminent domain by cities to gain private property).

29. *Main*, 348 S.W.3d at 384.

30. Laura Lee Prather & Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights from Anti-SLAPP in Texas,* 47 TEX. TECH L. REV. 725, 730 (2015); *see also Main*, 348 S.W.3d at 384.

31. *See* George F. Will, *Bulldozing the First Amendment*, WASH. POST (Aug. 20, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/08/19/AR2009081902262.html.

32. *See Main*, 348 S.W.3d at 400; *see also* Prather & Bland, *supra* note 30, at 730.

33. Rex Hall, Jr., *Western Michigan University Student Sued in Battle with Towing Company: Facebook Group Airing Complaints about T & J Towing Takes Off*, MLIVE (Apr. 14, 2010, 9:30 AM), http://www.mlive.com/news/kalamazoo/index.ssf/2010/04/western_michigan_university_st_8.html; *see* T & J Towing v. Kurtz, No. 2010-0206-NZ (Mich. 9th Cir. Ct. 2010); *see also* Prather & Bland, *supra* note 30, at 730.

34. *T & J Towing*, No. 2010-0206-NZ; *see also* Prather & Bland, *supra* note 30, at 730.

35. *See* Prather, *supra* note 12.

the rise of SLAPP suits in the state.[36]

Passage of the TCPA enjoyed broad-based and bipartisan support among public-interest groups, including: the Freedom of Information Foundation of Texas; Better Business Bureaus of Central Texas; Texas Daily Newspaper Association; Homeowners for Better Building; Coalition of HOA Reform; Texans for Lawsuit Reform; ACLU of Texas; Institute for Justice; Texas Association of Broadcasters; Public Citizen; Texas Press Association; Texas League of Conservation Voters; Texas Watch; Texas Municipal League; and Texas Conservative Coalition Research Institute.[37]

When invoked, the TCPA statute establishes a procedure for evaluating the merit of a claim relating to the exercise of First Amendment rights within the first few months of filing.[38] "Defendants who are sued for the lawful exercise of their First Amendment rights [move to dismiss the claim] by filing a motion to dismiss" that invokes the TCPA.[39] A TCPA "motion to dismiss stays discovery unless the judge finds good cause to order discovery on a limited basis, as necessary, to address the pending motion."[40]

This Article focuses on the passage, implementation, and developing jurisprudence of the TCPA.[41]

B. Texas Citizens Participation Act Compared to Other Jurisdictions

Generally, anti-SLAPP laws throughout the United States share four goals: (1) to provide protections against retaliatory lawsuits aimed at truthful statements (and expressive conduct) about matters of public concern in which the plaintiff is unable to support the cause of action;[42] (2) to furnish a

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36. Tex. H.B. 2973, 82d Leg., R.S., H.J. of Tex., 4916, 4623 (2011), *available at* http://www.journals.house.state.tx.us/hjrnl/82r/pdf/82rday82final.pdf; Tex. H.B. 2973, 82d Leg., R.S., S.J. of Tex., 2513, 2432 (2011), *available at* http://www.journals.senate.state.tx.us/sjrnl/82r/pdf/ 82RSJ05-18-F.pdf.

37. *See* Prather & Bland, *supra* note 30, at 734; House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011) (witness list); Senate State Affairs Comm., Bill Analysis, S.B. 1565, 83d Leg., R.S. (2011) (witness list). "The Texas Trial Lawyers testified 'on' the original bill but agreed upon the language in the committee substitute ultimately passed." *See* Prather & Bland, *supra* note 30, at 734 n.57.

38. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (West 2017).

39. *See* Prather & Bland, *supra* note 30, at 732; *see also* TEX. CIV. PRAC. & REM. §§ 27.001–.011; Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011).

40. *See* Prather & Bland, *supra* note 30, at 732; *see also* TEX. CIV. PRAC. & REM. §§ 27.003(c), 27.006; Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011).

41. Prather & Bland, *supra* note 30, at 732; *see also* H.J. of Tex., 4916, 82nd Leg., R.S. 4623 (2011), *available at* http://www.journals.house.state.tx.us/hjrnl/82r/pdf/82RDAY82FINAL.PDF; S.J. of Tex., 82nd Leg., R.S. 2513, 2532 (2011), *available at* http://www.journals.senate.state.tx.us/sjrnl/82r/pdf/ 82RSJ05-18-F.PDF.

42. *See, e.g.*, CAL. CIV. PROC. CODE §§ 425.16–.18; D.C. CODE ANN. § 16-5501 (West 2011); 735 ILL. COMP. STAT. ANN. 110/15 (West 2007); IND. CODE ANN. § 34-7-7-1–34-77-10 (West 1998.); LA. CODE CIV. PROC. ANN. art. 971 (2012); ME. REV. tit. STAT. ANN. 14, § 556 (2011); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2010); OR. REV. STAT. ANN. § 31.150 (West 2009); 9 R.I. GEN. LAWS ANN. §§ 9-33-1–9-33-4 (West 1993); TENN. CODE ANN. § 4-21-1001-21-1004 (West 1997); TEX. CIV. PRAC. & REM. CODE ANN. § 27.002-9 (West 2017); VT. STAT. ANN. tit. 12, § 1041 (West 2005).

framework that encourages and facilitates prompt and inexpensive resolution of challenges to SLAPP suits;[43] (3) to provide a right to immediate appeal of a trial court ruling on an anti-SLAPP motion;[44] and (4) to require reasonable reimbursement for fees and expenses incurred as a result of defending against a meritless suit.[45]

In 1989, Washington passed the nation's first anti-SLAPP statute.[46] The original version of the statute applied only in the limited context of complaints or statements directed toward a government entity or official.[47] Four years later, "in 1993, California paved the way [to] broader anti-SLAPP [protection], when it enacted legislation covering 'any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.'"[48] Since then, some states have opted for more narrow protections, limiting early dismissal to certain issues.[49] More recently, other states have followed California's lead by adopting multipurpose anti-SLAPP statutes.[50]

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43. *See, e.g.*, CAL. CIV. PROC. CODE §§ 425.16–.18; D.C. CODE § 16-5501; 735 ILL. COMP. STAT. 110/15; IND. CODE § 34-7-7-1–34-77-10; LA. CODE CIV. PROC. art. 97; ME. REV. tit. STAT. 14, § 556; MD. CODE, CTS. & JUD. PROC. § 5-807; OR. REV. STAT. § 31.150; 9 R.I. GEN. LAWS §§ 9-33-1–9-33-4; TENN. CODE § 4-21-1001–21-1004; TEX. CIV. PRAC. & REM. CODE § 27.002-9; VT. STAT. tit. 12, § 1041.

44. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16; D.C. CODE § 16-5501; HAW. REV. STAT. §§ 634F-1–634F-4 (2002); 735 ILL. COMP. STAT. 110/15; LA. CODE CIV. PROC. art. 971; ME. STAT tit. 14, § 556; MASS. GEN. LAWS ANN. ch. 231, § 59H (West 1996); MINN. STAT. ANN. §§ 554.01–554.05 (West 1994); 27 PA. CONS. STAT. §§ 7707, 8301-3 (2000); TEX. CIV. PRAC. & REM. CODE § 27.002-9; UTAH CODE ANN. §§ 78B-6-1401–78B-6-1405 (West 2008); VT. STAT. ANN. tit. 12, § 1041.

45. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16; D.C. CODE § 16-5501; HAW. REV. STAT. §§ 634F-1–634F-4; 735 ILL. COMP. STAT. 110/15; LA. CODE CIV. PROC. art. 971; ME. STAT tit. 14, § 556; MASS. GEN. LAWS ch. 231, § 59H; MINN. STAT. §§ 554.01–554.05; 27 PA. CONS. STAT. §§ 7707, 8301-3; TEX. CIV. PRAC. & REM. CODE § 27.002-9; UTAH CODE §§ 78B-6-1401–78B-6-1405; VT. STAT. tit. 12, § 1041.

46. *See* Bruce E.H. Johnson et al., *Washington Enacts New Anti-SLAPP Law*, DAVIS WRIGHT TREMAINE LLP (Mar. 18, 2010), https://www.dwt.com/advisories/Washington_Enacts_New_AntiSLAPP_Law_03_18_2010/. "Washington's original statute . . . allowed a defendant to bring a motion to defeat SLAPP claims" and allowed defendants to recoup costs and attorney's fees upon dismissal. Prather & Bland, *supra* note 30, at 734 n.62; *see* WASH. REV. CODE ANN. § 4.24.510 (West 2012). However, the statute only protected complaints or informative statements directed at a government entity or official. *Id.*

47. *See* Johnson et. al., *supra* note 46.

48. Prather & Bland, *supra* note 30, at 734–35; *see* CAL. CIV. PROC. CODE § 425.16. The statute "provides that a plaintiff's claim will be dismissed unless 'the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.'" *See* Prather & Bland, *supra* note 30, at 735 (quoting CAL. CIV. PROC. CODE § 425.16(b)(1)). "'The special motion [to strike] may be filed within 60 days of the service of the complaint' and must be heard no more than 30 days after the motion is served." *See* Prather & Bland, *supra* note 30, at 735 (quoting CAL. CIV. PROC. § 425.16(f)).

49. "For instance, Pennsylvania has one of the narrowest protections," limiting redress to those individuals who petition the government regarding environmental issues. *See* Prather & Bland, *supra* note 30, at 735; *see* 27 PA. CONS. STAT. §§ 7707, 8301–8303.

50. For example, Texas enacted its own anti-SLAPP statute in 2011, becoming the twenty-eighth state to do so. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited Feb. 11, 2018); *see also* Laura Lee Prather, *Federal Court Applies Anti-SLAPP Statute for the First Time, Confirming it Creates a Substantive First Amendment Right*, HAYNESBOONE (June 19, 2014), http://www.haynesboone.com/press-releases/federal-court-applies-texas-antislapp-statute-for-the-first-time-confirming-it-creates-a-substantive-first-amendment-

Currently, thirty-two states, the District of Columbia, and Guam have recognized some form of anti-SLAPP protection, either through the enactment of anti-SLAPP statutes or development of common law protections.[51] Conversely, eighteen states have no anti-SLAPP statutes or common-law protections.[52]

Among the states providing anti-SLAPP protection, the breadth of the protection varies. Thirteen states have laws that apply in limited contexts,[53] such as statements relating to government licensing, permitting or other government decisions,[54] or communications in connection with implementation and enforcement of environmental laws and regulations.[55] In contrast, California's statute has been a model for several other jurisdictions; the statute protects "any act of [a] person in furtherance of the person's right of petition or free speech."[56] An act in furtherance of the right to petition includes:

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right. Soon thereafter, in 2013 Nevada borrowed heavily from the California statute when it adopted its statute. *See* NEV. REV. STAT. ANN. §§ 41.635–.670 (West 1997). And in 2014, Oklahoma passed a statute that almost mirrored the Texas statute. *See* OKLA. STAT. ANN. tit. 12, § 1430 (West 2014). Other states like Florida and Georgia have recently amended their statutes to broaden their protections and make them more similar to the California and Texas anti-SLAPP statutes. *See* FLA. STAT. ANN. §§ 720.304(4), 768.295 (West 2010); GA. CODE ANN. §§ 9-11-11.1 (West, 2016).

51. *See* ARIZ. REV. STAT. ANN. §§ 12-751–12-752 (West 2006); ARK. CODE ANN. §§ 16-63-501–16-63-508 (West 2005); CAL. CIV. PROC. CODE §§ 425.16–425.18; DEL. CODE ANN. tit. 10, § 8136 (West 1992); D.C. CODE ANN. §§ 16-5501–5505 (West 2011); FLA. STAT. §§ 720.304(4), 768.295; GA. CODE § 9-11–11.1; HAW. REV. STAT. ANN. §§ 634F-1–634F-4 (West 2002); 735 ILL. COMP. STAT. ANN. 110/15 (West 2007); IND. CODE ANN. § 34-7-7-1–34-77-10 (West 1998); KAN. STAT. ANN. § 60-5320 (West 2016); LA. CODE CIV. PROC. ANN. art. 971 (West 2012); ME. REV. STAT. ANN. tit. 14, § 556 (West 2011); MD. CODE ANN., CTS. & JUD. PROC. ANN. § 5-807 (West 2010); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 1996); MINN. STAT. ANN. §§ 554.01–554.05 (West 1994) (subsequently held unconstitutional by Leiendecker v. Asian Women United of Minn., 895 N.W.2d 623 (Minn. 2017)); MO. REV. STAT. ANN. § 537.528 (West 2012); NEB. REV. STAT. ANN. §§ 25-21, 243 (West 1994); NEV. REV. STAT. §§ 41.635–.670; N.M. STAT. ANN. § 38-2-9.1-2 (West 2001); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 1992); N.Y. C.P.L.R. 3211(g) (McKinney 2006); OKLA. STAT. tit. 12, §§ 1430–40 (2014); OR. REV. STAT. ANN. § 31.150 (West 2009); 27 PA. CONS. STAT. ANN. §§ 7707, 8301-3 (West 2000); 9 R.I. GEN. LAWS ANN. §§ 9-33-1–9-33-4 (West 1993); TENN. CODE ANN. § 4-21-1001-21-1004 (West 1997); TEX. CIV. PRAC. & REM. CODE ANN. § 27 (West 2017); UTAH CODE ANN. §§ 78B-6-1401–78B-6-1405 (West 2008); VT. STAT. ANN. tit. 12, § 1041 (West 2005); VA. CODE ANN. § 8.01-223.2 (West 2017); WASH. REV. CODE ANN. § 4.24.500–.525 (West 2010) (A stronger anti-SLAPP statute, RCW 4.24.525, was held to be invalid on its face for violating the state constitutional right to a jury trial in 2015 according to Davis v. Cox, 351 P.3d 862, 873 (Wash. 2015), but the previous anti-SLAPP law remains intact.); 2017 Conn. Acts 17 (Reg. Sess.); 7 GUAM CODE ANN. § 17104 (West 1998); Protect Our Mountain Env't, Inc. v. Dist. Court, 677 P.2d 1361 (Colo. 1984); Harris v. Adkins, 432 S.E.2d 549 (W.Va. 1993).

52. These states include Alabama, Alaska, Idaho, Iowa, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Wisconsin, and Wyoming. *See State Anti-SLAPP Laws*, *supra* note 50.

53. *See id.* These states include Colorado, Delaware, Maine, Maryland, Nebraska, New Mexico, New York, Pennsylvania, Tennessee, Utah, Virginia, Washington, and West Virginia. *See id.* Two of these states, Colorado and West Virginia, have no statute, relying instead on common law rules. *See id.*

54. *See, e.g.*, DEL. CODE. tit. 10, § 8136.

55. *See, e.g.*, 27 PA. CONS. STAT. § 7707.

56. CAL. CIV. PROC. CODE § 425.16.

> any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or . . . any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.[57]

It provides that a plaintiff's claim will be dismissed unless "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."[58] "The special motion [to strike] may be filed within sixty days of the service of the complaint" and must be heard no more than thirty days after the motion is served.[59] Although there are differences, the TCPA, like the California statute, is broader than those focused on protecting speech directed at the government.

III. PROCEDURE—PLEADINGS AND DEADLINES

The TCPA authorizes a motion to dismiss a suit if the suit is based on the lawful exercise of a person's right to free speech, petition, or association.[60] Lawful "[c]itizen participation benefits society, whether it comes in the form of petitioning the government, writing a news article or blog post, or commenting on [a matter of public concern]."[61] SLAPP suits chill public debate because they lack merit by definition, but nevertheless cost money to defend, thus presenting a hidden tax on truthful speech.[62] "These suits are particularly problematic for independent voices . . . , in part because the Internet has created a searchable record of public participation."[63] Anyone can be an outspoken advocate, critic, or whistleblower, and anyone can be the target of a SLAPP suit.[64]

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57. *Id*.

58. *Id. See generally* Kristen Rasmussen, *Fighting Frivolous Lawsuits against Journalists*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS, SLAPP STICK (Summer 2011), http://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf (reviewing all of the state anti-SLAPP statutes).

59. CAL. CIV. PROC. CODE § 425.16(f).

60. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West 2017).

61. S. Comm. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011).

62. H. Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011).

63. *Id.*

64. *See* S. Comm. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011).

A. Pleadings and Discovery

1. Motion to Dismiss

There is not a prototypical SLAPP suit.[65] Because the TCPA looks to the substance of allegations made, a variety of claims may present a basis for a motion to dismiss under the statute.[66] If a meritless lawsuit has been filed in response to the exercise of one's First Amendment rights, the filing of a motion to dismiss is warranted.[67] Under the statutory scheme, the initial burden is on the movant to establish that the suit implicates the exercise of the movant's First Amendment rights.[68] The movant may rely on the initial pleading to demonstrate that the claim relates to a protected right, or may provide affidavit support.[69] Pleadings thus are considered evidence for purposes of determining whether the claim falls within the TCPA.[70]

In 2017, the Supreme Court of Texas held that, even if the defendant denies making the statement alleged, the statute can apply if the petition alleges actions that are covered by the Act and seeks to recover based on those allegations.[71] In so holding, the Court explained that, "the basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations . . . . When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more."[72]

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65. *See generally supra* text accompanying notes 3–6 (giving examples of various types of SLAPP suits).

66. *See generally supra* text accompanying notes 3–6 (same).

67. *See generally supra* text accompanying notes 7–10 (explaining various state statutory responses to SLAPP suits).

68. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West 2017).

69. *See* TEX. CIV. PRAC. & REM. § 27.006(a); *see also* Schimmel v. McGregor, 438 S.W.3d 847, 859 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("We first note that, in making a determination on a motion to dismiss, the trial court is not limited to considering only supporting and opposing affidavits, but the court 'shall consider the pleadings' as well.").

70. *See* TEX. CIV. PRAC. & REM. § 27.006.

71. *See* Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017).

72. *Id.*; *see also* Tex. CIV. PRAC. & REM. § 27.006(a) ("In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."); Shipp v. Malouf, 439 S.W.3d 432, 432 (Tex. App.—Dallas 2014, pet. denied), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); *Schimmel*, 438 S.W.3d at 859; Rio Grande H2O Guardian v. Robert Muller Family P'ship Ltd., No. 04-13-00441-CV, 2014 WL 309776, at *3 (Tex. App.—San Antonio Jan. 29, 2014, no pet.) (mem. op.), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015) ("Because we may consider the pleadings as evidence in this case, Rio Grande H2O Guardian's petition established that the appellants were exercising their right to petition in filing the lawsuit.").

2. Stay of Discovery

The TCPA provides for an automatic stay of discovery in the case while a motion to dismiss is pending.[73] Trial court proceedings are also stayed while an interlocutory ruling denying the motion is on appeal.[74] A bankruptcy stay, however, will preclude consideration of a motion until the stay is lifted. In the case of *Better Business Bureau of Metropolitan Dallas, Inc. v. Lloyd Ward & Associates P.C.*, the plaintiff nonsuited and declared bankruptcy after the case was remanded for consideration of attorney's fees, effectively staying proceedings in the trial court pending the outcome of the bankruptcy proceedings.[75] The purpose of both is to prevent costs associated with defending against a meritless claim.[76]

For good cause, however, the trial court can, on its own motion or at the request of the parties, authorize limited discovery relevant to the motion.[77] Good cause is a necessary requirement.[78] The Fifth Court of Appeals granted mandamus relief requiring a trial court to vacate an order granting discovery in a TCPA case, in which there was "no good cause for the discovery."[79] In that case, the non-movant sought depositions "in order to defend the motion to dismiss;" the appeals court held that a general need was insufficient to demonstrate "good cause for the discovery."[80] The Sixth Court of Appeals also clarified it is not sufficient to ask for limited discovery the day of the hearing on the motion without also requesting a continuance.[81] When a trial

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73. *See* Tex. CIV. PRAC. & REM. § 27.003(c).

74. *See id.* § 51.014(a)(12), (b).

75. *See generally* Better Bus. Bureau of Metro. Dall., Inc. v. Ward, 401 S.W.3d 440, 445 (Tex. App.—Dallas 2013, pet. denied).

76. *See generally* TEX. CIV. PRAC. & REM. § 27.003(c).

77. *Id.* § 27.006(b); *see also In re* Elliott, 504 S.W.3d 455, 465 (Tex. App.—Austin 2016, no pet.) (holding that discovery must be directed at resolving the motion to dismiss); Hand v. Hughey, No. 02-15-00239-CV, 2016 WL 1470188, at *3 (Tex. App.—Fort Worth Apr. 14, 2016, no pet.) (per curiam) (allowing limited depositions); Am. Heritage Capital, LP v. Gonzalez, 436 S.W.3d 865, 865–69 (Tex. App.—Dallas 2014, no pet.) (allowing limited depositions); Pickens v. Cordia, 433 S.W. 3d 179, 179–83 (Tex. App.—Dallas 2014, no. pet.) (allowing limited discovery); Clark v. Hammond, No. 14-12-01167-CV, 2014 WL 1330275, at *1 (Tex. App.—Houston [14th Dist.] Apr. 3, 2014, no pet.) (per curium) (allowing limited discovery). It is not an abuse of discretion for judges to allow limited *means* of discovery. *See, e.g.*, Mansik & Young Plaza LLC v. K-Town Mgmt., LLC, No. 05-15-00353-CV, 2016 WL 4306900, at *9 (Tex. App.—Dallas Aug. 15, 2016, no pet.) (allowing two witnesses to aver what they heard in a meeting while disallowing the deposition of the speaker at the meeting).

78. *See* Walker v. Schion, 420 S.W.3d 454, 458–59 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (finding no abuse of discretion where trial court disallowed discovery); *In re* D.C., No. 05-13-00944-CV, 2013 WL 4041507, at *1 (Tex. App.—Dallas Aug. 9, 2013, no pet.) (granting writ of mandamus after trial court granted expedited discovery); Ramsey v. Lynch, No. 10-12-00198-CV, 2013 WL 1846886, at *1 (Tex. App.—Waco May 2, 2013, no pet.) (detailing that the trial court concluded there was no good cause for discovery).

79. *See In re D.C.*, 2013 WL 4041507, at *1.

80. *See id.*

81. *See* Whisenhunt v. Lippincott, 474 S.W.3d 30, 41 (Tex. App.—Texarkana 2015, no pet.), *reh'g overruled* (Sept. 1, 2015).

court orders discovery, courts have applied the standard discovery rules within the TCPA's deadlines.[82]

3. Claimant's Pleading and Amended Pleading

Nothing in the statute prohibits claimants from amending their pleadings; however, amendment after a TCPA motion is filed may not defeat the motion.[83] Any new claim is subject to a TCPA motion.[84] The same holds true for the addition of new parties—a newly added party may file a motion to dismiss within sixty days of being brought into the lawsuit.[85] The TCPA provides: "A motion to dismiss a legal action . . . must be filed not later than the [sixtieth] day after the date of service of the legal action."[86] "Legal action" includes a "lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief."[87] Thus, service of any new claim or addition of a new party triggers the sixty-day statutory deadline as to those new claims or parties.[88]

Courts have consistently restarted the clock for motions filed in connection with newly asserted claims.[89] For instance, in *Williams v. Cordillera Communications, Inc.*, a lawsuit against a television station based on the station's reports on a teacher's inappropriate behavior, a TCPA motion to dismiss was filed after the filing of a second amended complaint.[90] The amended complaint contained new claims arising out of recent broadcasts not a part of earlier pleadings.[91] The court ruled that the term "legal action" in § 27.001(6) "contemplates additional pleadings and additional causes of

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82. *See, e.g.*, Abraham v. Greer, 509 S.W.3d 609, 617 (Tex. App.—Amarillo 2016, pet. denied) (upholding a journalist's privilege in limited discovery context).

83. *See* TEX. R. CIV. P. 63; *e.g.*, Lindsey v. Adler, No. 05-12-00010-CV, 2013 WL 1456633, at *3 (Tex. App.—Dallas Apr. 9, 2013, no pet.) (holding that a motion to dismiss under the Texas Medical Liability Act cannot be subverted by filing an amended petition); *see also* Salma v. Capon, 74 Cal Rptr. 3d 873, 888–89 (2008) (holding that the trial court properly denied a request to file a proposed amended complaint while an anti-SLAPP motion was pending).

84. *See In re* Estate of Check, 438 S.W.3d 829, 836–37 (Tex. App.—San Antonio 2014, no pet.) ("Extrapolating from *Ward*, in the absence of new parties or claims, the deadline for filing a motion to dismiss would run from the date of service of the original 'legal action.'"); *see also* Better Bus. Bureau of Metro. Dall., Inc. v. Ward, 401 S.W.3d 440, 443 (Tex. App.—Dallas 2013, pet. denied) (concluding that the court of appeals had jurisdiction over a trial court's order to deny a motion to dismiss interlocutory appeal).

85. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003(b), 27.001(6) (West 2017).

86. *Id.* § 27.003(b).

87. *Id.* § 27.001(6).

88. *See id.* §§ 27.001(b), 27.003(b).

89. *See* James v. Calkins, 446 S.W.3d 135, 145 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (holding that new causes of action in an amended complaint do not share the same date as the original complaint); *see also* Williams v. Cordillera Commc'ns, Inc., No. 2:13-CV-124, 2014 WL 2611746, at *2 (S.D. Tex. June 11, 2014) (explaining that new claims are not dated to the original document).

90. *See Williams*, 2014 WL 2611746, at *2.

91. *See id*.

action that may arise during the progress of a case."[92] Because the claims in the second amended complaint related to separate broadcasts that did not occur until a year after the original complaint was filed, the court ruled that the motion—which was filed within sixty days of the operative pleading in which the new claims were added—was timely with respect to those new claims.[93]

Conversely, in *In re Estate of Check*, the Fourth Court of Appeals held that an amended pleading did not reset the sixty-day deadline to file a motion under the TCPA when no new parties or claims were added.[94] Similarly, in *Paulsen v. Yarrell*, the First Court of Appeals, in considering a denial of a motion to dismiss, stated:

> An amended pleading that does not add new parties or claims does not restart the deadline for filing a motion to dismiss under the TCPA. Permitting the [sixty]-day deadline to be reset each time a party amended a petition or counterclaim, regardless of whether new claims or parties have been introduced, would frustrate the expressed legislative purpose of the TCPA, "which is to allow a defendant *early in the lawsuit* to dismiss claims that seek to inhibit a defendant's constitutional rights to petition, speak freely, associate freely, and participate in government as permitted by law."[95]

B. Statutory Procedures

1. No Service Required to File a Motion to Dismiss

The act of filing a meritless SLAPP claim triggers the statute; thus, a defendant may appear voluntarily in lieu of service and move to dismiss the case.[96] This is to prevent a plaintiff from filing a lawsuit for the sole purpose of gaining notoriety by filing the suit without any intention of pursuing it.[97] With today's instantaneous notification of lawsuit filings, the public taint to being named as a defendant in a SLAPP suit can attach even before service of process occurs.[98]

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92. *See id.*; TEX. CIV. PRAC. & REM. § 27.001(6).

93. *See Williams*, 2014 WL 2611746, at *2.

94. *See In re* Estate of Check, 438 S.W.3d 829, 836–37 (Tex. App.—San Antonio 2014, no pet.); *see also* Miller Weisbrod, L.L.P. v. Llamas-Soforo, 511 S.W.3d 181, 193–94 (Tex. App.—El Paso 2014, no pet.) (finding a TCPA motion untimely because the new claims were originally brought in a first amended petition, and the motion was filed more than sixty days after the first amended petition was filed).

95. Paulsen v. Yarrell, 455 S.W.3d 192, 197 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citations omitted) (quoting *In re Estate of Check*, 438 S.W.3d at 836).

96. *See* James v. Calkins, 446 S.W.3d 135, 141–42 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

97. *See id.* at 144.

98. *See generally* Serafine v. Blunt, 466 S.W.3d 352, 365–66 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring) (explaining that SLAPP suits involve intimidation, harassment, and a financial burden).

