

BULLIES BEWARE: SAFEGUARDING CONSTITUTIONAL RIGHTS THROUGH ANTI- SLAPP IN TEXAS*

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* The authors acknowledge and thank Alicia Wagner Calzada, J.D., St. Mary’s University School of Law, 2010, and Lucy Netherton of Haynes and Boone, L.L.P. for their significant assistance in the preparation of this Article.

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I. INTRODUCTION

When a miscreant manipulates the legal system to intimidate and silence people who are telling the truth, such manipulation threatens core values of democracy—the right to freely speak, petition the government, and associate.

Legal intimidation of truthful speech is not a hypothetical problem. Take the scandal surrounding Lance Armstrong. Armstrong rose to bicycling fame as a seven-time winner of the Tour de France. Throughout his career, however, rumors of performance-enhancing drug use plagued him. His denials were vehement. Over the course of his career, in an attempt to silence those who spoke out against him, he filed lawsuit after lawsuit.¹

- In 2003, Emma O'Reilly, Armstrong's former soigneur, publicly described Armstrong's performance-enhancing drug use when she agreed to cooperate with authors of the book *L.A. Confidential: Les secrets de Lance Armstrong*. Armstrong sued her. The case settled.²
- In 2004, Armstrong sued *The Sunday Times* of London for libel after the paper reprinted allegations contained in the book *L.A. Confidential: Les secrets de Lance Armstrong*. *The Sunday Times* spent more than \$1 million in legal fees defending against the lawsuit and paid Armstrong \$500,000 to settle the suit.³
- In 2004, Armstrong sued SCA Promotions for failure to pay a bonus for winning the Tour de France. SCA had declined to pay it because of reports of Armstrong's performance-enhancing drug use.⁴ SCA Promotions paid Armstrong \$7.5 million to settle the suit.⁵
- In 2005, Armstrong sued his former personal assistant, Mike Anderson, after Anderson disclosed his discovery of a box of

1. 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>.

2. Mary Pilon, *Armstrong Aide Talks of Doping and Price Paid*, N.Y. TIMES, Oct. 12, 2012, http://www.nytimes.com/2012/10/13/sports/cycling/lance-armstrong-aide-talks-of-doping-and-price-paid.html?pagewanted=all&_r=0.

3. 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.heraldsun.com.au/sport/british-journalist-david-walsh-says-the-sunday-times-will-wants-money-back-after-settling-with-lance-armstrong/story-fngr0c3f-1226557282585>.

4. Robert Wilonsky, *Dallas-Based Sports Insurer that Paid Lance Armstrong \$7.5 Million for '04 Tour de France Win Wants Money Back*, DALL. MORNING NEWS SCOOP BLOG (Oct. 22, 2012, 4:51 PM), <http://thescoopblog.dallasnews.com/2012/10/dallas-based-sports-insurer-that-paid-lance-armstrong-7-5-million-for-04-tour-de-france-win-wants-money-back.html/>.

5. *Id.*

androstenedione while cleaning Armstrong's apartment.⁶ The case settled.⁷

- In 2006, lawyers for *The Sunday Times* issued the following statement: “*The Sunday Times* has confirmed to Mr. Armstrong that it never intended to accuse him of being guilty of taking any performance-enhancing drugs and sincerely apologizes for any such impression.”⁸

After six years and millions of dollars in legal fees and settlements, the truth finally vindicated these voices that Armstrong had subdued through lawsuits. In 2012, The United States Doping Agency issued its “Reasoned Decision,” citing to mountains of proof of Armstrong's performance-enhancing drug use.⁹ In an about face, Armstrong did a “tell-all” interview with Oprah Winfrey, admitting to doping to improve his race results. He also conceded that he was nothing more than a bully who had sued the journalists, friends, and colleagues who had accused him of doping:

Armstrong: “Yeah, I was a bully.”

Winfrey: “You're suing people and you know they're telling the truth? What is that? . . .”

Armstrong: “It's a major flaw.”¹⁰

Armstrong had lied about his years of rampant performance-enhancing drug use. His vehement denials survived in part because, each time a truth-teller challenged him, Armstrong slapped that person with a lawsuit in retaliation.¹¹

6. Ben Broad, *A Brief Look at Some of Those Who Haven't Believed Lance Armstrong*, HERALD SUN, June 14, 2012, <http://www.heraldsun.com.au/news/a-brief-look-at-some-of-those-who-havent-believed-lance-armstrong/story-e6fr7jo-1226395139794>.

7. 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>.

8. *The Sunday Times Sues Lance Armstrong Over Libel-Suit Settlement*, VELONEWS (Dec. 23, 2012), http://velonews.competitor.com/2012/12/news/the-sunday-times-sues-lance-armstrong-over-libel-suit-settlement_269715 (quoting the formal apology, as part of a joint statement, issued by *The Sunday Times*).

9. See generally U.S. ANTI-DOPING AGENCY, REPORT ON PROCEEDINGS UNDER THE WORLD ANTI-DOPING CODE AND THE USADA PROTOCOL: REASONED DECISION OF THE UNITED STATES ANTI-DOPING AGENCY ON DISQUALIFICATION AND INELIGIBILITY (2012), available at <http://d3epuodzu3wuiss.cloudfront.net/ReasonedDecision.pdf> (explaining the U.S. Anti-Doping Agency's reasoned decision on disqualification and ineligibility regarding *U.S. Anti-Doping Agency v. Armstrong*).

10. *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/.

11. See, e.g., *Armstrong v. SCA Promotions, Inc.*, No. 05-14-00300-CV, 2014 WL 1678988, at *1 (Tex. App.—Dallas Apr. 24, 2014, no pet.) (mem. op.); Philip Jankowski, *Firms Sue Lance Armstrong for \$500,000 Over Doping Admission*, STATESMAN (Oct. 7, 2014, 7:15 PM), <http://www.statesman.com/news/news/local/firms-sue-lance-armstrong-for-500000-over-doping-a/nhdhT/>; *Lance Armstrong Settles with Sunday Times*, GUARDIAN (Aug. 25, 2013, 4:17 AM), <http://www.theguardian.com/sport/2013/aug/25/lance-armstrong-settles-sunday-times>; 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?_r=0; Brent Schrottenboer, *Lance Armstrong Loses Bid to Have Lawsuit Dismissed*, USA TODAY,

While the Armstrong scandal was brewing, many states had noticed a trend in Armstrong-like litigation aimed at chilling freedom of speech, petition, and association. When meritless lawsuits target truthful speech, lawful petitioning, and legal association, free speech advocates have dubbed them “Strategic Lawsuits Against Public Participation” (SLAPP suits).¹² A SLAPP suit is the offensive use of legal proceedings to retaliate against persons lawfully exercising First Amendment rights.¹³

SLAPP suits differ from ordinary lawsuits in that they seek to dissuade one from exercising a lawful right, such as testifying at a City Council meeting,¹⁴ complaining to a medical board about an unfit doctor,¹⁵ investigating fraud in our education system,¹⁶ or participating in a political campaign.¹⁷ SLAPP suits effectively chill First Amendment activities by subjecting citizens who exercise constitutional rights to the intimidation and expense of litigation.¹⁸ While legitimate litigation serves to right a wrong, the primary motivation behind a SLAPP suit is to extinguish lawful speech.¹⁹ SLAPP filers harness the judicial process as a weapon in a strategy to win a political, social, or economic battle.²⁰ During the last decade, the Texas Legislature, like those in numerous other states, noted this troubling trend and, in response, enacted the Texas Citizens Participation Act in 2011.²¹

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

A. History and Purpose

Several notable SLAPP cases spurred legislative action. When Carla Main wrote the book *Bulldozed: “Kelo,” Eminent Domain, and the American*

June 19, 2014, <http://www.usatoday.com/story/sports/cycling/2014/06/19/lance-armstrong-lawsuit-us-government-doping/10999179/>.

12. 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.” *Id.* at 3.

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

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

15. See *Lewis v. Garraway*, No. D-1-GN-06-001397 (201st Dist. Ct., Travis County, Tex. 2007).

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

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

18. 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.”).

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

20. *Id.*

21. See TEX. CIV. PRAC. & REM. CODE ANN. ch. 27 (West 2015).

Lust for Land, little did she know she would be “bulldozed” into court.²² In the book, Main discussed cities’ use of eminent domain to gain property for private development.²³ Dallas developer H. Walker Royall sued Main and a local Texas newspaper that reviewed the book.²⁴ Royall kept the non-diverse defendants in the suit for one year and one day—long enough to increase costs and destroy diversity jurisdiction.²⁵ 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”; little did he know that the towing company would sue him for \$750,000.²⁶ T & J Towing also asked the court to judicially silence Justin by issuing a restraining order against him.²⁷ Stories like Carla’s and Justin’s inspired legislators across the country to enact laws aimed at those who file unfounded lawsuits specifically targeting citizens who speak out truthfully on matters of public concern.²⁸

The defining characteristic of a SLAPP suit is its purpose to deter First Amendment activities and to do so through costly and exhausting litigation.²⁹ The SLAPP suit target must hire lawyers, answer petitions, file motions, and respond to burdensome discovery requests.³⁰ An overwhelming number of SLAPP filers eventually drop their claims, having achieved their goal of silencing dissent.³¹ Because summary judgment may not provide for dismissal of a SLAPP suit until years down the road, the damage has been done, and oftentimes, the speaker has been silenced by the very cost of defending the suit.³² “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

22. 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).

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

24. *Id.*

25. 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>.

26. 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).

27. *T & J Towing*, No. 2010-0206-NZ.

28. See Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/recent/anti-slapp-statutes-spread-across-the-nation/> (last visited May 30, 2015).

29. *Id.*

30. See generally *id.* (noting that SLAPP suits threaten defendants with financial liability and litigation costs).

31. Lori Potter, *Strategic Lawsuits Against Public Participation and Petition Clause Immunity*, 31 ENVTL. L. REP. 10852, 10854 (July 2001); PRING & CANAN, *supra* note 12, at 1–2.

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

financially and chill the defendant's public involvement."³³ "The 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."³⁴

The U.S. Court of Appeals for the Ninth Circuit, having more than twenty years of experience interpreting anti-SLAPP laws,³⁵ 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) [a concern] that unscrupulous lawyers and litigants will be encouraged to use meritless lawsuits to discourage the exercise of first amendment rights.³⁶

Whether petitioning the government, writing a traditional news article, or commenting on the quality of a consumer business, citizen involvement in the exchange of ideas benefits our society.³⁷ Citizen participation is at the heart of our democracy, but meritless lawsuits aimed at silencing that participation have become increasingly common.³⁸ In response to this rise in retaliatory litigation, thirty states, the District of Columbia, and the United States territory of Guam have passed some form of anti-SLAPP legislation.³⁹ Texas numbers among them.

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

34. *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)).

35. See Wyrwich, *supra* note 33, 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. *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. COURTS FOR NINTH CIRCUIT, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135 (last visited Apr. 18, 2015).

36. See *Metabolic Research, Inc.*, 693 F.3d at 799-800 (citing *John v. Douglas Cnty. Sch. Dist.*, 219 P.3d 1276, 1282 (Nev. 2009)).

37. PRING & CANAN, *supra* note 12, at 1-2.

38. *Id.*

39. See ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (2003 & Supp. 2013); ARK. CODE ANN. §§ 16-63-501 to -508 (West 2005); CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2015); DEL. CODE ANN. tit. 10, §§ 8136-8138 (West 2013); D.C. CODE §§ 16-5501 to -5505 (2012); FLA. STAT. ANN. §§ 720.304(4) (West 2015), 768.295 (West 2011); GA. CODE ANN. §§ 9-11-11.1, 51-5-7(4) (West 2010); HAW. REV. STAT. §§ 634F-1 to -4 (West 2011); 735 ILL. COMP. STAT. ANN. 110/15-/25 (West 2011); IND. CODE ANN. §§ 34-7-7-1 to -10 (West 2011); LA. CODE CIV. PROC. ANN. art. 971 (2005 & Supp. 2015); ME. REV. STAT. ANN. tit. 14, § 556 (2012); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2011); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2011); MINN. STAT. ANN. §§ 554.01-.05 (West 2011); MO. ANN. STAT. § 537.528 (West 2012); NEB. REV. STAT. §§ 25-21,241-21,246 (2010); NEV. REV. STAT. ANN. §§ 41.637, 41.650-.670 (West 2013); N.M. STAT. ANN. § 38-2-9.1 (West 1978 & Supp. 2014); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2011); N.Y. C.P.L.R. 3211(g) (McKinney 2011); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2010); OR. REV. STAT. ANN. §§ 31.150-.155 (West 2011); 27 PA. CONS. STAT. ANN. §§ 7707, 8301-8303 (West 2011); R.I. GEN. LAWS ANN. §§ 9-33-1 to -4 (West

This Article focuses on the passage, implementation, and interpretation of the Texas Citizens Participation Act (the TCPA), passed unanimously by both the house and the senate in 2011.⁴⁰ Before enactment of the TCPA, summary judgment was the only procedural mechanism for stopping a SLAPP suit.⁴¹ While summary judgment disposes of a controversy before a trial, that resolution seldom happens before both parties spend significant time and resources on the lawsuit, including conducting expensive discovery. By providing for an early dismissal of meritless lawsuits, the TCPA promotes the First Amendment rights of Texas citizens and alleviates some of the burden on the court system.⁴²

The Texas anti-SLAPP statute allows a judge to dismiss meritless SLAPP claims in the first 60–90 days.⁴³ Defendants who are sued for the lawful exercise of their First Amendment rights request dismissal under the statute by filing a motion to dismiss.⁴⁴ An anti-SLAPP 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.⁴⁵

B. Examples of Demonstrated Need Prior to Passage of Statute

In addition to Carla Main's testimony about her experience, the Texas Legislature heard other instances of SLAPP activity, demonstrating the need for the proposed legislation.⁴⁶

(1) In one case, a woman was sued by her doctor after she complained to the Texas State Board of Medical Examiners and a local television station about her experience with that doctor. The doctor was later sanctioned and

2010); TENN. CODE ANN. §§ 4-21-1001 to -1004 (West 2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West 2015); UTAH CODE ANN. §§ 78B-6-1401 to -1405 (West 2011); VT. STAT. ANN. tit. 12, § 1041 (West 2011); WASH. REV. CODE ANN. §§ 4.24.510–.525 (West 2005 & Supp. 2014); 7 GUAM CODE ANN. §§ 17101–17109 (2015).

40. H.J. of Tex., 82d Leg., R.S. 4916, 4623 (2011), available at <http://www.journals.house.state.tx.us/hjml/82r/pdf/82RDAY82FINAL.PDF>; S.J. of Tex., 82d Leg., R.S. 2513, 2532 (2011), available at <http://www.journals.senate.state.tx.us/sjml/82r/pdf/82RSJ05-18-F.PDF>.

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

42. *Id.*

43. TEX. CIV. PRAC. & REM. CODE § 27.003.

44. TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011; see also Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011).

45. TEX. CIV. PRAC. & REM. CODE §§ 27.003(c), 27.006; see also Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011).

46. The following witnesses testified in favor of the Bill at the hearing before the House Committee on Judiciary and Civil Jurisprudence on March 28, 2011: Shane Fitzgerald, Freedom of Information Foundation of Texas (FOIFT); Joe Ellis, Texas Association of Broadcasters (TAB); Laura Prather, Better Business Bureau and Texas Daily Newspaper Association, FOIFT, and TAB; Janet Ahmad, HomeOwners for Better Building; Robin Lent, Coalition of HOA Reform; Carla Main; and Brenda Johnson. House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011).

the lawsuit was eventually dismissed, but only after the defendants were forced to pay \$100,000 in legal expenses.⁴⁷

(2) In another, a man who applied for a “taxicab franchise from the city of Austin was sued for defamation by his former employer for statements the man made at a city council meeting” in connection with the licensing process.⁴⁸

(3) “A newspaper was sued by a non-profit foundation” after publishing news stories about the charity’s verified connections to a terrorist organization. “After the federal government investigated the foundation,” it froze the foundation’s assets and shut it down. The plaintiffs then non-suited the case. Before the dismissal, however, considerable discovery was conducted, and the defendant incurred substantial expenses.⁴⁹

(4) “Former Houston Independent School District administrator Robert Kimball” complained to the school district about mismanagement of a private program that had contracted with the district to teach troubled children. In response, a private company sued Kimball for defamation.⁵⁰

(5) A number of local television stations were sued for defamation by a political candidate, alleging that he was defamed by the broadcast of a political opponent’s ad. The television stations’ summary judgment motion was denied, but an appellate court overturned the decision. The plaintiff thereafter filed a petition for review with the Texas Supreme Court, which the court denied. The litigation caused great expense to the several television stations that aired the political advertisement, despite the fact that, under federal law, the stations were not allowed to alter it.⁵¹

At a hearing on H.B. 2973, testifiers included:

(1) Brenda Johnson, a civil litigator from San Antonio, who testified about a 2010 homeowner’s association dispute, which, after two years, five lawsuits, and an estimated \$300,000 in legal and related fees, chilled member participation and debate.⁵²

(2) Joe Ellis, an employee of KDFW, who testified about two media suits involving temporary restraining orders used to silence sources.⁵³ The

47. *Examples of SLAPP Suits in Texas*, SLAPP’ED IN TEXAS.COM, <http://www.slappedintexas.com/examples-of-slapp-suits-in-texas> (last visited Apr. 18, 2015).

48. *See id.*

49. *See id.*

50. *See id.*; Ericka Mellon, *HISD Urged to Reconsider Alternative Schools Deal*, HOUS. CHRON., July 13, 2008, <http://www.chron.com/news/houston-texas/article/HISD-urged-to-reconsider-alternative-schools-deal-1613875.php>.

51. *See KENS-TV, Inc. v. Farias*, No. 04-07-00170-CV, 2007 WL 2253502, at *8 (Tex. App.—San Antonio Aug. 8, 2007, pet. denied) (mem. op.) (reversing denial of summary judgment for running political advertisement).

52. Texas Citizens Participation Act: Hearing on Tex. H.B. 2973 Before the H. Comm. on Judiciary & Civil Jurisprudence, 82d Leg., R.S. (Mar. 28, 2011) [hereinafter Citizens Participation Act: Hearings] (statement of Brenda Johnson), available at http://tlchouse.granicus.com/MediaPlayer.php?view_id=26&clip_id=3919.

53. *Id.* (statement of Joe Ellis).

suits requested that KDFW shut down broadcasts of investigations into fraud in the education system⁵⁴ and in the Medicare arena.⁵⁵

(3) Janet Ahmad, President of Homeowners for Better Building, who was sued for her efforts to galvanize protests against a homebuilder who had built a subdivision on top of a World War II bombing range, leading to a \$2.6 million clean-up paid for by the federal government. She testified that she and several other consumers had been sued for \$20 million for alleged racketeering in a lawsuit that had been pending for almost a decade at the time of her testimony.⁵⁶

Passage of the TCPA enjoyed broad-based 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.⁵⁷ Supporters agreed that Texas should join the ranks of other states that had enacted laws intended to stop meritless lawsuits aimed at chilling First Amendment rights.⁵⁸

C. Comparison of Statute to Other Jurisdictions

Texas was the 28th state to enact an anti-SLAPP statute.⁵⁹ Since its passage, Nevada has significantly expanded its anti-SLAPP statute,⁶⁰ and Oklahoma passed an almost-mirror image of Texas's statute in 2014.⁶¹ The first anti-SLAPP statute was passed in 1989 by Washington State, but it only applied in narrow circumstances.⁶² Then, in 1993, California paved the way

54. *Id.*; see also *Tutors with Computers, LLC v. Fernandez*, No. 10-5779 (44th Dist. Ct., Dallas County, Tex. 2010).

55. See *Fernandez*, No. 10-5779; *AG Total Care Home Health Servs., Inc. v. Fox Television Stations*, No. 08-04668 (191st Dist. Ct., Dallas County, Tex. 2008).

56. Citizens Participation Act: Hearings, *supra* note 52 (statement of Janet Ahmad).

57. 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.

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

59. See *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection/> (last visited Apr. 18, 2015).

60. See NEV. REV. STAT. ANN. §§ 41.635–.670 (West 2013). "Nevada courts have held that Nevada's Anti-SLAPP statute should be read similarly to California's, upon which it is based." *Anti-SLAPP Law in Nevada*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/anti-slapp-law-nevada> (last updated Nov. 26, 2012).

61. See OKLA. STAT. ANN. tit. 12, § 1430 (West 2010 & Supp. 2015).

62. Bruce E.H. Johnson et al., *Washington Enacts New Anti-SLAPP Law*, DAVIS WRIGHT TREMAINE LLP (Mar. 18, 2010), http://www.dwt.com/advisories/Washintgon_Enacts_New_AntiSLAPP_Law_03_18_2010/. Washington's original statute, Wash. Rev. Code Ann. § 4.24.510, allowed a defendant to

by enacting broader anti-SLAPP legislation.⁶³ It protected “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.”⁶⁴ Though some others have chosen more narrow protections—limited to speech in certain settings or about certain issues—many states have followed California’s lead in adopting broad anti-SLAPP statutes. For instance, Pennsylvania has one of the narrowest protections under its anti-SLAPP law. It limits redress to those individuals who petition the government regarding environmental issues.⁶⁵ Similarly, Florida’s two anti-SLAPP statutes do not currently extend to journalists and others engaged in publishing activities;⁶⁶ however, the Florida Legislature has just passed a law substantially expanding its anti-SLAPP law (SB 1312/HB 1041), which is awaiting the governor’s signature.⁶⁷ Other states with more narrowly drawn statutes are Connecticut, Tennessee, and West Virginia.⁶⁸

In contrast, California’s broad statute, which has been a model for several other jurisdictions, 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.”⁶⁹ “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.⁷⁰ The statute protects “any act of [a] person in furtherance of the person’s right of petition or free speech.”⁷¹ An act in furtherance of the right to petition includes:

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.⁷²

The common feature of most anti-SLAPP statutes is a mechanism for an early, dispositive motion requiring the claimant to come forward with

bring a motion to defeat SLAPP claims and to recover fines and attorney’s fees for the cost of defending against the SLAPP claim. WASH. REV. CODE ANN. § 4.24.510 (West 2005). “However, the statute’s protections were limited to claims based on statements made to government officials in the course of government decision making.” See Johnson et al., *supra*.

63. See CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2015).

64. *Id.*

65. See 27 PA. CONS. STAT. ANN. §§ 7707, 8301–8303 (West 2011).

66. See FLA. STAT. ANN. §§ 720.304(4) (West 2015), 768.295 (West 2011).

67. S.B. 1312, Reg. Sess. (Fla. 2015); H.B. 1041, Reg. Sess. (Fla. 2015).

68. See generally KRISTEN RASMUSSEN, FIGHTING FRIVOLOUS LAWSUITS AGAINST JOURNALISTS, REPS. COMMITTEE FOR FREEDOM PRESS, SLAPP STICK (Summer 2011), available at <http://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf> (reviewing all of the state anti-SLAPP statutes).

69. *Id.*

70. CAL. CIV. PROC. CODE § 425.16(b)(1)(f) (West 2004 & Supp. 2015).

71. *Id.*

72. *Id.* § 425.16(e).

evidence showing that the plaintiff's claims have merit.⁷³ Oftentimes the statutes mandate an award of attorney's fees or other sanctions for bringing a meritless SLAPP suit.⁷⁴ To invoke anti-SLAPP protection, the defendant must show that the plaintiff's claim targets the defendant's lawful exercise of free speech, petition, or association.⁷⁵

Particularly important is the requirement that the plaintiff demonstrate that the claims are viable early in the case.⁷⁶ In Texas, such analysis should take place before filing the suit; the TCPA requires a claimant to show that work.⁷⁷

Generally, anti-SLAPP laws share four basic goals: (1) to provide, as a matter of substantive law, protection against lawsuits for statements (and expressive conduct) about matters of public concern, where the plaintiff is unable to establish a prima facie case supporting his or her cause of action; (2) to furnish a procedural framework that encourages and facilitates prompt and inexpensive resolution of such SLAPP claims; (3) to provide a right of immediate appeal of a trial court ruling on an anti-SLAPP motion; and (4) to require appropriate reimbursement for fees and expenses incurred by SLAPP suit targets.⁷⁸

D. Texas Legislative History

1. Passage of the Law

After more than a decade of effort toward anti-SLAPP legislation, a strong bipartisan coalition from civic, business, citizen, media, and justice groups worked together to obtain unanimous support for passage of the TCPA.⁷⁹

The bill analysis of the law discusses the reasons for its passage and its basic mechanics:

[F]rivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of our democracy. The Internet age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of speech. Unfortunately, abuses of the legal system, aimed at silencing these citizens,

73. See, e.g., *id.* § 425.16(b)(1) (requiring the plaintiff to show he may prevail on the claim).

74. See, e.g., *id.* § 425.16(c)(1) (permitting recovery of attorney's fees).

75. See Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1270–71 (2007) (analyzing state anti-SLAPP statutes).

76. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b) (West 2015).

77. See TEX. R. CIV. P. 13; TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01.

78. See, e.g., WASH. REV. CODE ANN. § 4.24.525 (West 2005 & Supp. 2014).

79. See sources cited *supra* note 40.

have also grown. These lawsuits are called Strategic Lawsuits Against Public Participation or “SLAAP” [sic] suits.

. . . [SLAPP suits] allow defendants in such cases to dismiss cases earlier than would otherwise be possible, thus limiting the costs and fees. The Texas Citizens Participation Act would allow defendants—who are sued as a result of exercising their right to free speech or their right to petition the government—to file a motion to dismiss the suit, at which point the plaintiff would be required to show by clear and specific evidence that he had a genuine case for each essential element of the claim. In addition, if the motion to dismiss is granted, the plaintiff who has wrongly brought the lawsuit may be required to pay attorney’s fees of the defendant.⁸⁰

On June 17, 2011, Governor Perry signed H.B. 2973 into law, and the TCPA (also known as the Texas anti-SLAPP statute) went into immediate effect.⁸¹

The TCPA protects citizens from meritless lawsuits filed against them for exercising their First Amendment right to petition, speak, and associate.⁸² A SLAPP suit defendant can ask the court to evaluate the lawsuit’s merit in the first 60–150 days after the suit is filed.⁸³ And, in applying the test set forth in the statute, should the court find the case to be meritless, the lawsuit is dismissed and fees and potential sanctions are awarded against the filing party.⁸⁴

2. Amendments to the Statute

In 2013, the legislature further clarified the statute, expressly conferring the right to an interlocutory appeal of the denial of a motion to dismiss, based on the TCPA, by adding it to Texas Civil Practice and Remedies Code § 51.014.⁸⁵

The proposal and the original statute passed last session provided for three situations where a party to the cause of action could appeal the interlocutory order disposing of the Motion to Dismiss. First, if the trial court failed to act within the time period in the statute; second, if the trial court granted the motion to dismiss; and third, if the trial court denied the motion to dismiss. In the process of these “motions” going through the court system, the

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

81. Prather, *supra* note 28.

82. *Id.*

83. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.004(a) (West 2015).

84. See *id.*

85. See *Jennings v. WallBuilder Presentations, Inc. ex rel. Barton*, 378 S.W.3d 519, 529 (Tex. App.—Fort Worth 2012, pet. denied) (holding that without specific statutory authorization, an interlocutory appeal of a denial of an anti-SLAPP motion was not available; this was one of the first anti-SLAPP cases on appeal that demonstrated the need for clarification); see also TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)–(b) (West 2015); Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 2935, 83d Leg., R.S. (2013) (explaining that the section adding the interlocutory appeal would amend Texas Civil Practice and Remedies Code § 51.014(a) and (b)).

Second Court of Appeals ruled that in the case of a denial of a motion to dismiss signed by a judge, the statute did not allow an interlocutory appeal. Both the Thirteenth and the Fourteenth Courts of Appeals have ruled that the existing statute does provide for the right to an interlocutory appeal under these circumstances. The purpose of this bill is to clarify the legislative intent to provide for an interlocutory appeal in all three of the circumstances outlined in Chapter 27 and to provide for a stay of the underlying proceedings pending the outcome of the appeal.⁸⁶

In addition, the statutory amendment contained in H.B. 2935 addressed the time constraints presented by the requirement to hold a hearing within thirty days; the amendments extended the hearing deadline to sixty days.⁸⁷ Finally, the amendments clarified that a court could base a motion to dismiss on an uncontroverted affirmative defense.⁸⁸ And, in the exemptions portion of the bill, it once again reiterated that the TCPA statute does not apply to insurance claims.⁸⁹

The legislature passed the statutory amendment by more than a two-thirds majority in both chambers; it went into immediate effect when the governor signed the bill on June 14, 2013.⁹⁰

III. PROCEDURE—PLEADINGS AND DEADLINES

The Texas anti-SLAPP statute 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.⁹¹ 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].”⁹² 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.⁹³ “These suits are particularly problematic for independent voices . . . , in part because the Internet has created a searchable record of

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

87. *See id.*; *see also* TEX. CIV. PRAC. & REM. CODE § 27.004 (“A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion” These changes were brought about in part by the courts’ confusion and difficulty in determining whether discovery was allowable, what the deadlines should be, and if and when a hearing should take place). *See generally In re Lipsky*, 411 S.W.3d 530, 540–54 (Tex. App.—Fort Worth 2013, orig. proceeding), *mand. denied*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015) (providing an example of how the thirty-day requirement causes confusion: “the Lipskys contended that they complied with section 27.004 because that section requires a hearing on a motion to dismiss to be ‘set,’ not heard, within thirty days”).

88. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d) (West 2015).

89. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b), (d) (West 2015).

90. *See* Tex. H.B. 2935, 83d Leg., R.S. (2013).

91. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West 2015).

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

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

public participation.”⁹⁴ Anyone can be an outspoken advocate, critic, or whistle-blower; anyone can be the target of a SLAPP suit.⁹⁵

A. Pleadings and Discovery

1. Motion to Dismiss

A variety of claims may present a basis for a motion to dismiss under the statute. The initial burden is on the movant to establish that he has been sued for the exercise of his First Amendment rights.⁹⁶ The movant may refer to the initial pleading as support for such a declaration.⁹⁷ Pleadings are considered evidence for purposes of the statute:⁹⁸

§ 27.006. EVIDENCE.

(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.⁹⁹

The movant may also preemptively file a robust motion, establishing with evidence that the claimant cannot demonstrate a viable claim.¹⁰⁰ In doing so, the movant should address the elements of the claims, pointing out fatal flaws or asserting affirmative defenses that nullify the claim.

2. Stay of Discovery

The anti-SLAPP statute provides for an automatic stay of discovery in the case while a motion to dismiss is pending¹⁰¹ and a stay of trial court proceedings while the motion is on appeal.¹⁰² The purpose of the discovery

94. *Id.*

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

96. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West 2015).

97. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2015).

98. See 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.”); Shipp v. Malouf, 439 S.W.3d 432, 432 (Tex. App.—Dallas 2014, pet. denied), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015, orig. proceeding); 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 on other grounds In re Lipsky*, 2015 WL 1870073 (“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.”).

99. TEX. CIV. PRAC. & REM. CODE § 27.006(a).

100. See TEX. CIV. PRAC. & REM. CODE § 27.005(d).

101. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(c) (West 2015).

102. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12), (b) (West 2015).

stay is to prevent costs associated with defending against a meritless claim, for which no amount of discovery will support a meritorious cause of action.

For good cause, however, the trial court can, on its own motion or at the request of the parties, authorize specified and limited discovery relevant to the motion.¹⁰³ Good cause is a necessary requirement.¹⁰⁴ The Fifth Court of Appeals granted mandamus relief requiring a trial court to vacate an order granting discovery in an anti-SLAPP case when there was “no good cause for the discovery.”¹⁰⁵ In that case, the non-movant had stated that he needed depositions “in order to defend the motion to dismiss”; the appellate court held that a general need was insufficient grounds for discovery and not “good cause.”¹⁰⁶

3. Claimant’s Pleading and Amended Pleading

Nothing in the statute prohibits claimants from amending their pleadings; however, each new claim re-opens the window of opportunity to file an anti-SLAPP motion.¹⁰⁷ 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.¹⁰⁸ The TCPA provides: “[a] motion to dismiss a legal action . . . must be filed not later than the 60th day after the date of service of the legal action,”¹⁰⁹ and “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.”¹¹⁰ Thus, it is the service of the claim that triggers the sixty-day statutory deadline.¹¹¹

The courts have consistently re-started the clock for motions filed in connection with newly asserted claims. For instance, in *Williams v. Cordillera Communications, Inc.*—a lawsuit against a television station

103. TEX. CIV. PRAC. & REM. CODE § 27.006(b); *see also* Am. Heritage Capital, L.P. v. Gonzalez, 436 S.W.3d 865, 865–69 (Tex. App.—Dallas 2014, no pet.) (limited depositions were conducted); Pickens v. Cordia, 433 S.W.3d 179, 179–83 (Tex. App.—Dallas 2014, no pet.) (trial court allowed 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.) (mem. op.) (per curiam) (trial court allowed discovery); Walker v. Schion, 420 S.W.3d 454, 458–59 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (trial court did not allow requested discovery).

104. *See In re D.C.*, No. 05-13-00944-CV, 2013 WL 4041507, at *1 (Tex. App.—Dallas Aug. 9, 2013, no pet.) (mem. op.) (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.) (mem. op.) (trial court concluded there was no good cause for discovery).

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

106. *Id.*

107. *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).

108. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001(6), 27.003(b) (West 2015).

109. TEX. CIV. PRAC. & REM. CODE § 27.003(b).

110. TEX. CIV. PRAC. & REM. CODE § 27.001(6).

111. TEX. CIV. PRAC. & REM. CODE §§ 27.001(6), 27.003(b).

based on the station's reports on a teacher's inappropriate behavior with female students—an anti-SLAPP motion to dismiss was filed after the filing of a second amended complaint.¹¹² The amended complaint contained new claims arising out of recent broadcasts that were not a part of the prior complaints.¹¹³ The court ruled that the term “legal action” in § 27.001(6) refers not only to the first pleading requesting relief; “[r]ather, it contemplates additional pleadings and additional causes of action that may arise during the progress of a case.”¹¹⁴ 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 amended pleading adding the new claims, was timely with respect to those new claims.¹¹⁵

For a short time, courts had to distinguish between legal actions filed before and after the effective date of the TCPA.¹¹⁶ For example, in *Better Business Bureau of Metropolitan Dallas, Inc. v. Ward*, the Fifth Court of Appeals decided that the claims of a plaintiff who joined a lawsuit after the TCPA's effective date were subject to dismissal under the TCPA, even though the underlying lawsuit was filed before the statute's effective date.¹¹⁷

In determining whether a TCPA motion has been timely filed, the courts look to whether the amended petition adds new claims or parties. In *In re Estate of Check*, the Fourth Court of Appeals disallowed an argument that an amended pleading automatically reset the sixty-day deadline to file a motion under the TCPA.¹¹⁸ Rather, a motion to dismiss could only be filed within sixty days of a pleading adding new parties or claims.¹¹⁹ Similarly, in *Paulsen v. Yarrell*, the First Court of Appeals, in considering the appeal of 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 60-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

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

113. *Id.* at *2.