Texas courts have ruled that the decision to nonsuit, even before service occurs, does not preclude a claim for anti-SLAPP relief.[99] In *James v. Calkins*, the movant filed a TCPA motion before it was served with the lawsuit.[100] The First Court of Appeals held that a voluntary appearance prior to service, or in lieu of service, did not preclude the filing of a TCPA motion.[101] The court observed:

> Appellees cite no authority, and we have found none, to support the argument that the language in section 27.003(b) was intended to limit application of the TCPA to defendants who are served with process. Indeed, appellees' contention that section 27.003(b) precludes a defendant who waives service from filing a motion to dismiss is incongruous with the legislative intent evident in the plain meaning of the statute.[102]

Similarly, in the case of *Landmark Technology, LLC v. eBay, Inc.*, Landmark sued eBay for exercising its right of petition in the United States Patent and Trademark Office's reexamination process.[103] After the reexamination concluded, Landmark asserted various state tort claims based upon eBay's requests for reexamination of the patents.[104] EBay did not wait to be served before filing a TCPA motion, contending that Landmark sued it for exercising its right to petition and right of free speech.[105] Shortly after eBay filed its motion, Landmark dismissed its case.[106] EBay sought fees for the cost of bringing the motion.[107] The case ultimately settled.[108]

In *Rauhauser v. McGibney*, a case arising out of Internet speech, the plaintiff filed a nonsuit five hours after the defendant filed a TCPA motion to dismiss.[109] The trial court failed to rule on the motion, causing it to be

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99. *See* Villafani v. Trejo, 251 S.W.3d 466, 468–69 (Tex. 2008); *see also* Am. Heritage Capital LP v. Gonzalez, 436 S.W.3d 865, 868 (Tex. App.—Dallas 2014, no pet.) (explaining Chapter 27 of the Civil Practice and Remedies Code); James v. Calkins, 446 S.W.3d at 146–48 (discussing the appellants' motion to dismiss).

100. *See James*, 446 S.W.3d at 142.

101. *See id.*

102. *Id.*

103. *See* Plaintiff's Original Complaint at 29–37, Landmark Tech., LLC v. eBay, Inc., No. 2:14-CV-00605, 2014 WL 1831621 (E.D. Tex. May 8, 2014).

104. *See id.*

105. *See* Defendant EBay Inc.'s Motion to Dismiss Pursuant to Chapter 27 of the Texas Civil Practice & Remedies Code & Request for Hearing at 7, Landmark Tech., LLC v. eBay Inc., No. 2:14-CV-00605-JRG, 2014 WL 4565768 (E.D. Tex. Aug. 13, 2014).

106. *See* Ryan Davis, *EBay to Seek Sanctions over Dropped Patent Re-Exam Suit*, LAW360 (Sept. 15, 2014, 4:24 PM), http://www.law360.com/articles/577275/ebay-to-seek-sanctions-over-dropped-patent-re-exam-suit.

107. *See id.*

108. Ryan Davis, *EBay, Landmark Bury Hatchet over Patent Re-Exam Suit*, LAW360 (Oct. 3, 2014, 4:04 PM), http://www.law360.com/articles/584094/ebay-landmark-bury-hatchet-over-patent-re-exam-suit.

109. *See* Rauhauser v. McGibney, 508 S.W.3d 377, 381 (Tex. App.—Fort Worth 2014, no pet.).

denied by operation of law.[110] On appeal, the Second Court of Appeals ruled that the TCPA motion survived the nonsuit and that the trial court erred in allowing the denial of the motion by operation of law.[111] Citing the Texas Supreme Court's decisions in *Villafani v. Trejo*, *CTL/Thompson Texas*, *LLC v. Starwood Homeowner's Association*, *Inc.*, and *Klein v. Dooley*, it noted:

> The law is well-settled that a defendant's motion to dismiss that may afford more relief than a nonsuit affords constitutes a claim for affirmative relief that survives a nonsuit, as evidenced by three Texas Supreme Court per curiam opinions . . . . Applying the holdings of these cases to the present facts, despite Appellees' nonsuit, Rauhauser was entitled to be heard on his statutorily-based motion to dismiss seeking dismissal with prejudice, attorney's fees, and sanctions; Rauhauser's motion to dismiss may afford him more relief than the nonsuit and therefore constitutes a claim for affirmative relief that survives Appellees' nonsuit.[112]

2. Deadlines for Parties

When a movant has invoked the TCPA, several procedural deadlines come into play. A movant must file its motion to dismiss within sixty days after the plaintiff has served it with the legal action.[113] Though nothing prohibits a voluntary appearance with a TCPA motion before the plaintiff accomplishes service,[114] service starts the clock ticking on the deadline for filing the motion. If, however, the movant has invoked the abatement period under the Defamation Mitigation Act, the 60 day TCPA deadline is stayed like all other deadlines in the case.[115]

Upon a showing of good cause, a trial court may extend the time to file the motion.[116] For example, although a movant filed his motion one day late, an appeals court held that "in making a statement . . . [that the motion was timely], the trial court implicitly ruled that if [the movant] technically filed the motion late he had good cause for the late filing."[117] No provision exists in the statute allowing for an extension of time to file a motion to dismiss if the court does not rule on such a request.[118]

The second deadline concerns the date of the hearing on the motion. A hearing must be set within sixty days after the motion was served on the

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110. *See id.*

111. *See id.* at 380.

112. *Id.* at 381–82 (citations omitted).

113. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b) (West 2017).

114. *See supra* Part III.B.1 (dismissing meritless SLAPP suits without filing a motion).

115. Hearst Newspapers, LLC v. Status Lounge, Inc., 541 S.W.3d 881, 2017 WL 6459231, 46 Media L. Rep. 1254 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

116. *See* TEX. CIV. PRAC. & REM. § 27.003(b).

117. *See* Schimmel v. McGregor, 438 S.W.3d 847, 856 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

118. *See In re* Estate of Check, 438 S.W.3d 829, 836 (Tex. App.—San Antonio 2014, no pet.).

plaintiff, unless one of the following circumstances exists: (1) "the docket conditions of the court require a later hearing," (2) for good cause, or (3) by agreement of the parties.[119] "[B]ut in no event shall the hearing occur more than 90 days after service of the motion . . . ."[120] One exception to this deadline is "[i]f the [trial] court allows discovery under [§] 27.006(b), the court may extend the hearing date" to no later "than 120 days after the service of the motion . . . ."[121]

Generally, a movant has the burden to set a hearing on a TCPA motion.[122] The Fifth Court of Appeals recently clarified that, when the trial court does not expressly deny a TCPA motion, the motion to dismiss will not be considered denied by operation of law in the absence of setting a hearing within the proper timeframe.[123] If there is no trial court order that is subject to interlocutory appellate review, then a hearing is a prerequisite to an interlocutory appeal on a TCPA motion.[124] The court left open whether mandamus relief is available to compel a trial court to set the hearing within the requisite timeframe.[125]

As the Second Court of Appeals has explained, "the plain language of [§] 27.004 applies to the setting, not the hearing or consideration, of a chapter 27 motion to dismiss . . . ."[126] For this reason, the non-movant should schedule an early hearing so that the parties may request a continuance, if necessary, to review a response filed immediately before the hearing.[127] A continuance does not interfere with the statute if the hearing is otherwise set within the statutory deadlines.[128]

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119. TEX. CIV. PRAC. & REM. CODE § 27.004(a).

120. *Id.*

121. *Id.* § 27.004(c).

122. *See generally* Enriquez v. Livingston, 400 S.W.3d 610, 619 (Tex. App.—Austin 2013, pet. denied).

123. *See* Braun v. Gordon, No. 05-17-00176-CV, 2017 WL 4250235, at *1–2 (Tex. App.—Dallas Sept. 26, 2017, no pet.); Braun v. Haley, No. 05-17-00086-CV, 2017 WL 4250208, at *1 (Tex. App.—Dallas Sept. 26, 2017, no pet.).

124. *See Gordon*, 2017 WL 4250235, at *2; *Haley*, 2017 WL 4250208, at *1.

125. *See Gordon*, 2017 WL 4250235, at *1.

126. *In re* Lipsky, 411 S.W.3d 530, 540 (Tex. App.—Fort Worth 2013), *mandamus denied*, 460 S.W.3d 579 (Tex. 2015). *See generally* TEX. CIV. PRAC. & REM. § 27.004 (explaining deadlines).

127. *See* TEX. CIV. PRAC. & REM. § 27.004(c) (discussing court extensions). Local rules, however, may require a response to be filed before the hearing. For example, the Dallas County Local Rules require that "responses and replies relating to a motion . . . set for hearing must be served and filed with the Clerk of the Court no later than three working days before the scheduled hearing . . . . Briefs not filed and served in accordance with this paragraph likely will not be considered." *See* Dall. (Tex.) Civ. Dist. Ct. Loc. R. 2.09, *available at* http://www.dallascounty.org/department/districtclerk/media/New_LocalRules_for_CivilCourt.pdf.

128. *See In re Lipsky*, 411 S.W.3d at 540–41.

3. Deadlines for Court

"The court must rule on a motion [to dismiss] . . . not later than the [thirtieth] day following the date of the hearing on the motion."[129] A failsafe provision in the statute provides that if the court does not rule within thirty days, then the motion is overruled by operation of law, at which time the moving party may seek interlocutory appeal of the denial.[130]

When trial courts have attempted to rule after the thirty-day deadline, the appellate courts have consistently held that such rulings are in error and that trial courts have no discretion to extend this deadline.[131] The Fifth Court of Appeals was one of the first to address this issue in *Avila v. Larrea*.[132] In *Avila*, the trial court began a hearing on a motion to dismiss and then continued it after a ninety-day discovery period.[133] The court of appeals held the motion to dismiss was denied by operation of law because the trial court did not rule within thirty days.[134] The court explained that no provision in the TCPA extends the mandatory thirty-day period for a ruling pursuant to § 27.005(a) when a hearing on a motion to dismiss has been conducted.[135] Similarly, in *Direct Commercial Funding Inc. v. Beacon Hill Estates, LLC*, the Fourteenth Court of Appeals nullified the trial court's grant of a motion to dismiss that occurred six weeks after the motion was overruled by operation of law, stating: "[t]he Act contains no provision authorizing such an action, nor can the authority to do so be implied."[136] In *Jain v. Cambridge Petroleum Group*, the Fifth Court of Appeals held that a trial court order denying a motion to dismiss after the thirty-day deadline had "no effect because the motion to dismiss was already denied."[137] Finally, in *Inwood Forest Community Improvement Ass'n v. Arce*, a movant's TCPA motion was held to be denied by operation of law when the trial court made an oral statement that it was "going to grant the motions to dismiss," but did not sign written orders within the thirty-day window.[138]

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129. TEX. CIV. PRAC. & REM. § 27.005(a).

130. *See id.* § 27.008(a).

131. *See* James v. Calkins, 446 S.W.3d 135, 150 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); Jain v. Cambridge Petroleum Grp., Inc., 395 S.W.3d 394, 397 (Tex. App.—Dallas 2013, no pet.); Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC, 407 S.W.3d 398, 401 (Tex. App.—Houston [14th Dist.] 2013, no pet.); Avila v. Larrea, 394 S.W.3d 646, 662 (Tex. App.—Dallas 2012, pet. denied).

132. *See generally Avila*, 394 S.W.3d at 652.

133. *See id.* at 649.

134. *See id.* at 662.

135. *See id.* at 656.

136. *Direct Commercial Funding, Inc*., 407 S.W.3d at 401.

137. Jain v. Cambridge Petroleum Grp., Inc., 395 S.W.3d 394, 396 (Tex. App.—Dallas 2013, no pet.).

138. Inwood Forest Cmty. Improvement Ass'n v. Arce, 485 S.W.3d 65, 67 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

IV. EVIDENCE

A. Pleadings and Affidavits

The TCPA expressly provides that the parties may rely on pleadings as evidence in the anti-SLAPP context.[139] Often, a movant will rely on the pleadings to establish that the claims brought against it are based on, related to, or made in response to the exercise of the right of free speech, right to petition, or right of association—the TCPA-required showing to obtain dismissal.[140] The Supreme Court of Texas has recently made it clear that the facts asserted in the pleadings can demonstrate that the statute applies, even if the defendant denies making the statements, holding that "[w]hen it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more."[141]

Importantly though, the facts asserted in those pleadings must be specific enough to determine the applicability of the statute if relying solely on them to demonstrate that the TCPA is applicable.[142] If the facts are not clear, an affidavit may be required to demonstrate applicability of the statute.[143] For example, in *Cheniere Energy, Inc. v. Lotfi*, a case in which both parties relied only on the pleadings, the First Court of Appeals held:

> Because we are to view the pleadings and evidence in the light most favorable to the non-movant, we conclude that the limited assertions in Lotfi's pleading fail to meet the movants' burden of establishing that they had a communication, they acted in furtherance of a common interest, and that Lotfi's claim against them is related to their exercise of the right of association. Absent affidavit evidence supporting their contentions, Souki and Rayford have failed to meet their burden to obtain dismissal.[144]

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139. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2017).

140. *See id.*

141. Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017); *see also* Schimmel v. McGregor, 438 S.W.3d 847, 859 (Tex. App.—Houston [1st Dist.] 2014) ("We first note that, in making a determination on a motion to dismiss, the trial court is not limited to considering only supporting and opposing affidavits, but the court 'shall consider the pleadings' as well."); Rio Grande H2O Guardian v. Robert Muller Family P'ship, No. 04-13-00441-CV, 2014 WL 309776, at *3 (Tex. App.—San Antonio Jan. 29, 2014, no pet.), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015) ("Because we may consider the pleadings as evidence in this case, Rio Grande H2O Guardian's petition established that the appellants were exercising their right to petition in filing the lawsuit.").

142. *See Tatum,* 526 S.W.3d at 467.

143. *See id.*

144. Cheniere Energy, Inc. v. Lotfi, 449 S.W.3d 210, 214–15 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citations omitted).

B. Live Testimony

The TCPA does not contemplate live testimony at a hearing on a motion to dismiss.[145] The Eighth Court of Appeals upheld the trial court's decision to exclude live testimony, because "[b]y statute, the trial court's decision on a motion to dismiss under Section 27.003 is not based on live testimony . . . ."[146] Recently, the Third Court of Appeals also upheld a ruling that excluded live testimony, reasoning that "the TCPA confined the court's inquiry solely to the 'evidence' of pleadings or affidavits that the Act explicitly references."[147]

C. Need for Discovery

On the filing of a motion to dismiss pursuant to § 27.003(a), all discovery in the legal action is suspended until the trial court rules on the motion, except as provided by § 27.006(b).[148] Under § 27.006(b), the court may allow specified and limited discovery relevant to the motion upon a showing of good cause.[149] "Good cause" has been defined as "the discovery necessary to further [a] cause of action."[150] The plaintiff must show the trial court that the requested discovery would provide evidence of essential elements of the claim necessary to refute the motion to dismiss.[151] If discovery is permitted, the court may extend the hearing date to no longer than 120 days after the date the motion to dismiss was served.[152]

A trial court's ruling that permits or denies specific and limited discovery is reviewed under an abuse of discretion standard.[153] To establish an abuse of discretion, a plaintiff must show that the inability to obtain the discovery prevented the plaintiff from prevailing.[154] Multiple litigants have

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145. *See* TEX. CIV. PRAC. & REM. CODE § 27.006(a).

146. Pena v. Perel, 417 S.W.3d 552, 556 (Tex. App.—El Paso 2013, no pet.).

147. Elite Auto Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 195 (Tex. App.—Austin, 2017, pet. dism'd) (citing TEX. CIV. PRAC. & REM. § 27.006(a)).

148. TEX. CIV. PRAC. & REM. § 27.003(c); *see also* San Jacinto Title Servs. of Corpus Christi, LLC, v. Kingsley Props., LP, 452 S.W.3d 343, 349–51 (Tex. App.—Corpus Christi 2013, pet. denied); Avila v. Larrea, 394 S.W.3d 646, 653 (Tex. App.—Dallas 2012, pet. denied).

149. *See* TEX. CIV. PRAC. & REM. § 27.006(b).

150. Ramsey v. Lynch, No. 10-12-00198-CV, 2013 WL 1846886, at *4 (Tex. App.—Waco May 2, 2013, no pet.).

151. *See* Walker v. Schion, 420 S.W.3d 454, 458 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

152. *See* TEX. CIV. PRAC. & REM. § 27.004(c).

153. *Walker*, 420 S.W.3d at 458. "Although we have found no other cases specifically addressing the standard of review applicable to the denial of a motion for discovery under the Citizens Participation Act, we agree with Schion that the abuse-of-discretion standard applies. This approach is consistent not only with the permissive language of the statute, but also with the longstanding general rule that a trial court's denial of discovery is reviewed for abuse of discretion." *Id.*; *see, e.g.*, Ford Motor Co. v. Castillo, 279 S.W.3d 656, 661 (Tex. 2009) ("We review a trial court's actions denying discovery for an abuse of discretion."); *see also In re* CSX Corp., 124 S.W.3d 149, 152 (Tex. 2003) (per curiam) ("Generally, the scope of discovery is within the trial court's discretion.").

154. *See Walker*, 420 S.W.3d at 458–59.

raised constitutional challenges to the provision restricting discovery during the pendency of a TCPA motion on the basis that it violates the open-courts doctrine in the Texas Constitution, but those challenges have been unsuccessful.[155] Specifically, in both *Abraham v. Greer* and *Combined Law Enforcement Ass'ns of Texas v. Sheffield*, the courts of appeals noted that the restrictions on discovery were tempered by the ability for a litigant to obtain discovery upon a showing of good cause.[156]

V. HEARING ON ANTI-SLAPP MOTION

In determining whether to grant anti-SLAPP relief, the court engages in a two-step inquiry. The initial burden is on the movant to establish "that the legal action is based on, relates to, or is in response to the [moving] party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association."[157] "Exercise of the right of free speech means a communication made in connection with a matter of public concern."[158] If the movant meets his burden, then the burden shifts to the claimant to establish a prima facie case for each essential element of his claims by clear and specific evidence.[159] Section 27.005(b) mandates dismissal if the non-movant fails to meet this burden.[160]

While the "clear and specific" standard does not impose a higher burden of proof than the one required at trial, it does require more than notice pleadings.[161] The evidence presented by the plaintiff "must provide enough detail to show the factual basis for its claim."[162] In a defamation case, for example, the plaintiff's evidence must establish "the facts of when, where, and what was said, the defamatory nature of the statements, and how they damage[] the plaintiff . . . ."[163]

Prior to *In re Lipsky*, the appellate courts were divided as to what the clear and specific standard meant and whether only direct evidence is relevant when considering a motion to dismiss.[164] In that case, the Texas Supreme Court determined that relevant circumstantial evidence can be sufficient to satisfy the clear and specific evidence requirement under the

155. Mem'l Hermann Health Sys. v. Khalil, No. 01-16-00512-CV, 2017 WL 3389645, at *16 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied); Abraham v. Greer, 509 S.W.3d 609, 615 (Tex. App.—Amarillo 2016, pet. denied); Combined Law Enf't Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672, at *10 (Tex. App.—Austin Jan. 31, 2014, pet. denied).

156. *Khalil*, 2017 WL 3389645, at *16; *Greer*, 509 S.W.3d at 616–17; *Sheffield*, 2014 WL 411672, at *10.

157. TEX. CIV. PRAC. & REM. § 27.005(b).

158. *Id.* § 27.001(3) (internal quotation marks omitted).

159. *Id.* § 27.005(c).

160. *Id.* § 27.005(b).

161. *See In re* Lipsky, 460 S.W.3d 579, 590–91 (Tex. 2015).

162. *Id.* at 591.

163. *Id.*

164. *See id.* at 584.

TCPA.[165] In so holding, the Court noted that "clear and specific" is not a recognized evidentiary standard and that the Court must assume that the legislature intended it to be different than "clear and convincing."[166] The court further noted that "[a]ll evidentiary standards, including clear and convincing evidence, recognize the relevance of circumstantial evidence."[167] Because the statute does not eliminate the use of circumstantial evidence, imposing a direct-evidence requirement would create the seemingly nonsensical result that the statute was "creat[ing] a greater obstacle for the plaintiff to get into the courthouse than to win its case . . . ."[168] The Court's ruling also emphasized that, although circumstantial evidence could be considered, conclusory evidence was not sufficient to establish a *prima facie* case under the TCPA.[169]

A. Initial Burden to Establish Statute Applies

There are two (potentially three) steps to a trial court's consideration of a TCPA motion.[170] In the first step, the court must determine whether the movant has shown "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 the right of free speech, the right to petition, or the right of association . . . ."[171] The burden is on the moving party—usually the defendant—to meet this test.[172] Although affidavits are useful for meeting this burden, they are not required if the face of the petition demonstrates that the lawsuit "is based on, relates to, or is in response to protected rights."[173] Furthermore, in *Hersh v. Tatum*, the Texas Supreme Court held that a defendant may obtain dismissal under the TCPA of a suit based on a "communication made in connection with a matter of public concern," even though she denied making the communication at issue.[174] In so holding, the Court observed that a plaintiff's

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165. *See id.* at 589.

166. *Id.*

167. *Id.*

168. *Id.*

169. *See id.* at 593 (emphasis added).

170. *See generally* Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

171. *Id.* at 80 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West 2017)) (setting forth the court's duty on a party's motion to dismiss).

172. *See* TEX. CIV. PRAC. & REM. § 27.005(b).

173. *See id.* § 27.006 (providing for consideration for the pleadings as well as affidavit evidence); Rio Grande H2O Guardian v. Robert Muller Family P'ship, No. 04-13-00441-CV, 2014 WL 309776, at *3 (Tex. App.—San Antonio Jan. 29, 2014, no pet.), *disapproved of by In re* Lipsky, 560 S.W.3d 579 (Tex. 2015).

174. *See* Hersh v. Tatum, 526 S.W.3d 462, 466 (Tex. 2017) (quoting TEX. CIV. PRAC. & REM. § 27.001(3)); *see also* TEX. CIV. PRAC. & REM. § 27.006(a) ("In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."); Shipp v. Malouf, 439 S.W.3d 432, 432 (Tex. App.—Dallas 2014, pet. denied), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015);

petition "is the 'best and all-sufficient evidence of the nature of the action,'" and therefore, that the defendant need not show more when it is clear from the plaintiff's pleadings that the action is covered by the TCPA.[175]

TCPA movants must demonstrate the suit implicates First Amendment rights by a preponderance of the evidence.[176] Notably, the required evidence should not address the communication method but rather the communication topic.[177] For example, the Supreme Court of Texas has held that communications sent via private email invoke the statute if the communications were about a matter of public concern.[178] Conversely, the statute was held inapplicable to communications widely published on an internet blog regarding a family member because the information conveyed was about private family matters.[179]

The Texas Supreme Court squarely addressed whether the statute is applicable to private communications in both *Lippincott v. Whisenhunt* and *ExxonMobil v. Coleman*.[180] In both cases, the Court observed that the statute applies to both public and private communications about matters of public concern.[181] Furthermore, relying on the Texas Supreme Court's decision in *Coleman*, the Third Court of Appeals held that the statutory definition of "communications" does not have a "limitation or overlay" not expressed in the statute.[182] Employing the statutory definition, in *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, the Third Court of Appeals held that a shop's action against members of a competing business for trade-secret misappropriation was based on, related to, or in response to members'

Schimmel v. McGregor, 438 S.W.3d 847, 859 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *Rio Grande H2O Guardian*, 2014 WL 309776, at *3 ("Because we may consider the pleadings as evidence in this case, Rio Grande H2O Guardian's petition established that the appellants were exercising their right to petition in filing the lawsuit.").

175. *Hersh*, 526 S.W.3d at 467 (quoting Stockyards Nat'l Bank v. Maples, 95 S.W.2d 1300, 1302 (Tex. 1936)).

176. *See generally* TEX. CIV. PRAC. & REM. § 27.005(b).

177. *Compare* Combined Law Enf't Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672, at *12–13 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (holding that the TCPA statute applied to private email communication under right of association), *with* Pickens v. Cordia, 433 S.W.3d 179, 187 (Tex. App.—Dallas, 2014, no pet.) (holding that the TCPA statute did not apply to a public blog post that was about a private family matter).

178. *See* ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895, 901 (Tex. 2017) (applying the TCPA to statements that were "private and among EMPCo employees," which related to an employee's job failure to complete procedures that "at least in part, [] reduce the potential environmental, health, safety, and economic risks associated with noxious and flammable chemicals overfilling and spilling onto the ground"); *Sheffield*, 2014 WL 411672, at *5 (applying the TCPA to private email communication under the right of association).

179. *See Pickens*, 433 S.W.3d at 184.

180. *See generally Coleman*, 512 S.W.3d at 901; Lippincott v. Whisenhunt, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam).

181. *See Coleman*, 512 S.W.3d at 901; *Lippincott*, 462 S.W.3d at 509; *see also* KBMT Operating Co., LLC v. Toledo, 492 S.W.3d 710, 711 (Tex. 2016) (applying the TCPA to public communications).

182. Elite Auto Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. dism'd).

exercise of their rights of association, therefore implicating the TCPA.[183]

Some examples of cases in which the statute has been applied include those concerning: (1) the Better Business Bureau's reliability reports and ratings of businesses;[184] (2) actual and constructive fraud and barratry claims related to the exercise of the right of petition;[185] (3) a spokesman's comments on behalf of a public watchdog group who publicly criticized the contract procedure in the City of Laredo;[186] (4) communications made in judicial proceedings involving HOA members;[187] (5) conspiracy to defame claims brought by a former client against an attorney who wrote a letter to the Texas Board of Pardons and Paroles;[188] (6) email communications about an employee's failure to conduct procedures which protect the environment;[189] (7) a television station's report on a pediatrician disciplined for having an inappropriate relationship with an adult patient;[190] (8) a reality show about a pastor convincing prostitutes to leave their trade;[191] (9) an attorney's communications in a divorce proceeding;[192] and (10) investigative journalism reports involving the exposure of wrongdoing.[193]

Some examples of cases in which courts have concluded that the TCPA does not apply include those concerning: (1) a trade secret dispute between two chemical companies;[194] (2) an employee's suit against a former employer for wrongful termination;[195] (3) defamatory statements of officers of an

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183. *See generally id.*

184. *See* Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc., 402 S.W.3d 299, 307–09 (Tex. App.—Dallas 2013, pet. denied); Better Bus. Bureau of Metro. Dall., Inc. v. Ward, 401 S.W.3d 440, 444–45 (Tex. App.—Dallas 2013, pet. denied); Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dall., Inc., No. 05-11-01337-CV, 2013 WL 3024692, at *2–3 (Tex. App.—Dallas June 14, 2013, no pet.) (mem. op.); Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 353–54 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

185. *See* James v. Calkins, 446 S.W.3d 135, 147–48 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

186. *See* Farias v. Garza, 426 S.W.3d 808, 812–13 (Tex. App.—San Antonio 2014, pet. denied), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

187. *See* Fitzmaurice v. Jones, 417 S.W.3d 627, 632 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

188. *See* Pena v. Perel, 417 S.W.3d 552, 555 (Tex. App.—El Paso 2013, no pet.).

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

190. *See* KBMT Operating Co. v. Toledo, 492 S.W.3d 710, 712–13 (Tex. 2016).

191. *See* Forsterling v. A&E Television Networks, LLC, No. H-16-2941, 2017 WL 980347, at *2 (S.D. Tex., Mar. 9, 2017).

192. *See* Mills v. Carlock, No. 05-16-01027-CV, 2017 WL 1532047, at *3–4 (Tex. App.—Dallas Apr. 26, 2017, pet. denied).

193. *See* Prather & Bland, *supra* note 30, at 751; *see also* Williams v. Cordillera Commc'ns, Inc., No. 2:13-CV-124, 2014 WL 2611746, at *3–5 (S.D. Tex. June 11, 2014); Shipp v. Malouf, 439 S.W.3d 432, 436–38 (Tex. App.—Dallas 2014, pet. denied), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); KTRK Television, Inc. v. Robinson, 409 S.W.3d 682, 688–90 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Salvaggio v. High Plains Broad., Inc., No. 2011-CI-10127 (131st Dist. Ct., Bexar County, Tex. Mar. 9, 2012); Simpton v. High Plains Broad., Inc., No. 2011-CI-13290 (285th Dist. Ct., Bexar County, Tex. Apr. 10, 2012).

194. *See* Jardin v. Marklund, 431 S.W.3d 765, 773–74 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

195. *See* Cheniere Energy, Inc. v. Lotfi, 449 S.W.3d 210, 213–16 (Tex. App.—Houston [1st Dist.]

HOA;[196] (4) communications on an internet blog concerning private family matters;[197] (5) the issue of whether a bank owned a note;[198] (6) statements made in the context of a disagreement over a real estate joint venture;[199] and (7) communications made in the context of a private commercial dispute.[200]

A non-movant's failure to challenge the applicability of the statute in response to a motion to dismiss may constitute a waiver.[201] Notably, however—as discussed further in Section VII.C—at least one court of appeals has considered the applicability of the statute to be a jurisdictional issue.[202] The Fourteenth Court of Appeals noted that its determination that a movant had waived its TCPA argument created a jurisdictional defect that deprived the court of the ability to hear the case.[203] Another court has noted that this interpretation conflates the issue of jurisdiction with the scope of protection under the TCPA.[204] The majority of courts addressing the issue of jurisdiction have concluded that whether the movant has met its TCPA burden is an issue over which an appellate court has jurisdiction.[205]

2014, no pet.).

196. *See* Herrera v. Stahl, 441 S.W.3d 739, 742–46 (Tex. App.—San Antonio 2014, no pet.).

197. *See* Pickens v. Cordia, 433 S.W.3d 179, 183–84 184, *disapproved of by* Hersh v. Tatum, 526 S.W.3d 462 (Tex. 2017).

198. *See* Espinoza v. Wells Fargo, Bank N.A., No. 02-13-00111-CV, 2013 WL 6046611, at *4 (Tex. App.—Fort Worth Nov. 14, 2013, pet. denied).

199. *See* Lahjiani v. Melifera Partners, LLC, No. 01-14-01025-CV, 2015 WL 6692197, at *4 (Tex. App.—Houston [1st Dist.] Nov. 3, 2015, no pet.).

200. *See* Brugger v. Swinford, No. 14-16-00069-CV, 2016 WL 4444036, at *3 (Tex. App.—Houston [14th Dist.] Aug 23, 2016, no pet.).

201. *See, e.g.*, Rehak Creative Servs., Inc. v. Witt, 404 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved by In re* Lipsky, 460 S.W.3d 479 (Tex. 2015) ("Rehak does not dispute that the claims for libel, business disparagement, tortious interference with business relationships and prospective business opportunities, intentional infliction of emotional distress, and civil conspiracy are based on, related to, and asserted in response to Witt's exercise of the 'right of free speech' under sections 27.003(a) and 27.005(b)(1)."); *see also* E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987) (per curiam) (finding that the argument that the DTPA was not applicable to a claim was never raised at the trial court level, and thus was waived on appeal); *In re* Lendman, 170 S.W.3d 894, 898 (Tex. App.—Texarkana 2005, no pet.) (holding that if an issue is not raised at the trial court level, the complaint is waived on appeal).

202. *See* Bacharach v. Doe, No. 14-14-00947-CV, 2016 WL 269958, at *1 (Tex. App.—Houston [14th Dist.] Jan. 21, 2016, no pet.); Jardin v. Marklund, 431 S.W.3d 765, 774 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("We conclude that Jardin has not shown the claims here are based on, related to, or in response to his exercise of the rights to petition and of association. Accordingly, the TCPA does not apply, and we lack jurisdiction over this interlocutory appeal."). *But see* Combined Law Enf't Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672, at *4 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (considering an interlocutory appeal of a denial of a motion to dismiss under the TCPA); Miller Weisbrod, L.L.P. v. Llamas-Soforo, 511 S.W.3d 181, 187 (Tex. App.—El Paso 2014, no pet.) (holding that the court had interlocutory jurisdiction based on the language of § 27.008, even though the appeal had been pending before the enactment of § 51.014(a)(12)).

203. QTAT BPO Sols., Inc. v. Lee & Murphy Law Firm, G.P., 524 S.W.3d 770, 774–75 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

204. *See, e.g.*, Schimmel v. McGregor, 438 S.W.3d 847, 863 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (reversing the denial of a TCPA motion based on lack of applicability of the statute).

205. Shipp v. Malouf, 439 S.W.3d 432, 439–42 (Tex. App.—Dallas 2014, pet. denied), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Young v. Krantz, 434 S.W.3d 335, 342 (Tex. App.—

B. Burden Shift to Establish Clear and Specific Evidence of Claim

Once the moving party establishes that the suit implicates First Amendment rights, the burden then shifts from the moving party (usually the defendant), to the party bringing the action (usually the plaintiff) to adduce clear and specific evidence for each essential element of the claim in question.[206] If the plaintiff does not meet its burden, then the court must dismiss the claim.[207]

The Texas Supreme Court opined that the clear and specific evidence standard recognizes relevant circumstantial evidence.[208] The Court explained the TCPA's clear and specific standard requires more than fair notice of a claim as required by the Texas Rules of Civil Procedure.[209] According to the Court,

> Fair notice of a claim under our procedural rules thus may require something less than 'clear and specific evidence' of each essential element of the claim. Because the [TCPA] requires more, mere notice pleading—that is, general allegations that merely recite the elements of a cause of action—will not suffice. Instead, a plaintiff must provide enough detail to show the factual basis for its claim.[210]

In a defamation case that implicates the TCPA, for example, the plaintiff must establish, through pleadings and evidence, the facts of when, where, and what was said; the defamatory nature of the statements; and how they damaged the plaintiff.[211] Conclusory affidavits without a factual basis, do not meet the clear and specific evidentiary burden.[212] In *Lipsky*, the Court held that the affidavit of a company executive with unsupported conclusions

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Dallas 2014, no pet.), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); *Schimmel,* 438 S.W.3d. at 854–57; Farias v. Garza, 426 S.W.3d 808, 813 (Tex. App.—San Antonio 2014, pet. denied), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Rio Grande H2O Guardian v. Robert Muller Family P'ship, No. 04-13-00441-CV, 2014 WL 309776, at *5 (Tex. App.—San Antonio Jan. 29, 2014, no pet.), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc., 402 S.W.3d 299, 306–07 (Tex. App.—Dallas 2013, pet. denied); Better Bus. Bureau of Metro. Dall., Inc. v. Ward, 401 S.W.3d 440, 443 (Tex. App.—Dallas 2013, pet. denied); Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 354 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); KTRK Television, Inc. v. Robinson, 409 S.W.3d 682, 692 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71, 78–80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Fitzmaurice v. Jones, 417 S.W.3d 627, 631–34 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

206. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West 2017); *see also In re* Lipsky, 411 S.W.3d 530 (Tex. App.—Fort Worth 2013), *mandamus denied*, 460 S.W.3d 579 (Tex. 2015).

207. *See* TEX. CIV. PRAC. & REM. § 27.005.

208. *See In re Lipsky*, 460 S.W.3d at 591.

209. *Id.* at 590–91.

210. *Id.*

211. *See id.*

212. *See id.*

about damages was not sufficient clear and specific evidence for a business disparagement claim, nor was the general accusation of bias by a third-party consultant sufficient clear and specific evidence to support a conspiracy claim.[213]

C. Burden Shift Back to Establish Affirmative Defense

If the non-movant meets his burden, then the movant still may obtain a dismissal by establishing each essential element of a valid defense to the claims at issue.[214] This third step was formally added by the legislature in 2013 with the addition of § 27.005(d) to the statute.[215] Courts, however, generally recognized the potential to defeat a claim with proof of a valid defense prior to the addition of the provision.[216] In *Kinney v. BCG Attorney Search, Inc.*, the Austin Court of Appeals recognized that "under either version of the statute, the result is the same and [the non-movant] is required to overcome any affirmative defenses [the movant] established."[217] The court held that a dismissal was warranted based on the affirmative defense of res judicata.[218] Similarly, in *Tervita v. Sutterfield*, the Dallas Court of Appeals held that an employer's representative's testimony in a workers' compensation proceeding was absolutely privileged; therefore, the employer was able to establish a valid defense to claims based on that testimony.[219]

VI. RULING ON AN ANTI-SLAPP MOTION

A. Denial of Motion by Written Order

There are two methods by which a motion to dismiss under Chapter 27 can be denied.[220] The first is by written order denying the motion to dismiss.[221] The second is by operation of law, which occurs automatically if the trial court fails to rule on the motion within thirty days after the date of the hearing.[222]

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213. *See id.* at 592–93.

214. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d) (West 2017).

215. *Id.*

216. *See, e.g.*, Kinney v. BCG Att'y Search, Inc., No. 03-12-00579-CV, 2014 WL 1432012, at *8 (Tex. App.—Austin 2014, pet. denied) ("[E]ven prior to the addition of section 27.005(d), the plain language of section 27.006 required the court to consider 'the pleadings and supporting and opposing affidavits stating the facts on which the liability *or defense* is based.'" (emphasis in original)).

217. *Id.*

218. *See id.*

219. *See* Tervita, LLC v. Sutterfield, 482 S.W.3d 280, 285 (Tex. App.—Dallas 2015, pet. denied).

220. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b)–(c) (West 2017).

221. TEX. CIV. PRAC. & REM. § 27.005(c); *see, e.g.*, United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc., 430 S.W.3d 508, 511 (Tex. App.—Fort Worth 2014, no pet.) ("After a hearing, the trial court denied United Food's motion to dismiss under the TCPA.").

222. TEX. CIV. PRAC. & REM. CODE § 27.008(a); *see, e.g.*, James v. Calkins, 446 S.W.3d 135, 141

Trial courts will deny a motion to dismiss for two primary reasons.[223] First, a trial court may determine that the statute does not apply to the legal action because the claims asserted do not implicate First Amendment rights.[224] The movant must demonstrate by a preponderance of the evidence that the legal action is based on the exercise of the movant's right of free speech, right of petition, or right of association.[225] If the movant fails to meet that burden, the inquiry ends and the motion must be denied.[226] Second, the trial court may conclude that the non-movant established "by clear and specific evidence a prima facie case for each essential element of the claim in question," and that prima facie case is not overcome by a valid defense.[227] The statute provides a mechanism and framework intended to cull out lawsuits that are without merit before substantial judicial and litigant resources are expended.[228] In addition to these primary bases, courts have also denied motions in cases in which the statute's strict deadlines have not been met.[229] Finally, a court might also deny the motion if it determines that a statutory exemption applies.[230]

B. Grant of Motion

A trial court has thirty days from the date of the hearing to grant the motion.[231] The statute is silent as to whether the grant of the motion must be by written order or whether the motion can be granted orally in open court;[232] however, at least one court has held that a trial court's oral statement that it

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(Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("The trial court did not rule on the motion within 30 days of the hearing, and it was therefore overruled by operation of law.").

223. *See* TEX. CIV. PRAC. & REM. § 27.005(b)–(c).

224. *Id.* § 27.005(b).

225. *See id.*

226. *See, e.g.*, Cheniere Energy, Inc. v. Lotfi, 449 S.W.3d 210, 213 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (deciding that communications in a wrongful termination case were not in violation of the right of association); *see also* Espinoza v. Wells Fargo Bank, N.A., No. 02-13-00111-CV, 2013 WL 6046611, at *4 (Tex. App.—Fort Worth 2013, pet. denied) (mem. op.) ("[T]he issue of whether Wells Fargo actually owned the note[ ] is not the proper subject of a chapter 27 motion to dismiss.").

227. TEX. CIV. PRAC. & REM.§ 27.005(c). In 2013, the legislature amended the statute to clarify that if a movant establishes each essential element of a valid defense to the claim the case should be dismissed. *Id.* § 27.005(d); *see, e.g.*, United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc., 430 S.W.3d 508, 513 (Tex. App.—Fort Worth 2014, no pet.) ("We hold that Wal-Mart met its burden under section 27.005(c) to establish by clear and specific evidence a prima facie case for each essential element of trespass.").

228. *See* TEX. CIV. PRAC. & REM. § 27.005.

229. *See, e.g.*, Miller Weisbrod, L.L.P. v. Llamas-Soforo, 511 S.W.3d 181, 192 (Tex. App.—El Paso 2014, no pet.) (upholding a denial of an untimely TCPA motion).

230. *See* TEX. CIV. PRAC. & REM. § 27.010 (listing actions to which the statute does not apply). Exemptions include: actions brought by the state or a political subdivision, commercial speech, cases brought under the Insurance Code or an insurance contract, and bodily injury, wrongful death, or survival cases. *Id.*

231. TEX. CIV. PRAC. & REM. § 27.005(a). Failing to grant the motion within thirty days operates as a denial by operation of law, which is subject to immediate interlocutory appeal. *Id.* §§ 27.008, 51.014.

232. *See id.* § 27.005.

was "going to grant the appellees' motions" was not sufficient to satisfy the thirty-day statutory deadline and avoid denial by operation of law.[233] To grant the motion to dismiss, the court has to determine that the statute applies, that the non-movant has not demonstrated a prima facie case by clear and specific evidence, and that the movant has not countered a prima facie case with its own uncontroverted proof of each essential element of a valid defense to the claim.[234] If the requirements are met, dismissal is mandatory.[235] A court errs if it fails to grant a motion when the requirements of the motion are met.[236]

C. Denial by Operation of Law

Thirty days after the hearing on the motion, the motion is denied by operation of law.[237] At that point, the trial court loses the power to rule on the motion and can neither grant nor deny it.[238] This issue was first brought before the Fifth Court of Appeals in *Avila v. Larrea*.[239] In *Avila*, the appellate court held that a motion filed under the TCPA was denied by operation of law thirty days after the hearing on the motion because the TCPA did not provide any circumstances for extending the deadline.[240] The deadline for a ruling is mandatory.[241] Importantly, however, a motion cannot be denied by operation of law in the absence of a hearing.[242]

The Fourteenth Court of Appeals also discussed this principal in *Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC*.[243] In *Direct*

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233. Inwood Forest Cmty. Improvement Ass'n v. Arce, 485 S.W.3d 65, 67 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

234. *See* TEX. CIV. PRAC. & REM. § 27.005(b)–(d).

235. *Id.* § 27.005(b) (noting that "a court shall dismiss" the legal action if the criteria is met). The use of the word "shall" indicates that an action is mandatory. TEX. GOV'T CODE ANN. §§ 311.011(a), 311.016(2) (West 1997) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."); RepublicBank Dall., N.A. v. Interkal, Inc., 691 S.W.2d 605, 607 (Tex. 1985) ("Unless a statute is ambiguous, [courts] must follow the clear language of the statute."); Aaron Rents, Inc. v. Travis Cent. Appraisal Dist., 212 S.W.3d 665, 672 (Tex. App.—Austin 2006, no pet.) ("[S]tatutes providing that a . . . 'party shall be awarded' . . . attorney's fees mandate an award of fees that [is] reasonable and necessary.").

236. *See, e.g.*, Rauhauser v. McGibney, 508 S.W.3d 377, 380 (Tex. App.—Fort Worth 2014, no pet.) ("[W]e hold that the trial court erred by permitting Rauhauser's motion to be denied by operation of law."); KTRK Television, Inc. v. Robinson, 409 S.W.3d 682, 684 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) ("We hold that . . . the trial court erred by denying KTRK's motion to dismiss, and we reverse.").

237. *See* TEX. CIV. PRAC. & REM. § 27.008(a).

238. *See id.*

239. *See generally* Avila v. Larrea, 394 S.W.3d 646, 649–50 (Tex. App.—Dallas 2012, pet. denied).

240. *See id.* at 656.

241. *See id.*

242. *See* Braun v. Gordon, No. 05-17-00176-CV, 2017 WL 4250235, at *2 (Tex. App.—Dallas Sept. 26, 2017, no pet.); Braun v. Haley, No. 05-17-00086-CV, 2017 WL 4250208, at *1 (Tex. App.—Dallas Sept. 26, 2017, no pet.).

243. Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC, 407 S.W.3d 398, 400 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

Commercial Funding, the trial court attempted to grant the anti-SLAPP motion six weeks after it had been denied by operation of law.[244] In overruling the grant, the Fourteenth Court of Appeals stated that the statute "did not authorize the trial court to extend the time in which the court is permitted to rule on the motion . . . . The Act contains no provision authorizing such an action, nor can the authority to do so be implied."[245] Citing *Avila*, the Fourteenth Court agreed with the *Avila* court's interpretation of the ruling deadline as mandatory in that the legislature drew a mandatory deadline in order to expedite the dismissal and appeal of suits "brought to punish or prevent the exercise of certain constitutional rights."[246]

D. Findings of Fact and Conclusions of Law

A movant may request findings of fact and conclusions of law pursuant to § 27.007 of the Texas Civil Practice and Remedies Code, which states, "[a]t the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose."[247] At least one court has ruled that the non-movant has no similar right to request findings of fact, relying on § 27.007, which states, "[a]t the request of a party making a motion under Section 27.003, the court shall issue findings."[248]

VII. APPEAL OF AN ANTI-SLAPP RULING

A. Interlocutory Appeal of Denial

Before the 2013 statutory amendments, which expressly permit an interlocutory appeal under § 51.014 of the Texas Civil Practice & Remedies Code, a split in authority existed on the issue of whether the TCPA permitted an interlocutory appeal when the trial court expressly denied the motion.[249] The confusion in the courts brought about the 2013 amendment by the Texas Legislature that revised the TCPA to clarify "the established right for one to take an interlocutory appeal of the denial or grant of a Motion to Dismiss filed under Chapter 27 (Actions Involving the Exercise of Certain

244. *See id.* at 399.
245. *Id.* at 401.
246. *Id.*
247. TEX. CIV. PRAC. & REM. CODE ANN. § 27.007(a) (West 2017).
248. *See* Schlumberger Ltd. v. Rutherford, No. 2014-13621, 2014 WL 8105895, at *1 (127th Dist. Ct., Harris County, Tex. Aug. 27, 2014), *aff'd in part*, 472 S.W.3d 881 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing TEX. CIV. PRAC. & REM. § 51.014) (issuing an order denying findings of fact and conclusions of law in accordance with § 27.007).
249. *See* TEX. CIV. PRAC. & REM. § 51.014.

Constitutional Rights) of the Civil Practice and Remedies Code."[250] The legislature also added language to § 51.014(a)(12) of the Civil Practice & Remedies Code allowing for an interlocutory appeal of an order that "denies a motion to dismiss filed under Section 27.003."[251]

In *Paulsen v. Yarrell*, the First Court of Appeals held that there is no right to an interlocutory appeal from an order denying a request for attorney's fees under the TCPA.[252] The court strictly construed §§ 27.003 and 51.014(a)(12) of the Texas Civil Practice and Remedies Code as permitting an interlocutory appeal only from an order that denies a motion to dismiss, not a fee decision.[253]

B. Appeal of Grant

A grant of a TCPA motion to dismiss often disposes of all claims, giving rise to a right to appeal the final order.[254] However, when there are multiple parties or claims, courts have consistently held that there is no such authority for an appeal of an interlocutory order granting relief.[255] Thus, a practitioner seeking to immediately appeal that ruling should consider seeking a severance of the prevailing defendant from the remainder of the case.[256]

Whether an appeal is of a denial or grant of a TCPA motion to dismiss, it must be timely brought.[257] In 2014, the First Court of Appeals dismissed an appeal from a trial court's order granting a motion to dismiss because the

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250. Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 2935, 83d Leg., R.S. (2013).

251. *See* TEX. CIV. PRAC. & REM. § 51.014(a)(12). The Texas Legislature enacted two section 12s in 2013. *See, e.g.*, Jardin v. Marklund, 431 S.W.3d 765, 775 n.6 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (Frost, J., dissenting) (citations omitted). "Under current Texas law, section 51.014 has two subsections denominated '(a)(12), . . . The majority and dissenting opinions address the subsection (a)(12) dealing with interlocutory orders in which the trial court denies a motion to dismiss filed under section 27.003, rather than the subsection (a)(12) dealing with interlocutory orders in which the trial court denies a motion for summary judgment filed by an electric utility regarding liability in a suit subject to section 75.0022." *Id.*

252. *See* Paulsen v. Yarrell, 455 S.W.3d 192, 194 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

253. *See id.* at 195.

254. *See generally* Trane US, Inc. v. Sublett, 501 S.W.3d 783 (Tex. App.—Amarillo 2016, no pet.).

255. *See* Schlumberger Ltd. v. Rutherford, 472 S.W.3d 881, 887 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (citations omitted) ("[T]he law now expressly permits an interlocutory appeal of an order denying a TCPA motion to dismiss. By contrast, no statute expressly provides for interlocutory appeal of an order that grants such a motion."); *see also* Pulliam v. City of Austin, No. 03-17-00131-CV, 2017 WL 1404745, at *1 (Tex. App.—Austin Apr. 14, 2017, no pet.); *Trane US, Inc*., 501 S.W.3d at 787 ("Since the enactment of section 51.014(a)(12), . . . [n]o statutory authority exists . . . for an interlocutory appeal from the grant of a motion to dismiss under section 27.003 of the TCPA."); Flynn v. Gorman, No. 02-16-00131-CV, 2016 WL 4699198, at *1 (Tex. App.—Fort Worth Sept. 8, 2016, no pet.); Inwood Forest Cmty. Improvement Ass'n v. Arce, 485 S.W.3d 65, 70 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) ("No statutory authority exists, however, for an interlocutory appeal from the grant of a motion to dismiss under section 27.003 of the TCPA.").

256. *See, e.g.*, AOL, Inc. v. Malouf, No. 05-13-01637-CV, 2015 WL 1535669, at *1 (Tex. App.—Dallas Apr. 2, 2015, no pet.) (deciding a case which severed claims from the TCPA claim).

257. *See, e.g.*, Spencer v. Pagliarulo, 448 S.W.3d 605, 606–07 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

appeal was untimely.[258] All appeals of a trial court order on a TCPA motion to dismiss are expedited and, therefore, the notice of appeal must be filed within twenty days.[259] When a notice of appeal is not filed within twenty days, or within an extension period, appellate courts can dismiss for lack of jurisdiction.[260]

Generally, the granting of a motion to dismiss creates a final judgment, and an interlocutory appeal is thus not necessary unless there are remaining claims that need determination.[261] Such suits, in which some claims arise from activities protected by the statute and some claims do not, have been called "mixed claims."[262] When a party takes an interlocutory appeal of part of the case based on the TCPA, the remaining claims in the trial court are stayed.[263] In *Schlumberger, Ltd. v. Rutherford*, the trial court granted the movant's motion to dismiss on a "mixed claim" with respect to the plaintiffs' misappropriation of trade secrets, conversion, breach of fiduciary duty, and Texas Theft Liability Act claims, and denied the motion as to the plaintiffs' breach of contract claims.[264] Cross interlocutory appeals were filed and, pursuant to Texas Civil Practice & Remedies Code § 51.014(b), the underlying proceedings were stayed.[265] On appeal, the First Court of Appeals noted that Texas appellate courts generally only have jurisdiction over final judgments, except where a statute explicitly authorizes an interlocutory appeal.[266] Consistent with the general rule that statutes granting interlocutory appeals should be construed strictly, the court interpreted the TCPA's appeal provision to provide an interlocutory appeal only for denials of a motion to dismiss.[267] As a result, it had no appellate jurisdiction over any ruling other than the denial of the anti-SLAPP motion; the court dismissed plaintiff-appellant Schlumberger's appeal from the partial grant of the

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258. *See id.* Although the First Court of Appeals notified the pro se appellant that his appeal was subject to dismissal for want of jurisdiction, the pro se appellant failed to respond and thus his appeal was dismissed. *Id.*

259. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(b) (West 2017); TEX. R. APP. P. 26.1(b) (West 1997).

260. *See Spencer*, 448 S.W.3d at 607 ("Because Spencer's notice of appeal was not filed within twenty days of the trial court's final judgment or within the fifteen-day extension period, Spencer's response fails to demonstrate either that his notice of appeal was timely or that we have jurisdiction over this appeal.").

261. *See generally* Paulsen v. Yarrell, 455 S.W.3d 192 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

262. *See generally* Motion for Leave to File Notice of Supplemental Authority of Appellant Church of Scientology International, Sloat v. Rathbun, 513 S.W.3d 500 (Tex. App.—Austin 2015, pet. dism'd) (No. 03-14-00199), 2014 WL 7183674, at *1 (giving an example of mixed claims).

263. *See* TEX. CIV. PRAC. & REM. § 51.014(b).

264. *See* Charlotte Rutherford's Brief as Cross-Appellant, Schlumberger, Ltd. v. Rutherford, 472 S.W.3d 881 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (No. 01-14-00776-CV), 2014 WL 7669397, at *10.

265. *Id.*; *see also* TEX. CIV. PRAC. & REM. § 51.014(b).

266. *See* Schlumberger Ltd. v. Rutherford, 472 S.W.3d 881, 886 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

267. *See id.* at 887.

anti-SLAPP motion for want of jurisdiction.[268]

C. Applicability of Statute versus Jurisdiction on Appeal

A court of appeals must first determine whether it has subject matter jurisdiction before addressing the merits of any dispute.[269] In the TCPA context, appellate jurisdiction of the denial of an anti-SLAPP motion is established by statute.[270]

The majority of courts have determined that § 51.014(a)(12) confers jurisdiction to review and affirm an interlocutory order denying a motion to dismiss despite determining that the TCPA did not apply.[271] However, the Fourteenth Court of Appeals has held that it lacks appellate jurisdiction if it concludes the appellant has not shown that the claims are based on, related to, or are in response to the appellant's exercise of the right of free speech, the right to petition, or the right of association.[272]

The First Court of Appeals was the first to consider this issue in *Schimmel v. McGregor*.[273] In *Schimmel*, the trial court initially held the defendant's statements to the media were not about a matter of public concern, and as a result, the claims did not fall within the scope of TCPA protection.[274] On appeal, focusing on the content of the speech, the appellate court held that Schimmel's statements about a failed government buyout of beach-front property after Hurricane Ike was an exercise of his free speech rights protected by the TCPA.[275] Whether a TCPA motion is denied by operation of law or by signed order, and whether the denial is for failure of the movant or the respondent to meet their respective burdens, the denial itself is immediately appealable under §§ 51.014(a)(12) and 27.008(a) of the Texas Civil Practice and Remedies Code.[276]

Since *Schimmel*, several other courts of appeals have implicitly adopted this approach, exercising jurisdiction to review and affirm denials of TCPA motions, even where the courts ultimately determined that the protections of the TCPA statute were not applicable.[277] In *Adams v. Starside Custom*

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268. *See id.* at 891.

269. *See* Avila v. Larrea, 394 S.W.3d 646, 654 (Tex. App.—Dallas 2012, pet. denied) (citing Minton v. Funn, 355 S.W.3d 634, 639 (Tex. 2011)).

270. *See* TEX. CIV. PRAC. & REM. § 51.014(a)(12); *see also Avila*, 394 S.W.3d at 654.

271. Adams v. Starside Custom Builders, LLC, No. 05-15-01162-CV, 2016 WL 3548013, at *1 (Tex. App.—Dallas June 28, 2016), *rev'd on other grounds*, 16-0786, 2018 WL 1883075 (Tex. Apr. 20, 2018).

272. *See* Jardin v. Marklund, 431 S.W.3d 765, 774 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

273. *See generally* Schimmel v. McGregor, 438 S.W.3d 847, 862 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

274. *See id.* at 859.

275. *See id.*

276. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.008(a), 51.014(a)(12) (West 2017).

277. *See generally* Sloat v. Rathbun, 513 S.W.3d 500, 510 (Tex. App.—Austin 2015, pet. dism'd); Adams v. Starside Custom Builders, LLC, No. 05-15-01162-CV, 2016 WL 3548013, at *1 (Tex. App.—Dallas June 28, 2016), *rev'd on other grounds*, No. 16-0786, 2018 WL 1883075 (Tex. Apr. 20, 2018); I–

Builders, LLC, for example, the Fifth Court of Appeals affirmed the lower court's determination that appellants failed to establish the applicability of the TCPA to plaintiff's defamation claim.[278] The First and Third Courts of Appeals have also exercised jurisdiction in similar cases.[279]

The Fourteenth Court of Appeals, however, has taken a different approach, holding that a determination of the inapplicability of the TCPA deprives the court of subject-matter jurisdiction over an interlocutory appeal.[280] In *Jardin v. Marklund*, a divided court of appeals held that it did not have jurisdiction over an appeal of the denial of a TCPA motion because the trial court held the TCPA did not apply.[281] Chief Justice Frost dissented, observing:

> A person may appeal from an interlocutory order of a district court . . . that . . . denies a motion to dismiss filed under Section 27.003.
>
> . . . Under the unambiguous language of section 51.014(a)(12), this court has jurisdiction over Jardin's appeal from this interlocutory order. The basis for appellate jurisdiction under section 51.014(a)(12) is an interlocutory order in which the trial court denies a motion to dismiss filed under section 27.003; the basis for appellate jurisdiction under this statute is not that the claims in question fall within the scope of the Texas Citizens' Participation Act. Thus, if the appellate court concludes that the claims in question do not fall within the scope of the Texas Citizens' Participation Act and therefore that the trial court properly denied the motion to dismiss under section 27.003, the proper appellate judgment would be to affirm the trial court's order rather than to dismiss the appeal for lack of appellate jurisdiction.[282]

The Fourteenth Court of Appeals confronted this issue again in *QTAT BPO Solutions, Inc. v. Lee & Murphy Law Firm, G.P.*, but it ultimately determined that it was bound by its earlier decision in *Jardin*.[283] In *QTAT*, the Fourteenth Court of Appeals applied horizontal stare decisis, ultimately holding that although it had jurisdiction to review a trial court's interlocutory denial of a motion to dismiss, the court nevertheless lacks appellate jurisdiction if it determines that an appellant has not shown that the claims are based on the appellant's exercise of the right of free speech, the right to

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10 Colony, Inc. v. Lee, Nos. 01–14–00465–CV, 01–14–00718–CV, 2015 WL 1869467, at *2, 4–5 (Tex. App.—Houston [1st Dist.] Apr. 23, 2015, no pet.).

278. *Adams*, 2016 WL 3548013, at *1.

279. *See Sloat*, 513 S.W.3d at 510; *I–10 Colony, Inc.*, 2015 WL 1869467, at *2, *4–5.