114. *Id.*

115. *Id.*

116. See *James v. Calkins*, 446 S.W.3d 135, 135–36 (Tex. App.—Houston [1st Dist.] 2014, pet. filed); *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); *Better Bus. Bureau of Metro. Dall., Inc. v. Ward*, 401 S.W.3d 440, 440–41 (Tex. App.—Dallas 2013, pet. denied).

117. *Ward*, 401 S.W.3d at 443.

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

119. *Id.* at 837.

freely, associate freely, and participate in government as permitted by law.”¹²⁰

Similarly, in *Miller Weisbrod, L.L.P. v. Llamas-Soforo*, the movant waited to file an anti-SLAPP motion until after a second amended petition was filed.¹²¹ The Eighth Court of Appeals held that the motion was untimely because the new claims were originally brought in a first amended petition; additionally, the motion was filed more than sixty days after the first amended petition was filed.¹²²

B. Statutory Procedures

1. No Service Required: Dismissal Survives Nonsuit

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.¹²³ This is to prevent a plaintiff from filing a lawsuit for the sole purpose of gaining leverage without having any intention of pursuing it.¹²⁴ With today’s instantaneous notification of lawsuit filings, the public taint to being named as a defendant in a SLAPP suit often attaches before service of process occurs.

In *James v. Calkins*, the movant filed an anti-SLAPP motion prior to service.¹²⁵ The First Court of Appeals held that a voluntary appearance prior to service, or in lieu of service, did not preclude the filing of an anti-SLAPP motion.¹²⁶ 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.¹²⁷

Similarly, in the case of *Landmark Technology, LLC v. eBay, Inc.*, Landmark sued eBay for exercising its right of petition in the United States

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

121. *Miller Weisbrod, L.L.P. v. Llamas-Soforo*, No. 08-12-00278-CV, 2014 WL 6679122, at *2 (Tex. App.—El Paso Nov. 25, 2014, no pet.).

122. *Id.* at *11.

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

124. *See id.* at 142.

125. *Id.*

126. *Id.*

127. *Id.*

Patent and Trademark Office's reexamination process.¹²⁸ After the reexamination concluded, Landmark asserted various state tort claims based upon the filing of the requests for reexamination of the patents.¹²⁹ eBay did not wait to be served before filing an anti-SLAPP motion, contending that Landmark sued it merely for exercising its right to petition and right of free speech.¹³⁰ Shortly after eBay filed its motion, Landmark dismissed its case.¹³¹ eBay continued seeking fees for the cost of bringing the motion.¹³² A decision to nonsuit, even before service occurs, does not preclude a claim for anti-SLAPP relief.¹³³ The case ultimately settled.¹³⁴

In *Rauhauser v. McGibney*, a case arising out of Internet speech, the plaintiff filed a nonsuit five hours after the defendant filed an anti-SLAPP motion to dismiss.¹³⁵ The trial court failed to rule on the motion, causing it to be dismissed by operation of law.¹³⁶ On appeal, the Second Court of Appeals ruled that the anti-SLAPP motion survived the nonsuit and that the trial court erred in allowing the denial of the motion by operation of law.¹³⁷ 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

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

129. *Id.*

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

131. 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>.

132. *Id.*

133. See *Villafani v. Trejo*, 251 S.W.3d 466, 468–69 (Tex. 2008); see also *James v. Calkins*, 446 S.W.3d 135, 146–48 (Tex. App.—Houston [1st Dist.] 2014, pet. filed) (discussing the appellants' motion to dismiss); *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).

134. Ryan Davis, *eBay, Landmark Bury Hatchet Over Patent Re-Exam Suit*, LAW360 (Oct. 03, 2014, 4:04 PM), <http://www.law360.com/articles/584094/eBay-landmark-bury-hatchet-over-patent-re-exam-suit> (last visited Apr. 18, 2015).

135. *Rauhauser v. McGibney*, No. 02-14-00215-CV, 2014 WL 6996819, at *4 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.) (per curiam).

136. *Id.*

137. See *id.* at *9.

him more relief than the nonsuit and therefore constitutes a claim for affirmative relief that survives Appellees' nonsuit.¹³⁸

2. Deadlines for Parties

A movant must file its motion to dismiss within sixty days after the plaintiff has served it with the legal action.¹³⁹ Service starts the clock ticking on the deadline for filing the motion, though nothing prohibits a voluntary appearance with an anti-SLAPP motion before the plaintiff accomplishes service.¹⁴⁰

Upon a showing of good cause, the trial court may extend the time to file the motion.¹⁴¹ For example, although a movant filed his motion one day late, an appellate 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.”¹⁴² 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.¹⁴³

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 plaintiff, unless one of the following exists: (1) “the docket conditions of the court require a later hearing,” (2) good cause, or (3) an agreement between the parties.¹⁴⁴ “[B]ut in no event shall the hearing occur more than 90 days after service of the motion”¹⁴⁵ One exception to this deadline is “[i]f the [trial] court allows discovery under Section 27.006(b), the court may extend the hearing date” to no later “than 120 days after the service of the motion.”¹⁴⁶

There is no statutory deadline for filing a response to an anti-SLAPP motion.¹⁴⁷ This lack of a response deadline presents a potential problem should the non-movant wait until immediately prior to the hearing to file it. For this reason, the non-movant should schedule an early hearing so that the parties may request a continuance, if necessary, to review the response.¹⁴⁸ As the Second Court of Appeals explained, “the plain language of section 27.004 applies to the setting, not the hearing or consideration, of a chapter 27 motion

138. *Id.* at *2 (citations omitted).

139. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b) (West 2015).

140. *See supra* Part III.B.1.

141. TEX. CIV. PRAC. & REM. CODE § 27.003(b).

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

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

144. TEX. CIV. PRAC. & REM. CODE ANN. § 27.004(d) (West 2015).

145. *Id.*

146. *Id.* § 27.004(c).

147. *See generally id.* § 27.004 (explaining other deadlines).

148. *See id.* § 27.004(c) (discussing court extensions).

to dismiss.”¹⁴⁹ A continuance does not interfere with the statute if the hearing is otherwise set within the statutory deadlines.¹⁵⁰ Local rules may also provide relief. 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.”¹⁵¹

3. Deadlines for Court

“The court must rule on a motion [to dismiss] . . . not later than the 30th day following the date of the hearing on the motion.”¹⁵² 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 appeal the denial.¹⁵³ The Fourteenth Court of Appeals has confirmed that the trial court has no discretion to extend this deadline.¹⁵⁴ And, when trial courts have attempted to rule after the thirty-day deadline, the courts of appeal have consistently held that such rulings are in error.¹⁵⁵ The Fifth Court of Appeals was one of the first to address this issue in *Avila v. Larrea*.¹⁵⁶ In *Avila*, the trial court began a hearing on a motion to dismiss and then continued it after a ninety-day discovery period.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ 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: “The Act contains no provision authorizing such an

149. *In re Lipsky*, 411 S.W.3d 530, 540 (Tex. App.—Fort Worth 2013, orig. proceeding), *mand. denied*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015).

150. *See id.* at 540–41.

151. *See* Dallas (Tex.) Civ. Dist. Ct. Loc. R. 2.09, *available at* http://www.dallascounty.org/departments/districtclerk/media/New_LocalRules_for_CivilCourt.pdf.

152. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(a) (West 2015).

153. TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(a) (West 2015).

154. *See* *Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC*, 407 S.W.3d 398, 401 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

155. *See* *James v. Calkins*, 446 S.W.3d 135, 150 (Tex. App.—Houston [1st Dist.] 2014, pet. filed); *Direct Commercial Funding, Inc.*, 407 S.W.3d at 401; *Jain v. Cambridge Petrol. 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); *Avila v. Larrea*, 394 S.W.3d 646, 662 (Tex. App.—Dallas 2012, pet. denied).

156. *Avila*, 394 S.W.3d at 652.

157. *Id.* at 649.

158. *Id.* at 662.

159. *Id.* at 656.

action, nor can the authority to do so be implied.”¹⁶⁰ Finally, in *Jain v. Cambridge Petroleum Group, Inc.*, 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.”¹⁶¹

IV. EVIDENCE

A. Pleadings and Affidavits

The TCPA expressly provides that the parties may rely on pleadings as evidence in the anti-SLAPP context.¹⁶² 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 requires showing to obtain dismissal.¹⁶³ In response, some plaintiffs have argued that the defendant must provide affidavits in support for its motion to dismiss.¹⁶⁴ The Fourth Court of Appeals, however, rejected this precise argument in *Rio Grande H₂O Guardian v. Robert Muller Family Partnership Ltd.*¹⁶⁵

The appellees contend that the appellants failed to meet their burden of proving that the underlying lawsuit related to the exercise of their right to petition because they presented no evidence. Unlike other types of cases where pleadings are not considered evidence, section 27.006 of the Act, which is entitled “Evidence,” expressly provides, “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.” 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.¹⁶⁶

Similarly, in *Schimmel v. McGregor*, the court held it “shall consider the pleadings” as evidence as required by § 27.006(a), entitled “Evidence,” in ruling on TCPA motions to dismiss.¹⁶⁷

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

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

162. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2015).

163. *Id.*

164. *See 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 on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015, orig. proceeding).

165. *Id.*

166. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE § 27.006(a)).

167. *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.”).

In *Cheniere Energy, Inc. v. Lotfi*, however, a case in which neither party filed affidavits and both relied only on the pleadings, the First Court of Appeals warned:

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.¹⁶⁸

B. Live Testimony

The TCPA does not contemplate live testimony at a hearing on a motion to dismiss.¹⁶⁹ One court denied live testimony, stating: “[b]y statute, the trial court’s decision on a motion to dismiss under Section 27.003 is not based on live testimony.”¹⁷⁰ Instead, the ruling on the motion “must be based on the pleadings and the supporting and opposing affidavits.”¹⁷¹

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 court rules on the motion, except as provided by § 27.006(b).¹⁷² Under § 27.006(b), the court may allow specified and limited discovery relevant to the motion upon a showing of good cause.¹⁷³ Good cause has been defined as: “the discovery necessary to further [a] cause of action.”¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶

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

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

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

171. *Id.* (holding that a trial court did not abuse its discretion by denying an inmate’s motion for a bench warrant so that he could appear at an anti-SLAPP hearing in a lawsuit he brought pro se against his attorney).

172. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(c) (West 2015); 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).

173. TEX. CIV. PRAC. & REM. CODE § 27.006(b).

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

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

176. TEX. CIV. PRAC. & REM. CODE ANN. § 27.004(c) (West 2015).

A trial court's ruling that permits or denies specific and limited discovery is reviewed under an abuse of discretion standard.¹⁷⁷ To establish an abuse of discretion, a plaintiff must show that the inability to obtain the discovery prevented the plaintiff from prevailing.¹⁷⁸

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) [its] right of free speech; (2) the right to petition; or (3) the right of association."¹⁷⁹ "Exercise of the right of free speech means a communication made in connection with a matter of public concern."¹⁸⁰ 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.¹⁸¹ Section 27.005(b) mandates dismissal if the non-movant fails to meet this burden.¹⁸²

The statutory test is derived from *In re Does*, in which the Sixth Court of Appeals held that a third party must establish a viable claim when requesting a court order to identify an anonymous speaker for the purposes of pursuing a defamation claim.¹⁸³ In that case, the court of appeals found that a correct balance of interests requires a prima facie showing of each essential element of the claims at the outset.¹⁸⁴ This meant that the plaintiff was required to provide proof, and not just allegations, sufficient to preclude the granting of summary judgment.¹⁸⁵ By incorporating this test into the anti-SLAPP statute, the legislature chose to apply the same standard to claims brought against non-anonymous speakers as claims brought against

177. *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.").

178. *Walker*, 420 S.W.3d at 458–59.

179. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West 2015).

180. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3) (West 2015) (internal quotation marks omitted).

181. TEX. CIV. PRAC. & REM. CODE § 27.005(c).

182. *Id.* § 27.005(b).

183. *In re Does*, 242 S.W.3d 805, 813, 822–23 (Tex. App.—Texarkana 2007, no pet.).

184. *Id.* at 821–22.

185. See *id.*

anonymous ones.¹⁸⁶ One must establish the viability of a claim challenging First Amendment-protected conduct before the lawsuit may proceed.¹⁸⁷

Furthermore, the “clear and specific” standard requires more than notice pleadings. The Texas Supreme Court analyzed the standard in *In re Lipsky* and ruled that although it does not impose a higher burden of proof than required at trial, one cannot just make general allegations and recite the elements of the claim and expect to survive an anti-SLAPP motion to dismiss. Instead, the evidence presented by the plaintiff “must provide enough detail to show the factual basis for its claim.”¹⁸⁸ In a defamation case, 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.

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. In one of the first appellate cases to consider the clear and specific standard under the TCPA, the Fourteenth Court of Appeals adopted the rationale found in the pre-TCPA cases,¹⁸⁹ explaining the following: “On appeal from an order decided under section 27.005(c), we 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.”¹⁹⁰ Several other appellate courts had adopted this interpretation.¹⁹¹ Other appellate courts, however, concluded that relevant circumstantial evidence could also be considered when evaluating a TCPA

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

187. *Id.*

188. See *In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. App. 24, 2015, orig. proceeding).

189. *McDonald v. Clemens*, 464 S.W.2d 450, 456 (Tex. Civ. App.—Tyler 1971, no writ) (stating that an affirmative defense of fraud must be established “by clear and specific evidence unaided by presumptions, inferences or intendments”); see, e.g., *Sw. Olshan Found. Repair Co. v. Gonzales*, 345 S.W.3d 431, 440–41 (Tex. App.—San Antonio 2011, pet. granted) (finding that although fraud invariably must be proven by circumstantial evidence, a vital fact may not be established with inference stacking), *aff’d on other grounds*, 400 S.W.3d 52 (Tex. 2013).

190. *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 727 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved of by In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. App. 24, 2015, orig. proceeding).

191. See *James v. Calkins*, 446 S.W.3d 135, 146 (Tex. App.—Houston [1st Dist.] 2014, pet. filed); *KBMT Operating Co. v. Toledo*, 434 S.W.3d 276, 282 (Tex. App.—Beaumont 2014, pet. granted), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Rio Grande H₂O Guardian v. Robert Muller Family P’ship Ltd.*, No. 04-13-00441-CV, 2014 WL 309776, at *2 (Tex. App.—San Antonio Jan. 29, 2014, no pet.) (mem. op.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Farias v. Garza*, 426 S.W.3d 808, 813–14 (Tex. App.—San Antonio 2014, pet. filed), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Walker v. Schion*, 420 S.W.3d 454, 457 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Sierra Club v. Andrews Cnty.*, 418 S.W.3d 711, 716 (Tex. App.—El Paso 2013, pet. filed), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Alphonso v. Deshotel*, 417 S.W.3d 194, 198 (Tex. App.—El Paso 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Fitzmaurice v. Jones*, 417 S.W.3d 627, 632 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 354–55 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

motion.¹⁹² The Texas Supreme Court agreed that clear and specific evidence under the TCPA includes relevant circumstantial evidence.¹⁹³

A. Initial Burden to Establish Statute Applies

There are two steps to a trial court's consideration of an anti-SLAPP motion. 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."¹⁹⁴ The burden is on the moving party—usually the defendant—to meet this test.¹⁹⁵ 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.¹⁹⁶ In *Rio Grande H₂O Guardian*, the Fourth Court of Appeals held that, because § 27.006 states "we may consider the pleadings as evidence in this case, [and] Rio Grande H₂O Guardian's petition established that the appellants were exercising their right to petition in filing the lawsuit," the pleadings alone were sufficient to meet the movant's burden.¹⁹⁷

Anti-SLAPP movants must demonstrate the suit implicates First Amendment rights by a preponderance of the evidence.¹⁹⁸ Notably, the important factor is not the communication method, but rather the communication topic.¹⁹⁹ Communications sent via private email have been held to invoke the statute when they related to the moving party's free speech rights.²⁰⁰ Conversely, the statute was held inapplicable to communications widely published on an Internet blog regarding a family member because the

192. Schimmel v. McGregor, 438 S.W.3d 847, 855 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); Combined Law Enforcement Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672, at *10 (Tex. App.—Austin Jan. 31, 2014, pet. filed) (mem. op.); Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *In re Lipsky*, 411 S.W.3d at 530, 539 (Tex. App.—Fort Worth 2013, orig. proceeding), *mand. denied*, 2015 WL 1870073.

193. *In re Lipsky*, 2015 WL 1870073.

194. *Newspaper Holdings, Inc.*, 416 S.W.3d at 80 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b)) (setting forth the court's duty on a party's motion to dismiss).

195. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West 2015).

196. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.006 (West 2015) (providing for consideration for the pleadings as well as affidavit evidence); *Rio Grande H₂O Guardian*, 2014 WL 309776, at *3.

197. *Rio Grande H₂O Guardian*, 2014 WL 309776, at *3.

198. TEX. CIV. PRAC. & REM. CODE § 27.005(b).

199. Compare Combined Law Enforcement Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672, at *12–13 (Tex. App.—Austin Jan. 31, 2014, pet. filed) (mem. op.) (holding that the anti-SLAPP 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 anti-SLAPP statute did not apply to a public blog post that was about a private family matter).