280. Jardin v. Marklund, 431 S.W.3d 765, 774 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

281. *See id.*

282. *Id.* at 775–76 (Frost, C.J., dissenting) (footnotes omitted) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (West 2017)).

283. *See* QTAT BPO Sols., Inc. v. Lee & Murphy Law Firm, G.P, 524 S.W.3d 770, 777 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

petition, or the right of association.[284] That decision, noting the split among Texas courts of appeals, ultimately held that *Jardin* controlled, but did not express an opinion regarding the correct approach.[285]

The Fourth Court of Appeals recently held that when a trial court did not rule on a motion to dismiss, but struck all of the pleadings, including the motion to dismiss, the order striking the pleadings was the "functional equivalent" of an order denying the motion to dismiss, which provided the appellate court with jurisdiction over the appeal.[286]

D. Standard of Review

The Fifth Court of Appeals noted that, "Every Texas court of appeals to address the issue on direct appeal has concluded the standard of review on the first prong is de novo."[287] The Supreme Court of Texas has done the same, noting that application of the statute implicates issues of statutory construction, which are reviewed de novo.[288]

Three of the earliest decisions addressing the appropriate standard of appellate review under the TCPA each determined that de novo is the appropriate standard. First, in *Avila v. Larrea*, the Fifth Court of Appeals reasoned that, because the question implicated issues of statutory construction, de novo was the appropriate standard.[289] Next, the First Court of Appeals in *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, also held de novo review was the appropriate standard for determining whether the suit implicated First Amendment rights.[290] A few months later, the Fourteenth Court of Appeals in *Rehak Creative Services, Inc. v. Witt*, further analyzed the question and sided with the Fifth Court of Appeals' decision in *Avila*:[291]

> *De novo* review governs a question-of-law inquiry concerning the meaning of specific words used in the statute. But invoking the *de novo* standard alone does not fully explain the dismissal standard to be applied when an appellate court determines *de novo* whether (1) the movant satisfied section 27.005(b)'s initial burden; and (2) the non-movant satisfied section

284. *See id.*

285. *See id.*

286. *See* Retzlaff v. Klein, No. 04-16-00675-CV, 2017 WL 3270368, at *2 (Tex. App.—San Antonio Aug. 2, 2017, pet. denied).

287. Pickens v. Cordia, 433 S.W.3d 179, 183 (Tex. App.—Dallas 2014, no pet.).

288. *See* ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895, 899 (Tex. 2017).

289. Avila v. Larrea, 394 S.W.3d 646, 652–53 (Tex. App.—Dallas 2012, pet. denied) (noting that issues of statutory construction are reviewed de novo).

290. *See* Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

291. *See* Rehak Creative Servs., Inc. v. Witt, 404 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved of by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

27.005(c)'s shifted burden.[292]

The Fourteenth Court of Appeals then explained that courts review the initial burden under § 27.005(b) de novo in accordance with the First Court's prior ruling in *Newspaper Holdings*.[293] And for the second prong of the test under § 27.005(c), the court determined that courts of appeals should "determine *de novo* whether the record contains a minimum quantum of clear and specific evidence that, unaided by inferences, would establish each essential element of the claim in question if no contrary evidence is offered."[294] The Supreme Court later clarified in *In re Lipsky* that relevant circumstantial evidence can be sufficient to satisfy the clear and specific evidence requirement under the TCPA, disapproving of *Rehak* to the extent that it required evidence "unaided by inferences."[295]

With regard to rulings on request for limited discovery under the TCPA, an abuse of discretion standard applies. In *Walker v. Schion*, the Fourteenth Court of Appeals stated that:

> [W]e have found no other cases specifically addressing the standard of review applicable to the denial of a motion for discovery under the Citizens Participation Act, we agree with Schion that the abuse-of-discretion standard applies. This approach is consistent not only with the permissive language of the statute, but also with the longstanding general rule that a trial court's denial of discovery is reviewed for abuse of discretion.[296]

VIII. EFFECT OF PLAINTIFF'S NONSUIT

It is well established that Texas law allows parties an absolute right to a nonsuit; however, if a TCPA motion has already been filed, the nonsuit does not affect the TCPA movant's right to attorney's fees and sanctions.[297] Even though a plaintiff can nonsuit its claims at any time before it has introduced all of its evidence, "[a]ny dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief" and it "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal."[298] The Texas Supreme Court confirmed that a plaintiff's nonsuit without prejudice has no effect on a defendant's pending claim for affirmative relief, including a request for

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292. *Id.* at 725 (emphasis in original).

293. *See id.*; *see also Newspaper Holdings, Inc*., 416 S.W.3d at 80.

294. *Rehak*, 404 S.W.3d at 727 (emphasis in original).

295. *In re Lipsky*, 460 S.W.3d at 587, 589.

296. Walker v. Schion, 420 S.W.3d 454, 458 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

297. *See* TEX. R. CIV. P. 162 (outlining that any dismissal or nonsuit "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court"); *see also* Villafani v. Trejo, 251 S.W.3d 466, 469 (Tex. 2008).

298. TEX. R. CIV. P. 162.

dismissal with prejudice and for an award of fees, expenses, costs, and sanctions.[299]

Appellate courts have followed this reasoning in the TCPA context when a nonsuit is filed while the motion is pending.[300] If a motion to dismiss and request for fees or sanctions is pending when an order of dismissal is signed, then the order does not resolve the pending motion for fees and sanctions and is not a final judgment.[301] The trial court still has jurisdiction over the pending motion for fees and sanctions, and the movant can request a hearing and determination of these matters.[302] Because an order of nonsuit does not dispose of a defendant's pending, affirmative claims for relief, the court does not lose plenary power.[303]

Applying this principle, courts have awarded fees and sanctions after voluntary nonsuits when there is a pending TCPA motion.[304] If the movant has incurred expenses defending against the lawsuit, then awarding attorney's fees serves the purpose of the statute.[305]

Further, when there is a nonsuit following a TCPA motion and the court fails to rule on the motion, it is denied by operation of law and is subject to appeal.[306] In *Rauhauser v. McGibney*, the plaintiff nonsuited five hours after a TCPA motion was filed.[307] The court did not rule on the motion, leading

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299. *See* CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, 390 S.W.3d 299, 300 (Tex. 2013) (per curiam).

300. *See* Am. Heritage Capital, LP v. Gonzalez, 436 S.W.3d 865, 871 (Tex. App.—Dallas 2014, no pet.); Rauhauser v. McGibney, 508 S.W.3d 377, 381 (Tex. App.—Fort Worth 2014, no pet.), *disapproved of by* Hersch v. Tatum, 526 S.W.3d 462 (Tex. 2017) ("Although a plaintiff decides which of its own claims to pursue or to abandon, that decision does not control the fate of a nonmoving party's independent claims for affirmative relief."); James v. Calkins, 446 S.W.3d 135, 143–44 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

301. *See Am. Heritage Capital, LP*, 436 S.W.3d at 871.

302. *See id.* at 871–72.

303. *See id.*; *see also James*, 446 S.W.3d at 143–44.

304. *See, e.g.*, *Am. Heritage Capital, LP*, 436 S.W.3d at 880–81 (affirming the trial court's award of $15,616 in fees and $15,000 in sanctions ordered after nonsuit); *see also* Breitling Oil & Gas Corp. v. Petrol. Newspapers of Alaska, LLC, No. 05-14-00299-CV, 2015 WL 1519667, at *1 (Tex. App.—Dallas Apr. 1, 2015, pet. denied); Zimmerman v. Austin Investigative Reporting Project, No. D-1-GN-14-004290 (53rd Dist. Ct., Travis County, Tex. Jan. 7, 2015) (arguing for fees and sanctions where there is a pending motion); Delgado v. Alvarado, No. 2014-10592 (234th Dist. Ct., Harris County, Tex. May 12, 2014); Algae Int'l Grp., Inc., v. Stegman, No. DC-13-03933 (44th Dist. Ct., Dallas County, Tex. Sept. 13, 2013); Hest Techs., Inc. v. Bethel, No. 067-256909-11 (67th Dist. Ct., Tarrant County, Tex. Apr. 17, 2012).

305. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011) at 2; Prather & Bland, *supra* note 30, at 764; *see also Breitling Oil & Gas Corp.*, 2015 WL 1519667, at *5 (granting dismissal after a nonsuit was signed and awarding $80,000 fees, $2,444.58 expenses, as well as conditional fees in the event of an appeal); *Zimmerman*, No. D-1-GN-14-004290 (ruling that the court had jurisdiction to hear the motion to dismiss after the non-movant nonsuited prior to a hearing on the motion to dismiss); *Delgado*, No. 2014-10592 (awarding $11,395.50 in attorney's fees and expenses after a nonsuit); *Algae Int'l Grp., Inc.*, No. DC-13-03933 (awarding $58,790.50 in attorney's fees and $29,395.25 in sanctions after nonsuit was filed); *Hest Techs., Inc.*, No. 067-256909-11 (awarding $7,500 in attorney's fees after a nonsuit was filed).

306. *See* Rauhauser v. McGibney, 508 S.W.3d 377, 385 (Tex. App.—Fort Worth 2014, no pet.), *disapproved of by* Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017).

307. *See id.* at 381.

to a denial by operation of law.[308] On appeal, the Second Court of Appeals held that the motion survived the nonsuit and that the trial court erred in permitting the motion to be denied by operation of law.[309] On remand, the court ordered $300,383.84 in attorney's fees and $1 million in sanctions, which the Second Court of Appeals subsequently rejected as excessive.[310]

IX. ATTORNEY'S FEES AND SANCTIONS

A. Mandatory Nature of Fees under the Statute

The TCPA provides, if the court orders a dismissal of the claim:

> [t]he court *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.[311]

Under the TCPA, the trial court must consider and award fees and sanctions that are supported by the evidence.[312] The attorney's fees award reimburses the costs of defending the improper legal action.[313] Sanctions are awarded, as necessary, to deter the party who brought the legal action from bringing similar future, retaliatory lawsuits.[314] The attorney's fees subsection requires the attorney's fees and court costs to be reasonable and the amount of the sanctions award is within the trial court's discretion.[315] Courts have held both to be mandatory, as indicated by the use of the word "shall" in the statute.[316] At least eighteen other Texas laws state that the court "shall"

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308. *See id.* at 390.

309. *See id.* at 381.

310. *See* Order Awarding Attorney's Fees and Sanctions, McGibney v. Retzlaff, No. 67-270669-14, 2016 WL 1703694 (67th Jud. Dist., Tarrant County, Tex., Dec. 30, 2015) (issuing order awarding attorney's fees and sanctions); McGibney v. Rauhauser, No. 02-16-00244-CV (Tex. App.—Ft. Worth Apr. 19, 2018, no pet. h.) (reversing award of attorney's fees and sanctions as excessive).

311. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(1)–(*2) (West 2017) (emphasis added).

312. *See* Cruz v. Van Sickle, 452 S.W.3d 503, 522 (Tex. App.—Dallas 2014, pet. denied) ("Pursuant to the plain wording of the [TCPA], appellees are entitled to an award of attorney's fees that is supported by the evidence.").

313. *See* TEX. CIV. PRAC. & REM. § 27.009(a)(i) (awarding attorney's fees and costs incurred). *See generally* Judiciary & Civil Jurisprudence Comm., Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011) (explaining that SLAPP actions "chill public debate because they cost money to defend" and that H.B. 2975 would help remedy the effects such suits have upon citizens' rights).

314. *See* TEX. CIV. PRAC. & REM. § 27.009(a)(2).

315. *See id.* § 27.009(a)(1); *see also* Kinney v. BCG Att'y Search, Inc., No. 03-12-00579-CV, 2014 WL 1432012, at *12 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (upholding a sanctions award of $75,000 based in part on "the broad discretion afforded the trial court by section 27.009").

316. *See* TEX. CIV. PRAC. & REM. § 27.009(a)(2); *see also* Sullivan v. Abraham, 488 S.W.3d 294, 299 (Tex. 2016) ("Based on the statute's language and punctuation, we conclude that the TCPA requires

award attorney's fees, and the term is consistently interpreted as mandatory.[317]

In contrast, if the non-movant prevails, an award of fees is discretionary, not mandatory.[318] Section (b) states: "If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party."[319] The contrasting use of "the court shall" and "the court may" indicates that the former is intended to be mandatory upon a proper showing, while the latter is discretionary.[320]

In 2016, the Supreme Court of Texas held that a "reasonable" attorney's fee "is one that is not excessive or extreme, but rather moderate or fair."[321] That Court also held that the determination of what was reasonable "rests within the court's sound discretion."[322] However, the Court also expressly directed that such discretion does not include the ability to adjust the fees award downwards for considerations of "justice and equity."[323] In that case, the movant sought attorney's fees under the fee-shifting provision of the TCPA for $67,290 in attorney's fees, $4,381.01 in costs and expenses, and

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an award of 'reasonable attorney's fees' to the successful movant."); Serafine v. Blunt, 03-16-00131-CV, 2017 WL 2224528, at *7 (Tex. App.—Austin May 19, 2017, no pet. h.) (holding that "*some* sanctions award" is required, though the trial court is allowed broad discretion on the amount).

317. *See, e.g.*, Nauslar v. Coors Brewing Co., 170 S.W.3d 242, 257 (Tex. App.—Dallas 2005, no pet.) (reversing a denial of a prevailing defendant's attorney's fees under the Texas Beer Industry Fair Dealing Law, holding that "the fee award is mandatory, in that subsection (c) explicitly states the prevailing party 'shall' recover reasonable attorney's fees"); *see also* TEX. ALCO. BEV. CODE ANN. § 102.79(c) (West 1981) ("The prevailing party in any action under Subsection (a) of this section shall be entitled to actual damages, including . . . reasonable attorney's fees, and court costs."). Likewise, "[a]ttorney's fees are mandatory when a consumer prevails under the DTPA" because the language of the Texas Business and Commerce Code § 17.50(d) states that "[e]ach consumer who prevails shall be awarded court costs and reasonable and necessary attorney's fees." Town E. Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 812 (Tex. App.—Dallas 1987, no writ) (emphasis omitted) (quoting TEX. BUS. & COM. CODE ANN. § 17.50(d) (West 1987)); *see also* TEX. GOV'T CODE ANN. § 311.016(2) (West 2013) (stating that the use of the term "'[shal]l' imposes a duty"); Aaron Rents, Inc. v. Travis Cent. Appraisal Dist., 212 S.W.3d 665, 672 (Tex. App.—Austin 2006, no pet.) (explaining that statutes providing that a party shall be awarded attorney's fees "mandate an award of fees that are reasonable and necessary").

318. *See* TEX. CIV. PRAC. & REM. § 27.009(b).

319. *Id.*

320. *See* DLB Architects, P.C. v. Weaver, 305 S.W.3d 407, 409 (Tex. App.—Dallas 2010, pet. denied) ("Every word of a statute must be presumed to have been used for a purpose, and every word excluded from a statute must also be presumed to be excluded for a purpose.").

321. *Sullivan*, 488 S.W.3d at 299 (quoting Garcia v. Gomez, 319 S.W.3d 638, 642 (Tex. 2010)).

322. *Id.*

323. *Id.* The phrase "as justice and equity may require" was added as an amendment during the legislative process by Senator Robert Duncan, Chair of the Senate State Affairs Committee, for the purpose of providing a measure of discretion to the judge regarding the amount of the award. Senate Comm. On State Affairs Tex. S.B. 1565, 82d Leg., R.S., at 4 (2011); *see also* Judiciary & Civil Jurisprudence Comm., Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011) ("The Senate companion bill contains language that would limit court costs, attorney fees, and other expenses 'as justice and equity may require.' This language should be added to the House bill to ensure a court could award attorney fees that were lower than what the attorney typically charges, if appropriate."). The language was taken from New Mexico Statute § 46A-10-1004 (2003).

sanctions.[324] The trial court granted dismissal of the claim but stated that "justice and equity necessitate Defendant's recovery of reasonable attorney's fees in the amount of $6,500 and costs in the amount of $1,500."[325] The movant appealed the downward adjustment and the Supreme Court, in reviewing the statutory language on attorney's fees, relied on the last-antecedent canon to determine that the statutory language permitting adjustment for "justice and equity" was limited only to the adjustment of "other expenses" awarded under the TCPA.[326]

B. Movant's Evidence

A successful TCPA movant who pursues attorney's fees "bears the burden of proof, which includes, at a minimum, documentation of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required."[327] Texas courts generally consider the following factors in a determination of the amount of attorney's fees: "the nature and complexity of the case; the nature of the services provided by counsel; the time required for trial; the amount of money involved; the client's interest that is at stake; the responsibility imposed upon counsel; and the skill and expertise required."[328] Generalities about the tasks performed prevent the court from undertaking a reasonable review of the fee application.[329]

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324. *Sullivan*, 488 S.W.3d at 295.

325. *Id.* at 295–96.

326. *Id.* at 298.

327. *Id.* at 299; *see also* Schimmel v. McGregor, 438 S.W.3d 847, 863 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (quoting El Apple I, Ltd. v. Olivas, 370 S.W.3d 757, 763 (Tex. 2012)); Alphonso v. Deshotel, 417 S.W.3d 194, 200 (Tex. App.—El Paso 2013, no pet.) (citing Brownhawk, L.P. v. Monterrey Homes, Inc., 327 S.W.3d 342, 348 (Tex. App.—El Paso 2010, no pet.)). Reasonableness can also be established by demonstrating:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Weaver v. Jamar, 383 S.W.3d 805, 813–14 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (quoting Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997)). The movant, however, need not present evidence on each of these factors as "[t]he trial court may also consider the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties." *Id.* (citing Rapid Settlements, Ltd. v. Settlement Funding, LLC, 358 S.W.3d 777, 786 (Tex. App.—Houston [14th Dist.] 2012, no pet.)); *see also* Acad. Corp. v. Interior Buildout & Turnkey Constr., Inc., 21 S.W.3d 732, 742 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

328. *See* Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 881 (Tex. 1990) (per curiam).

329. *Sullivan*, 488 S.W.3d at 299.

In *Schimmel v. McGregor*, the First Court of Appeals upheld the affidavit evidence submitted by Schimmel stating "the date on which work was performed, the number of hours spent, the particular tasks involved, and the applicable billing rate[]" sufficiently established reasonable attorney's fees.[330] In *Cruz v. Van Sickle*, the non-movant complained that the affidavit evidence was not formally introduced as evidence; the movant's attorney had attempted to enter the affidavit into evidence at the hearing, and the trial judge had deemed it unnecessary.[331] The appellate court upheld the award, noting that the non-movant "has cited no legal authority, nor have we found any, to support his contention that affidavits filed with the trial court over one month before the attorney's fees hearing had to be formally introduced into evidence at the hearing . . . ."[332] Without the trial court's express permission, however, the better practice is to introduce evidence supporting a request for attorney's fees at the hearing.

On appeal, when a denial of a TCPA motion is reversed, courts typically have remanded the case to the trial court for a determination of attorney's fees.[333] Courts awarding TCPA movant's attorney's fees typically include conditional attorney's fees for appeals if requested.[334] Most courts have

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330. *Schimmel*, 438 S.W.3d at 852.

331. *See* Cruz v. Van Sickle, 452 S.W.3d 503, 515 (Tex. App.—Dallas 2014, pet. denied).

332. *Id.* at 521.

333. *See generally, e.g.*, Shipp v. Malouf, 439 S.W.3d 432 (Tex. App.—Dallas 2014, no pet.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Young v. Krantz, 434 S.W.3d 335, 337–38 (Tex. App.—Dallas 2014, no pet.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Rauhauser v. McGibney, 58 S.W.3d 377 (Tex. App.—Fort Worth 2014, no pet.) (per curiam) (reversing denial of the motion to dismiss and remanding for a determination of fees); James v. Calkins, 446 S.W.3d 135, 139–40 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *Schimmel*, 438 S.W.3d at 847; Farias v. Garza, 426 S.W.3d 808, 812 (Tex. App.—San Antonio 2014, pet. denied), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Rio Grande H2O Guardian v. Robert Muller Family P'ship Ltd., No. 04-13-00441-CV, 2014 WL 309776, at *1 (Tex. App.—San Antonio Jan. 29, 2014, no pet.) (mem. op.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc., 402 S.W.3d 299, 301 (Tex. App.—Dallas 2013, pet. denied); Better Bus. Bureau of Metro. Dall., Inc. v. Ward, 401 S.W.3d 440, 441 (Tex. App.—Dallas 2013, pet. denied); Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 350 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); KTRK Television, Inc. v. Robinson, 409 S.W.3d 682, 684 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71, 75 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Fitzmaurice v. Jones, 417 S.W.3d 627, 629 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Avila v. Larrea, 394 S.W.3d 646, 649 (Tex. App.—Dallas 2012, pet. denied).

334. *See, e.g.*, *Sierra Club v. Andrews County*, 418 S.W.3d 711, 714 (Tex. App.—El Paso 2013, pet. granted), *rev'd per curiam on other grounds*, 463 S.W.3d 867 (Tex. 2015); Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc., No. DC-12-00921 (14th Dist. Ct., Dallas County, Tex. Apr. 21, 2014), *rev'd on other grounds*, 402 S.W.3d 299 (Tex. App.—Dallas 2014, pet. denied); Delgado v. Alvarado, No. 2014-10592 (234th Dist. Ct., Harris County, Tex. May 12, 2014); KTRK Television, Inc. v. Robinson, No. 2011-54895 (234th Dist. Ct., Harris County, Tex. Oct. 8, 2014); Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., No. 2011-74615 (234th Dist. Ct., Harris County, Tex. Nov. 17, 2014), *rev'd on other grounds*, 416 S.W.3d 71 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *In re* Thuesen, No. 2012-49262 (151st Dist. Ct., Harris County, Tex. Mar. 4, 2013), *mandamus denied,* 14-13-00174-CV, 2013 WL 1461790, at *3 (Tex. App.—Houston [14th Dist.] Apr. 11, 2013, no pet.); Rehak Creative Servs.,

remanded for a determination of fees.[335] When there is no affidavit admitted into evidence in the trial court, it is certain that remand is required.[336] In *Schimmel*, despite having affidavit evidence, the appellate court remanded for a determination of attorney's fees because the trial court had not conducted a hearing in the first instance.[337] The Supreme Court of Texas has also held that when there is competing evidence on the reasonableness of fees, it is not appropriate for an appellate court to render fees, but rather the case should be remanded.[338]

Finally, appellate courts have viewed the ability to recover attorney's fees for pro bono representation differently. The Fifth Court of Appeals has held that, in a case in which a lawyer represented the defendant pro bono, attorney's fees were not incurred, and therefore the defendant, represented by a private law firm, could not recover attorney's fees that had previously been awarded by the trial court under § 27.009.[339] Courts in West Texas have taken a different approach permitting recovery of pro bono attorney's fees in TCPA cases.[340]

C. Non-Movant's Evidence

Once the party seeking attorney's fees has met its burden of establishing its right to a fee award and the reasonableness of the requested fees, the non-movant should present controverting evidence to either discredit or impeach the movant's requested fees.[341] Also, if the requested fees and costs

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Inc. v. Witt, No. 2012-25062, 2012 WL 8505285 (215th Dist. Ct., Harris County, Tex. June 22, 2012), *aff'd*, 404 S.W.3d 716 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

335. *See, e.g.*, Elite Auto Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 206 (Tex. App.—Austin 2017, pet. dism'd); Serafine v. Blunt, 466 S.W.3d 352, 364 (Tex. App.—Austin 2015, no pet.); *see also* Cox Media Group, LLC v. Joselevitz, 524 S.W.3d 850, 864–65 (Tex. App.—Houston [14th Dist.] Mar. 21, 2017, no pet.) (declining to render judgment on fees when the record does not indicate that the trial court has considered the issue, including "weigh[ing] the evidence").

336. *See Joselevitz*, 524 S.W.3d at 865.

337. *See* Schimmel v. McGregor, 438 S.W.3d 847, 862 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("When an appellate court determines that the trial court erroneously denied a defendant's motion to dismiss under the TCPA, the appropriate disposition of the case is to reverse the trial court's denial of the motion and remand for the trial court to conduct further proceedings pursuant to section 27.009(a) and to order dismissal of the suit.").

338. *See* Sullivan v. Abraham, 488 S.W.3d 294, 299–300 (Tex. 2016) (holding that remand was required when one party controverted the other's fee evidence, and the trial court did not consider or weigh the competing evidence).

339. Cruz v. Van Sickle, 452 S.W.3d 503, 525 (Tex. App.—Dallas 2014, pet. denied) ("Because the undisputed evidence before us establishes that their attorneys represented them pro bono, the [movants] did not incur any attorney's fees . . . [and] were not entitled an award for attorney's fees pursuant to the Act.").

340. *See* Final Judgment and Award of Sanctions and Attorney's Fees, No. 2016-519,749 (99th Dist. Ct., Lubbock County, Tex., Nov. 17, 2016); *see also* Trane US, Inc. v. Sublett, 501 S.W.3d 783, 787 (Tex. App.—Amarillo 2016, no pet.) (noting pro bono counsel representation).

341. *See* Sierra Club v. Andrews County, 418 S.W.3d 711, 721 (Tex. App.—El Paso 2013, pet. granted).

include those from a subsequent or prior issue that is not related to the motion to dismiss or that was not granted within the motion to dismiss, then the non-movant should object to those fees and request that the court segregate them or otherwise risk that any complaint as to those fees will be waived.[342] At least one court has concluded that "section 27.009(a)(1) permits a successful movant to recover attorney's fees incurred in the defense of a cause of action even if the fees were incurred before the movant was actually sued."[343]

D. Method of Determining Fees and Sanctions

On remand, the vast majority of fee and sanction determinations have been conducted by the court, as anticipated by the statute, either by submission of affidavits[344] or a hearing on attorney's fees.[345] One trial court, however, permitted assessment of attorney's fees to be made by a jury upon a demand for one,[346] in seeming contravention of the statute's purpose to

342. *See id.*; *see also Cruz*, 452 S.W.3d at 525–26 ("Because [the appellant] did not file a controverting affidavit, [the appellee]'s affidavit was sufficient evidence to support the trial court's finding that the attorney's fees charged were reasonable and necessary.").

343. Am. Heritage Capital, LP v. Gonzalez, 436 S.W.3d 865, 880 (Tex. App.—Dallas 2014, no pet.).

344. *See, e.g.*, Banik v. Tamez, No. 7:16-CV-00462 (S.D. Tex. Aug. 4, 2017) (awarding attorney's fees in excess of $86,000 on submission); Zimmerman v. Austin Investigative Reporting Project, No. D-1-GN-14-004290 (53rd Dist. Ct., Travis County, Tex. Jan. 13, 2015); Mapp v. Dall. Morning News, No. DC-14-02118 (191st Dist., Dallas County, Tex. July 3, 2014); Int'l Grp., Inc., v. Wendy Stegman & Univ. of Cal. at San Diego, No. DC-13-03933 (44th Dist. Ct., Dallas County Tex. Sept. 13, 2013); Head v. Chicory Media, LLC, No. 2013-0040 (71st Dist. Ct., Harrison County, Tex. Sept 25, 2013), *appeal dism'd*, 415 S.W.3d 559, 560–61 (Tex. App.—Texarkana 2013, no pet.); *see also, e.g.*, Landry's Inc. v. Animal Legal Defense Fund, No. 14-17-00207-CV (Tex. App.—Houston [14th Dist.] Mar. 20, 2017, no pet.); Bovee v. Hous. Press L.L.P., No. 10-16-00051-CV, 2016 WL 1274755, at *1–2 (Tex. App.—Waco, Mar. 31, 2016, no pet.); Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC, No. 05-14-00299-CV, 2015 WL 1519667, at *3–4 (Tex. App.—Dallas Apr. 1, 2015, pet. denied); Kinney v. BCG Attorney Search, Inc., No. 03-12-00579-CV, 2014 WL 1432012, at *9 (Tex. App.—Austin, Apr. 11, 2014, pet. denied); Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dall., Inc., No. 05-11-01337-CV, 2013 WL 3024692, at *3–4 (Tex. App.—Dallas June 14, 2013, no pet.); *Am. Heritage Capital, LP*, 436 S.W.3d at 878; KTRK Television, Inc. v. Robinson, 409 S.W.3d 682, 687 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

345. *See, e.g.*, Cantu v. Trevino, No. C-2063-15-A (92nd Dist. Ct., Hidalgo County, Tex. Aug. 14, 2017) (awarding attorney's fees of $120,842 awarded upon hearing); *see also* Deangelis v. Protective Parents Coalition, No. 02-16-00216-CV (Tex. App.—Fort Worth, June 27, 2016); Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc., 402 S.W.3d 299, 305–06 (Tex. App.—Dallas 2013, pet. denied); Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Rehak Creative Servs., Inc. v. Witt, 404 S.W.3d 716, 723 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (noting that trial court awarded attorney's fees to defendant following hearing on motion to dismiss); Ramsey v. Lynch, No. 10-12-00198-CV, 2013 WL 1846886, at *3 (Tex. App.—Waco May 2, 2013, no pet.) (affirming trial court's award of attorney's fees, which was based upon evidence presented at hearing on motion to dismiss); Avila v. Larrea, 394 S.W.3d 646, 656 (Tex. App.—Dallas 2012, pet. denied); Cruz v. Van Sickle, No. DC-12-09275, (160th Dist. Ct., Dallas County, Tex. Mar. 22, 2013).

346. *See* John Moore Servs., Inc. v. Better Bus. Bureau of Metro. Hous., Inc., No. 2012-35162, 2012 WL 8968956, at *1 (269th Dist. Ct., Harris County, Tex. Oct. 23, 2012). The jury decided that the Better Business Bureau should be awarded $250,001.44 plus post-judgment interest and $6,000 in sanctions. *Id.*

provide a cost-effective means of dismissing meritless claims.

E. Awards of Attorney's Fees in Anti-SLAPP Cases

Courts throughout Texas have awarded attorney's fees as appropriate and reasonable in TCPA cases, and Texas appellate courts consistently have upheld reasonable fee awards in TCPA matters.[347] The reported fee awards have ranged from zero to $350,000.[348] In the 127th District Court in Harris County, the court awarded $350,000 in attorney's fees to the defendant-movant.[349] Other notable awards have included $250,001.44[350] and $251,689.29 in Harris County.[351] In cases with multiple defendants, each defendant is entitled to recovery and defense costs can be high. For instance, in Dallas County, a court awarded a total of $356,674.17 to several defendants who were sued by the family of Ahmed Mohamed, whose arrest for bringing a home-made clock that looked like a bomb to school made international news.[352] In *Paulsen v. Yarrell*, however, the First Court of Appeals held that there was no right to an interlocutory appeal of a denial of

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On appeal, the First Court of Appeals held that the evidence was legally sufficient to support the jury's verdict and the court's award of attorney's fees. *See* John Moore Servs., Inc. v. Better Bus. Bureau of Metro. Hous. Inc., No. 01-14-00906-CV, 2016 WL 3162206, at *7 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

347. *See, e.g.*, *Am. Heritage Capital, LP*, 436 S.W.3d at 880–81; Cruz v. Van Sickle, 452 S.W.3d 503, 525–26 (Tex. App.—Dallas 2014, pet. denied); Rehak Creative Servs., Inc. v. Witt, 404 S.W.3d 716, 734 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Ramsey v. Lynch, No. 10-12-00198-CV, 2013 WL 1846886, at *3 (Tex. App.—Waco May 2, 2013, no pet.); *see also* Prather & Bland, *supra* note 30, at 771. *But see* McGibney v. Rauhauser, No. 02-16-00244-CV (Tex. App.—Ft. Worth Apr. 19, 2018, no pet. h.) (reversing trial court award of $300,383.84 in attorney's fees as excessive where attorney billing entries did not provide adequate information to justify award).

348. *See, e.g.*, Schlumberger Ltd. v. Rutherford, No. 2014-13621, 2014 WL 8105895, at *1 (127th Dist. Ct., Harris County., Tex. Aug. 27, 2014) (awarding the defendants $350,000 in attorney's fees), *aff'd in part, appeal dismissed in part*, Schlumberger Ltd. v. Rutherford, 472 S.W.3d 881, 883–84 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

349. *See id.*

350. *See* John Moore Servs., Inc. v. Better Bus. Bureau of Metro. Hous., Inc., No. 2013-35162, 2014 WL 10020319, at *4 (269th Dist. Ct., Harris County. Tex. Aug. 8, 2014), *aff'd*, No. 01-14-00906-CV, 2016 WL 3162206 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.).

351. Robinson v. KTRK Television, Inc., No. 01-14-00880-CV, 2016 WL 1267990, at n.6 (Tex. App.—Houston [1st Dist.] Mar. 31, 2016, pet denied).

352. *See* Order Granting Defendant Ben Shapiro's Motion for an Award of Attorney's Fees, Costs, and Expenses at 1, Mohamad v. The Blaze, Inc., No. DC-16-12579 (162nd Dist. Ct., Dallas County, Tex. Feb. 22, 2017) (granting $68,198.00 in attorney's fees and $801.29 in costs); Order Granting Jim Hanson and Center for Security Policy's Attorney's Fees, Costs, Expenses, and Sanctions at 2, Mohamed v. The Blaze, Inc., No. DC-16-12579 (162nd Dist. Ct., Dallas County, Tex. Feb. 22, 2017) (granting $67,238.50 in attorney's fees and $223.68 in costs); Order Granting The Blaze, Inc. and Glenn Beck's Attorney's Fees, Costs, Expenses, and Sanctions at 2, Mohamed v. The Blaze, Inc., No. DC-16-12579 (162nd Dist. Ct. Dallas County, Tex. Feb. 22, 2017) (granting $133,115.00 in attorney's fees and $4,653.78 in costs); Order Granting KDFW Defendants Attorney's Fees, Costs and Expenses and Awarding Sanctions at 2, Mohamed v. The Blaze, Inc. No. DC-16-12579 (162nd Dist. Ct., Dallas County, Tex. Dec. 27, 2016) (granting $80,870.00 in attorney's fees and $1,573.92 in costs).

attorney's fees under the TCPA separate from a ruling on the merits.[353]

F. Discretionary Fee Award When Texas Citizens Participation Act Motion Was Frivolous or Brought Solely for the Purpose of Delay

A trial court may also award attorney's fees to a prevailing non-movant under § 27.009(b), which provides that: "If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party."[354] However, in the absence of such a finding, an award of attorney's fees is not authorized by statute.[355] In *Rathbun v. Miscavige*, the 433rd District Court of Comal County issued a twenty-five page opinion, specifically finding that the movants' TCPA motions were not frivolous but still awarding costs and attorney's fees to the responding party because the judge found that "the method in which the motions were litigated, from the discovery to the objections, etc., resulted in hours upon hours of courtroom time that could have been better spent elsewhere."[356] On appeal, the Third Court of Appeals reversed the trial court's award of attorney's fees, noting that the TCPA does not authorize an award of attorney's fees to a non-movant in the absence of a determination that the motion was frivolous or solely intended to delay.[357] Logically, when the denial of a TCPA motion is overturned on appeal so too is any award of fees under § 27.009(b).[358] For instance, in the case of *Fawcett v. Grosu*, the trial court's denial of a TCPA motion to dismiss was reversed in part on appeal, and as a result, the award of fees against the movant was reversed.[359] In at least one instance, attorney's fees were awarded to the non-movant after a finding that the TCPA motion was frivolous, and both the denial of the motion and the fee award were upheld on appeal.[360]

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353. Paulsen v. Yarrell, 455 S.W.3d 192, 194 (Tex. App.—Houston [1st Dist.] Dec. 16, 2014, no pet.).

354. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(b) (West 2017); *see also* Prather & Bland, *supra* note 30, at 771.

355. TEX. CIV. PRAC. & REM. § 27.009(b); Prather & Bland, *supra* note 30, at 771.

356. Anti-SLAPP Motions of All Defendants Findings of Fact and Conclusions of Law & Ruling Denying All Anti-SLAPP Motions to Dismiss at 24, Rathbun v. Miscavige, No. C2013-1082B (433d Dist. Ct., Comal County, Tex. Mar. 14, 2014), 2014 WL 6389494, at *12 (denying the motions to dismiss under Chapter 27, and declining to "conclude that Defendants' motions, in and of themselves, are frivolous," and awarding court costs and attorney's fees to the non-movant), *rev'd sub nom.* Sloat v. Rathbun, 513 S.W.3d 500, 510 (Tex. App.—Austin 2015, pet. dism'd); *see also* Prather & Bland, *supra* note 30, at 771–72.

357. *See Sloat*, 513 S.W.3d at 510.

358. *See, e.g.*, *id.*; MacFarland v. Le-Vel Brands, LLC, No. 05-16-00672-CV, 2017 WL 1089684, at *19 (Tex. App.—Dallas Mar. 23, 2017, no pet.).

359. *See* Fawcett v. Grosu, 498 S.W.3d 650, 665–66 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

360. *See* Miller v. Talley Dunn Gallery, LLC, No. 05-15-00444-CV, 2016 WL 836775, at *16 (Tex. App.—Dallas Mar. 3, 2016, no pet.).

G. Attorney's Fees if the Plaintiff Nonsuits Prior to a Ruling on the TCPA Motion

As discussed in Part VIII, the filing of a nonsuit has no impact on pending TCPA motions to dismiss or requests for fees and sanctions contained in those motions.[361] Trial courts throughout Texas have awarded attorney's fees to movants in cases in which the non-movants have nonsuited the case prior to the anti-SLAPP hearing.[362] Similarly, appellate courts have enforced awards or mandated them when trial courts have not done so.[363] Courts have consistently concluded any nonsuit dismissal does not have an effect on pending motions for sanctions or fees at the time of dismissal.[364] Most recently, in *Ford v. Bland*, the Fourteenth Court of Appeals held that a motion to dismiss under the TCPA survives the partial nonsuit of the specific claims on which the motion was based.[365]

This approach is consistent with the statutory protections for First Amendment rights provided under the TCPA.[366] A TCPA motion that could be defeated by a later nonsuit would cause a SLAPP target to incur unnecessary fees defending against a meritless claim, and could deter speech as intended by the retaliatory claim.[367] Although a nonsuit may ameliorate the costs associated with the claim, nonsuits leave the potential threat of an action being re-filed.

H. Mandatory Sanctions to Deter Future Similar Conduct

An award of sanctions is provided for under the TCPA.[368] Sanctions may be appropriate when the plaintiff has shown an intention to harass via

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361. *See supra* Part VIII.

362. *See, e.g.*, Zimmerman v. Austin Investigative Reporting Project, No. D-1-GN-14-004290 (53d Dist. Ct., Travis County, Tex. Jan. 7, 2015); Delgado v. Alvarado, No. 2014-10592 (234th Dist. Ct., Harris County, Tex. May 12, 2014); Algae Int'l Grp., Inc. v. Stegman, No. DC-13-03933 (44th Dist. Ct., Dallas County, Tex. Sept. 13, 2013); Hest Techs., Inc. v. Bethel, No. 067-256909-11 (67th Dist. Ct., Tarrant County, Tex. Apr. 17, 2012).

363. *See, e.g.*, Rauhauser v. McGibney, 508 S.W.3d 377, 389–90 (Tex. App.—Fort Worth 2014, no pet.), *disapproved on other grounds by* Hersh v. Tatum, 526 S.W.3d 462 (Tex. 2017) (remanding for fee determination after nonsuit); *see also* Breitling Oil & Gas Corp. v. Petrol. Newspapers of Alaska, LLC, No. DC1308494 (298th Dist. Ct., Dallas County, Tex. Feb. 5, 2014), *aff'd*, No. 05-14-00299-CV, 2015 WL 1519667 (Tex. App.—Dallas 2015, pet. denied) (mem. op.) (awarding, after nonsuit, $80,000 in fees, $2,444.58 in expenses, $25,000 if appealed to the court of appeals, $4,000 if a petition for review was filed, and $15,000 if the Supreme Court requested briefing).

364. *See Breitling*, 2015 WL 1519667, at *5.

365. *See* Ford v. Bland, No. 14-15-00828-CV, 2016 WL 7323309, at *2 (Tex. App.—Houston [14th Dist.] Dec. 15, 2016, no pet.) ("Because appellants met their initial burden under the TCPA, their motion to dismiss survived appellees' amendment of their counterclaims.").

366. *See supra* text accompanying notes 4–9 (discussing the legislative intent behind anti-SLAPP legislation).

367. *See generally* Canan, *supra* note 8.

368. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(2) (West 2017).

the court system.[369] For instance, a plaintiff might file multiple lawsuits in multiple jurisdictions against the same defendant to drain its resources or exhaust its manpower.[370] To discourage plaintiffs from filing retaliatory legal actions, sanctions sufficient to deter a plaintiff from filing similar claims are appropriate under § 27.009(a)(2) and may be levied against the party personally.[371] Courts have "broad discretion to determine what amount is sufficient to deter the party from bringing similar actions in the future" under the TCPA.[372] However, the Fort Worth Court of Appeals rejected a trial court's imposition of nonmonetary sanctions, interpreting the statutory language of § 27.009 to authorize the imposition of monetary sanctions only.[373] In *Kinney v. BCG Attorney Search, Inc.*, an award of $75,000 in sanctions was upheld because the matters had previously been litigated in a prior action that "resulted in an award of attorney's fees against [the plaintiff] in the amount of $45,000."[374] The appellate court noted that, "Given the history of the litigation, the trial court could have reasonably determined that a lesser sanction would not have served the purpose of deterrence."[375] Courts considering the appropriate amount of sanctions under the statute have awarded between $100 and $1,000,000.[376] In determining the appropriate

369. *See id.*; *see also, e.g.*, Kinney v. BCG Attorney Search, Inc., No. 03-12-00579-CV, 2014 WL 1432012, at *11 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.) ("Section 27.009(a)(2) requires the trial court to award sanctions if it dismisses a claim pursuant to section 27.003 and gives the trial court broad discretion to determine what amount is sufficient to deter the party from bringing similar actions in the future.").

370. *See Kinney*, 2014 WL 1432012, at *12; *see also* KTRK Television, Inc. v. Robinson, 409 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (involving plaintiffs who originally filed two actions in federal court against defendants before filing their state court action).

371. *See* TEX. CIV. PRAC. & REM. § 27.009(a)(2); *see also, e.g.*, *Kinney*, 2014 WL 1432012, at *12. *But see* Banik v. Tamez, No. 7:16-CV-00462 (S.D. Tex. July 13, 2017) (granting a TCPA motion and awarding $86,483.50 in attorney's fees and $4,782.25 in expenses, assessed jointly against the Plaintiff and his counsel, and $15,000 in sanctions solely against the Plaintiff).

372. *Kinney*, 2014 WL 1432012, at *12 (upholding a sanctions award of $75,000 based in part on "the broad discretion afforded the trial court by section 27.009").

373. *See* McGibney v. Rauhauser, No. 02-16-00244-CV (Tex. App.—Ft. Worth Apr. 19, 2018, no pet. h.).

374. *Id.*

375. *Id.*

376. *See, e.g.*, Order Awarding Attorney's Fees and Sanctions, McGibney v. Retzlaff, No. 67-270669-14 (67th Jud. Dist., Tarrant County, Tex. Dec. 30, 2015), *rev'd*, McGibney v. Rauhauser, No. 02-16-00244-CV (Tex. App.—Ft. Worth Apr. 19, 2018) (awarding $1 million in sanctions); *see also* Am. Heritage Capital, LP v. Gonzalez, 436 S.W.3d 865, 881 (Tex. App.—Dallas 2014, no pet.) (upholding an award of $15,000 in sanctions); *Robinson*, 409 S.W.3d at 692 (awarding $100 in sanctions on remand); Schlumberger Ltd. v. Rutherford, No. 2014-13621, 2014 WL 8105895 (127th Dist. Ct., Harris County, Tex. Aug. 27, 2014) (awarding $250,000 in sanctions), *aff'd in part, appeal dismissed in part*, Schlumberger Ltd. v. Rutherford, 472 S.W.3d 881, 883 (Tex. App.—Houston [1st Dist.] 2015, no pet.); Algae Int'l Grp., Inc. v. Stegman, No. DC-13-03933 (44th Dist. Ct., Dallas County, Tex. Sept. 13, 2013) (awarding $29,395.25 in sanctions to the defendants after a nonsuit was filed prior to a hearing on the defendants' motion to dismiss); Head v. Chicory Media, LLC, No. 2013-0040 (714st Dist. Ct., Harrison County, Tex. Sept. 25, 2013) (awarding a total of $55,000 in sanctions), *appeal dismissed*, 415 S.W.3d 559 (Tex. App.—Texarkana 2013, no pet.); *In re* Thuesen, No. 2012-49262 (151st Dist. Ct., Harris County, Tex. Mar. 4, 2013) (awarding $24,000 in sanctions), *mandamus denied*, No. 14-13-00174-CV,

amount of sanctions, courts look at various considerations, such as the tactics employed by the plaintiff, any un-recoupable expenses incurred (such as expenses from prior proceedings), and the need for a deterrent effect.[377] The highest sanction award to date—one million dollars—came in a defamation suit involving allegations of "revenge porn" deemed to be groundless.[378] In entering the award, the Tarrant County District Court held that because the plaintiff had filed substantially similar lawsuits in Texas, California state and California federal court around the same time, a "significant deterrent sanction" was appropriate under the TCPA.[379] That amount was subsequently reduced to $150,000, and upon review, the Second Court of Appeals ultimately reversed the sanctions award, holding that the amount was impermissibly punitive and not, as the statute requires, imposed as a deterrent of future conduct.[380] Although some trial courts ultimately have denied requests for sanctions,[381] all appellate courts to consider the issue have determined that the consideration of sanctions is mandatory.[382]

X. CONSTITUTIONAL RIGHTS PROTECTED BY THE STATUTE

A. Right to Petition

The TCPA protects a party from meritless claims brought against it for exercising its right to petition.[383] The right to petition is defined as any of the following:

> (A) a communication in or pertaining to:
>
> (i) a judicial proceeding;

2013 WL 1461790, at *3 (Tex. App.—Houston [14th Dist.] 2013, no pet.); Rustic Cedar Cabins Inc. v. Cortell, No. 28500 (21st Dist. Ct., Bastrop County, Tex. Sept. 5, 2012) (awarding $500 in sanctions); Simpton v. High Plains Broad., Inc., No. 2011-13290 (285th Dist. Ct., Bexar County, Tex. July 30, 2012) (awarding $85,000 in sanctions).

377. *See Schlumberger Ltd.*, 2014 WL 8105895 (awarding $250,000 in sanctions after only several months on file and no appeals).

378. *See generally* Order Awarding Attorney's Fees and Sanctions, McGibney v. Retzlaff, No. 67-270669-14 (67th Jud. Dist., Tarrant County, Tex. Dec. 30, 2015).

379. *Id.* at 10.

380. McGibney v. Rauhauser, No. 02-16-00244-CV (Tex. App.—Ft. Worth Apr. 19, 2018, no pet. h.).

381. *See* Cruz v. Van Sickle, 452 S.W.3d 503, 518–19 (Tex. App.—Dallas 2014, pet. denied) (noting that "[t]he trial court denied appellees' request for sanctions pursuant to section 27.009(2)").

382. *See* Serafine v. Blunt, No. 03-16-00131-CV, 2017 WL 2224528, at *7 (Tex. App.—Austin May 19, 2017, no pet. h.); *Am. Heritage Capital, LP*, 436 S.W.3d at 882 ("Section 27.009 prescribes that a court that dismisses a legal action under Chapter 27 shall award the movant '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.'" (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(2) (West 2017)).

383. *See* TEX. CIV. PRAC. & REM. § 27.003(a).

> (ii) an official proceeding, other than a judicial proceeding, to administer the law;
> (iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;
> (iv) a legislative proceeding, including a proceeding of a legislative committee;
> (v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;
> . . .
> (viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or
> (ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;
>
> (B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;
> (C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;
> (D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and
> (E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.[384]

Consistent with the TCPA's directive to construe the statute liberally, courts have held that a variety of activities fall within the statutory definition of the right to petition. For example, in the *In re Lipsky* case, the Texas Supreme Court confirmed that the movants' petitioning of the EPA to act on their claims of water contamination constituted an exercise of their right to petition as defined by Chapter 27.[385] Other activities that have been found to be within the ambit of the right to petition include: claims involving matters of public concern that pertain to a governmental proceeding;[386]

384. *See id.* § 27.001(4).

385. *See In re* Lipsky, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding).

386. *See* KBMT Operating Co. v. Toledo, 492 S.W.3d 710, 711 (Tex. 2016); *see also* KTRK Television, Inc. v. Robinson, 409 S.W.3d 682, 687 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (discussing the application of the TCPA in a defamation case based on a broadcaster's statements

communications surrounding the initiation of a lawsuit;[387] statements to law enforcement authorities and university officials regarding an alleged rape;[388] pre-suit demand letters;[389] Rule 202 pre-suit depositions;[390] lis pendens filings;[391] and involvement in governmental negotiations on behalf of homeowners.[392]

B. Right of Association

The TCPA protects a party from meritless claims brought against it for exercising its right of association.[393] "The 'exercise of the right of association' is defined in the TCPA as 'a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.'"[394]

The first appellate case to address the right of association was *Combined Law Enforcement Ass'ns of Texas v. Sheffield*.[395] In *Sheffield*, a former employee of a police labor union sued the union and its executive director, alleging defamation based on five different alleged communications discussing the plaintiff, Sheffield, including: an email from the executive director to the union's board and staff; two communications between the union and other police associations; statements made by the union's corporate counsel regarding a job the plaintiff received; and statements made by the same corporate counsel to the district attorney about Sheffield.[396] The union filed a motion to dismiss under the TCPA, alleging that the claims related to its exercise of its right of association, but the trial court denied the

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regarding a school's financial mismanagement).

387. *See* James v. Calkins, 446 S.W.3d 135, 145 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); Rio Grande H2O Guardian v. Robert Muller Family P'ship. Ltd., No. 04-13-00441-CV, 2014 WL 309776, at *3–4 (Tex. App.—San Antonio Jan. 29, 2014, no pet.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

388. *See* Cuba v. Pylant, 814 F.3d 701, 711 (5th Cir. 2016) (noting that rape allegations are exercises of the right to petition even though there was no live proceeding when statements were made).

389. *See* Long Canyon Phase II & III Homeowners Ass'n, Inc. v. Cashion, 517 S.W.3d 212, 218 (Tex. App.—Austin 2017, no pet.). *But see* Levatino v. Apple Tree Cafe Touring, Inc., 486 S.W.3d 724, 728 (Tex. App.—Dallas 2016, pet. denied) (concluding that the ordinary meaning of "a judicial proceeding" is an actual, pending judicial proceeding such that pre-suit communications did not implicate the TCPA).

390. *See* Watson v. Hardman, 497 S.W.3d 601, 604–05 (Tex. App.—Dallas 2016, no pet.). *But see* Glassdoor, Inc. v. Andra Group, LP, No. 05-16-00189-CV, 2017 WL 1149668, at *10 (Tex. App.—Dallas Mar. 24, 2017, pet. filed), *reh'g denied* (Apr. 28, 2017) (declining to decide "whether a Rule 202 petition is a 'legal action' for Chapter 27 purposes").

391. *See* Serafine v. Blunt, 466 S.W.3d 352, 359–60 (Tex. App.—Austin 2015, no pet.).

392. *See* Schimmel v. McGregor, 438 S.W.3d 847, 862 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

393. *See generally* TEX. CIV. PRAC. & REM. CODE § 27.003(a) (West 2017).

394. Cheniere Energy, Inc. v. Lotfi, 449 S.W.3d 210, 212 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (quoting TEX. CIV. PRAC. & REM. § 27.001(2)).

395. *See generally* Combined Law Enf't Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (mem. op.).

396. *See id.* at *3.

motion.[397] The Third Court of Appeals held that the first three statements related to the right of association.[398] The court held, however, that the movants failed to demonstrate that the two statements by corporate counsel were made "to an individual with whom he had joined together to collectively express, promote, pursue, or defend common interests."[399]

In *Herrera v. Stahl*, the plaintiffs sued a condominium association, its president, and its secretary, claiming fraud and defamation.[400] The defendants filed a TCPA motion on the grounds that the lawsuit was filed against them for exercising their right of association in expressing, promoting, or defending the common interest of the association's membership.[401] Among other statements, the evidence submitted by the plaintiffs alleged that one of the defendants had called one of the plaintiffs a "crazy, stupid bitch" and told her, "[d]on't get your panties in a wad."[402] The Fourth Court of Appeals held that, while there was no dispute that the "the Association is a group of 'individuals who join together to collectively express, promote, pursue, or defend [the] common interests [of the Chesapeake Condominium owners],'" the movants did not explain what the common interests were that "he was expressing, promoting, or defending when he made the statements alleged by the plaintiffs, or how any of the alleged statements related to a specific 'common interest.'"[403]

In *Cheniere Energy, Inc. v. Lotfi*, Azin Lotfi, who was general counsel for Cheniere Energy, sued her former employer for wrongful termination and two of her co-workers for tortious interference with her employment.[404] The co-workers filed a motion to dismiss under Chapter 27, asserting that the claims against them were related to their exercise of their right of association.[405] The movants failed to submit affidavits in support of their TCPA motion, leaving the court with only the pleadings to rely on in determining whether the defendants were exercising their right of association.[406] The court held that, although the communication at issue may

397. *See id.* The appellate court noted that, "[b]ecause they did not raise the free speech or petition rights as grounds for dismissal under the TCPA, the trial court did not reject them in denying the motions to dismiss, and arguments relating to those contentions are not properly within the limited scope of this interlocutory appeal." *Id.* at *4.

398. *See id.* at *5.

399. *Id.* Similarly, a 2016 decision from the Dallas Court of Appeals held that a lawyer's adversarial communication to a third party on behalf of his client did not meet the statutory definition of exercising the right of association. *See* Levatino v. Apple Tree Cafe Touring, Inc., 486 S.W.3d 724, 728 (Tex. App.—Dallas, pet. denied).

400. *See generally* Herrera v. Stahl, 441 S.W.3d 739, 740 (Tex. App.—San Antonio 2014, no pet.).

401. *See id.* at 741–42.

402. *Id.*

403. *Id.* at 743 (alteration in original) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2) (West 2017)).

404. *See* Cheniere Energy, Inc. v. Lotfi, 449 S.W.3d 210, 211 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

405. *See id.* at 212.

406. *See id.* at 212–13.

have been interpreted as relating to their right of association, it could have just as easily been a result of personal interests or financial interests in wanting to see the plaintiff fired.[407] For this reason, the court upheld the denial of the motion to dismiss.[408]

Finally, in *ExxonMobil Pipeline Co. v. Coleman*, the Dallas Court of Appeals read a "public-participation requirement" into the definition of the exercise of the right to association.[409] In *Coleman*, a former petroleum terminal technician sued his former employer and supervisors for defamation, business disparagement, and additional related causes of action stemming from purported communications in which the defendants alleged that the plaintiff had failed to perform a required job duty known as "gauging the tanks."[410] The defendants moved to dismiss under the TCPA, arguing that the communications at issue were made in the exercise of the right to free speech and right to association.[411] The Dallas Court of Appeals affirmed the lower court's denial of the TCPA motion, holding that appellants did not meet their burden of establishing that the communications at issue were made in the exercise of their right to association because the communications did not "have any element of citizen participation."[412] While noting the Texas Supreme Court's instruction against "judicially amending" the Act, the court of appeals inferred a public-participation requirement, holding that the right of association required an "element of citizen participation."[413] The Texas Supreme Court reversed the court of appeals' decision, holding that the communications at issue implicated the defendants' right to free speech; accordingly, it did not reach the issue of the court of appeals' public-participation requirement or whether the communications were made in the exercise of a right of association under the TCPA.[414]

C. Right to Free Speech

Finally, the TCPA protects a party from meritless claims brought against it for exercising its right of free speech.[415] The statute specifies that it must "be construed liberally to effectuate its purpose and intent fully."[416] The exercise of the right of free speech is defined under the statute as: "a

407. *Id.* at 214.

408. *See id.* ("[T]he limited assertions in Lotfi's pleading fail to meet the movants' burden of establishing that they had a communication, they acted in furtherance of a common interest, and that Lotfi's claim against them is related to their exercise of the right of association.").

409. *See* ExxonMobil Pipeline Co. v. Coleman, 464 S.W.3d 841, 848–49 (Tex. App.—Dallas 2015), *rev'd on other grounds*, 512 S.W.3d 895 (2017) (per curiam).

410. *Id.* at 842.

411. *See id.* at 843.

412. *Id.* at 849–50.

413. *Id.* at 848–49.

414. *See id.* at 902.

415. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West 2017).