200. See *Sheffield*, 2014 WL 411672, at *5 (applying anti-SLAPP to private email communication under Right of Association).

information conveyed was not a matter of public concern.²⁰¹ The Texas Supreme Court recently addressed whether the statute is applicable to private communications and held in *Lippincott v. Whisenhunt* that the statute applies to both public and private communications about matters of public concern.²⁰²

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;²⁰³ (2) actual and constructive fraud and barratry claims related to the exercise of the right of petition;²⁰⁴ (3) a spokesman's comments on behalf of a public watchdog group who publicly criticized the contract procedure in the City of Laredo;²⁰⁵ (4) communications made in judicial proceedings involving HOA members;²⁰⁶ (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;²⁰⁷ and (6) investigative journalism reports involving the exposure of wrongdoing.²⁰⁸

Some examples of cases in which the statute has not been implicated include those concerning: (1) a trade secret dispute between two chemical companies;²⁰⁹ (2) an employee's suit against a former employer for wrongful termination;²¹⁰ (3) defamatory statements of officers of an HOA;²¹¹ and (4) communications on an Internet blog concerning private family matters.²¹²

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

202. See *Lippincott v. Whisenhunt*, No. 13-0926, 2015 WL 1967025 (Tex. App. 24, 2015) (per curiam).

203. See *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. Dall., Inc. v. Ward*, 401 S.W.3d 440, 444-45 (Tex. App.—Dallas 2013, pet. denied); *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); *Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 307-09 (Tex. App.—Dallas 2013, pet. denied).

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

205. See *Farias v. Garza*, 426 S.W.3d 808, 812-13 (Tex. App.—San Antonio 2014, pet. filed), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. App. 24, 2015, orig. proceeding).

206. See *Fitzmaurice v. Jones*, 417 S.W.3d 627, 632 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073.

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

208. See *Shipp v. Malouf*, 439 S.W.3d 432, 436-38 (Tex. App.—Dallas 2014, pet. denied), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 688-90 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Williams v. Cordillera Commc'ns, Inc.*, No. 2:13-CV-124, 2014 WL 2611746 (S.D. Tex. June 11, 2014); *Simpton v. High Plains Broad., Inc.*, No. 2011-CI-13290 (285th Dist. Ct., Bexar County, Tex. Apr. 10, 2012); *Salvaggio v. High Plains Broad., Inc.*, No. 2011-CI-10127 (131st Dist. Ct., Bexar County, Tex. Mar. 9, 2012).

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

210. See *Cheniery Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 213-16 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

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

212. See *Pickens v. Cordia*, 433 S.W.3d 179, 184 (Tex. App.—Dallas 2014, no pet.).

If a non-movant fails to challenge the applicability of the statute in response to a motion to dismiss, that may constitute a waiver.²¹³ Notably, however, some courts of appeal have considered the applicability of the statute to be a jurisdictional issue.²¹⁴ This interpretation conflates the issue of jurisdiction with the scope of protection under the TCPA.²¹⁵ Whether the movant has met its TCPA burden is an issue over which an appellate court has jurisdiction.²¹⁶ Thus, whether the claims at issue fall within the scope of protection under the TCPA (i.e., whether the statute is applicable) should not impact an appellate court's jurisdiction under Texas Civil Practice and Remedies Code §§ 51.014(a)(12) and 27.003.²¹⁷

213. See, e.g., *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073 (“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 if an issue is not raised at the trial court level, the complaint is waived on appeal).

214. See *Jardin*, 431 S.W.3d at 774 (“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.”); *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *4 n.6 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.) (“Kinney contends that BCG has waived this argument by not presenting it in the trial court. However, because it pertains to this Court’s jurisdiction, we will address it.”). *But see* *Miller Weisbrod, L.L.P. v. Llamas-Soforo*, No. 08-12-00278-CV, 2014 WL 6679122, at *6 (Tex. App.—El Paso Nov. 25, 2014, no pet.) (holding that it 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)); *Combined Law Enforcement Ass’ns of Tex. v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672, at *4 (Tex. App.—Austin Jan. 31, 2014, pet. filed) (mem. op.) (considering an interlocutory appeal of a denial of a motion to dismiss under the TCPA).

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

216. See *id.* at 854–57; *Shipp v. Malouf*, 439 S.W.3d 432, 439–42 (Tex. App.—Dallas 2014, pet. denied), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Young v. Krantz*, 434 S.W.3d 335, 342 (Tex. App.—Dallas 2014, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Farias v. Garza*, 426 S.W.3d 808, 813 (Tex. App.—San Antonio 2014, pet. filed), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Rio Grande H₂O Guardian v. Robert Muller Family P’ship Ltd.*, No. 04-13-00441-CV, 2014 WL 309776, at *5 (Tex. App.—San Antonio Jan. 29, 2014, no pet.) (mem. op.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *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 on other grounds In re Lipsky*, 2015 WL 1870073; *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); *Better Bus. Bureau of Metro. Dall., Inc. v. BHDFW, 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).

217. *Jardin*, 431 S.W.3d at 775–76 (Frost, C.J., dissenting).

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

After 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), who then must adduce clear and specific evidence for each essential element of the claim in question.²¹⁸ If the plaintiff does not meet its burden, then the court must dismiss the claim.²¹⁹

The Texas Supreme Court recently opined about the clear and specific standard and held that it, like all other standards (including clear and convincing), recognizes the relevance of circumstantial evidence and does not categorically exclude circumstantial evidence.²²⁰ 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.²²¹ 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 pleadings—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.²²²

In a defamation case that implicates the TCPA, 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.

The court continued to explain that conclusory affidavits do not suffice to meet the clear and specific evidentiary burden. In *In re Lipsky*, however, the court held that the affidavit of a company executive with global conclusions about damages was not sufficient clear and specific evidence for the business disparagement claim, nor were the general accusations of bias by a third-party consultant sufficient clear and specific evidence to support the conspiracy claim.²²³

218. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West 2015); *In re Lipsky*, 411 S.W.3d 530 (Tex. App.—Fort Worth 2013, orig. proceeding), *mand. denied*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015)

219. TEX. CIV. PRAC. & REM. CODE § 27.005.

220. *In re Lipsky*, 2015 WL 1870073, at *10.

221. *Id.* at *13.

222. *Id.*

223. *Id.*

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.²²⁴ This third step was formally added by the legislature in 2013 with the addition of § 27.005(d) to the statute.²²⁵ Courts, however, generally recognized the potential to defeat a claim with proof of a valid defense prior to the addition of the provision.²²⁶ In *Kinney v. BCG Attorney Search, Inc.*, the Third 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.”²²⁷ The court held that a dismissal was warranted based on the affirmative defense of *res judicata*.²²⁸

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. The first is by written order denying the motion to dismiss.²²⁹ 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.²³⁰

Trial courts will deny a motion to dismiss for two primary reasons. First, a trial court may determine that the statute does not apply to the legal action because it does not implicate First Amendment rights.²³¹ 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.²³² If the movant fails to meet that burden, the inquiry

224. TEX. CIV. PRAC. & REM. CODE § 27.005(d).

225. *Id.*

226. *See, e.g., Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *8 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.) (“[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.’”).

227. *Id.*

228. *Id.*

229. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c); *see, e.g., United Food & Commercial 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.”).

230. TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(a) (West 2015); *see, e.g., James v. Calkins*, 446 S.W.3d 135, 141 (Tex. App.—Houston [1st Dist.] 2014, pet. filed) (“The trial court did not rule on the motion within 30 days of the hearing, and it was therefore overruled by operation of law.”).

231. TEX. CIV. PRAC. & REM. CODE § 27.005(b).

232. *Id.*

ends.²³³ Second, the trial court may conclude that the non-movant failed to establish 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.²³⁴ The statute provides a mechanism and framework for the dismissal of lawsuits that are without merit before substantial judicial and litigant resources are expended.²³⁵ In addition to these primary bases, courts have also denied motions in cases where the statute’s strict deadlines have not been met.²³⁶ Finally, a court might also deny the motion if it determines that a statutory exemption applies.²³⁷

B. Grant of Motion

The trial court has thirty days from the date of the hearing to grant the motion.²³⁸ 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.²³⁹ 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.²⁴⁰ If the requirements are met, dismissal is

233. See, e.g., *Cheniery 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); *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) (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.”).

234. TEX. CIV. PRAC. & REM. CODE § 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 & Commercial Workers Int’l Union*, 430 S.W.3d at 513 (“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.”).

235. See TEX. CIV. PRAC. & REM. CODE § 27.005.

236. See, e.g., *Miller Weisbrod, L.L.P. v. Llamas-Soforo*, No. 08-12-00278-CV, 2014 WL 6679122, at *11 (Tex. App.—El Paso Nov. 25, 2014, no pet.) (upholding a denial of an anti-SLAPP motion by some defendants that was untimely).

237. TEX. CIV. PRAC. & REM. CODE ANN. § 27.010 (West 2015) (listing actions to which the statute does not apply). Exemptions include: actions brought by the state or a political subdivision, commercial speech, wrongful death, and cases brought under the Insurance Code or an insurance contract. *Id.* This chapter does not apply to a legal action seeking recovery for bodily injury or wrongful death or survival, or to statements made regarding that legal action. *Id.* § 27.010(c). This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract. TEX. CIV. PRAC. & REM. CODE § 27.005(a).

238. TEX. CIV. PRAC. & REM. CODE § 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. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.008, 51.014 (West 2015).

239. See TEX. CIV. PRAC. & REM. CODE § 27.005.

240. *Id.* § 27.005(b)–(d).

mandatory.²⁴¹ A court errs if it fails to grant a motion when the requirements of the motion are met.²⁴²

C. Denial by Operation of Law

Thirty days after the hearing on the motion, the motion is denied by operation of law.²⁴³ At that point, the trial court loses the power to rule on the motion and can neither grant nor deny it.²⁴⁴ This issue was first brought before the Fifth Court of Appeals in *Avila*.²⁴⁵ In *Avila*, the appellate court held that a motion filed under the TCPA was overruled by operation of law thirty days after the hearing on the motion because the TCPA did not provide any circumstances for extending the deadline.²⁴⁶ The deadline for a ruling is mandatory.²⁴⁷

The Fourteenth Court of Appeals also discussed this principal in *Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC*.²⁴⁸ In *Direct Commercial Funding*, the trial court attempted to grant the anti-SLAPP motion six weeks after it had been denied by operation of law.²⁴⁹ 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.”²⁵⁰ 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.²⁵¹

241. *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 2013) (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage.”); RepublicBank Dall., N.A. v. Intekal, 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”).

242. *See, e.g.*, *Rauhauser v. McGibney*, No. 02-14-00215-CV, 2014 WL 6996819, at *1 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.) (per curiam) (“[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.”).

243. TEX. CIV. PRAC. & REM. CODE § 27.008(a).

244. *Id.*

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

246. *Id.* at 656.

247. *Id.*

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

249. *Id.* at 399.

250. *Id.* at 401.

251. *Id.*

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.”²⁵² 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, “at the request of a party making a motion under Section 27.003, the court shall issue findings.”²⁵³

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 and 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.²⁵⁴ Under the 2011 statute, the Second Court of Appeals decided that an interlocutory appeal was permitted under § 27.008 only when the trial court failed to rule on a motion to dismiss, and not when the trial court signed an express order denying the motion.²⁵⁵ In contrast, the Fourteenth and Thirteenth Courts of Appeals concluded that Chapter 27 allowed an interlocutory appeal regardless of whether the motion to dismiss was denied by an express order or by operation of law.²⁵⁶ 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 Constitutional Rights) of the Civil Practice and Remedies Code.”²⁵⁷ The legislature also added language to § 51.014(a) of the Civil Practice and Remedies Code allowing for an interlocutory appeal

252. TEX. CIV. PRAC. & REM. CODE § 27.007(a) (West 2015).

253. See *Schlumberger Ltd. v. Rutherford*, No. 2014-13621 (127th Dist. Ct., Harris County, Tex. Aug. 27, 2014), *appeal docketed*, No. 01-14-00776-CV (Tex. App.—Houston [1st Dist.] Sept. 17, 2014) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (West 2013)) (issuing an order denying findings of fact and conclusions of law in accordance with § 27.007).

254. See TEX. CIV. PRAC. & REM. CODE § 51.014.

255. See *Jennings v. WallBuilder Presentations, Inc. ex rel. Barton*, 378 S.W.3d 519, 524–29 (Tex. App.—Fort Worth 2012, pet. denied); see also *Lipsky v. Range Prod. Co.*, No. 02–12–00098–CV, 2012 WL 3600014, at *1 (Tex. App.—Fort Worth Aug. 23, 2012, pet. denied) (mem. op.).

256. See *Direct Commercial Funding, Inc.*, 407 S.W.3d at 399; see also *San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Props., LP*, 452 S.W.3d 343 (Tex. App.—Corpus Christi 2013, pet. denied).

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

of an order that “denies a motion to dismiss filed under Section 27.003.”²⁵⁸ “Additionally, section 51.014 of the civil practice and remedies code was amended in the 2013 legislative session to specifically allow for an interlocutory appeal from the denial of a motion to dismiss filed under section 27.003.”²⁵⁹

Recently, in *Paulsen*, the First Court of Appeals opined that there is no right to an interlocutory appeal from an order denying a request for attorney’s fees under the TCPA.²⁶⁰ 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.²⁶¹

B. Appeal of Grant

Often the non-movant appeals the trial court’s grant of a motion to dismiss under the statute. One of the earliest appeals of a grant was to the Fourteenth Court of Appeals in *Rehak Creative Services v. Witt*.²⁶² In *Rehak*, a case arising out of a political campaign, the appellate court affirmed the grant of the anti-SLAPP motion because the record did not contain the evidence necessary to prove any of the plaintiff’s claims for libel, business disparagement, tortious interference, intentional infliction of emotional distress, and civil conspiracy.²⁶³ In an order issued one month after *Rehak*, the Fifth Court of Appeals upheld the trial court’s grant of an anti-SLAPP motion in a case involving the Dallas Better Business Bureau (BBB), which had been sued by Wholesale TV & Radio for a poor rating in its reliability report. The court held that the BBB had carried its initial burden in “showing that Wholesale’s claims [were] based on or relate[d] to BBB’s exercise of the right of free speech within the meaning of the TCPA.”²⁶⁴ Under the second prong of the test, the court held that Wholesale failed to address the essential

258. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12). The Texas Legislature enacted two section 12s in 2013 as footnoted in the dissenting opinion by C. J. Frost in *Jardin v. Marklund*. See *Jardin v. Marklund*, 431 S.W.3d 765, 775 n.6 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (Frost, C.J., dissenting). “Under current Texas law, section 51.014 has two subsections denominated ‘(a)(12).’” *Id.*; see TEX. CIV. PRAC. & REM. CODE § 51.014. “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.” *Jardin*, 431 S.W.3d at 775 n.6.

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

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

261. *Id.*

262. *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 716 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015, orig. proceeding).

263. *Id.* at 732–33.

264. *Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dall., Inc.*, No. 05-11-01337-CV, 2013 WL 3024692, at *3 (Tex. App.—Dallas June 14, 2013, no pet.) (mem. op.).

elements of producing cause and damages on its DTPA claims, its claims for fraud, and its negligent misrepresentation claim.²⁶⁵ Other Texas courts of appeals, including the Third, Eighth, and Second Courts of Appeals, have affirmed the granting of motions to dismiss.²⁶⁶

Both *Rehak* and *Wholesale* were decided prior to the 2013 statutory amendments, when the sole authority for the appeal was found in § 27.008(b) of the TCPA, which provided an appeal can be taken on an expedited basis, whether interlocutory or not, from a trial court order on a motion to dismiss or from a trial court's failure to rule within the time prescribed by § 27.005.²⁶⁷ The 2013 amendment added the express denial of an anti-SLAPP motion to the laundry list of matters that could be taken up on interlocutory appeal under § 51.014.²⁶⁸

Though the statute permits an interlocutory appeal, it must be timely brought. In 2014, the First Court of Appeals dismissed an appeal from a trial court's order granting a motion to dismiss because the appeal was untimely.²⁶⁹ 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.²⁷⁰ "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."²⁷¹

Generally speaking, 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.²⁷² Such suits, where some claims arise from activities protected by the statute and some claims do not, have been called "mixed claims."²⁷³ Should a party interlocutorily appeal part of

265. *Id.* at *3–4.

266. See also *Rigsby v. EECU*, No. 02-14-00074-CV, 2015 WL 1543913 (Tex. App.—Fort Worth Apr. 2, 2015, no pet. h.) (mem. op.); *Malouf v. Wood*, No. 05-13-01637-CV, 2015 WL 1535669 (Tex. App.—Dallas Apr. 2, 2015, no pet. h.) (mem. op.); *Breitling Oil v. Petrol. Newspapers*, No. 05-14-00299-CV, 2015 WL 1519667 (Tex. App.—Dallas Apr. 1, 2015, no pet. h.) (mem. op.); *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 882 (Tex. App.—Dallas 2014, no pet.); *Walker v. Schion*, 420 S.W.3d 454, 458–59 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Cruz v. Van Sickle*, 452 S.W.3d 503, 525 (Tex. App.—Dallas 2014, pet. filed); *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *13 (Tex. App.—Austin Apr. 11, 2014, no pet.) (mem. op.); *Alphonso v. Deshotel*, 417 S.W.3d 194, 210–02 (Tex. App.—El Paso 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Pena v. Perel*, 417 S.W.3d 552, 556–57 (Tex. App.—El Paso 2013, no pet.).

267. TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(b) (West 2015).

268. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12) (West 2015).

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

270. See TEX. CIV. PRAC. & REM. CODE § 27.008; TEX. R. APP. P. 26.1(b).

271. *Spencer*, 448 S.W.3d at 607.