416. *Id.* § 27.011(b).

communication made in connection with a matter of public concern."[417] And "[m]atter of public concern" is defined to include 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.[418]

The list of subjects that qualify as an exercise of one's right to free speech were taken from case law preceding the passage of the TCPA but do not constitute an exhaustive list.[419] Rather, the delineated topics are listed as examples of what might be considered a matter of public concern. The United States Supreme Court has held that a public concern must be viewed broadly, lest "courts themselves . . . become inadvertent censors."[420] Thus, speech deals with a matter of public concern when, for example, it is "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public . . . ."[421] "The arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'"[422] In passing the TCPA, the legislature did not abrogate existing constitutional, statutory, case, or common-law rulings concerning what constitutes a matter of public concern.[423] When determining whether a lawsuit is related to the exercise of free speech about a matter of public concern, courts "must look to the context of the communication in which the allegedly defamatory statement is made."[424] Consistent with purposes expressed in the statute, the Supreme Court of Texas has applied the free-speech prong broadly. For example, the court has held that the TCPA applied to communications related to employment disputes that also related to a matter of public concern, including

417. *Id.* § 27.001(3).
418. *Id.* § 27.001(7).
419. *See* Means v. ABCABCO, Inc., 315 S.W.3d 209 (Tex. App.—Austin 2010, no pet.)
420. Snyder v. Phelps, 562 U.S. 443, 452 (2011).
421. *Id.* at 453 (quoting City of San Diego Cal. v. Roe, 543 U.S. 77, 83–84 (2004) (per curiam)) (citations omitted).
422. *Id.* (quoting Rankin v. McPherson, 483 U.S. 378, 387 (1987)) (internal quotation marks omitted); *see also* Anonsen v. Donahue, 857 S.W.2d 700, 703–04 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (stating that matters of public concern "extend[] beyond subjects of political or public affairs to all matters of the kind customarily regarded as 'news' and all matters giving information to the public for purposes of education, amusement or enlightenment").
423. *See* TEX. CIV. PRAC. & REM. § 27.011(a).
424. Campbell v. Clark, 471 S.W.3d 615, 624 (Tex. App.—Dallas 2015, no pet.).

health, safety, the environment, economic risks,[425] and community well-being.[426]

1. Public Concern and Falsity

Some litigants have argued that false speech cannot be of public concern by virtue of its falsity.[427] Under the TCPA, however, courts are not asked to determine the truth or falsity of the communication at the threshold determination of whether the communication is made in connection with a matter of public concern.[428] Rather, that assessment is part of the evaluation of the non-movant's prima facie case.[429]

Texas courts have found the following communications constituted the exercise of the right to free speech because they were made in connection with a matter of public concern though the statements were alleged to be false: blog posts and emails accusing a neighborhood developer and HOA of engaging in corrupt behavior;[430] political advertisements and critiques of office holders;[431] statements made in connection with a government proposed buyout of property owned by victims of a hurricane;[432] investigations into Medicaid fraud;[433] statements about legal services offered;[434] published

425. *See* ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895, 901 (Tex. 2017) (per curiam) (stating that private communications between employees fall within the scope of the TCPA); *see also* Lippincott v. Whisenhunt, 462 S.W.3d 507, 510 (Tex. 2015) (holding that under the TCPA the scope of "communications" include both public and private communications).

426. *See Lippincott*, 462 S.W.3d at 510.

427. *See* Rehak Creative Servs., Inc. v. Witt, 404 S.W.3d 716, 733 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

428. *See* TEX. CIV. PRAC. & REM. § 27.005; Kinney v. BCG Attorney Search, Inc., No. 03-12-00579-CV, 2014 WL 1432012, at *5 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.); *see also In re* Lipsky, 411 S.W.3d 530, 543 (Tex. App.—Fort Worth 2013), no pet., *mandamus denied*, 460 S.W.3d 579 (Tex. 2015) ("The statutory definitions for the exercise of the right of free speech . . . do not include language requiring us to determine the truth or falsity of communications when deciding whether a movant for dismissal has met its preliminary preponderance of the evidence burden under section 27.005(b).").

429. *See* TEX. CIV. PRAC. & REM. § 27.005(b).

430. Adams v. Starside Custom Builders, LLC, No. 16-0786, 2018 WL 1883075 (Tex. Apr. 20, 2018).

431. *See, e.g.*, Hotchkin v. Bucy, No. 02-13-00173-CV, 2014 WL 7204496, at *3 (Tex. App.—Fort Worth Dec. 18, 2014, no pet.) (mem. op.) (holding that pushcards and press releases regarding a political campaign were a public concern); *Rehak Creative Servs.*, 404 S.W.3d at 729–30 (holding that statements made on a political campaign website during a political campaign and suit for conversion and misappropriation were matters of public concern); Ramsey v. Lynch, No. 10-12-00198-CV, 2013 WL 1846886, at *4 (Tex. App.—Waco May 2, 2013, no pet.) (mem. op.) (holding that a complaint concerning a mayor's performance as a public official was a matter of public concern).

432. *See* Schimmel v. McGregor, 438 S.W.3d 847, 850 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (holding that statements of a homeowners' association's attorney, forming the basis of the homeowners' action for tortious interference with sale the of their respective beachfront properties to the city, were matters of public concern).

433. *See* Shipp v. Malouf, 439 S.W.3d 432, 439 (Tex. App.—Dallas 2014, pet. denied), *rev'd on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015) (holding that an investigative reporter's allegedly false statements made in a news broadcast were matters of public concern regarding reporting of government efforts to curb Medicaid fraud and recover taxpayer dollars).

434. *See* Avila v. Larrea, 394 S.W.3d 646, 655 (Tex. App.—Dallas 2012, pet. denied) (holding that a

opinions concerning the quality of a business;[435] the filing of a financing statement which encumbered mineral rights;[436] statements about the award of a public contract;[437] statements about environmental concerns;[438] statements about an employee's failure to follow safety protocols that impacted the environment;[439] an email about a nurse anesthetist's provision of medical services;[440] investigations into financial mismanagement of a charter school;[441] and reporting on noncompliance with licensing requirements of an assisted living facility.[442]

2. Public Setting versus Private Setting

Application of the TCPA is not limited to participation in a governmental proceeding. As the Texas Supreme Court has held, the TCPA applies to both public and private communications about matters of public concern.[443] In *Lippincott v. Whisenhunt*, Whisenhunt, a nurse anesthetist, sued Lippincott and Parks, administrators at a surgery center that had contracted with Whisenhunt, claiming tortious interference, conspiracy, and defamation after Lippincott sent emails questioning the health care services

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communication about the legal services offered by an attorney was a matter of public concern because it concerned a service in the marketplace).

435. *See* Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc., 402 S.W.3d 299, 308 (Tex. App.—Dallas 2013, pet. denied) (holding that a Better Business Bureau's "F" rating of a residential pool manufacturer "was a communication relating to an issue of public concern"); Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 354 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (holding that an expression of opinions by the Better Business Bureau as to the quality of the business's goods and services were a matter of public concern).

436. *See* Quintanilla v. West, No. 04-16-00533-CV, 2017 WL 1684832, at *7 (Tex. App.—San Antonio Apr. 26, 2017, pet. filed).

437. *See* Farias v. Garza, 426 S.W.3d 808, 819 (Tex. App.—San Antonio 2014, pet. denied), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015) (holding that a defamation action regarding an "award of [a] public contract[] is almost always a public matter and an issue of public concern").

438. *See In re* Lipsky, 411 S.W.3d 530, 542–43 (Tex. App.—Fort Worth 2013), *mandamus denied*, 460 S.W.3d 579, 594–95 (Tex. 2015) (holding that property owners' statements, forming the basis of a natural gas drilling company's action for civil conspiracy, aiding and abetting, defamation, and business disparagement, were matters of public concern because the statements regarded the environmental effects of fracking in general, the specific cause of the contamination of the property owners' wells, the safety of the company's operation methods, the company's alleged political power, and the alleged corruption of government agencies).

439. *See* ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895, 901 (Tex. 2017).

440. *See* Lippincott v. Whisenhunt, 462 S.W.3d 507, 510 (Tex. 2015) (per curiam).

441. *See* KTRK Television, Inc. v. Robinson, 409 S.W.3d 682, 692 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (holding that the broadcast of a news program alleging financial mismanagement at a charter school was a matter of public concern).

442. *See* Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71, 81 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (holding that newspaper articles reporting on an assisted living facility regarding the facility's obligations to fulfill licensing requirements and standards set forth in assisted living facility regulations reflected specific public concern of ensuring that assisted living facility residents retained the right to choose their own health care professionals).

443. *See Lippincott*, 462 S.W.3d at 509–10.

that Whisenhunt had provided.[444] Lippincott and Parks filed a TCPA motion to dismiss, which the trial court granted as to the tortious interference and conspiracy claims but denied as to the defamation claim.[445] The Sixth Court of Appeals in Texarkana reversed the dismissal of the tortious interference and conspiracy claims on the grounds that the TCPA did not apply to private communications made outside a public setting.[446] In reversing the appellate court, the Texas Supreme Court looked at the statutory definitions and found no basis for the limited view of the TCPA's applicability. The TCPA defines the "exercise of free speech rights" as "a communication made in connection with a matter of public concern."[447] The Texas Supreme Court concluded that the statute defines "communication," as follows:

> to include any form or medium, including oral, visual, written, audiovisual, or electronic media—regardless of whether the communication takes a public or private form. The plain language of the statute imposes no requirement that the form of the communication be public. Had the [l]egislature intended to limit the Act to publicly communicated speech, it could have easily added language to that effect.[448]

Further, because the email communications discussed the provision of medical services by a health care professional, there was no debate as to whether this was a discussion of a matter of public concern.[449] Finally, the Court noted that the legislature had directed the courts to construe the Act "liberally to effectuate its purpose and intent fully."[450] In its holding, the Court expressly rejected the argument that the TCPA applied only to alleged statements "readily available to the public."[451]

The Texas Supreme Court again addressed the issue of private speech and the TCPA in its recent decision in *ExxonMobil Pipeline Co. v. Coleman*. In *Coleman*, a petroleum technician brought an action for

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444. *See id.* at 508–09.

445. *See id.* at 509.

446. *See id.*

447. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3) (West 2017).

448. *Lippincott*, 462 S.W.3d at 509 (citations omitted).

449. *See id.* at 510; *see also* TEX. CIV. PRAC. & REM. § 27.001(7) (defining a "[m]atter of public concern").

450. *See Lippincott*, 462 S.W.3d at 509; *see also* TEX. CIV. PRAC. & REM. § 27.011; Shipp v. Malouf, 439 S.W.3d 432, 439 (Tex. App.—Dallas 2014, pet. denied), *rev'd on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015). "The Legislature could have limited the protection provided by the TCPA to the exercise of free speech relating to participation in government, but did not do so. Because the statutory definition of issues representing a 'matter of public concern' is not ambiguous, we must enforce it as written." Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc., 402 S.W.3d 299, 308 (Tex. App.—Dallas 2013, pet. denied). *But see* Rivers v. Johnson Custodial Home, Inc., No. A-14-CA-484-SS, 2014 WL 4199540, at *1 (W.D. Tex. Aug. 22, 2014) (ruling statements made to prospective employers do not fall within the purview of the TCPA).

451. Whisenhunt v. Lippincott, 416 S.W.3d 689, 692–95, 699–700 (Tex. App.—Texarkana 2013, pet. granted), *rev'd sub nom*. Lippincott v. Whisenhunt, 462 S.W.3d 507 (Tex. 2015) (per curiam).

defamation, business disparagement, and other related causes of action arising from communications in which the plaintiff's former supervisors alleged that he had failed to conduct a required safety check of petroleum additive tanks, a process known as "gauging the tanks."[452] The Dallas Court of Appeals affirmed the lower court's denial of defendants' TCPA motion, holding that the private nature of the communications at issue precluded application of the TCPA.[453] Upon review, the Texas Supreme Court reversed, holding that the statements at issue were communications made in connection with environmental, health, safety, and economic concerns, and as a result involved exercise of the right of free speech; the fact that the statements were privately made did not preclude defendants' TCPA motion.[454] The Texas Supreme Court explained that the TCPA does not require that the communications at issue have more than a "tangential relationship" to health, safety, environmental, or economic concerns for the TCPA to apply.[455]

3. Public Figure versus Private Figure

The TCPA expressly includes statements about public officials and public figures within the definition of a "matter of public concern."[456] This definition includes a candidate for election to public office.[457] As with traditional libel law, the determination of whether one is a public official or a public figure is a "question of law for the court to decide."[458] The Texas Supreme Court has noted two types of public figures:

> (1) all-purpose, or general-purpose, public figures, and (2) limited-purpose public figures. General-purpose public figures are those individuals who have achieved such pervasive fame or notoriety that they become public figures for all purposes and in all contexts. Limited-purpose public figures, on the other hand, are only public figures for a limited range of issues surrounding a particular public controversy.[459]

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452. ExxonMobile Pipeline Co. v. Coleman, 512 S.W.3d 895, 897 (Tex. 2017).

453. *Id.*

454. *Id.* at 902.

455. *Id*. at 900; *see also* Quintanilla v. West, No. 04-16-00533-CV, 2017 WL 1684832, at *7 (Tex. App.—San Antonio Apr. 26, 2017, pet. filed) (holding that financing statements, which were filed to provide notice to the public of an encumbrance on mineral interests offered for sale in the public marketplace, related to a matter of public concern under § 27.001(7)(E)).

456. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(D) (West 2017).

457. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 271–72 (1971); Ross v. Labatt, 894 S.W.2d 393, 395 (Tex. App.—San Antonio 1994, writ dism'd w.o.j.).

458. Klentzman v. Brady, 312 S.W.3d 886, 904 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (citing Rosenblatt v. Baer, 383 U.S. 75, 88 (1966)).

459. WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998) (citation omitted) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)); *see also* Pickens v. Cordia, 433 S.W.3d 179, 185 (Tex. App.—Dallas 2014, no pet.) (discussing public figures).

The Texas Supreme Court has set out the following three-prong test to determine if someone is a limited-purpose public figure:

> (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;
> (2) the plaintiff must have more than a trivial or tangential role in the controversy; and
> (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.[460]

At least one court has interpreted the definition of public figure in holding that the TCPA did not apply to a blog post about a prominent individual's personal life. In *Pickens v. Cordia*, the Fifth Court of Appeals held that blog posts about T. Boone Pickens's personal life, including allegations of abuse and drug addiction among family members, was not a matter of public concern.[461] The court also held that the appellant did not prove that Pickens was a general-purpose public figure or a limited-purpose public figure as defined in the TCPA, though public interest in Pickens arose "from his connections and opinions in the energy industry."[462]

The Texas Supreme Court provided additional guidance regarding the public official inquiry in *Greer v. Abraham*, one of two companion cases brought by public official Salem Abraham.[463] In 2012, the political blog AgendaWise reported that Abraham was forcibly removed from a campaign event for a political opponent because he was heckling.[464] Abraham disputed the account and eventually brought a defamation action against the blog.[465] The trial court granted the defendant's TCPA motion because Abraham did not establish a prima facie case of actual malice.[466] The court of appeals reversed, however, holding that actual malice was not an essential element of the claim because the article did not (1) identify Abraham's role as a school board member, (2) directly relate to his status as a public figure, or (3) call into question his fitness for office.[467]

The Texas Supreme Court reversed the Seventh Court of Appeals' ruling, holding that Abraham was a public figure and, therefore, that the

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460. *WFAA-TV, Inc.*, 978 S.W.2d at 571 (quoting Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 433–34 (5th Cir. 1987)).

461. *See Pickens*, 433 S.W.3d at 184 ("We cannot conclude that statements of private life, such as those recounted in Michael's blog, implicate the broader health and safety concerns or community well-being concerns contemplated by chapter 27.").

462. *Id.* at 186.

463. *See generally* Greer v. Abraham, 489 S.W.3d 440 (Tex. 2016).

464. *See id.* at 442.

465. *See id.* at 441.

466. *Id.*

467. *See id.*

actual malice standard applied under *New York Times Co. v. Sullivan*.[468] The Court noted that statements about a public figure relate to their official conduct when the conduct relates to an official's fitness for office, which it did in this case.[469] The Court also held that express reference to an individual's status as a public official is unnecessary because "the reference is implied[] for those public officials 'so well-known *in their communities* that the general public automatically associates them with their official positions.'"[470] Applying this standard, the Court determined that the reference to his status as a public figure was implied and that Abraham had not established a prima facie case of actual malice so as to avoid dismissal under the TCPA.[471]

XI. TYPES OF SPEECH PROTECTED BY THE STATUTE

A. Online Speech

One of the fastest growing segments of TCPA litigation involves statements on internet sites, including blog posts. Because § 27.001(1) defines "[c]ommunication" as including "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic,"[472] Texas courts have applied the TCPA to online speech.[473]

In the recent case of *Rauhauser*, the Second Court of Appeals held that Rauhauser's postings of social media statements and blog entries about the controversy of vigilante justice constituted the exercise of free speech through public, online disclosures.[474] And in *Cruz v. Van Sickle*, a case regarding an internet post expressing concerns about a judicial candidate on a political website and blog, the Burnt Orange Report, the Fifth Court of Appeals stated that "the complained-of statement was a communication made in connection with an issue related to Cruz as a public official or public

468. *Id.* at 447–48; *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

469. *See Greer*, 489 S.W.3d at 447.

470. *Id.* at 446 (quoting Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 815 (Tex. 1976)).

471. *Id.* at 445–46, 448.

472. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(1) (West 2017).

473. *See, e.g.*, Lippincott v. Whisenhunt, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam) (applying the TCPA to email communications); *see also* Kinney v. BCG Attorney Search, Inc., No. 03-12-00579-CV, 2014 WL 1432012, at *1 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.) (posting on a website qualifies for TCPA protection); Am. Heritage Capital, LP v. Gonzalez, 436 S.W.3d 865, 874–76, 881 n.16 (Tex. App.—Dallas 2014, no pet.) (holding TCPA covers comments made online by former customer), *disapproved on other grounds by* Hersh v. Tatum, 526 S.W.3d 462 (Tex. 2017); Rehak Creative Servs., Inc. v. Witt, 404 S.W.3d 716, 733–34 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (holding entries on a candidate's website fall within the purview of the TCPA), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

474. *See* Rauhauser v. McGibney, 508 S.W.3d 377, 386 (Tex. App.—Fort Worth 2014, no pet.) (per curiam), *disapproved on other grounds by* Hersh v. Tatum, 526 S.W.3d 462 (Tex. 2017).

figure" and was an "exercise of the right to free speech."[475] Finally, several cases arising out of the Better Business Bureau's ratings of businesses contained in their reliability reports, which are posted online, have been found to fall within the purview of the TCPA's exercise of the right to free speech because the online business ratings relate to "a good, product, or service in the marketplace."[476]

B. Oral Statements

Most of the cases brought under the oral communications portion of the statute pertain to participation in governmental settings. In *In re Lipsky*, a suit brought by a property owner against a natural gas drilling company Range, Range filed counterclaims against the property owner regarding its communications with EPA personnel, the public, and the news media about the local drinking water, in which the property owner blamed Range for contaminating the well.[477] Range's counterclaims attacked statements made by the Lipskys and their agents in official hearings about the appraisal of the value of their home and in communications with Parker County officials.[478] The Second Court of Appeals ruled that many of the claims should have been dismissed under the TCPA because Range failed to establish a prima facie claim for defamation and business disparagement against the property owner's environmental-services contractor.[479] On appeal, the Texas Supreme Court ruled the defamation per se claim could survive the TCPA motion because the challenged element of damages was presumed as a result of the claim being per se.[480] The Court agreed, however, there was not sufficient evidence of a prima facie claim for business disparagement and conspiracy to survive the TCPA motion.[481] Other contexts in which oral statements have received TCPA protection include: (1) statements made to

475. Cruz v. Van Sickle, 452 S.W.3d 503, 515 (Tex. App.—Dallas 2014, pet. denied).

476. *See* Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc., 402 S.W.3d 299, 312 (Tex. App.—Dallas 2013, pet. denied); Better Bus. Bureau of Metro. Dall., Inc. v. Ward, 401 S.W.3d 440, 445 (Tex. App.—Dallas 2013, pet. denied); Wholesale TV & Radio Advert., LLC v. Better Bus. Bureau of Metro. Dall., Inc., No. 05-11-01337-CV, 2013 WL 3024692, at *4 (Tex. App.—Dallas June 14, 2013, no pet.) (mem. op.); Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 353 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (quoting TEX. CIV. PRAC. & REM. § 27.001(7)(E)); *see also* Young v. Krantz, 434 S.W.3d 335, 344–45 (Tex. App.—Dallas 2014, no pet.) (regarding movant's unfavorable contractor review on Angie's List), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

477. *See In re* Lipsky, 411 S.W.3d 530, 542 (Tex. App.—Fort Worth 2013), *mandamus denied*, 460 S.W.3d 579, 597 (Tex. 2015).

478. *Id.* ("The environmental effects of fracking in general, the specific cause of the contamination of the [movant's] well, and the safety of [the non-movant's] operation methods are matters of public concern under chapter 27.").

479. *See id.* at 548.

480. *In re Lipsky*, 460 S.W.3d at 595–96.

481. *Id.* at 597.

the media about the award of public contracts;[482] (2) statements made from the pulpit regarding settlement agreements with a public official;[483] and (3) statements made in addresses to the city council.[484] The Second Court of Appeals decided a case involving an individual plaintiff who was criticized for yelling at umpires during a baseball game for seven-year-old children, holding the TCPA applied because the statements at issue related to the health and safety of children in the community.[485]

C. Written Statements

The TCPA has been held to protect written complaints about public officials,[486] statements made in lawsuit pleadings,[487] written letters by an attorney to the Board of Pardons and Parole,[488] and political advertisements.[489] In addition, several TCPA cases involve investigations conducted by, or information provided to, the news media, such as: (1) a defamation action arising out of a newspaper story regarding a nursing home's compliance with regulations;[490] (2) a suit complaining about written statements to a *Houston Chronicle* reporter and others related to a city's plan to purchase properties and expend government funds;[491] and (3) a defamation suit brought by a reality television show participant against a weekly magazine for publishing allegations made by the mother of the plaintiff's deceased former fiancé.[492]

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482. *See* Farias v. Garza, 426 S.W.3d 808, 819 (Tex. App.—San Antonio 2014, pet. denied) (observing that "the award of public contracts is almost always a public matter and an issue of public concern"), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

483. Alphonso v. Deshotel, 417 S.W.3d 194, 202 (Tex. App.—El Paso 2013, no pet.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

484. *See* Walker v. Schion, 420 S.W.3d 454, 455–59 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

485. Bilbrey v. Williams, No. 02-13-00332-CV, 2015 WL 1120921, at *1, *9 (Tex. App.—Fort Worth Mar. 12, 2015, no pet.) (mem. op.).

486. *See* Ramsey v. Lynch, No. 10-12-00198-CV, 2013 WL 1846886, at *2–5 (Tex. App.—Waco May 2, 2013, no pet.) (mem. op.) (holding that a complaint concerning a mayor's performance as a public official was subject to the TCPA).

487. *See* Fitzmaurice v. Jones, 417 S.W.3d 627, 633–35 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015).

488. *See* Pena v. Perel, 417 S.W.3d 552, 555 (Tex. App.—El Paso 2013, no pet.).

489. *See* Pitre v. Hardy, No. 05-14-00625-CV, 2014 WL 3778925, at *1 (Tex. App.—Dallas July 31, 2014, no pet.) (mem. op.).

490. *See* Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71, 81 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (holding that the allegations contained in a newspaper article about an assisted-living facility were a matter of public concern because they related to issues on which the legislature had chosen to regulate such facilities).

491. *See* Schimmel v. McGregor, 438 S.W.3d 847, 851, 858 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (determining that communications were "'an exercise of the right of free speech' and related to an exercise of the right of petition[] and were made 'in connection with a matter of public concern'" (quoting the appellant's arguments) (internal quotation marks omitted)).

492. *See DLE Attorneys Successfully Defend against Reality TV Show Participant's Defamation Suit*, DEUTSCH, LEVY & ENGEL, http://www.dlec.com/Latest/head-v-chicory.html (last visited Feb. 20, 2018). *See generally* Head v. Chicory Media, LLC, 415 S.W.3d 559 (Tex. App.—Texarkana 2013, no pet.)

D. Private Communications

As discussed above, the TCPA is silent regarding whether communications must be made publicly to fall within the scope of the Act's protection. However, two recent decisions by the Texas Supreme Court have decided the issue: both private and public communications fall under the TCPA when the content of the communication relates to a matter of public concern.[493]

E. First Amendment Activities

As the United States Supreme Court has recognized, the First Amendment's protections do not end at the spoken or written word.[494] It is well established that expressive conduct can constitute protected activity under the First Amendment.[495] As a result, conduct related to a defendant's exercise of protected First Amendment speech can fall within the scope of TCPA protection.[496] In *Forsterling v. A&E Television Network*, for example, the Southern District of Texas held that producing a reality television show was an exercise of free speech when the subject was a matter of public concern—even though parts of the broadcast are dramatized.[497] The court held that First Amendment speech is not limited to documentaries and newspapers, but covers a range of expressive conduct, including the dramatization and production of a reality television show addressing the significant public concern of human trafficking.[498] Similar decisions addressing the California Anti-SLAPP statute further underscore that expressive conduct made in furtherance of a defendant's free speech rights are protected under anti-SLAPP statutes.[499]

(dismissing the plaintiff's TCPA claims for failure to provide an appellate record).

493. *See* ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895 (Tex. 2017); Lippincott v. Whisenhunt, 462 S.W.3d 507 (Tex. 2015).

494. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989)

495. *See, e.g.*, *id.* (protecting the conduct of flag burning under the First Amendment).

496. *See, e.g.*, Forsterling v. A&E Television Networks, LLC, H-16-2941, 2017 WL 980347, 45 Media L. Rptr. 1413 (S.D. Tex. Mar. 9, 2017) (determining that producing a television show, although it is conduct that is not spoken or written, falls under the scope of the First Amendment).

497. *See id*.

498. *Id.*

499. *See* Doe v. Gangland Prods., Inc., 730 F.3d 946, 951–55 (9th Cir. 2013) (rejecting argument that anti-SLAPP did not apply to claims arising from conduct in furtherance of defendants' free speech rights); *see also* GLAAD v. CNN, 742 F.3d 414, 424–25 (9th Cir. 2014) (discussing that an action directly targeting the way a content provider chooses to deliver, present, or publish content on matters of public interest, is based on conduct in furtherance of free speech rights).

F. Exemptions under the Texas Citizens Participation Act

The TCPA expressly exempts certain lawsuits from its applicability, including: (1) enforcement actions brought by the State or law enforcement, (2) lawsuits brought against someone for statements made in connection with the sale or leasing of goods or services, (3) legal actions brought under the Insurance Code or arising out of an insurance contract, and (4) cases brought for wrongful death or bodily injury.[500]

1. Enforcement Actions Brought by the State or a Political Subdivision

Section 27.010(a) of the TCPA exempts enforcement actions brought by the State or law enforcement.[501] A similar provision is contained in the District of Columbia's anti-SLAPP statute.[502] To date, there are no reported cases that discuss this portion of the statute or in which this exemption has been applied.[503] A 2015 appeal before the Second Court of Appeals challenged the trial court's dismissal of an ethics commission fine based on the TCPA.[504] Although commentators were hopeful that the case would provide clarity on this particular exemption, the court of appeals' decision focused on venue considerations and did not provide guidance on how the courts will view the enforcement action exemption.[505] After the case was transferred back to Travis County, the trial court denied the TCPA motion finding the exemption applied,[506] and the case is now pending before the Third Court of Appeals.[507]

2. Commercial Speech

The most commonly asserted exemption to the TCPA is the commercial speech exemption, which is intended to carve out advertising disputes and similar claims.[508] A split of authority emerged regarding the proper

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500. TEX. CIV. PRAC. & REM. CODE ANN. § 27.010 (West 2017).

501. *Id.* § 27.010(a).

502. *See* D.C. CODE ANN. § 16-5501 (West 2018).

503. *But see* Brief of Appellee Texas Ethics Commission, Sullivan v. Tex. Ethics Comm'n, 2017 WL 4712735 (Tex. App.—Austin Oct. 10, 2017, no pet.) (No. 03-17-00392-CV).

504. Tex. Ethics Comm'n v. Sullivan, 02-15-00103-CV, 2015 WL 6759306, at *1–2 (Tex. App.—Fort Worth Nov. 5, 2015, pet. denied).

505. *See id.* at *9.

506. Order Denying TCPA Motion, Tex. Ethics Comm'n v. Sullivan, No. D-1-GN-17-001878 (June 12, 2017).

507. *See* Brief of Appellee Texas Ethics Commission, *supra* note 503.

508. *See generally, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b) (West 2017); Lamons Gasket Co. v. Flexitallic L.P., 9 F. Supp. 3d 709, 711–12 (S.D. Tex. 2014) (applying commercial speech exemption to a business disparagement claim based on competitive sales literature distributed to actual and potential customers stating that the manufacturer's goods did not comply with industry standards).

interpretation of this exception,[509] which the Texas Supreme Court ultimately resolved in *Castleman v. Internet Money Ltd.*[510]

The First Court of Appeals was the first to opine about the applicability of the commercial speech exemption in *Newspaper Holdings Inc. v. Crazy Hotel Assisted Living, Ltd*.[511] The case was brought by an assisted living facility against a newspaper and its sources for defamation, disparagement, and tortious interference with a contract. The trial court denied the movant's motion to dismiss.[512] The assisted living facility argued that the commercial speech exemption should apply because the newspaper sold advertisements and subscriptions.[513] Because the Texas commercial speech exemption is substantially similar to the California exemption, the First Court of Appeals looked to the California Supreme Court's interpretation of California's commercial speech provision for guidance.[514] In doing so, the court modified California's test in creating and adopting the test to determine to fit the TCPA's commercial speech exemption:

> (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services;
> (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services;
> (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and
> (4) the intended audience for the statement or conduct [is an actual or potential buyer or customer].[515]

The court noted that the burden of proving the applicability of any exemption is on the asserting party, and because the plaintiff had not met its

509. *See* Kinney v. BCG Attorney Search, Inc., No. 03-12-00579-CV, 2014 WL 1432012, at *6 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (adopting the *Newspaper Holdings* test); Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71, 88–90 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (adopting a four-pronged test from California to determine whether the commercial speech exemption applies). *Compare*, Glob. Tel*link Corp. v. Securus Techs., Inc., No. 05-16-01224-CV, 2017 WL 3275921, at *3 (Tex. App.—Dallas July 31, 2017, pet. dism'd) (rejecting the *Newspaper Holdings* four-pronged test and endorsing the analysis by the Amarillo Court of Appeals); Castleman v. Internet Money Ltd., No. 07-16-00320-CV, 2017 WL 1449224, at *4 (Tex. App.—Amarillo Apr. 19, 2017, pet. filed) (rejecting the commercial speech exemption analysis applied by *Newspaper Holdings* and other Texas courts).

510. Castleman v. Internet Money Ltd., No. 17-0437, 2018 WL 1975039 (Tex. Apr. 27, 2018) (slip op.).

511. *See Newspaper Holdings*, 416 S.W.3d at 88–90.

512. *Id.*

513. *Id.* at 88.

514. *See id.*

515. *Id.* (quoting Simpson Strong-Tie Co. v. Gore, 230 P.3d 1117, 1129 (Cal. 2010)).

burden, the court held that the exemption did not apply.[516]

Two weeks after the *Newspaper Holdings* decision, the Fifth Court of Appeals addressed the commercial speech exemption in *Better Business Bureau of Metropolitan Dallas, Inc. v. BH DFW, Inc*.[517] In the *BH DFW* case, the plaintiff argued that the business reviews of the Better Business Bureau (BBB) constituted commercial speech exempt from the TCPA because the BBB sold accreditation to businesses who qualified.[518] Referring to the opinion in *Newspaper Holdings*, the court concluded that the exemption did not apply because (1) "BH DFW offered no evidence [that] the BBB's business review, including the 'F' rating," was tied to its accreditation process, and (2) "the BBB offered evidence that the intended audience of the business review was the general public," not an actual or potential buyer or customer, as required by the statute.[519] The appellate court held that the BBB's online business reviews were protected speech under the TCPA because the review and rating related to a good, product, or service in the marketplace.[520]

Since those decisions, however, a different panel from the Dallas Court of Appeals and the Amarillo Court of Appeals have rejected the four-part *Newspaper Holdings* test after determining that language from the test is not identical to the language in the TCPA's commercial speech exemption.[521] The Amarillo court's analysis explained that, "[o]mitted from [the Texas] verbiage is any mention of the statement being made or conduct being undertaken 'for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's [i.e. actor's] goods or services.'"[522] The court went on to note that, "As written, § 27.010(b) does not require that the speaker utter the defamatory statements for the purpose of enhancing the sale of his own products or services."[523]

In April 2018, the Supreme Court resolved this split in appellate authority, reversing the Amarillo Court of Appeals' ruling in *Castleman*.[524] Although the Court did not find California's construction of its commercial-speech exemption dispositive in light of the differences in the

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516. *Id.* at 89; *see also* Pena v. Perel, 417 S.W.3d 552, 555 (Tex. App.—El Paso 2013, no pet.).

517. *See generally* Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc., 402 S.W.3d 299 (Tex. App.—Dallas 2013, pet. denied).

518. *See id.* at 303–04.

519. *Id.* at 309.

520. *Id.* at 308–09; *see also* Wholesale TV & Radio Advert., LLC v. Better Bus. Bureau of Metro. Dall., Inc., No. 05-11-01337-CV, 2013 WL 3024692, at *4–5 (Tex. App.—Dallas June 14, 2013, no pet.) (mem. op.) (holding again that online business reviews were protected speech).

521. *See* Castleman v. Internet Money Ltd., No. 07-16-00320-CV, 2017 WL 1449224, at *4 (Tex. App.—Amarillo Apr. 19, 2017, pet. filed); Glob. Tel*link Corp. v. Securus Techs., Inc., No. 05-16-01224-CV, 2017 WL 3275921, at *3 (Tex. App.—Dallas July 31, 2017, pet. dism'd).

522. *Castleman*, 2017 WL 1449224, at *3.

523. *Id.* (emphasis added).

524. Castleman v. Internet Money Ltd., No. 17-0437, 2018 WL 1975039 (Tex. Apr. 27, 2018) (slip op.) (emphasis added).

specific language of the two statutes' commercial-speech exemptions, the Court nevertheless held that "the Texas exemption, when construed within its own statutory context, carries the same meaning" as the California exemption.[525] Accordingly, when "read within its statutory context," the Texas Supreme Court concluded that the exemption "requires that the defendant engaged in the conduct on which the claim is based *in his capacity as 'a person primarily engaged in the business of selling or leasing goods or services.*"[526] The Court further held "that 'the intended audience' of the statement or conduct must be actual or potential customers of the defendant," as opposed to the plaintiff's actual or prospective customers or to the public at large.[527]

While courts have determined that statements made in conjunction with client representation are not commercial speech under the TCPA, lawyer advertising falls within the commercial speech exemption.[528] In *Schimmel v. McGregor*, the First Court of Appeals revisited the commercial speech exemption in a tortious interference case brought by homeowners against their homeowners' association's attorney for statements he made to the City of Galveston while acting as an attorney.[529] The homeowners argued the commercial speech exemption applied because:

> (1) Schimmel was primarily engaged in the business of selling his legal services; (2) the [homeowners'] cause of action arose from Schimmel's conduct consisting of representations of fact about Schimmel's services; (3) Schimmel's conduct occurred in the course of delivering his legal services; and (4) the intended audience of his conduct was a potential buyer, the City of Galveston.[530]

The court disagreed, stating that, although he was working as an attorney when he made the statements, the intended audience for his statements was the City of Galveston, an entity that he did not represent and that was not a "potential buyer or customer" of Schimmel's legal services.[531]

Thus, as the Texas Supreme Court recently clarified, if the actions taken involved speaking out about a matter of public concern and the statements were made to the general public, the TCPA's commercial speech exemption

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525. *Id.* at 5.

526. *Id.* at 8.

527. *Id.*

528. *See* NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C., 745 F.3d 742, 755 (5th Cir. 2014); Miller Weisbrod, L.L.P. v. Llamas-Soforo, 511 S.W.3d 181, 189 (Tex. App.—El Paso 2014, no pet.). *But see* Simpton v. High Plains Broad., No. 2011-CI-13290 (285th Dist. Ct., Bexar County., Tex. Apr. 10, 2012).

529. *See* Schimmel v. McGregor, 438 S.W.3d 847, 850 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

530. *Id.* at 857.

531. *Id.* at 857–58.

would not apply.[532] If, however, the statements were made for the purpose of selling one's products and the target audience was potential purchasers of the same, the exemption under § 27.010(b) would likely apply, and the motion to dismiss would be denied.[533]

3. Wrongful Death and Bodily Injury Cases

Section 27.010 of the TCPA includes a provision exempting claims seeking recovery for bodily injury, wrongful death, or survival actions, and to statements made regarding those legal actions.[534] "This provision was added at the suggestion of the Texas Trial Lawyers Association, which was concerned about the applicability of the statute to personal injury . . ." and wrongful death cases.[535] The exemption was tempered by the express preservations of constitutional immunities contained in § 27.011(a) so as to not impede the ability to assert TCPA protections in negligent speech cases.[536]

At the time it was enacted, the TCPA was the only anti-SLAPP statute in the nation that provided an exemption for wrongful death and bodily injury cases.[537] However, the TCPA no longer has that distinction; Oklahoma's and Connecticut's respective anti-SLAPP laws also contain bodily injury exceptions to prevent the statutes' application to common law or statutory claims for bodily injury, wrongful death, or survival.[538]

There has been little opportunity for courts to interpret the TCPA's bodily injury exception; in fact, this provision has only been at issue in three cases since becoming law.[539] First, in *Sloat v. Rathbun*, a plaintiff brought an action against the Church of Scientology, alleging intentional infliction of emotional distress, related privacy torts, and interference with contract.[540] The Church moved to dismiss under the TCPA, but the district court denied the motion.[541] On appeal, the Scientology defendants briefed numerous

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532. *See* Castleman v. Internet Money Ltd., No. 17-0437, 2018 WL 1975039 at *8 (Tex. Apr. 27, 2018) (slip op.); *Schimmel* 438 S.W.3d at 858.

533. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b) (West 2017).

534. *Id*. § 27.010.

535. Prather & Bland, *supra* note 30, at 788.

536. *See* Laura Lee Prather, *A Primer on the Texas Anti-SLAPP Statute*, SLAPPEDINTEXAS.COM (Oct. 18, 2017), http://www.haynesboone.com/publications/texas-antislapp-primer.

537. *See id*.

538. *See* OKLA. STAT. ANN. tit. 12, § 1439 (West 2017) (exempting legal actions "seeking recovery for bodily injury, wrongful death or survival or to statements made regarding that legal action"); 2017 Conn. Acts 17-71 § 1 (Spec. Sess.) (statute does not "apply to a common law or statutory claim for bodily injury or wrongful death").

539. *See generally* Cavin v. Abbott, No. 03-16-00395-CV, 2017 WL 3044583 (Tex. App.—Austin July 14, 2017, no pet. h.); Kirkstall Rd. Enters, Inc. v. Jones, 523 S.W.3d 251 (Tex. App.—Dallas 2017, no pet.); Sloat v. Rathbun, 513 S.W.3d 500 (Tex. App.—Austin 2015, pet. dism'd).

540. *Sloat*, 513 S.W.3d at 509.

541. *See* Rathbun v. Miscavige, No. C2013-1082B, 2014 WL 6389494 (433rd Dist. Ct., Comal County, Tex. Mar. 14, 2014).

appellate issues, including the applicability of the bodily injury exemption.[542] However, the Third Court of Appeals did not ultimately reach the issue in its opinion because it held that the defendants did not establish that the TCPA applied at all.[543] Second, in *Kirkstall Road Enterprises, Inc. v. Jones*, an interviewee brought a negligence claim against the producer of a television series after the interviewee was shot, claiming that his gunshot wounds were the result of the producer's negligence in failing to adequately protect his identity.[544] The Dallas Court of Appeals ultimately held that the negligence claim came within the bodily injury exemption and the case could not be appealed to the Texas Supreme Court under the old jurisdiction rules for interlocutory appeals.[545] Third, in *Cavin v. Abbott*, a daughter and her husband brought an action against the daughter's parents, alleging several causes of action arising from a family dispute regarding the plaintiff daughter's choice of a husband.[546] The Travis County District Court denied the defendants' TCPA motion. On appeal, the Third Court of Appeals held that the trial court did not err in holding that the daughter's assault claim was exempt from dismissal under the TCPA.[547]

4. Insurance Cases

By including the sale or lease of insurance products in the commercial speech exemption, the legislature demonstrated its intent to exclude insurance matters from the TCPA.[548] Because of some confusion at the trial court level, however, the statute was amended in 2013 to add the following italicized language to the TCPA exemptions to add more clarity to the issue:

> (b) This chapter does not apply to a legal action 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, *insurance services*, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.
> *(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract*.[549]

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542. *See* Brief of Appellant Church of Scientology Int'l at 9–10, Sloat v. Rathbun, 513 S.W.3d 500 (Tex. App.—Austin 2015, pet. dism'd) (No. 03-14-00199-CV), 2014 WL 2879586.

543. *Sloat*, 513 S.W.3d at 509.

544. *See Kirkstall Rd. Enters.*, 523 S.W.3d at 252.

545. *Id.* at 253.

546. *See* Cavin v. Abbott, No. 03-16-00395-CV, 2017 WL 3044583, at *1–2 (Tex. App.—Austin July 14, 2017, no pet.).

547. *See generally id.*

548. *See* Tex. H.B. 2973, 82d Leg., R.S. (2011).

549. Tex. H.B. 2935, 83d Leg., R.S. (2013) (emphasis added).

To date, there are no reported cases applying this exemption for insurance matters, and only one case exists in which the statutory exemption is placed at issue at all.[550] In *Tervita, LLC v. Sutterfield*, an employee brought an action against several defendants, including his former employer, the employer's workers' compensation insurer, and others for violation of the Texas Labor Code, negligent misrepresentation, and conspiracy arising out of the denial of his workers' compensation claim.[551] The Dallas Court of Appeals held that the Insurance Code exemption did not preclude the application of the TCPA because the plaintiff's suit was not a "legal action brought under the Insurance Code or arising out of an insurance contract."[552] Instead, the court of appeals held that the action was brought under the Texas Labor Code and common law.[553]

XII. CAUSES OF ACTION FOUND IN A TCPA CASE

The defining characteristic of a SLAPP suit is its purpose to deter a person or entity from exercising its constitutional rights.[554] Accordingly, there is not a prototypical SLAPP filer. SLAPP suits encompass many forms of litigation, including both direct lawsuits and counterclaims or cross-claims in pending actions.[555] SLAPP suit filers may camouflage their grievances against the target's constitutional activities by filing varying types of claims.[556] Five typical causes of action used as a vehicle for SLAPP suit litigation are: defamation, business disparagement, conspiracy, and constitutional and civil rights violations.[557] Other less common causes of action may include claims for nuisance, trespass, and emotional harms.[558] Other causes of action are emerging as areas for SLAPP litigation in Texas,

550. *See* Tervita, LLC v. Sutterfield, 482 S.W.3d 280, 285 (Tex. App.—Dallas 2015, pet. denied).
551. *See id.* at 283.
552. *Id.* at 285 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(d) (West 2017)).
553. *Id*. at 285–86.
554. *See* PRING & CANAN, *supra* note 1, at 8–9.
555. *See id.* at 9–10.
556. *See id.*
557. *See id.*
558. A nationwide study of SLAPP suit litigation identified defamation in the forms of libel, slander, and business disparagement as the most common causes of action that house a SLAPP purpose. George W. Pring, *SLAPPs: Strategic Lawsuits against Public Participation*, 7 PACE ENVTL. L. REV. 3, 9 (1989). Business torts was the second most common cause of action, including interference with contract or business, antitrust, restraint of trade, and unfair competition. *Id.*

including conspiracy claims[559] and trade secrets assertions.[560]

In the same way that there is no prototypical SLAPP filer, there similarly is no prototypical SLAPP defendant; SLAPP cases are filed against individuals,[561] corporations,[562] and media organizations.[563]

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559. *See, e.g.*, Lippincott v. Whisenhunt, 462 S.W.3d 507 (Tex. 2015); Camp v. Patterson, No. 03-16-00733-CV, 2017 WL 3378904 (Tex. App.—Austin Aug. 3, 2017, no pet.); MacFarland v. Le-Vel Brands LLC, No. 05-16-00672-CV, 2017 WL 1089684 (Tex. App.—Dallas Mar. 23, 2017, no pet.); QTAT BPO Sols., Inc. v. Lee & Murphy Law Firm, G.P., 524 S.W.3d 770 (Tex. App.—Houston [14th Dist.] 2017, pet. denied); Mission Wrecker Serv., S.A., Inc. v. Assured Towing, Inc., No. 04-17-00006-CV, 2017 WL 3270358 (Tex. App.—San Antonio Aug. 2, 2017, pet. denied); Brugger v. Swinford, No. 14-16-00069-CV, 2016 WL 4444036 (Tex. App.—Houston [14th Dist.] Aug. 23, 2016, no pet.) (mem. op.); Hicks v. Grp. & Pension Adm'rs, Inc., 473 S.W.3d 518 (Tex. App.—Corpus Christi 2015, no pet.); Tervita, LLC v. Sutterfield, 482 S.W.3d 280 (Tex. App.—Dallas 2015, pet. denied); Bilbrey v. Williams, No. 02-13-00332-CV, 2015 WL 1120921 (Tex. App.—Fort Worth Mar. 12, 2015, no pet.) (mem. op.); Shipp v. Malouf, 439 S.W.3d 432 (Tex. App.—Dallas 2014, pet. denied); Summersett v. Jaiyeola, 438 S.W.3d 84 (Tex. App.—Corpus Christi 2013, pet. denied); Rehak Creative Servs., Inc. v. Witt, 404 S.W.3d 716 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

560. *See, e.g.*, Elite Auto Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 193 (Tex. App.—Austin 2017, pet. dism'd).

561. *See, e.g.*, Kinney v. BCG Attorney Search, Inc., No. 03-12-00579-CV, 2014 WL 1432012 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.); Am. Heritage Capital, LP v. Gonzalez, 436 S.W.3d 865 (Tex. App.—Dallas 2014, no pet.); Young v. Krantz, 434 S.W.3d 335 (Tex. App.—Dallas 2014, no pet.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); James v. Calkins, 446 S.W.3d 135 (Tex. App.—Houston [1st Dist.] 2014, pet. denied; Fitzmaurice v. Jones, 417 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Walker v. Schion, 420 S.W.3d 454 (Tex. App.—Houston [14th Dist.] 2014, no pet.); Farias v. Garza, 426 S.W.3d 808 (Tex. App.—San Antonio 2014, pet. denied), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Alphonso v. Deshotel, 417 S.W.3d 194 (Tex. App.—El Paso 2013, no pet.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Pena v. Perel, 417 S.W.3d 552 (Tex. App.—El Paso 2013, no pet.); Rehak Creative Servs., Inc. v. Witt, 404 S.W.3d 716 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); Ramsey v. Lynch, No. 10-12-00198-CV, 2013 WL 1846886 (Tex. App.—Waco 2013, no pet.) (mem. op.).

562. *See, e.g.*, United Food & Commercial Workers Int'l Union v. Wal-Mart Stores, Inc., 430 S.W.3d 508 (Tex. App.—Fort Worth 2014, no pet.); Cheniere Energy, Inc. v. Lotfi, 449 S.W.3d 210 (Tex. App.—Houston [1st Dist.] 2014, no pet.); Rio Grande H2O Guardian v. Robert Muller Family P'ship Ltd., No. 04-13-00441-CV, 2014 WL 309776 (Tex. App.—San Antonio Jan. 29, 2014, no pet.) (mem. op.), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Props., LP, 452 S.W.3d 343 (Tex. App.—Corpus Christi 2013, pet. denied); Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc., 402 S.W.3d 299 (Tex. App.—Dallas 2013, pet. denied); Better Bus. Bureau of Metro. Dall., Inc. v. Ward, 401 S.W.3d 440 (Tex. App.—Dallas 2013, pet. denied); Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dall., Inc., No. 05-11-01337-CV, 2013 WL 3024692 (Tex. App.—Dallas June 14, 2013, no pet.); Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 441 S.W.3d 345 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC, 407 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

563. *See, e.g.*, KBMT Operating Co. v. Toledo, 492 S.W.3d 710 (Tex. 2016); Shipp v. Malouf, 439 S.W.3d 432 (Tex. App.—Dallas 2014, pet. denied), *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015); KTRK Television, Inc. v. Robinson, 409 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Head v. Chicory Media, LLC, 415 S.W.3d 559 (Tex. App.—Texarkana 2013, no pet.); Avila v. Larrea, 394 S.W.3d 646 (Tex. App.—Dallas 2012, pet. denied).

XIII. CONSTITUTIONAL CHALLENGES

A. Constitutional Challenges in Texas

Some have challenged the TCPA on the ground that it is unconstitutional.[564] There are multiple theories of unconstitutionality, but they primarily boil down to an argument that the TCPA violates the open courts provision of the Texas Constitution.[565]

Several Texas courts have been presented with challenges to the constitutionality of the TCPA, but most have declined to address such arguments on the merits, either through application of the doctrine of constitutional avoidance or by holding that constitutional challenges to the TCPA raised for the first time on appeal were waived.[566] The three Texas appellate courts—the First,[567] Third,[568] and Seventh[569] Courts of Appeals—that have directly addressed the constitutionality of the statute have upheld it as constitutional.

1. Open Courts Challenges

In *Combined Law Enforcement Ass'ns of Texas v. Sheffield*, the plaintiff brought a constitutional challenge based on the open-courts provision of the Texas Constitution.[570] The plaintiff contended that the TCPA imposed "a higher standard of proof than would ordinarily be required for the

564. *See, e.g.*, Castello v. City of Seattle, No. C10-1457MJP, 2011 WL 219671, at *13 (W.D. Wash. Jan. 24, 2011); Combined Law Enf't Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672, at *9 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (mem. op.); Jardin v. Marklund, 431 S.W.3d 765, 768 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

565. *See, e.g.*, *John Moore Servs., Inc.*, 441 S.W.3d at 352 n.1 ("John Moore also argues that an interpretation of the 'clear and specific evidence' standard in the TCPA that requires a high burden of proof before trial would violate the open-courts provision of the Texas Constitution and the right to a trial by jury. To the extent that John Moore argues that the statute is unconstitutional, that argument was waived due to failure to present it to the trial court." (citing TEX. R. APP. P. ANN. 33.1(a) (West 2017)); Sw. Elec. Power Co. v. Grant, 73 S.W.3d 211, 222 (Tex. 2002) ("A litigant must raise an open-courts challenge in the trial court.")).

566. *See, e.g.*, Quintanilla v. West, 04-16-00533-CV, 2017 WL 1684832, at *12 (Tex. App.—San Antonio Apr. 26, 2017, pet. filed) (explaining that an open-courts challenge to TCPA was not properly preserved for appellate review); Whisenhunt v. Lippincott, 474 S.W.3d 30, 39 (Tex. App.—Texarkana 2015, no pet.), *reh'g overruled* (Sept. 1, 2015) (same); Cruz v. Van Sickle, 452 S.W.3d 503, 513 (Tex. App.—Dallas 2014, pet. denied) (same); *see also* City of San Antonio v. Schautteet, 706 S.W.2d 103, 104 (Tex. 1986) (per curiam) ("Schautteet raised the issue of violation of the open courts provision for the first time in a reply brief filed on appeal. Therefore, the issue was never before the trial court and should not have been considered by the court of appeals." (citing City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671 (Tex. 1979)).

567. *See* Mem'l Hermann Health Sys. v. Khalil, 01-16-00512-CV, 2017 WL 3389645, at *15 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied); Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc., 500 S.W.3d 26, 46 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

568. *See Sheffield*, 2014 WL 411672, at *9–11.

569. *See* Abraham v. Greer, 509 S.W.3d 609, 617 (Tex. App.—Amarillo 2016, pet. denied).

570. *See Sheffield*, 2014 WL 411672, at *9.

plaintiff/respondent to prevail at trial."[571] The Texas Supreme Court clarified it in the *In re Lipsky* decision that "clear and specific" did not impose a higher burden of proof than what is necessary to prevail on the claim.[572] In *Sheffield*, the plaintiff also argued that the TCPA imposed "unreasonable prohibitions, limitations or restrictions on discovery prior to the hearing on the motions to dismiss (particularly when coupled with the expedited notice/hearing requirements under the act)" and that the "mandatory (non-discretionary) fee awards and sanctions upon dismissal" unreasonably restricted a plaintiff's ability to pursue redress for defamation.[573]

The Third Court of Appeals rejected Sheffield's argument that the TCPA imposed a higher burden of proof, holding that "no provision in the TCPA . . . purports to impose a higher standard of proof than would be required at trial. [If the statute applies,] . . . the TCPA requires only that the claimant produce evidence that establishes a prima facie case . . . . That standard does not increase the burden of proof."[574] The court elaborated that:

> The characterization of the evidence needed to support the prima facie case as "clear and specific" does not alter the burden or cause it to exceed a preponderance of the evidence. This TCPA motion-to-dismiss process imposes a burden to produce evidence almost certainly sooner than a typical trial, but so do the summary-judgment processes. [The plaintiff] has not shown that the TCPA requires a higher standard of proof, much less one that violates the open-courts provision of the Texas [C]onstitution.[575]

The Texas Supreme Court implicitly agreed with this logic in *In re Lipsky* by holding the clear and specific standard does not impose a higher burden of proof than required at trial.[576] As to the *Sheffield* plaintiff's claim that the stay of discovery imposed an unreasonable burden, the Court held that "[o]ur review of the case on appeal does not reveal how the stay of discovery as applied here prevented Sheffield from establishing a prima facie case through clear and specific evidence and violated the constitution."[577] The Court concluded that, "[T]he provisions staying discovery are tempered by provisions permitting discovery upon a showing of good cause."[578]

The *Sheffield* court also held that the attorney's fees provision of the TCPA was not unconstitutional because, despite the mandatory nature of the language, the court still has discretion as to the amount.[579] Thus, the TCPA

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571. *Id.*
572. *See In re* Lipsky, 460 S.W.3d 579, 592–93 (Tex. 2015).
573. *Sheffield*, 2014 WL 411672, at *9–11.
574. *Id.* at *10.
575. *Id.* (internal citations omitted).
576. *See In re Lipsky*, 460 S.W.3d at 592–93.
577. *Sheffield*, 2014 WL 411672, at *10.
578. *Id.*
579. *See id.* at *11.

provision, like similarly mandatory fee provisions in at least eighteen other Texas statutes, did not violate the open-courts guarantee.[580]

The Texas Supreme Court has provided guidelines for addressing an open-courts challenge and has interpreted the open-courts provision of the state constitution to provide

> at least three separate constitutional guarantees: 1) courts must actually be operating and available; 2) the [l]egislature 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."[581]

The open-courts provision has been held to apply only to protect common-law claims, not statutory claims.[582] Thus, an open-courts challenge can only be brought as it relates to a common-law claim.

The Seventh Court of Appeals considered a constitutional challenge to the TCPA in *Abraham v. Greer*.[583] In that case, a defamation plaintiff unsuccessfully sought discovery and later alleged that the TCPA's provision impermissibly abridged his common law remedy for defamation in violation of the open-courts provision of the Texas Constitution.[584] On remand from the Supreme Court, which reversed and remanded on a separate issue, the Seventh Court of Appeals rejected the plaintiff's open-courts argument, noting that discovery could have occurred (but was not properly pursued) despite the existence of the provisions limiting discovery and that the interplay of the applicable discovery provisions "did not contravene the open courts provision of the Texas Constitution under the particular facts . . . ."[585] The First Court of Appeals, relying heavily on *Sheffield*, again upheld the constitutionality of the TCPA in the face of an open-courts constitutional challenge in *Memorial Hermann Health System v. Khalil*.[586] In that case, the plaintiff argued that the TCPA imposed "expedited, draconian procedures" in a manner that unconstitutionally restricted her right of access to open courts.[587] The court of appeals ultimately held that the restricted discovery

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580. *See id.*

581. Trinity River Auth. v. URS Consultants, Inc.–Tex., 889 S.W.2d 259, 261 (Tex. 1994) (quoting Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 448 (Tex. 1993)).

582. *See* Univ. of Tex. Health Sci. Ctr. at Hous. v. Crowder, 349 S.W.3d 640, 650 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("[N]one of their claims is a cognizable common-law claim, which is a requirement for protection under this constitutional provision.").

583. *See* Abraham v. Greer, 509 S.W.3d 609, 617 (Tex. App.—Amarillo 2016, pet. denied).

584. *Id.* at 614–15.

585. *Id.* at 617.

586. Mem'l Hermann Health Sys. v. Khalil, No. 01-16-00512-CV, 2017 WL 3389645, at *15–16 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied).

587. *Id.* at *15.

procedures were not so "unreasonable or arbitrary," as would be necessary to prevail on an open-courts challenge and upheld the statute's constitutionality.[588]

2. Vagueness and Over-Breadth

The *Sheffield* court addressed the assertion that the TCPA's definition of a right of association exceeded "the actual constitutional right," thus arguing that it "is overbroad facially and/or as applied, and is unconstitutionally vague because it could encompass all communications or activities of any group."[589] Because the complainant in that case cited no authority for his argument, the Third Court of Appeals rejected the claim, noting that the First Amendment protects against government action and the TCPA protects people exercising those rights "not from governmental restriction, but from meritless civil claims."[590] The court held that the challenge to the TCPA assumed the wrong posture because "an overbroad statute improperly *limits* protected freedoms," but Sheffield complained that "the statute provides more protection for freedom of association than the constitution does."[591] The court explained that there was no "support for the proposition that a statute that provides extra protection for a right violates the constitutional provision guaranteeing that right."[592]

The court similarly rejected Sheffield's vagueness argument, noting that "[t]o be void for vagueness, a statute must be so vague and indefinite as really to be no standard at all."[593] Noting that "the TCPA does not prohibit any activity," the court continued that the "legislature's choice to require a preliminary substantiation of legal actions relating to a broad range of organizational communications does not create difficulty in determining whether or how it applies."[594] The court declined to "determine the outer constitutional limits of the TCPA," noting that it was only required to determine "whether the TCPA's terms are permissible as applied to the statements at issue in this case, each of which generally relate to [the Combined Law Enforcement Associations of Texas (CLEAT)'s] internal affairs which are a common interest among CLEAT's members."[595] Thus, the court concluded that "[t]he TCPA's definition of the exercise of free association is not unconstitutionally overbroad or void for vagueness."[596]

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588. *Id.* at *16.