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

273. See generally Motion for Leave to File Notice of Supplemental Authority of Appellant Church of Scientology International, *Sloat v. Rathbun*, No. 03-14-00199-CV (Tex. App.—Austin appeal filed Apr. 2, 2014) (giving an example of mixed claims).

a case, the remaining claims in the trial court are stayed.²⁷⁴ 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.²⁷⁵ Cross interlocutory appeals were filed and, pursuant to Texas Civil Practice and Remedies Code § 51.014(b), the underlying proceedings were stayed.²⁷⁶

C. Applicability of Statute vs. Jurisdiction on Appeal

Although subject matter jurisdiction is essential for a court to have authority to decide the case, appellate jurisdiction of an anti-SLAPP case in which the trial court held the movant did not meet its burden of establishing that the lawsuit was filed as a result of him exercising his constitutional rights, is established by statute.²⁷⁷ Some non-movants have conflated appellate jurisdiction under § 51.014(a)(12) with the question of scope of protection under the TCPA, relying on dicta in *Avila*.²⁷⁸ But appellate jurisdiction is governed by § 51.014(a)(12).²⁷⁹ An appellate court thus has appellate jurisdiction in an appeal challenging the applicability of the TCPA.²⁸⁰

For instance, the First Court of Appeals recently reversed the trial court's denial of a TCPA motion in *Schimmel v. McGregor*.²⁸¹ 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.²⁸² On appeal, focusing on the content of the speech, the appellate court held that Schimmel's statements about a failed government buyout of beachfront property after Hurricane Ike was an exercise of his free speech rights protected by the TCPA.²⁸³ 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

274. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (West 2015).

275. Brief of Cross-Appellant at *10, *Schlumberger, Ltd. v. Rutherford*, 2014 WL 7669397 (Tex. App.—Houston [1st Dist.] appeal filed Nov. 19, 2014) (No. 01-14-00776-CV).

276. *Id.*; TEX. CIV. PRAC. & REM. CODE § 51.014(b).

277. See *Avila v. Larrea*, 394 S.W.3d 646, 654 (Tex. App.—Dallas 2012, pet. denied).

278. See *id.* at 655.

279. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12).

280. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.011(b) (West 2015); see also *San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Props., LP*, 452 S.W.3d 343 (Tex. App.—Corpus Christi 2013, pet. denied) (stating that the legislature instructed a liberal construction of the TCPA).

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

282. *Id.* at 859.

283. *Id.*

burdens, the denial itself is immediately appealable under §§ 51.014(a)(12) and 27.008(a) of the Texas Civil Practice and Remedies Code.²⁸⁴

The Fourteenth Court of Appeals, however, has held otherwise. In *Jardin v. Marklund*, the appellate court held it did not have jurisdiction over an appeal of the denial of an anti-SLAPP motion because the trial court held the TCPA did not apply.²⁸⁵ In her dissent to *Jardin*, Chief Justice Frost disagreed, 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.²⁸⁶

The approach taken by the majority opinion in *Jardin* would render both §§ 27.003 and 51.014(a)(12) meaningless in instances in which the holding is that the claims do not implicate the TCPA.²⁸⁷ Such an outcome appears contrary to the rule of statutory construction requiring each sentence, clause, phrase, and word to be given effect.²⁸⁸

D. Standard of Review

The Fifth Court of Appeals recently noted that “[e]very Texas court of appeals to address the issue on direct appeal has concluded the standard of review on the first prong is de novo.”²⁸⁹ In one of the first appellate cases to determine the standard of review under the TCPA, the First Court of Appeals in *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, held de novo review was the appropriate standard for determining whether the suit

284. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.008(a), 51.014(a)(12) (West 2015).

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

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

287. See *id.* at 774 (majority opinion); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003, 51.014(a)(12) (West 2015).

288. See *Morter v. State*, 551 S.W.2d 715, 718 (Tex. Crim. App. 1977) (“Every word of a statute is presumed to have been used for a purpose.”).

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

implicated First Amendment rights.²⁹⁰ A few months later, the Fourteenth Court of Appeals in *Rehak* further analyzed the standard of review under the TCPA, also determining *de novo* was the appropriate standard.²⁹¹ It (and the court in *Avila*) determined the standard on review should be *de novo*, as applicable to issues of statutory construction.²⁹²

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 27.005(c)'s shifted burden.²⁹³

The Fourteenth Court of Appeals then explained the initial burden under § 27.005(b) was to be reviewed *de novo* in accordance with the First Court's prior ruling in *Newspaper Holdings*.²⁹⁴ And, for the second prong of the test under § 27.005(c), "we 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."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:

[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 an anti-SLAPP motion has already been filed, the

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 on other grounds by In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015).

292. *Id.*; see also *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*).

293. *Rehak*, 404 S.W.3d at 725.

294. *Id.*; see *Newspaper Holdings, Inc.*, 416 S.W.3d at 80.

295. *Rehak*, 404 S.W.3d at 727 (applying an abuse of discretion standard to mandamus review of an anti-SLAPP denial).

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

nonsuit does not affect the anti-SLAPP 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 recently held that a plaintiff's nonsuit without prejudice has no effect on a defendant's pending claim for affirmative relief, including a request for dismissal with prejudice and for an award of fees, expenses, costs, and sanctions.²⁹⁹

This reasoning has been followed by appellate courts in the TCPA context when a nonsuit is filed while an anti-SLAPP 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

Courts have awarded fees and sanctions after voluntary nonsuits when there is a pending anti-SLAPP motion.³⁰⁴ If the movant has incurred expenses defending against the lawsuit, then awarding attorney's fees serves the purpose of the statute.³⁰⁵ In the case of *Breitling Oil & Gas Corp. v.*

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"); *Villafani v. Trejo*, 251 S.W.3d 466, 469 (Tex. 2008).

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

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

300. See *James v. Calkins*, 446 S.W.3d 135, 143–44 (Tex. App.—Houston [1st Dist.] 2014, pet. filed); *Rauhauser v. McGibney*, No. 02-14-00215-CV, 2014 WL 6996819, at *2 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.) (per curiam) ("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."); *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 871 (Tex. App.—Dallas 2014, no pet.).

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

302. See *id.* at 871–72.

303. *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 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 *5 (Tex. App.—Dallas Apr. 1, 2015, no pet.); *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).

305. See House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S., at 2 (2011); see also *Breitling Oil & Gas Corp.*, 2015 WL 1519667, at *5 (granting dismissal after a nonsuit was signed and awarding \$80,000 in fees, \$2,444.58 in 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

Petroleum Newspapers of Alaska, LLC, the Fifth Court of Appeals affirmed an attorney's fee award of more than \$80,000 after the plaintiff filed a nonsuit.³⁰⁶ Thus, a party cannot escape the TCPA via a nonsuit.

When there is a nonsuit following an anti-SLAPP motion and the court fails to rule on the motion, it is denied by operation of law and is subject to appeal.³⁰⁷ For example, in *Rauhauser*, the plaintiff nonsuited five hours after an anti-SLAPP motion was filed.³⁰⁸ The court did not rule on the anti-SLAPP motion, leading to a denial by operation of law.³⁰⁹ On appeal, the Second Court of Appeals held that the anti-SLAPP motion survived the nonsuit and that the trial court erred in permitting the motion to be denied by operation of law.³¹⁰

IX. ATTORNEY'S FEES AND SANCTIONS

A. Mandatory Nature of Fees Under the Statute

The Texas anti-SLAPP statute provides that, if the court orders a dismissal of the claim,

the 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

The attorney's fees award is designed to reimburse the costs of defending the improper legal action.³¹² Sanctions are awarded, as necessary, to deter the party who brought the legal action from similar future retaliatory lawsuits.³¹³ The attorney's fees subsection requires the attorney's fees and

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 movant attorney's fees, sanctions, and expenses in an anti-SLAPP case after the plaintiff filed a nonsuit); *Hest Techs., Inc.*, No. 067-256909-11 (awarding \$7,500 in attorney's fees after a nonsuit was filed).

306. *Breitling Oil & Gas Corp.*, 2015 WL 1519667 at *5.

307. *Rauhauser v. McGibney*, No. 02-14-00215-CV, 2014 WL 6996819, at *2 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.) (per curiam).

308. *Id.*

309. *Id.*

310. *Id.* at *1.

311. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(1)–(2) (West 2015) (emphasis added).

312. *See id.* § 27.009(a)(1) (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).

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

court costs to be reasonable, and the amount of the sanctions award is within the trial court's discretion.³¹⁴

The statute provides that the trial court must consider and award fees and sanctions that are supported by the evidence.³¹⁵ At least eighteen other Texas laws state that the court "shall" award attorney's fees and the term has consistently been interpreted as mandatory.³¹⁶ In contrast, if the non-movant prevails, an award of fees is discretionary, not mandatory.³¹⁷ 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."³¹⁸ 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.³¹⁹ The Fourteenth Court of Appeals has held a trial court erred by not awarding reasonable attorney's fees and court costs as required by § 27.009(a).³²⁰

The TCPA requires that the attorney's fees be "reasonable."³²¹ Under Texas law, "[a] reasonable fee is one that is not excessive or extreme, but rather moderate or fair."³²² 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

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

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

316. *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 2007) ("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) (Vernon Supp. 1987)); *see also* TEX. GOV'T CODE ANN. § 311.016(2) (West 2013) (stating that the use of the term "'shall' 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").

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

318. *Id.*

319. *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.").

320. Fitzmaurice v. Jones, 417 S.W.3d 627, 634 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. App. 24, 2015, orig. proceeding).

321. TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1).

322. Garcia v. Gomez, 319 S.W.3d 638, 642 (Tex. 2010).

award.³²³ The language was taken from New Mexico Statute § 46A-10-1004 (2003).³²⁴ Under Texas case law, determination of the amount of attorney's fees depends on "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."³²⁵

The Fifth Court of Appeals has interpreted "the phrase 'as justice and equity may require' in section 27.009(a)(1) [as] additional limitations on the trial court's award of attorney's fees, requiring them to be equitable and just."³²⁶

The language "as justice and equity may require" was added by a senate amendment to the house bill's version of section 29.009 to ensure a court could award attorney's fees that were less than what the attorney typically charges, if appropriate. Whether the amount of an attorney's fees award is equitable and just is left to the sound discretion of the trial court. There is nothing in the record before us to suggest that the trial court abused its discretion in awarding the amount of attorney's fees set forth in the uncontroverted affidavit filed by Van Sickle's attorney.³²⁷

The Third Court of Appeals has stated, however, that when remanding a TCPA case for consideration of fees, the phrase, "as justice and equity may require" may mean "that justice and equity do not require that costs, fees, or expenses be awarded and [a court] may determine that no sanctions are needed to deter the plaintiff from bringing similar actions."³²⁸ To date, the Austin court's analysis, which ignores the use of the word "shall" in the statute, is a minority view.³²⁹

323. Senate Comm. on State Affairs Tex. S.B. 1565, 82d Tex. Leg., R.S., at 4 (2011); 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.").

324. See N.M. STAT. ANN. § 46A-10-1004 (2003).

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

326. *Cruz v. Van Sickle*, 452 S.W.3d 503, 524 (Tex. App.—Dallas 2014, pet. filed).

327. *Id.* at 526 (footnote omitted) (citations omitted).

328. *Combined Law Enforcement Ass'ns of Tex. v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672, at *11 (Tex. App.—Austin Jan. 31, 2014, pet. filed) (mem. op.).

329. See *Schimmel v. McGregor*, 438 S.W.3d 847, 863 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *Sierra Club v. Andrews Cnty., Tex.*, 418 S.W.3d 711, 720 (Tex. App.—El Paso 2013, pet. filed), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015, orig. proceeding); *Alphonso v. Deshotel*, 417 S.W.3d 194, 200 (Tex. App.—El Paso 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Fitzmaurice v. Jones*, 417 S.W.3d 627, 634 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Ramsey v. Lynch*, No. 10-12-00198-CV, 2013 WL 1846886, at *5 (Tex. App.—Waco May 2, 2013, no pet.) (mem. op.).

B. Movant's Evidence

A successful anti-SLAPP movant “bears the burden to put forth evidence regarding its right to the award, as well as the reasonableness and necessity of the amount of the fee.”³³⁰ The movant should submit evidentiary proof of the attorney’s fees that includes: “(1) the nature of the work, (2) who performed the services and their rate, (3) approximately when the services were performed, and (4) the number of hours worked.”³³¹

In *Schimmel*, the First Court of Appeals held 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.³³² 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.³³³ 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.”³³⁴ Without the trial court’s express permission, however, the better practice is to introduce such evidence at the hearing.

On appeal, when a denial of an anti-SLAPP motion is reversed, courts have typically remanded the case to the trial court for a determination of attorney’s fees.³³⁵ There is precedent for the principle that, if the movant

330. *Alphonso*, 417 S.W.3d at 200 (citing *Brownhawk, L.P. v. Monterrey Homes, Inc.*, 327 S.W.3d 342, 348 (Tex. App.—El Paso 2010, no pet.)).

331. *Schimmel*, 438 S.W.3d at 863 (quoting *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012)). 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 Acad. Corp. v. Interior Buildout & Turnkey Constr., Inc.*, 21 S.W.3d 732, 742 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

332. *Schimmel*, 438 S.W.3d at 863.

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

334. *Id.* at 521.

335. *See, e.g., Rauhauser v. McGibney*, No. 02-14-00215-CV, 2014 WL 6996819, at *1 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.) (per curiam) (reversing denial of the motion to dismiss and remanding

submits evidence that is “clear, direct, positive, uncontroverted, and incapable of being discredited or impeached,” the appellate court can render the attorney’s fee award.³³⁶ Such “testimony from trial counsel establishes a party’s right to attorney’s fees and costs as a matter of law, especially when the opposing party had the means and opportunity to disprove the testimony and failed to do so.”³³⁷ TCPA movants typically include conditional attorney’s fees for appeals.³³⁸ In *Sierra Club v. Andrews County*, the Eighth Court of Appeals, relying on *Ragsdale v. Progressive Voters League*, rendered a judgment of attorney’s fees because the evidence met this standard, and the court held that, “[i]n such circumstances, it is proper for an appellate court to render judgment for fees and costs in the amount proved.”³³⁹ It is questionable, however, as to whether that rendition will hold since the Texas Supreme Court has now remanded the case to the court of appeals for reconsideration based on its interpretation of the clear and specific standard in *In re Lipsky*.³⁴⁰ If there is no affidavit admitted into

for a determination of fees); *James v. Calkins*, 446 S.W.3d 135, 139–40 (Tex. App.—Houston [1st Dist.] 2014, pet. filed); *Schimmel*, 438 S.W.3d at 847; *Shipp v. Malouf*, 439 S.W.3d 432 (Tex. App.—Dallas 2014, pet. denied), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. App.—Dallas 2014, orig. proceeding); *Young v. Krantz*, 434 S.W.3d 335, 337–38 (Tex. App.—Dallas 2014, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *Farias v. Garza*, 426 S.W.3d 808, 812 (Tex. App.—San Antonio 2014, pet. filed), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; *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 In re Lipsky*, 2015 WL 1870073; *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 In re Lipsky*, 2015 WL 1870073; *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); *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); *Avila v. Larrea*, 394 S.W.3d 646, 649 (Tex. App.—Dallas 2012, pet. denied).

336. *Sierra Club v. Andrews Cnty. Tex.*, 418 S.W.3d 711, 720–21 (Tex. App.—El Paso 2013, pet. granted) (granting “\$7,500 in appellate attorney’s fees for prevailing in this Court” based on uncontroverted trial testimony estimating the fees on appeal), *rev’d per curiam*, No. 14-0214, 2015 WL 2148029 (Tex. May 8, 2015).

337. *Id.*

338. See, e.g., *Sierra Club*, 418 S.W.3d at 714; *KTRK Television, Inc. v. Robinson*, No. 2011-54895 (234th Dist. Ct., Harris County, Tex. Oct. 8, 2014); *Delgado v. Alvarado*, No. 2014-10592 (234th Dist. Ct., Harris County, Tex. May 12, 2014); *In re Thuesen*, No. 2012-49262 (151st Dist. Ct., Harris County, Tex. Mar. 4, 2013), *appeal docketed*, No. 14-13-00523-CV (Tex. App.—Houston [14th Dist.]); *Rehak Creative Servs., 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 In re Lipsky*, 2015 WL 1870073; *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, No. 2011-74615 (234th Dist. Ct., Harris County, Tex. Nov. 17, 2014), *rev’d*, 416 S.W.3d 71 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *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*, 402 S.W.3d 299 (Tex. App.—Dallas 2013, pet. denied).

339. *Sierra Club*, 418 S.W.3d at 720–21 (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990) (per curiam)).

340. *Id.*

evidence in the trial court, remand is required.³⁴¹ 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.³⁴²

Finally, 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 § 27.009.³⁴³ The result may have been different if the lawyer had undertaken the representation on behalf of a pro bono organization, with an award of fees to be remitted to it.

C. Non-Movant's Evidence

The party seeking attorney's fees bears the burden of establishing its right to the award, and the reasonableness and necessity of the fees.³⁴⁴ The non-movant must present controverting evidence to either discredit or impeach the movant's requested fees.³⁴⁵ Also, if the requested fees and costs 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.³⁴⁶ At least one court has concluded that "section 27.009(a)(1) permits a successful movant to recover attorneys' fees incurred in the defense of a cause of action even if the fees were incurred before the movant was actually sued."³⁴⁷

341. *Id.*

342. *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.").

343. *Cruz v. Van Sickle*, 452 S.W.3d 503, 525 (Tex. App.—Dallas 2014, pet. filed) ("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.").

344. *Alphonso v. Deshotel*, 417 S.W.3d 194, 200 (Tex. App.—El Paso 2013, no pet.), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015, orig. proceeding); *see also Cleveland v. Taylor*, 397 S.W.3d 683, 701 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (discussing reasonableness and necessity as factors the party seeking attorney's fees must prove).

345. *Sierra Club*, 418 S.W.3d at 721.

346. *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.").

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

D. Determination by Court or Jury?

Many Texas courts of appeals have reversed and remanded denials of motions to dismiss for the trial court to assess damages and costs in accordance with § 27.009. The vast majority of these determinations have been conducted by the court, as anticipated by the statute. One trial court, however, has determined that the assessment of attorney's fees must be made by a jury, upon a demand for one.³⁴⁸ Such a ruling is inconsistent with the statutory purpose of an efficient remedy to a meritless claim.

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

Courts throughout Texas have awarded attorney's fees as appropriate and reasonable in anti-SLAPP cases. The reported fee awards have ranged from 0 to \$350,000.³⁴⁹ The largest award to date has been from a Harris County court in the 127th District Court wherein the court awarded \$350,000 in attorney's fees to the defendant–movant.³⁵⁰ This case is on appeal. In one of the first anti-SLAPP decisions in the state, *Simpton v. High Plains Broadcasting, Inc.*, involving defamation claims arising out of a series of television broadcasts that exposed Medicaid fraud, the Fourth Court of Appeals awarded \$92,623.35 in fees and an additional \$85,000 in sanctions.³⁵¹ In Harrison County, the district court awarded a total of \$187,310.32 to the defendants and a total of \$55,000 in sanctions after granting the defendants' anti-SLAPP motions.³⁵² Finally, in Dallas County, a district court awarded \$58,790.50 in attorney's fees and \$29,395.25 in sanctions to the defendants in a defamation case that involved the filing of an anti-SLAPP motion.³⁵³ Significantly, this award followed the plaintiff's notice of nonsuit, which was filed prior to the hearing on the defendants'

348. *John Moore Servs., Inc. v. Better Bus. Bureau of Metro. Hous., Inc.*, No. 2012-35162, 2012 WL 8964403 (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.* A Notice of Appeal was filed in the First Court of Appeals on Nov. 6, 2014. *See id.* (currently on appeal as No. 01-14-00906-CV).

349. *See, e.g., Schlumberger Ltd. v. Rutherford*, No. 2014-13621 (127th Dist. Ct., Harris County, Tex. Aug. 27, 2014) (awarding the defendants \$350,000 in attorney's fees) (currently on appeal as No. 01-14-00776-CV (Tex. App.—Houston [1st Dist.], filed Sept. 12, 2014)).

350. *Id.*

351. *Simpton v. High Plains Broad., Inc.*, No. 2011-13290 (285th Dist. Ct., Bexar County, Tex. July 30, 2012).

352. *Head v. Chicory Media, LLC*, No. 2013-0040 (714th Dist. Ct., Harrison County, Tex. Sept. 25, 2013), *appeal dismissed*, 415 S.W.3d 559 (Tex. App.—Texarkana 2013, no pet.).

353. *Algae Int'l Grp., Inc. v. Stegman*, No. DC-13-03933 (44th Dist. Ct., Dallas County, Tex. Sept. 13, 2013).

motion to dismiss.³⁵⁴ Texas appellate courts consistently have upheld reasonable fee awards in anti-SLAPP matters.³⁵⁵

Due to the proliferation of anti-SLAPP cases involving a party's request for attorney's fees, Texas courts are establishing fee standards and examining whether an appeal of a denial of fees is allowable under the statute before final judgment. For instance, in *Paulsen*, the First Court of Appeals held that there was no right to an interlocutory appeal of a denial of attorney's fees under the TCPA separate from a ruling on the merits.³⁵⁶ And in *Cruz*, the Fifth Court of Appeals held that there is no right to attorney's fees under the TCPA when the case is handled on a pro bono basis and the fees have not actually been incurred.³⁵⁷

F. Discretionary Fee Award When Anti-SLAPP 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."³⁵⁸ In *Rathbun v. Miscavige*, the 433rd District Court of Comal County issued a twenty-five page opinion, specifically finding that the movants' anti-SLAPP 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

354. *Id.*; see also *Zimmerman v. Austin Investigative Reporting Project*, No. D-1-GN-14-004290 (53d Dist. Ct., Travis County, Tex. Jan. 7, 2015) (awarding attorney's fees after nonsuit); *Delgado v. Alvarado*, No. 2014-10592 (234th Dist. Ct., Harris County, Tex. May 12, 2014) (awarding attorney's fees after nonsuit).

355. *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 880–81 (Tex. App.—Dallas 2014, no pet.); *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 734 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015, orig. proceeding); *Ramsey v. Lynch*, No. 10-12-00198-CV, 2013 WL 1846886, at *3 (Tex. App.—Waco May 2, 2013, no pet.) (mem. op.); see also *Sierra Club v. Andrews Cnty., Tex.*, 418 S.W.3d 711, 720–21 (Tex. App.—El Paso 2013, pet. filed), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073 (granting attorney's fees when reversing the denial of an anti-SLAPP motion because evidence of attorney's fees was in the record and there was no controverting evidence).

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

357. *Cruz v. Van Sickle*, 452 S.W.3d 503, 523–24 (Tex. App.—Dallas 2014, pet. filed).

358. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(b) (West 2015).

have been better spent elsewhere.”³⁵⁹ That case is currently on appeal in the Third Court of Appeals.³⁶⁰

G. Attorney’s Fees if the Plaintiff Nonsuits Prior to a Ruling on the Anti-SLAPP Motion

The district courts in Harris, Dallas, Tarrant, and Travis Counties have awarded attorney’s fees to movants in cases where the non-movants have nonsuited the case prior to the anti-SLAPP hearing.³⁶¹ In *Rauhauser*, the Second Court of Appeals reversed the denial by operation of law of a TCPA motion that was pending after a nonsuit and remanded the “case to the trial court to enter an order of dismissal . . . and for further proceedings relating to [the movant’s] court costs, attorney’s fees, expenses, and sanctions under section 27.009(a)(1) and (2) of the TCPA.”³⁶² In *Breitling Oil & Gas Corp.*, the Fifth Court of Appeals affirmed a more than \$80,000 fee award that was entered after the plaintiff nonsuited its claims.³⁶³ The court held any nonsuit dismissal does not prejudice the adverse party’s pending claim for affirmative relief and does not have an effect on motions for sanctions or fees at the time of dismissal.³⁶⁴ This ruling is consistent with the critical protections for speech provided under the TCPA. An alternative decision would cause a SLAPP victim to incur unnecessary fees defending against a meritless claim, would leave the potential threat of an action being re-filed, and would continue to chill the exercise of First Amendment rights. Finally, in the case of *Ward*, the plaintiff nonsuited and declared bankruptcy after the case was

359. 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, on appeal *sub nom* *Sloat v. Rathbun*, No. 03-14-00199-CV (Tex. App.—Austin *appeal filed* Apr. 2, 2014) (denying the motions to dismiss under Chapter 27, declining to “conclude that Defendants’ motions, in and of themselves, are frivolous,” and awarding court costs and attorney’s fees to the non-movant).

360. *Rathbun v. Miscavige*, No. C2013-1082B (433d Dist. Ct., Comal County, Tex. Mar. 14, 2014), 2014 WL 6389494, on appeal *sub nom Sloat*, No. 03-14-00199-CV.

361. 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. 067-256906-11 (67th Dist. Ct., Tarrant County, Tex. Apr. 17, 2012).

362. *Rauhauser v. McGibney*, No. 02-14-00215-CV, 2014 WL 6996819, at *9 (Tex. App.—Fort Worth, Dec. 11, 2014, no pet.) (per curiam).

363. *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, no pet. h.) (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. *Breitling Oil & Gas Corp.*, 2015 WL 1519667.

remanded for consideration of attorney's fees, thus effectively staying the trial court's activities pending the outcome of the bankruptcy proceedings.³⁶⁵

H. Mandatory Sanctions to Deter Future Similar Conduct

An award of sanctions is provided for under the TCPA.³⁶⁶ Sanctions can be particularly appropriate when the plaintiff has shown a propensity for retaliating against individuals, corporations, or the media for exercising their constitutional rights and has clearly shown an intention to harass via the court system.³⁶⁷ For instance, a plaintiff might file multiple lawsuits in multiple jurisdictions against the same defendant to drain its resources or exhaust its manpower.³⁶⁸ To deter plaintiffs from filing retaliatory legal actions, sanctions sufficient to deter a plaintiff from filing similar claims are appropriate under § 27.009 and may be levied against the party personally, not the plaintiff's attorney.³⁶⁹ Courts have "broad discretion to determine what amount is sufficient to deter the party from bringing similar actions in the future" under the TCPA.³⁷⁰ In *Kinney*, 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."³⁷¹ The appellate court noted that "[g]iven the history of the litigation, the trial court could have reasonably determined that a lesser sanction would not have served the purpose of deterrence."³⁷² Courts considering the appropriate amount of sanctions under the statute have awarded between \$100 and \$350,000.³⁷³ Depending upon the tactics

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

366. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(2) (West 2015).

367. *Id.*; see, 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.").

368. See generally *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 this state court action).

369. TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2); see also *supra* note 367.

370. *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").

371. *Id.*

372. *Id.*

373. See *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865 (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 (127th Dist. Ct., Harris County, Tex. Aug. 27, 2014) (awarding \$350,000 in sanctions), *appeal docketed*, No. 01-14-00776 (Tex. App.—Houston [1st Dist.] 2014); *Simpton v. High Plains Broad., Inc.*, No. 2011-13290 (285th Dist. Ct., Bexar County, Tex. July 30, 2012) (awarding \$85,000 in sanctions); *Head v. Chicory Media, LLC*, No. 2013-0040 (714th 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.); *Algae Int'l Grp., Inc. v. Stegman*, No. DC-13-

employed by the plaintiff, any un-recoupable expenses incurred (such as expenses from prior proceedings), and the need for a deterrent effect, a trial court may award a higher amount.³⁷⁴ Although some trial courts ultimately have denied requests for sanctions,³⁷⁵ all appellate courts to consider the issue have determined that the consideration of sanctions is mandatory.³⁷⁶

X. CONSTITUTIONAL RIGHTS PROTECTED BY THE STATUTE

A. Right to Petition

The TCPA protects against meritless claims brought against a party for exercising its right to petition.³⁷⁷ The right to petition is defined as any of the following:

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

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); *In re Thuesen*, No. 2012-49262 (151st Dist. Ct., Harris County, Tex. Mar. 4, 2013), *appeal docketed*, No. 14-13-00523-CV (Tex. App.—Houston [14th Dist.]) (awarding \$24,000 in sanctions); *Rustic Cedar Cabins Inc. v. Cortell*, No. 28500 (21st Dist. Ct., Bastrop County, Tex. Sept. 5, 2012) (awarding \$500 in sanctions).

374. *Schlumberger Ltd.*, No. 2014-13621 (awarding \$250,000 in sanctions after only several months on file and no appeals).

375. *Cruz v. Van Sickle*, 452 S.W.3d 503, 519 (Tex. App.—Dallas 2014, pet. filed) (noting that “[t]he trial court denied appellees’ request for sanctions pursuant to section 27.009(2)”).

376. See *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))).

377. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West 2015).

- (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.³⁷⁸

Courts have held that the right to petition applies to claims involving matters of public concern that pertain to a governmental proceeding.³⁷⁹ They have also determined that the filing of a lawsuit constitutes the exercise of one's right to petition under the TCPA.³⁸⁰ Further, involvement in governmental negotiations on behalf of homeowners has been held to be the exercise of the right to petition.³⁸¹ The Texas Supreme Court confirmed 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 in the *In re Lipsky* case.³⁸²

B. Right of Association

The TCPA protects against meritless claims brought against a party for exercising its right of association.³⁸³ "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.'"³⁸⁴

378. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(4) (West 2015).

379. KBMT Operating Co. v. Toledo, 434 S.W.3d 276, 283 (Tex. App.—Beaumont 2014, pet. granted), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015, orig. proceeding); *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 regarding a school's financial mismanagement).

380. James v. Calkins, 446 S.W.3d 135, 145 (Tex. App.—Houston [1st Dist.] 2014, pet. filed); 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.) (mem. op.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073.

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

382. *In re Lipsky*, 2015 WL 1870073.

383. TEX. CIV. PRAC. & REM. CODE § 27.003(a) (West 2015).

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

The first appellate case to address the right of association was *Combined Law Enforcement Associations of Texas v. Sheffield*.³⁸⁵ 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 Sheffield: 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.³⁸⁶ 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 motion.³⁸⁷ The Third Court of Appeals held that the first three statements related to the right of association.³⁸⁸ The court did hold, 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."³⁸⁹

In *Herrera v. Stahl*, the plaintiffs sued a condominium association, its president, and its secretary, claiming fraud and defamation.³⁹⁰ The defendants filed an anti-SLAPP 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.³⁹¹ The evidence submitted by the plaintiffs alleged that one of the defendants had called plaintiff a "crazy, stupid bitch" and told her, "Don't get your panties in a wad."³⁹² The other plaintiff alleged that the defendants "told her she did not 'know what [she was] talking about' during an Association meeting; [] yelled obscenities at her . . . ; she found signs . . . calling her and [the other plaintiff] 'fools in Proverbs Biblical quote[s], calling [them] information thieves, and calling [them] liars in pool notification "rumors about the pool not being safe"'"'; and otherwise ridiculed them.³⁹³ 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

385. *Combined Law Enforcement Ass'ns of Tex. v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672 (Tex. App.—Austin Jan. 31, 2014, pet. filed) (mem. op.).

386. *Id.* at *3.

387. *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.

388. *Id.* at *5.

389. *Id.*

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

391. *Id.* at 742.

392. *Id.*

393. *Id.*

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.’”³⁹⁴

In *Cheniere Energy, Inc.*, 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.³⁹⁵ 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.³⁹⁶ 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.³⁹⁷ The court held that, although the communication at issue may 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.³⁹⁸ For this reason, the court upheld the denial of the motion to dismiss.³⁹⁹

C. Right to Free Speech

Finally, the TCPA protects against meritless claims brought against a party for exercising its right of free speech.⁴⁰⁰ The exercise of the right of free speech is defined under the statute as: “a communication made in connection with a matter of public concern.”⁴⁰¹ And, “matter of public concern” is defined as including 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.⁴⁰²

By providing a laundry list of subjects that qualify as an exercise of one’s right to free speech, however, the legislature did not abrogate or lessen existing constitutional, statutory, case, or common-law rulings concerning

394. *Id.* at 743 (alteration in original) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2)) (internal quotation marks omitted).

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

396. *Id.* at 212.

397. *Id.* at 212–13.

398. *Id.* at 214.

399. *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.”).

400. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West 2015).

401. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3) (West 2015).

402. *Id.* § 27.001(7).

what constitutes a matter of public concern.⁴⁰³ The statute specifies that it must “be construed liberally to effectuate its purpose and intent fully.”⁴⁰⁴

The U.S. Supreme Court has held that a public concern must be viewed broadly, lest “courts themselves . . . become inadvertent censors.”⁴⁰⁵ 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. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”⁴⁰⁶ In the TCPA context, matters of public concern have been described as, “[a]mong other things, . . . an issue related to . . . environmental, economic, or community well-being . . . the government . . . [or] . . . a public official or public figure.”⁴⁰⁷

1. Public Concern and Falsity

Some confusion between the element of falsity and whether the speech is about a matter of public concern has arisen, with an argument that false speech cannot be of public concern.⁴⁰⁸ Under the TCPA, “a civil defendant enjoys the benefit of a presumption that he spoke the truth.”⁴⁰⁹ 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.⁴¹⁰ Rather, that assessment is part of the evaluation of the non-movant’s prima facie case.⁴¹¹

403. TEX. CIV. PRAC. & REM. CODE ANN. § 27.011(a) (West 2015).

404. *Id.* § 27.011(b).

405. *Snyder v. Phelps*, 562 U.S. 443 (2011).

406. *Id.* (citations omitted) (quoting *City of San Diego Cal. v. Roe*, 543 U.S. 77, 83–84 (2004) (*per curiam*)); *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”).

407. *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 723 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015, orig. proceeding) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(B), (C), (D)) (internal quotation marks omitted).

408. *See id.* at 733.

409. *Alphonso v. Deshotel*, 417 S.W.3d 194, 199 (Tex. App.—El Paso 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073.

410. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005 (West 2015); *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, orig. proceeding), *mand. denied*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 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).”).

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

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: political advertisements and critiques of office holders,⁴¹² statements made in connection with a government proposed buyout of property owned by victims of a hurricane,⁴¹³ investigations into Medicaid fraud,⁴¹⁴ statements about legal services offered,⁴¹⁵ published opinions concerning the quality of a business,⁴¹⁶ statements about the award of a public contract,⁴¹⁷ statements about environmental concerns,⁴¹⁸ investigations into financial mismanagement of a charter school,⁴¹⁹ and reports of noncompliance with licensing requirements of an assisted living facility.⁴²⁰

412. *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); *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); *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).

413. *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).

414. *Shipp v. Malouf*, 439 S.W.3d 432, 439 (Tex. App.—Dallas 2014, pet. denied), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073 (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).

415. *Avila v. Larrea*, 394 S.W.3d 646, 655 (Tex. App.—Dallas 2012, pet. denied) (holding that a communication about the legal services offered by an attorney was a matter of public concern because it concerned a service in the marketplace).