589. Combined Law Enf't Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672, at *11 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (mem. op.).

590. *Id.*

591. *Id.*

592. *Id.*

593. *Id.* at *12 (citing Jones v. City of Lubbock, 727 F.2d 364, 373 (5th Cir. 1984)).

594. *Id.*

595. *Id.*

596. *Id.*

B. Constitutional Challenges in Other States

The TCPA statute, in large measure, was patterned after the California anti-SLAPP statute.[597] California's law, which has had more judicial interpretation than any other in the country, has repeatedly been upheld as constitutional.[598]

Courts throughout the country have consistently rejected the argument that a plaintiff has a "constitutional right to unfettered defamation claims" or to file meritless lawsuits.[599] The California cases of *Equilon Enterprises v. Consumer Cause, Inc*.[600] and *Lafayette Morehouse Inc. v. Chronicle Publishing Co*.[601] illustrate the principle that the anti-SLAPP statute does not violate the right to petition. In *Equilon Enterprises*, California's highest court found that the anti-SLAPP statute "does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning"; rather, it "subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits."[602] In *Lafayette Morehouse*, a California appellate court reached the same conclusion, reasoning that "the [l]egislature could reasonably conclude [SLAPP] suits should be evaluated in an early and expeditious manner."[603]

Significantly, the courts that have evaluated the constitutionality of an anti-SLAPP statute have found the statute to be constitutional as long as the burden of proof is not higher than it is at trial.[604] Some challenges have been successful at the margins, however, resulting in courts striking down anti-SLAPP statutes in Washington and Minnesota as impermissibly restricting litigants' access to a jury trial.[605] Both of those states' anti-SLAPP

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597. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 27 (West 2017) (detailing the TCPA in its entirety), *with* CAL. CIV. PROC. CODE § 425.16 (West 2017) (detailing the California anti-SLAPP statute).

598. *See, e.g.*, Equilon Enters., LLC v. Consumer Cause, Inc., 52 P.3d 685, 690–92 (Cal. 2002).

599. Guam Greyhound, Inc. v. Brizill, 2008 Guam 13 ¶ 14, *3 (Guam 2008).

600. *Equilon Enters., LLC.*, 52 P.3d at 688–91.

601. Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 44 Cal. Rptr. 2d 46, 57 (Cal. Ct. App. 1995).

602. *Equilon Enters., LLC.*, 52 P.3d at 691.

603. *Lafayette Morehouse, Inc*., 44 Cal. Rptr. 2d at 52.

604. *See, e.g.*, *Equilon Enters., LLC*, 52 P.3d 685 (rejecting a right of petition challenge); *Lafayette Morehouse, Inc.*, 44 Cal. Rptr. 2d at 52 (rejecting a right of access challenge); *see also* Sandholm v. Kuecker, 942 N.E.2d 544, 560 (Ill. App. Ct. 2010) (rejecting a challenge based on the state constitution's guarantee to a remedy), *rev'd on other grounds*, 962 N.E.2d 418 (Ill. 2012) (affirming the constitutionality of Illinois' Citizen Participation Act); Lee v. Pennington, 830 So. 2d 1037, 1042 (La. Ct. App. 2015, writ denied) (rejecting an equal protection and due process challenge); Day v. Farrell, No. 97-2722, 2000 WL 33159180, at *3–4 (R.I. May 15, 2000) (rejecting a challenge based on access and due process); Hometown Props., Inc. v. Fleming, 680 A.2d 56, 60 (R.I. 1996) (rejecting a challenge based on numerous grounds, including separation of powers and right of access); Anderson Dev. Co. v. Tobias, 116 P.3d 323, 338 (Utah 2005) (rejecting a bill of attainder challenge); *Guam Greyhound Inc.*, 2008 Guam 13, at *5 (rejecting a challenge to an anti-SLAPP statute where it allegedly violated the right of access and was a prior restraint).

605. *See* Leiendecker v. Asian Women United of Minn., 895 N.W.2d 623, 636–37 (Minn. 2017); Davis v. Cox, 183 Wash. 2d 269, 294 (Wash. 2017).

statutes required plaintiffs to establish that their suits were not SLAPPs by clear and convincing evidence—a higher burden than the TCPA's prima facie case requirement as interpreted by the Texas Supreme Court. In Washington, the state's highest court invalidated the state's anti-SLAPP law, holding that the statute "creates a truncated adjudication of the merits of a plaintiff's claim . . . without a trial [and] . . . invades the jury's essential role of deciding debatable [issues] of fact."[606] Similarly, in Minnesota, the Supreme Court held that the state anti-SLAPP law was unconstitutional because it required plaintiffs to meet a higher burden of proof before trial than they would have had to meet at trial, in violation of the state constitution's provision regarding the right to a jury trial.[607]

The courts in *Davis v. Cox* and *Leiendecker v. Asian Women United of Minnesota*, similarly addressed statutes that created uniquely high pleading requirements.[608] For the anti-SLAPP statutes that include lesser burdens, such as the TCPA prima facie requirement, courts have rejected constitutional challenges based on the right to a trial by jury.[609]

XIV. APPLICATION OF STATUTE IN FEDERAL COURT

Some have questioned the extent to which federal courts sitting in diversity should apply state anti-SLAPP statutes.[610] Under *Erie Railroad Co. v. Tompkins* and its progeny, federal district courts sitting in diversity, in accordance with the Rules of Decision Act, must apply the substantive law of the state in which the district court sits.[611] In determining whether the state law is substantive or procedural, courts consider the twin aims of *Erie*, asking whether applying state law would discourage forum-shopping and avoid the "inequitable administration of the laws."[612]

When a valid Federal Rule of Civil Procedure governs an issue, however, *Erie* (and thus the application of state law) is displaced.[613] The test for federal rule displacement has two parts: (1) whether a federal rule

606. *Davis*, 183 Wash. 2d at 294.

607. *Leiendecker*, 895 N.W.2d at 636–37.

608. *See id.* at 635–37; *Davis*, 183 Wash. 2d at 293–94.

609. *See* AstenJohnson, Inc. v. Columbia Cas. Co., 562 F.3d 213, 222–26 (3d Cir. 2009); Burks v. Wis. Dep't of Transp., 464 F.3d 744, 759 (7th Cir. 2006).

610. *See, e.g.*, Williams v. Cordillera Commc'ns, Inc., No. 2:13-CV-124, 2014 WL 2611746, at *1 (S.D. Tex. June 11, 2014).

611. *See* Hanna v. Plumer, 380 U.S. 460, 465 (1965); Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). The Rules of Decision Act, codified under 28 U.S.C. § 1652, states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (2017).

612. *See Hanna*, 380 U.S. at 468.

613. *See id.* at 473; *see also* Shady Grove Orthopedic Assocs. v. Allstate Ins., 559 U.S. 393, 398 (2010) (Stevens, J., concurring) ("We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid.").

"answers the question in dispute";[614] and (2) whether the federal rule is valid.[615] Only when a federal rule does not apply or is invalid does *Erie* come back into play.[616]

A. The Texas Citizens Participation Act in Federal Court

The Fifth Circuit has not decided whether the TCPA applies in federal court. At every opportunity, it has assumed the TCPA applies without deciding that it does.[617] A recent Fifth Circuit decision appeared to backpedal from an earlier ruling, *Henry v. Lake Charles American Press*,[618] in which the Fifth Circuit held that Louisiana's anti-SLAPP statute, Article 971, applied in federal court; instead, the Fifth Circuit in *Block v. Tanenhaus* emphasized that the statute's applicability is "an open question" and entertained the possibility that "*Henry* could be interpreted as assuming the applicability of Article 971 for purposes of that case without deciding its applicability in federal courts more generally."[619] Many district courts have followed the Fifth Circuit's lead, side stepping the issue.[620] Although the TCPA's applicability remains an open question, each of Texas's federal district courts have applied the TCPA.[621]

Williams v. Cordillera Communications, Inc. was the first case in which a federal court in the Fifth Circuit addressed the issue of whether the TCPA applies in federal court sitting with diversity jurisdiction, holding that it does.[622] In *Williams*, a high school teacher, who had repeatedly been accused

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614. *Shady Grove*, 559 U.S. at 398.

615. *See id.* Valid means both valid as an exercise of the statutory authorization to create federal rules under the Rules Enabling Act and valid as an exercise of Congress's rulemaking power. *Id.*

616. *See id.*

617. *See* Cuba v. Pylant, 814 F.3d 701, 706 (5th Cir. 2016) ("To decide whether the appeals are timely, we first review the TCPA framework, which we assume—without deciding—controls as state substantive law in these diversity suits."); Culbertson v. Lykos, 790 F.3d 608, 631 (5th Cir. 2015) (citing NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C., 745 F.3d 742, 753 (5th Cir. 2014)) ("We have not specifically held that the TCPA applies in federal court; at most we have assumed without deciding its applicability."); Lozovyy v. Kurtz, 813 F.3d 576, 582–83 (5th Cir. 2015) (citing Henry v. Lake Charles Am. Press, 566 F.3d 164, 170 (5th Cir. 2009)).

618. *Henry*, 566 F.3d at 170.

619. Block v. Tanenhaus, 867 F.3d 585, 589 n.2 (5th Cir. 2017).

620. *See, e.g.*, Rivers v. Johnson Custodial Home, Inc., No. A-14-CA-484-SS, 2014 WL 4199540, at *1 (W.D. Tex. Aug. 22, 2014) (holding that the relevant speech was not protected by the TCPA rather than addressing whether the TCPA applies); Culbertson v. Lykos, No. H-12-3644, 2013 WL 4875069, at *2 (S.D. Tex. Sept. 11, 2013) (electing to dismiss on Rule 12(b)(6) when faced with a TCPA motion and a Rule 12(b)(6) motion to dismiss).

621. *See generally* Hammond v. Lovings, No. 5:15-CV-00579-RP, 2016 WL 9049579, at *2–3 (W.D. Tex. May 25, 2016) (applying the TCPA in a case removed to federal court pursuant to removal provisions in the Federal Torts Claims Act); Haynes v. Crenshaw, 166 F. Supp. 3d 773, 776 (E.D. Tex. 2016); Charalambopoulos v. Grammer, No. 3:14-CV-2424-D, 2015 WL 390664, at *1 (N.D. Tex. Jan. 29, 2015); Williams v. Cordillera Commc'ns, Inc., No. 2:13-CV-124, 2014 WL 2611746, at *1 (S.D. Tex. June 11, 2014).

622. *See generally Williams*, 2014 WL 2611746 at *2.

of improper behavior, filed a lawsuit in response to a local television station's investigative series about him.[623] The defendant filed a motion under the TCPA, and the plaintiff responded arguing that the TCPA does not apply in federal court.[624] In ruling on the motion, the court conducted an *Erie* analysis,[625] determining that, although there were procedural components to the statute, "these procedural features are designed to prevent substantive consequences—the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law . . . ."[626] The court then looked to the Fifth Circuit decision in *Henry v. Lake Charles American Press* in which Louisiana's anti-SLAPP law was applied, noting no material differences between the Louisiana and Texas statutes for determining their applicability in a federal court case deciding state law claims.[627]

Since *Williams*, other Texas district courts have similarly applied the TCPA in federal court in diversity actions. In the Northern District of Texas, Judge Sidney Fitzwater ultimately granted defendant's TCPA motion as to several of the plaintiff's claims in *Charalambopoulos v. Grammer*, a defamation suit arising from allegations of domestic violence.[628] One year later, in *Hammond v. Lovings*, the Western District of Texas dismissed an intentional infliction of emotional distress claim—which had been removed pursuant to the Federal Torts Claims Act—against several defendants pursuant to the TCPA.[629] In *Haynes v. Crenshaw*, the Eastern District of Texas adopted the reasoning of the *Williams* court, holding that the TCPA applies in federal court.[630] Most recently in *Forsterling v. A&E Television Networks, LLC*, Judge Lynn Hughes applied the TCPA to a case in which reality television show participants sued for, among other things, their identity being displayed on a show about human trafficking.[631]

The answer may be different for claims brought under federal law. In *Insurance Safety Consultants LLC v. Nugent*, the Northern District of Texas opined that the TCPA was in conflict with Federal Rules of Civil Procedure 12 and 56; accordingly, the court refused to apply the TCPA to dismiss the plaintiff's claims arising under federal law.[632] In *Nugent*, an employer

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623. *See id.* (laying out background facts in a summary judgment ruling).

624. *See id.* at *1.

625. *See id.*

626. *Id.* ("The Court thus enforces the TCPA as it applies to this case.").

627. *Id.* at *2 (citing Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164 (5th Cir. 2009)).

628. *See* Charalambopoulos v. Grammer, No. 3:14-CV-2424-D, 2015 WL 390664, at *28 (N.D. Tex. Jan. 29, 2015).

629. Hammond v. Lovings, No. 5:15-CV-00579-RP, 2016 WL 9049579, at *3 (W.D. Tex. May 25, 2016).

630. Haynes v. Crenshaw, 166 F. Supp. 3d 773, 777 (E.D. Tex. 2016).

631. *See* Forsterling v. A&E Television Networks, LLC, No. 4:16-CV-02941, 2017 WL 980347, at *1 (S.D. Tex. Mar. 9, 2017).

632. *See* Ins. Safety Consultants LLC v. Nugent, No. 3:15-CV-2183-B, 2016 WL 2958929, at *5 (N.D. Tex. May 23, 2016).

brought a claim under two federal statutes, the Computer Fraud and Abuse Act and the Electronic Communications Privacy Act, alleging the employee accessed an email account without permission.[633] The employee responded by filing, among other things, a counterclaim that "reserve[d] her right to request and enforce remedies" under the TCPA.[634] The court acknowledged that the Fifth Circuit had never formally decided whether state anti-SLAPP statutes apply in federal court and looked instead to the reasoning of the D.C. Circuit in *Abbas v. Foreign Policy Group*.[635] In *Abbas*, the D.C. Circuit applied the *Hanna/Shady Grove* two-step test, finding Federal Rule 12 and 56 both valid and in conflict with D.C.'s anti-SLAPP statute.[636] Finding the same conflict with the TCPA, the *Nugent* court held that the TCPA could not apply in federal court to federal claims.[637]

B. Interlocutory Appeals of the Texas Citizens Participation Act in Federal Court

Having observed that the applicability of the TCPA in federal courts remains a somewhat open question, the Fifth Circuit has noted that neither *Pylant* nor *Henry* addressed "whether, under the *Erie* doctrine, the array of state procedural rules surrounding anti-SLAPP motions to dismiss . . . follow the core anti-SLAPP motion to dismiss into federal court."[638] One such arguably procedural rule is the right to automatic interlocutory appeals upon the denial of an anti-SLAPP motion.[639] Although the TCPA and the Texas interlocutory appeal statutes provide the right to the interlocutory appeal of a trial court ruling on a TCPA motion, the Fifth Circuit has permitted interlocutory appeals in TCPA cases by applying the collateral order doctrine.[640] This doctrine requires that the following three conditions be met for an appeal to be permitted for a collateral order: "(1) the order must conclusively determine the disputed question; (2) it must resolve an important issue completely separate from the merits of the case; and (3) it must be effectively unreviewable on appeal from a final judgment."[641] To determine if the conditions apply to the TCPA, the court in *NCDR, L.L.C. v. Mauze & Bagby P.L.L.C.* looked to precedent involving application of the collateral order doctrine to the Louisiana anti-SLAPP statute and held that,

633. *Id.* at *1.
634. *Id.* at *5.
635. *Id.*
636. Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1333–36 (D.C. Cir. 2015).
637. *Nugent*, 2016 WL 2958929, at *5.
638. Block v. Tanenhaus, 867 F.3d 585, 589 n.2 (5th Cir. 2017) (quoting Cuba v. Pylant, 814 F.3d 701, 706 n.6 (5th Cir. 2016)).
639. *See* NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C., 745 F.3d 742, 746 (5th Cir. 2014).
640. *See id.* at 747 ("Where the district court's order is not a final judgment ending the action, the collateral order doctrine can confer limited appellate jurisdiction.").
641. *Id.*

"orders denying motions brought under anti-SLAPP statutes such as [Louisiana's] satisfy the conditions of the collateral order doctrine" and applied the same analysis to Texas's anti-SLAPP statute.[642] In doing so, the court held that the three conditions for a collateral order appeal were met, and thus the court permitted an interlocutory appeal.[643]

In *Cuba v. Pylant*, the Fifth Circuit again considered its jurisdiction over an interlocutory appeal from an order denying a TCPA motion.[644] In that case, an individual who was accused, but subsequently acquitted, of rape charges brought a defamation action against the alleged victim and her family.[645] Defendants filed TCPA motions, but the district court did not schedule a hearing within the statutory deadlines; when it did eventually rule on the motions, it held that the motions were moot because they had already been denied by operation of law.[646] The defendants appealed, and the plaintiff contested the appeal as untimely.[647] In response, the defendants relied on *NCDR*, arguing that the appeal was timely because "state law does not control the question of whether appellate review is available in federal court."[648] The Fifth Circuit rejected this argument, noting that *NCDR* does not support the conclusion that appellate review would still be available even in cases in which a state-law denial had taken place more than thirty days prior to appeal.[649] However, the Fifth Circuit ultimately exercised jurisdiction over the appeal, noting that the deadline for ruling on the motion is "pegged to the date of the hearing," and therefore, because no hearing occurred, "the motion was never deemed denied by operation of law."[650]

C. The Applicability of Other States' Anti-SLAPP Statutes in Federal Court

In federal district courts, the vast majority of jurisdictions outside of Texas have applied their anti-SLAPP statutes in diversity actions. Arizona, California, Illinois, Indiana, Maine, Maryland, Nevada, Oregon, Utah, Vermont, and Washington have applied state anti-SLAPP statutes in diversity actions.[651]

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642. *Id.* at 748 (citing Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 173 (5th Cir. 2009)).
643. *Id.* at 752.
644. *See* Cuba v. Pylant, 814 F.3d 701, 706 (5th Cir. 2016).
645. *Id.* at 705.
646. *Id.* at 704–05.
647. *Id.* at 706.
648. *Id.* at 708 (quoting NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C., 745 F.3d 742, 750 (5th Cir. 2014)).
649. *See id.*
650. *Id.* at 710.
651. *See* Godin v. Schencks, 629 F.3d 79, 86–87 (1st Cir. 2010) (applying the Maine statute); U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999) (applying the California statute); Tennenbaum v. Ariz. City Sanitary Dist., 799 F. Supp. 2d 1083 (D. Ariz. 2011) (applying the Arizona statute); Chi v. Loyola Univ. Med. Ctr., 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011) (applying the Illinois statute); Trudeau v. ConsumerAffairs.com, Inc., No. 10 C 7193, 2011 WL 3898041 (N.D. Ill. Sept.

The Ninth Circuit was the first appellate court to examine whether a state anti-SLAPP statute can be applied in a federal diversity action.[652] In the seminal case *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, the court considered whether two provisions of the California anti-SLAPP law—the motion to strike and the attorney's fees sections—conflicted with Federal Rules 8, 12, and 56.[653] In finding no direct collision, the Ninth Circuit concluded that the state statute and the federal rules "can exist side by side . . . each controlling its own intended sphere of coverage without conflict."[654] While the court recognized that there was some overlap between the pretrial procedures for expeditiously "weeding out meritless claims," the anti-SLAPP law also served another interest not directly addressed by the federal rules—namely, "the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances.'"[655] The *Newsham* court concluded that the twin purposes of the *Erie* doctrine favored application of California's anti-SLAPP statute in federal court, noting that:

> if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the [a]nti-SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the "twin aims" of the *Erie* doctrine.[656]

Since *Newsham*, the Ninth Circuit has "repeatedly held that California's anti-SLAPP statute can be invoked by defendants who are in federal court on the basis of diversity jurisdiction."[657]

On the other hand, several federal jurisdictions—in the District of Columbia, Massachusetts, Illinois, and New Mexico—have ruled that the *Erie* doctrine bars application of those jurisdictions' anti-SLAPP statutes in federal court.[658] The Massachusetts decisions have been called into question

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6, 2011) (applying the Illinois statute); Russell v. Krowne, No. DKC 2008-2468, 2010 WL 2765268 (D. Md. July 12, 2010) (applying the Maryland statute); Balestra-Leigh v. Balestra, No. 3:09-CV-551-ECR-RAM, 2010 WL 4280424 (D. Nev. Oct. 19, 2010) (applying the Nevada statute); Phillips v. KIRO-TV, Inc., 817 F. Supp. 2d 1317 (W.D. Wash. 2010) (applying the Washington statute); Containment Techs. Grp., Inc. v. Am. Soc'y of Health Sys. Pharmacists, No. 1:07-cv-0997-DFH-TAB, 2009 WL 838549 (S.D. Ind. Mar. 26, 2009) (applying the Indiana statute); USANA Health Scis., Inc. v. Minkow, No. 2:07-cv-159 TC, 2008 WL 619287 (D. Utah Mar. 4, 2008) (applying the burden-shifting and discovery provisions of the California statute); Bible & Gospel Tr. v. Twinam, No. 1:07-cv-17, 2008 WL 5245644 (D. Vt. Dec. 12, 2008) (applying the Vermont statute); Card v. Pipes, 398 F. Supp. 2d 1126, 1137 (D. Or. 2004) (applying the Oregon statute).

652. *See Newsham*, 190 F.3d 963.

653. *Id.* at 972.

654. *Id.* (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980)).

655. *Id.* at 972–73 (quoting CAL. CIV. PROC. CODE ANN. § 425.16(a) (West 2015)).

656. *Id.* at 973.

657. *See, e.g.*, Price v. Stossel, 620 F.3d 992, 999 (9th Cir. 2010).

658. *See generally* Los Lobos Renewable Power, LLC v. Americulture, Inc., No. 15-CV-0547-MV-

by the more recent First Circuit ruling in *Godin v. Schencks* (reviewing the Maine anti-SLAPP law).[659] A split of authority exists among district courts in the District of Columbia, with the majority holding that the anti-SLAPP statute applies in federal court.[660] Similarly, Georgia courts have ruled inconsistently on this issue,[661] and the applicability of the state's recently revised anti-SLAPP law in federal court remains a pending issue before the Eleventh Circuit.[662]

In 2016, the United States Supreme Court had the opportunity to address the issue of the applicability of state anti-SLAPP statutes in federal court and declined.[663]

D. The Interstate Application of Anti-SLAPP Laws

Another concern is the interstate application of anti-SLAPP protections, especially for websites that are governed by terms of use with a forum selection clause mandating a particular jurisdiction. For example, a federal district court in Seattle applied Washington's anti-SLAPP protections to a SLAPP case transferred from Florida.[664] The plaintiff, a Florida lawyer, sued a Seattle-based company, Avvo, in Florida, alleging defamation, false advertising, and misrepresentation arising in part from its description of his

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LAM, 2016 WL 8254920 (D.N.M. Feb. 17, 2016); Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328 (D.C. Cir. 2015); Intercon Sols., Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1042 (N.D. Ill. 2013) ("Applying that analysis to the facts of this case, the Court finds that [the Anti-SLAPP statute] cannot be applied by a federal court sitting in diversity because it is in direct conflict with Federal Rules of Civil Procedure 12 and 56."); 3M Co. v. Boulter, 842 F. Supp. 2d 85 (D.D.C. 2012); Sherrod v. Breitbart, 843 F. Supp. 2d 83 (D.D.C. 2012); S. Middlesex Opportunity Council, Inc. v. Town of Framingham, No. 07-12018-DPW, 2008 WL 4595369, at *10 (D. Mass. Sept. 30, 2008); Stuborn L.P. v. Bernstein, 245 F. Supp. 2d 312, 316 (D. Mass. 2003). The rulings by the Massachusetts District Court were handed down prior to the First Circuit's *Godin* decision reviewing the Maine anti-SLAPP law, which is similar in a number of respects to the Massachusetts anti-SLAPP statute. *See* Godin v. Schencks, 629 F.3d 79, 88 (1st Cir. 2010).

659. *Godin*, 629 F.3d at 88.

660. *Compare Abbas*, 783 F.3d 1328, *and 3M Co.*, 842 F. Supp. 2d at 104 (holding that the anti-SLAPP statute does not apply in federal court), *with* Forras v. Rauf, 39 F. Supp. 3d 45 (D.D.C. 2014) (holding that the anti-SLAPP statute's special motion to dismiss applies in federal court), Boley v. Atl. Monthly Grp., 950 F. Supp. 2d 249, 254 (D.D.C. 2013) (holding that the anti-SLAPP statute applies in federal court), *and* Farah v. Esquire Magazine, Inc., 863 F. Supp. 2d 29, 35 (D.D.C. 2012), *aff'd*, 736 F.3d 528 (D.C. Cir. 2013) (holding that the D.C. anti-SLAPP Act applies in federal court).

661. *Compare* Buckley v. DIRECTV, Inc., 276 F. Supp. 2d 1271 (N.D. Ga. 2003) (citing U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 970–73 (9th Cir. 1999)) (applying the Georgia statute), *with* Adventure Outdoors, Inc. v. Bloomberg, 519 F. Supp. 2d 1258, 1278 (N.D. Ga. 2007), *rev'd on other grounds*, 552 F.3d 1290 (11th Cir. 2008) (refusing to apply procedural elements of Georgia anti-SLAPP statute), *and* Carbone v. Cable News Network, Inc., No. 1:16-CV-1720-ODE, 2017 WL 5244176 (N.D. Ga. Feb. 15, 2017) (detailing that an order denying motion to strike on the grounds that Georgia's anti-SLAPP law does not apply in federal court).

662. Carbone v. Cable News Network, Inc., No. 17-10812 (11th Cir. Feb. 22, 2017).

663. *See generally* Mebo Int'l, Inc. v. Yamanaka, 136 S. Ct. 1449 (2016).

664. *See* Davis v. Avvo, Inc., No. C11-1571RSM, 2012 WL 1067640, at *8 (W.D. Wash. Mar. 28, 2012).

practice.[665] Relying on the Avvo.com website's terms of use and its forum selection clause, Avvo had the case transferred from Florida (which, at the time, had a less comprehensive anti-SLAPP statute) to Washington.[666] Avvo then filed a special motion to strike under Washington's anti-SLAPP law, which was granted by the federal court, dismissing the case and awarding the mandatory attorney's fees and a $10,000 statutory penalty.[667] In another multi-state case, *Kennedy v. Johnson Publishing Co.*, an Illinois court applied the California anti-SLAPP statute in a case in which the plaintiff was a California resident and was likely to have suffered the greatest injury in that state.[668]

XV. CONCLUSION

Meritless lawsuits designed to choke truthful public commentary weaken public accountability and threaten the modern communication marketplace—a marketplace made robust by continued nourishment of First Amendment freedoms.[669] The TCPA answers this lawsuit chokehold by providing threshold protections for the exercise of First Amendment rights.[670] Early dismissal of meritless lawsuits that implicate these rights furthers the exchange of truthful ideas and opinions unfettered by the prospect of being hauled into court for publicly voicing a critical view.[671] With the TCPA's adoption, First Amendment liberties in Texas have a practical bulwark against misuse of the judicial process.

To the extent that the TCPA removes litigation strategy from among the weapons for extinguishing truthful public criticism, the Act is consistent with the framers' view of First Amendment rights.[672] The timely remedy to most critical speech has always been more speech—not a meritless lawsuit:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of

665. *Id.* at *1–3.

666. *See id.*

667. *Id.* at *8.

668. *See* Kennedy v. Johnson Publ'g Co., LLC, No. 2014-L-001038 (Ill. Cir. Ct. July 10, 2014).

669. *See supra* Part I (discussing First Amendment freedoms and the modern communication marketplace).

670. *See supra* Part II.A (providing different components of the TCPA and how each of them protects First Amendment rights).

671. *See supra* Part II.A (explaining how the TCPA protects peoples' First Amendment rights in their expression of critical views).

672. *See supra* Part II.A (reconciling the Framers' intent in adopting the First Amendment in the provisions of the TCPA).

> education, the remedy to be applied is more speech, not enforced silence.[673]

By removing the threat of abusive litigation, 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.

673. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).