416. *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); *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”).

417. *Farias v. Garza*, 426 S.W.3d 808, 819 (Tex. App.—San Antonio 2014, pet. filed), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073 (holding that a defamation action regarding an “award of [a] public contract[] is almost always a public matter and an issue of public concern”).

418. *In re Lipsky*, 411 S.W.3d 530, 542–43 (Tex. App.—Fort Worth 2013, orig. proceeding), *mand. denied*, 2015 WL 1870073 (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).

419. *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).

420. *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

2. Public Setting vs. Private Setting

Application of the TCPA is not limited to participation in a governmental proceeding. As the Texas Supreme Court held in a per curiam decision, the TCPA applies to both public and private communications about matters of public concern.⁴²¹ In *Whisenhunt*, Whisenhunt, a nurse anesthetist, sued Lippincott and Parks, administrators at a surgery center that had contracted with Whisenhunt, for tortious interference, conspiracy, and defamation after Lippincott sent emails questioning health care services Whisenhunt provided. 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. The Sixth Court of Appeals in Texarkana reversed the dismissal of the tortious interference and conspiracy claims on the grounds that the statute did not apply to private communications made outside a public setting. In its per curiam decision, the Texas Supreme Court looked at the statutory definitions and found no basis for the Court of Appeals' 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."⁴²² The supreme court concluded that the statute

defines "communication" 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 Legislature intended to limit the Act to publicly communicated speech, it could have easily added language to that effect.⁴²³

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.⁴²⁴ Finally, the Court noted that the Legislature had directed the courts to construe the Act "liberally to effectuate its purpose and intent fully."⁴²⁵ In its holding, the

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).

421. *Lippincott v. Whisenhunt*, No. 13-0926 (Tex. Apr. 24, 2015) (per curiam).

422. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3) (West 2015).

423. *Lippincott*, 2015 WL 1967025, at *2 (citations omitted).

424. *See also*, TEX. CIV. PRAC. & REM. CODE § 27.001(7) (definition of "matter of public concern").

425. TEX. CIV. PRAC. & REM. CODE ANN. § 27.011 (West 2015); *see also* *Shipp v. Malouf*, 439 S.W.3d 432, 439 (Tex. App.—Dallas 2014, pet. denied), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015, orig. proceeding). "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. Dall., Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 308 (Tex. App.—Dallas 2013, pet. denied). *But see* *Rivers v. Johnson Custodial Home*,

Court expressly rejected the Sixth Court of Appeals ruling that the TCPA only applied to alleged statements “readily available to the public.”⁴²⁶

3. *Public Figure vs. Private Figure*

The TCPA expressly includes statements about public officials and public figures within the definition of a “matter of public concern.”⁴²⁷ This definition includes a candidate for election to public office.⁴²⁸ As with traditional libel law, the determination of whether one is a public official or “public figure is a question of law for the court to decide.”⁴²⁹ The Texas Supreme Court has defined the nature of public figures:

Public figures fall into two categories: (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.⁴³⁰

The Texas Supreme Court has set out a 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.⁴³¹

At least one court has interpreted the definition of public figure so as to not apply the TCPA to a blog post about a prominent individual’s personal life.

Inc., No. A-14-CA-484-SS, 2014 WL 4199540, at *1 (W.D. Tex. Aug. 22, 2014) (ruling that statements made to prospective employers do not fall within the purview of the TCPA).

426. *Whisenhunt*, 416 S.W.3d at 692–95, 699–700, *rev’d*, No. 13-0926 (Tex. App. 24, 2015) (per curiam).

427. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(D).

428. *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.).

429. *Klantzman 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)).

430. *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).

431. *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)).

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.⁴³² 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."⁴³³

XI. TYPES OF SPEECH PROTECTED BY THE STATUTE

A. Online Speech

One of the fastest growing segments of anti-SLAPP 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."⁴³⁴ Texas courts have applied the TCPA to online speech.⁴³⁵ In applying the TCPA to email communications, the Texas Supreme Court relied on the inclusion of electronic communications in the definition of "exercise of free speech."⁴³⁶

One of the earliest of these cases involved an advertising agency that brought claims including libel, business disparagement, conversion, and misappropriation against an unsuccessful candidate for the state legislature, based on entries on the candidate's website.⁴³⁷ The *Rehak* court stated that "we have no difficulty in concluding that section 27.005(b)'s initial burden is satisfied because *Rehak*'s causes of action for conversion and misappropriation have a connection with a 'communication' in the form of a political campaign website that 'relates to' the Texas Legislature."⁴³⁸ In *American Heritage Capital, LP v. Gonzalez*, a suit brought by an online mortgage lender for defamation and tortious interference regarding comments made online by a former customer, the Fifth Court of Appeals found that the defendant's online comments that employees "could barely speak English," "were incompetent," and required excessive information

432. *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.").

433. *Id.* at 186.

434. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(1) (West 2015).

435. See, e.g., *Lippincott v. Whisenhunt*, No. 13-0926, 2015 WL 1967025 (Tex. App. 24, 2015) (per curiam) (applying the TCPA to email communications).

436. *Id.* at *2.

437. *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 719–20, 722–23 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. App. 24, 2015, orig. proceeding).

438. *Id.* at 733–34.

were not defamatory and clearly fell within the purview of the TCPA since the comments had been published.⁴³⁹ The Third Court of Appeals in *Kinney* reversed and rendered the trial court's partial denial of a motion to dismiss regarding Kinney's statements in a post on an internet website.⁴⁴⁰

In the recent case of *Rauhauser*, the Second Court of Appeals stated 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.⁴⁴¹ And in *Cruz*, a case regarding an internet post expressing concerns about a judicial candidate on the 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 figure" and was an "exercise of the right to free speech."⁴⁴² 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."⁴⁴³

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, the drilling company filed counterclaims against the property owner regarding his communications with EPA personnel, the public, and the news media about the drinking water, in which the property owner blamed Range for contaminating the well.⁴⁴⁴ Range's counterclaims also attacked statements made by the Lipskys and their agents that were made in official hearings about the appraisal of the value of their home and in communications with

439. *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 874–76, 881 n.16 (Tex. App.—Dallas 2014, no pet.).

440. *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.).

441. *Rauhauser v. McGibney*, No. 02-14-00215-CV, 2014 WL 6996819, at *6 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.) (per curiam).

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

443. *See 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. CODE ANN. § 27.001(7)(E)); *Wholesale TV & Radio Adver., 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. 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); *see also Young v. Krantz*, 434 S.W.3d 335, 344–45 (Tex. App.—Dallas 2014, no pet.), *disapproved on other grounds In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. App.—Dallas 2015, orig. proceeding) (regarding movant's unfavorable contractor review on Angie's List).

444. *In re Lipsky*, 411 S.W.3d 530, 542 (Tex. App.—Fort Worth 2013, orig. proceeding), *mand. denied*, 2015 WL 1870073.

Parker County officials.⁴⁴⁵ The Second Court of Appeals ruled that many of the claims should have been dismissed under the TCPA because the natural gas drilling company failed to establish a prima facie case for defamation and business disparagement against the property owner's environmental services contractor.⁴⁴⁶ 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*. The Court also held, however, there was not sufficient evidence of a prima facie case for business disparagement and conspiracy to survive the TCPA motion.⁴⁴⁷ Other contexts in which oral statements have received TCPA protection include: statements made to the media about the award of public contracts,⁴⁴⁸ statements made from the pulpit regarding a settlement agreement with a public official,⁴⁴⁹ and statements made in an address to the city council.⁴⁵⁰ The Second Court of Appeals recently decided a case involving an individual plaintiff who was reported 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.⁴⁵¹

C. Written Statements

The TCPA has been held to protect written complaints about public officials,⁴⁵² statements made in lawsuit pleadings,⁴⁵³ written letters by an attorney to the Board of Pardons and Parole,⁴⁵⁴ and political advertisements.⁴⁵⁵ In addition, several TCPA cases involve investigations conducted by or information provided to the news media, such as: a defamation action arising out of a newspaper story regarding a nursing

445. *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.”).

446. *Id.* at 548.

447. *In re Lipsky*, 2015 WL 1870073.

448. *Farias v. Garza*, 426 S.W.3d 808, 819 (Tex. App.—San Antonio 2014, pet. filed), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073 (observing that “the award of public contracts is almost always a public matter and an issue of public concern”).

449. *Alphonso v. Deshotel*, 417 S.W.3d 194, 202 (Tex. App.—El Paso 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073.

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

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

452. *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).

453. *Fitzmaurice v. Jones*, 417 S.W.3d 627, 633–35 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073.

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

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

home's compliance with regulations,⁴⁵⁶ 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,⁴⁵⁷ and 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.⁴⁵⁸

D. Exemptions Under the TCPA

The TCPA expressly exempts certain lawsuits from its applicability, including: enforcement actions brought by the State or law enforcement, lawsuits brought against someone for statements made in connection with the sale or lease of goods or services, legal actions brought under the Insurance Code or arising out of an insurance contract, and cases brought for wrongful death or bodily injury.⁴⁵⁹

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.⁴⁶⁰ A similar provision is contained in the District of Columbia's anti-SLAPP statute.⁴⁶¹ To date, there are no reported cases that discuss this portion of the statute or in which a litigant has attempted to file a motion in contravention of this portion of the statute. There is, however, a pending appeal challenging the trial court's dismissal of an ethics commission fine based on the TCPA.⁴⁶² This case could demonstrate how the courts will view the enforcement action exemption.

456. *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).

457. *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)).

458. *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 Apr. 20, 2015). See generally *Head v. Chicory Media, LLC*, 415 S.W.3d 559 (Tex. App.—Texarkana 2013, no pet.) (dismissing the plaintiff's TCPA claims for failure to provide an appellate record).

459. TEX. CIV. PRAC. & REM. CODE ANN. § 27.010 (West 2015).

460. *Id.* § 27.010(a).

461. D.C. CODE § 16-5501 (2015).

462. *Tex. Ethics Comm'n v. Sullivan*, No. 02-15-00103-CV (Tex. App.—Fort Worth, filed Mar. 18, 2015).

2. Commercial Speech

The most commonly asserted exemption to the TCPA is the commercial speech exemption intended to carve out advertising disputes and similar claims.⁴⁶³ The First Court of Appeals, in *Newspaper Holdings*, was the first to opine about the applicability of the commercial speech exemption.⁴⁶⁴ The case was brought by an assisted living facility against a newspaper and its sources for defamation, disparagement, and tortious interference with a contract, and the trial court denied the movant's motion to dismiss.⁴⁶⁵ The assisted living facility argued that the commercial speech exemption should apply because the newspaper sold advertisements and subscriptions.⁴⁶⁶ Seeking guidance from the California Supreme Court's interpretation of California's commercial speech provision, the First Court of Appeals slightly modified California's test in creating and adopting the test to determine whether an action falls within 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].⁴⁶⁷

The court then went on to note that the burden of proving the applicability of any exemption is on the asserting party, and because the plaintiff had not met its burden, the exemption did not apply.⁴⁶⁸

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.*⁴⁶⁹ 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

463. TEX. CIV. PRAC. & REM. CODE § 27.010(b).

464. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 88–90 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

465. *Id.*

466. *Id.* at 88.

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

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

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

because the BBB sold accreditation to businesses who qualified.⁴⁷⁰ 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.⁴⁷¹ 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.⁴⁷²

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.⁴⁷³ In *Schimmel*, 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.⁴⁷⁴ 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.⁴⁷⁵

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.⁴⁷⁶

In contrast, the Eighth Court of Appeals in *Miller Weisbrod, L.L.P. v. Llamas-Soforo*, held that lawyer advertisements qualify as commercial speech and fall within the TCPA exemption.⁴⁷⁷ After referring to California’s

470. *Id.* at 303–04.

471. *Id.* at 309.

472. *See id.* at 308–09; *see also* Wholesale TV & Radio Adver., 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).

473. 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*, No. 08-12-00278-CV, 2014 WL 6679122 (Tex. App.—El Paso Nov. 25, 2014, no pet.). *But see* Simpton v. High Plains Broad., No. 2011-CI-13290 (285th Dist. Ct., Bexar County, Tex. Mar. 23, 2012 and Apr. 10, 2012).

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

475. *Id.* at 857.

476. *Id.* at 857–58.

477. *Miller Weisbrod, L.L.P.*, 2014 WL 6679122 at *9.

and Massachusetts's anti-SLAPP statutes, the court reasoned that lawyer advertising is not created as a matter of public concern but is intended to attract clients and is thus commercial speech.⁴⁷⁸ Whether the TCPA commercial speech exemption applied to lawyer advertising was also discussed by the Fifth Circuit in *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*⁴⁷⁹ In *NCDR*, the Fifth Circuit came to the same conclusion as the Texas state courts and, in doing so, adopted *Newspaper Holdings'* four-part analysis and concluded that the Texas Supreme Court would do the same.⁴⁸⁰

In *Lamons Gasket Co. v. Flexitallic L.P.*, the U.S. district court decided that the commercial speech exemption applied 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.⁴⁸¹

Thus, if the actions taken involved speaking out about a matter of public concern and the statements were made to the general public, it is doubtful the commercial speech exemption would apply. 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.

3. *Wrongful Death and Bodily Injury Cases*

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.⁴⁸² 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 cases.⁴⁸³ Only one court has applied this exemption and the case is currently on appeal to the Third Court of Appeals.⁴⁸⁴

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.⁴⁸⁵ Because of some confusion at the trial

478. *Id.* at *7–9.

479. See *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 755 (5th Cir. 2014); *Lamons Gasket Co. v. Flexitallic L.P.*, 9 F. Supp. 3d 709, 711–12 (S.D. Tex. 2014).

480. *NCDR, L.L.C.*, 745 F.3d at 755.

481. *Lamons Gasket Co.*, 9 F. Supp. 3d at 712.

482. See Laura Lee Prather, *A Primer on the Texas Anti-SLAPP Statute*, SLAPP'ED IN TEXAS.COM, <http://www.slappedintexas.com/primer/> (last visited Apr. 20, 2015).

483. See *id.*

484. See Brief of Appellant Church of Scientology International at 9–10, *Sloat v. Rathbun*, No. 03-14-00199-CV (Tex. App.—Austin appeal filed Apr. 2, 2014), 2014 WL 2879586.

485. Tex. H.B. 2973, 82d Leg., R.S. (2011).

court level, however, the statute was amended in 2013 to add the following italicized language to the TCPA exemptions:

(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.*⁴⁸⁶

To date, there have been no reported cases relying on the exemption for insurance matters.

XII. WHO USES ANTI-SLAPP AND WHAT CAUSES OF ACTION ARE FOUND IN A SLAPP CASE?

The defining characteristic of a SLAPP suit is its purpose to deter a person or entity from exercising its constitutional rights.⁴⁸⁷ 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.⁴⁸⁸ SLAPP suit filers often camouflage their grievances against the target's constitutional activities by filing varying types of claims.⁴⁸⁹ Five recognized causes of action are typically a vehicle for SLAPP suit litigation: defamation, business torts, process violations, conspiracy, and constitutional and civil rights violations.⁴⁹⁰ Other less common causes of action may include claims for nuisance, trespass, and emotional harms.⁴⁹¹ A nationwide study of SLAPP suit litigation identified defamation in the forms of libel, slander, and business libel as the most common cause of action that houses a SLAPP purpose.⁴⁹² Business torts was the second most common cause of action, including interference with contract or business, antitrust,

486. Tex. H.B. 2935, 83d Leg., R.S. (2013).

487. PRING & CANAN, *supra* note 12, at 8–9.

488. *Id.* at 9–10.

489. *Id.* at 217.

490. *Id.*

491. *Id.*

492. *Id.*

restraint of trade, and unfair competition.⁴⁹³ SLAPP cases are filed against individuals,⁴⁹⁴ corporations,⁴⁹⁵ and media organizations.⁴⁹⁶

XIII. CONSTITUTIONAL CHALLENGES

A. Constitutional Challenges in Texas

Some SLAPP filers, in Texas and other states, have argued that anti-SLAPP statutes are unconstitutional.⁴⁹⁷ There are multiple theories of unconstitutionality, but they primarily boil down to an argument that the anti-SLAPP laws improperly inhibit access to open courts.⁴⁹⁸

493. *Id.*

494. See James v. Calkins, 446 S.W.3d 135 (Tex. App.—Houston [1st Dist.] 2014, pet. filed); 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 In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. App. 24, 2015, orig. proceeding); Kinney v. BCG Attorney Search, Inc., No. 03-12-00579-CV, 2014 WL 1432012 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.); Farias v. Garza, 426 S.W.3d 808 (Tex. App.—San Antonio 2014, pet. filed), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; Walker v. Schion, 420 S.W.3d 454 (Tex. App.—Houston [14th Dist.] 2014, no pet.); Alphonso v. Deshotel, 417 S.W.3d 194 (Tex. App.—El Paso 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; Fitzmaurice v. Jones, 417 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; 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 In re Lipsky*, 2015 WL 1870073; Ramsey v. Lynch, No. 10-12-00198-CV, 2013 WL 1846886 (Tex. App.—Waco May 2, 2013, no pet.) (mem. op.).

495. See Cheniere Energy, Inc. v. Lotfi, 449 S.W.3d 210 (Tex. App.—Houston [1st Dist.] 2014, no pet.); United Food & Commercial Workers Int'l Union v. Wal-Mart Stores, Inc., 430 S.W.3d 508 (Tex. App.—Fort Worth 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 In re Lipsky*, 2015 WL 1870073; 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.); 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. Dall., Inc. v. Ward, 401 S.W.3d 440 (Tex. App.—Dallas 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); San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Props., LP, 452 S.W.3d 343 (Tex. App.—Corpus Christi 2013, pet. denied).

496. See, e.g., Shipp v. Malouf, 439 S.W.3d 432 (Tex. App.—Dallas 2014, pet. denied), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; KBMT Operating Co. v. Toledo, 434 S.W.3d 276 (Tex. App.—Beaumont 2014, pet. granted), *disapproved on other grounds In re Lipsky*, 2015 WL 1870073; 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.); KTRK Television, Inc. v. Robinson, 409 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); Avila v. Larrea, 394 S.W.3d 646 (Tex. App.—Dallas 2012, pet. denied).

497. See, e.g., Combined Law Enforcement Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672, at *9 (Tex. App.—Austin Jan. 31, 2014, pet. filed) (mem. op.); Castello v. City of Seattle, No. C10-1457MJP, 2011 WL 219671, at *13 (W.D. Wash. Jan. 24, 2011).

498. 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

Although several courts have held that constitutional challenges to the TCPA raised for the first time on appeal were waived,⁴⁹⁹ the only Texas appellate court to directly address the constitutionality of the statute has been the Third Court of Appeals.⁵⁰⁰

I. Open Courts Challenges

In *Sheffield*, the plaintiff brought a constitutional challenge based on the open courts provision to the Texas Constitution.⁵⁰¹ The plaintiffs contended that the TCPA imposed “a higher standard of proof than would ordinarily be required for the plaintiff/respondent to prevail at trial.”⁵⁰² In light of the *In re Lipsky* decision, this premise fails.⁵⁰³ 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.⁵⁰⁴

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.”⁵⁰⁵ 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

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. 33.1(a); 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.”))).

499. See, e.g., *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))).

500. *Sheffield*, 2014 WL 411672, at *9–11.

501. *Id.* at *9.

502. *Id.*

503. *In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015, orig. proceeding).

504. *Sheffield*, 2014 WL 411672, at *9–11.

505. *Id.* at *10.

shown that the TCPA requires a higher standard of proof, much less one that violates the open-courts provision of the Texas [C]onstitution.⁵⁰⁶

The Texas Supreme Court implicitly agreed with this logic in *In re Lipsky* by holding that the clear and specific standard does not impose a higher burden of proof than required at trial.⁵⁰⁷ As to the *Sheffield* plaintiffs' 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."⁵⁰⁸ The court concluded that "[t]he provisions staying discovery are tempered by provisions permitting discovery upon a showing of good cause."⁵⁰⁹

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 subsequent language tempers the conditions for making an award with discretionary terms like 'justice' and 'equity' and 'sufficient to deter.'"⁵¹⁰ Thus, the provision did not violate the open courts guarantee.⁵¹¹

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 Legislature cannot impede access to the courts through unreasonable financial barriers, and 3) meaningful remedies must be afforded, "so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress."⁵¹²

The open courts provision has been held to apply only to protect common-law claims, not statutory claims.⁵¹³ Thus, an open courts challenge can only be brought as it relates to a common-law claim.

506. *Id.*

507. *In re Lipsky*, 2015 WL 1870073.

508. *Sheffield*, 2014 WL 411672, at *10.

509. *Id.*

510. *Id.* at *11.

511. *Id.*

512. *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)).

513. *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.").

2. Vagueness and Over-Breadth

The *Sheffield* court also 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."⁵¹⁴ 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."⁵¹⁵ 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."⁵¹⁶ 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."⁵¹⁷

The court similarly rejected the 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."⁵¹⁸ 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."⁵¹⁹ 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 CLEAT's internal affairs which are a common interest among CLEAT's members."⁵²⁰ Thus, the court concluded that "[t]he TCPA's definition of the exercise of free association is not unconstitutionally overbroad or void for vagueness."⁵²¹

514. *Sheffield*, 2014 WL 411672, at *11.

515. *Id.*

516. *Id.*

517. *Id.*

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

519. *Id.*

520. *Id.*

521. *Id.*

B. Constitutional Challenges in Other States

The Texas anti-SLAPP statute, in large measure, was patterned after the California law.⁵²² Significantly, California's law, which has had more judicial interpretation than any other in the country, has repeatedly been upheld as constitutional.⁵²³ As one federal court in Washington has noted: "[T]he assertion that the [a]nti-SLAPP Act is unconstitutional is questionable given that California's [a]nti-SLAPP Act, which is substantially similar to Washington's statute, has been litigated multiple times and not held unconstitutional."⁵²⁴

Courts in other states have consistently rejected the argument that a plaintiff has a "constitutional right to unfettered defamation claims."⁵²⁵ The California cases of *Equilon Enterprises v. Consumer Cause, Inc.*⁵²⁶ and *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*⁵²⁷ 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."⁵²⁸ In *Lafayette Morehouse*, a California appellate court made the same finding, reasoning that the legislature "could reasonably conclude [SLAPP] suits should be evaluated in an early and expeditious manner."⁵²⁹

Significantly, the courts that have evaluated the constitutionality of an anti-SLAPP statute have consistently found the statute at issue to be constitutional.⁵³⁰

522. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 27 (West 2015) (detailing the TCPA in its entirety), with CAL. CIV. PROC. CODE § 425.16 (West 2004 & Supp. 2015) (detailing the California anti-SLAPP statute).

523. *Equilon Enters., LLC v. Consumer Cause, Inc.*, 52 P.3d 685 (Cal. 2002).

524. See, e.g., *Castello v. City of Seattle*, No. C10-1457MJP, 2011 WL 219671, at *13 (W.D. Wash. Jan. 24, 2011) (citing *Equilon Enters., LLC*, 52 P.3d at 685).

525. *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 14, at *3.

526. *Equilon Enters., LLC*, 52 P.3d at 685.

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

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

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

530. See *id.* at 46 (rejecting a right of access challenge); *Equilon Enters., LLC*, 52 P.3d 685 (rejecting a right of petition challenge); *Sandholm v. Kuecker*, 942 N.E.2d 544 (Ill. App. Ct. 2010) (rejecting a challenge based on the state constitution's guarantee to a remedy), *rev'd*, 962 N.E.2d 418 (Ill. 2012); *Lee v. Pennington*, 2002-0381 (La. App. 4 Cir. 10/16/02); 830 So. 2d 1037 (rejecting an equal protection and due process challenge); *Nexus v. Swift*, 785 N.W.2d 771 (Minn. Ct. App. 2010) (rejecting a challenge based on due process and right to jury trial), *abrogated by* *Leiendecker v. Asian Women United*, 848 N.W.2d 224 (Minn. 2014); *Day v. Farrell*, No. 97-2722, 2000 WL 33159180 (R.I. May 15, 2000) (rejecting a challenge based on access and due process); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996) (rejecting a challenge based on numerous grounds, including separation of powers and right of access); *Anderson Dev. Co. v. Tobias*, 2005 UT 36, 116 P.3d 323, 338 (rejecting a bill of attainder

XIV. APPLICATION OF STATUTE IN FEDERAL COURT

Some SLAPP filers have questioned the extent to which federal courts may apply state anti-SLAPP statutes in federal cases sitting in diversity.⁵³¹ Under the Supreme Court's ruling in *Erie Railroad Co. v. Tompkins* and its progeny, federal district courts sitting in diversity jurisdiction apply the substantive law of the state in which the district court sits, while the Federal Rules of Civil Procedure govern procedural matters.⁵³² In determining whether the state law is substantive or procedural, courts employ a two-part analysis under *Erie*.⁵³³ First, courts examine whether the state statute in question is in "direct collision" with any Federal Rule of Civil Procedure,⁵³⁴ or as recently articulated by the Supreme Court, whether the federal rule "answers the question in dispute."⁵³⁵ If the federal rule is "sufficiently broad to control the issue before the [c]ourt," thereby leaving no room for the operation of a seemingly conflicting state law,⁵³⁶ the federal rule governs unless the rule is invalid because "it exceeds statutory authorization or Congress's rulemaking power."⁵³⁷ Second, where the federal rule does not control the issues raised, then the court analyzes whether the state law should be applied to further the twin aims of *Erie*—"discouragement of forum-shopping and avoidance of inequitable administration of the laws."⁵³⁸

A. *The TCPA in Federal Court*

Prior to the recent ruling from the Southern District of Texas in *Williams v. Cordillera Communications, Inc.*, several Texas federal courts had presumed, without deciding, the applicability of the TCPA in federal court.⁵³⁹ *Williams* was the first ruling in which a federal court directly addressed the issue; it declared the Texas anti-SLAPP statute was a substantive right to be

challenge); *Guam Greyhound Inc.*, 2008 Guam 13 (rejecting a challenge to an anti-SLAPP statute where it allegedly violated the right of access and was a prior restraint).

531. 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).

532. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

533. *Erie*, 304 U.S. at 71–80.

534. *Hanna*, 380 U.S. at 472.

535. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

536. *Id.* at 422 (Stevens, J., concurring) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980)) (internal quotations omitted).

537. *Id.* at 398 (majority opinion).

538. *Hanna*, 380 U.S. at 468.

539. See, e.g., *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742 (5th Cir. 2014) (determining that if the TCPA applies, the commercial speech exemption applies); *Culbertson v. Lykos*, No. H-12-3644, 2013 WL 4875069 (S.D. Tex. Sept. 11, 2013) (dismissing under the TCPA); *Ascend Health Corp. v. Wells*, No. 4:12-CV-00083-BR, 2013 WL 1010589 (E.D.N.C. Mar. 14, 2013) (assuming without deciding that the TCPA applied, and declining to dismiss); *Monaco Entm't Grp., LLC v. City of El Paso*, No. 3:11-CV-00561-DB (W.D. Tex. May 30, 2013) (granting pending TCPA motion to dismiss among other motions, without discussion).

applied in federal court.⁵⁴⁰ *Williams* involved a local television station's investigative series about a high school teacher and coach who had repeatedly been accused of improper behavior for more than a decade and were nonetheless permitted to move from school district to school district.⁵⁴¹ When the teacher sued the television station that reported these allegations, the case was removed to federal court in the Southern District of Texas. The station filed a TCPA motion; the claimant countered that the TCPA was not applicable in federal court. In its ruling on the motion, the court conducted an *Erie* analysis⁵⁴² and determined that, although there are 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."⁵⁴³ The court then looked to Fifth Circuit precedent, which held that Louisiana's anti-SLAPP law applies in federal court and noted that there are no material differences between the Louisiana and Texas statutes.⁵⁴⁴ The court found that the lawsuit was based on the defendants' exercise of the right of free speech on "matters involving health and safety, community well-being, and—with respect to public educational institutions, mandatory primary education, and certification of teachers—the government" and applied the TCPA.⁵⁴⁵ Because the claimant failed to establish a prima facie case in support of his causes of action, the court granted the station's anti-SLAPP motion, dismissed the case in its entirety and, in a subsequent order, awarded fees to the station.⁵⁴⁶

Several other federal courts have considered the TCPA without making a determination regarding whether or not it applied in federal court. In *Rivers v. Johnson Custodial Home, Inc.*, a gender discrimination suit that included defamation and tortious interference claims, a former employer filed a motion to dismiss under the TCPA, claiming that the lawsuit had been filed as a result of the exercise of the right to free speech.⁵⁴⁷ Citing the appellate court holding in *Whisenhunt* (prior to the Texas Supreme Court's reversal of

540. *Williams v. Cordillera Commc'ns, Inc.*, No. 2:13-CV-124, 2014 WL 2611746 (S.D. Tex. 2014).

541. *See Williams v. Cordillera Commc'ns, Inc.*, 26 F. Supp. 3d 624 (S.D. Tex. 2014) (laying out background facts in a summary judgment ruling).

542. *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). Under *Erie Railroad Co. v. Tompkins*, except in matters governed by the Federal Constitution or Acts of Congress, "federal courts sitting in diversity apply state substantive law and federal procedural law." *Id.* (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)); *see also* 28 U.S.C. § 1652 ("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.").

543. *Williams*, 2014 WL 2611746, at *1–2 ("The Court thus enforces the TCPA as it applies to this case.").

544. *Id.*

545. *Id.* at *4.

546. *Id.* at *5.

547. *Rivers v. Johnson Custodial Home, Inc.*, No. A-14-CA-484-SS, 2014 WL 4199540, at *1 (W.D. Tex. Aug. 22, 2014).

that ruling), the Western District of Texas held that the free speech protections in the TCPA did not apply in that case because the lawsuit was based on private communications, which the court held were not covered under the free speech prong of the TCPA.⁵⁴⁸ The court further held that, even if private statements qualified for protection under the statute, the defendant failed to show that the statements at issue in that case related to a matter of public concern.⁵⁴⁹

In *Ward v. Rhode*, plaintiffs Ward and Ward & Associates, P.C., filed suit against the Rhodes for disparagement, tortious interference, libel, slander, and negligence regarding the Rhodes' website blog that allegedly contained defamatory statements about Ward.⁵⁵⁰ The Rhodes filed an anti-SLAPP motion in accordance with the statute, but they also filed several other Rule 12(b) motions regarding the court's jurisdiction to hear the case.⁵⁵¹ The district court granted the 12(b) motions without reaching the issue of the applicability of the TCPA.⁵⁵²

In *Culbertson v. Lykos*, the Southern District of Texas dismissed another claim under the TCPA, simply declaring that "[t]he Act applies" to the claims at issue.⁵⁵³ Notably, the *Culbertson* court followed the deadlines of the TCPA.⁵⁵⁴ Likewise, a federal court in North Carolina assumed without deciding that the TCPA applied to that case.⁵⁵⁵ An El Paso federal court also

548. *Id.* at *2 (citing *Whisenhunt v. Lippincott*, 416 S.W.3d 689 (Tex. App.—Texarkana 2013), *rev'd per curiam*, No. 13-0926 (Tex. App. 24, 2015)). The movants in *Rivers* did not assert that the claims at issue related to the TCPA's protection of the right of association, which might have provided a different outcome. *Compare id.* ("Defendants have not identified any case holding the existence of the qualified privilege makes all employer statements about employees 'matters of public concern.'"), with *Combined Law Enforcement Ass'ns of Tex. v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672, at *1, *5 (Tex. App.—Austin Jan. 31, 2014, pet. filed) (mem. op.) (applying the anti-SLAPP statute to private employer email communication under the right of association).

549. *Rivers*, 2014 WL 4199540, at *2.

550. *Ward v. Rhode*, 544 F. App'x 349, 351 (5th Cir. 2013) (trial court No. 6:11CV531, 2012 WL 4499307 (E.D. Tex. Sept. 7, 2012)).

551. *Id.*

552. *Id.* at 352–53.

553. *See Culbertson v. Lykos*, No. 4:12-cv-03644, 2013 WL 4875069, at *2 (S.D. Tex. Sept. 11, 2013). The plaintiffs in that case alleged that their public expressions of their opinions on a governmental issue (whether the breath-alcohol tests were viable) precluded their hiring, yet the district court held that they did not sustain their burden of proof to show, among other issues, that they were fired as a direct consequence of an illegal act of the defendants, but that they merely repeated third-party allegations. *See id.* at *4.

554. *Id.* at *1 ("Out of respect for its state, the court entered the order within the state-mandated deadline, whether it had to or not."). Oral argument before the Fifth Circuit on the plaintiff-appellants' claims was held on September 4, 2014; the court has not yet reached a decision. FIFTH CIRCUIT COURT OF APPEALS CALENDARS, SEPT. 2–4, 2014 (Aug. 28, 2014), <https://www.ca5.uscourts.gov/clerk/calendar/1409%5C07.htm>.

555. *See Ascend Health Corp. v. Wells*, No. 4:12-CV-00083-BR, 2013 WL 1010589, at *1, *4 (E.D.N.C. Mar. 14, 2013).

granted a motion to dismiss that was based on the TCPA, but that court did not discuss the applicability of the statute at all.⁵⁵⁶

B. Interlocutory Appeals of the TCPA in Federal Court

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 applied a federal analysis to its appellate jurisdiction by applying the collateral order doctrine.⁵⁵⁷ 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.”⁵⁵⁸ To determine if the conditions apply to the TCPA, the *NCDR* court looked to precedent involving application of the collateral order doctrine to the Louisiana anti-SLAPP statute, which found “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.⁵⁵⁹ 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.⁵⁶⁰

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, Georgia, Illinois, Indiana, Maryland, Nevada, Oregon, Utah, Vermont, and Washington have applied state anti-SLAPP statutes in diversity actions.⁵⁶¹

556. See *Monaco Entm’t Grp., LLC v. City of El Paso*, No. 3:11-CV-00561-DB (W.D. Tex. May 30, 2013).

557. *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 747 (5th Cir. 2014) (“Where the district court’s order is not a final judgment ending the action, the collateral order doctrine can confer limited appellate jurisdiction.”).

558. *Id.*

559. *Id.* at 748 (citing *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 173 (5th Cir. 2009)).

560. *Id.* at 752.

561. See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999) (applying the California statute); *Trudeau v. ConsumerAffairs.com, Inc.*, No. 10 C 7193, 2011 WL 3898041 (N.D. Ill. Sept. 6, 2011) (applying the Illinois statute); *Tennenbaum v. Ariz. City Sanitary Dist.*, 199 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); *Balestra-Leigh v. Balestra*, No. 3:09-CV-551-ECR-RAM, 2010 WL 4280424 (D. Nev. Oct. 19, 2010) (applying the Nevada statute); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010) (applying the Washington statute); *Russell v. Krowne*, No. DKC 2008-2468, 2010 WL 2765268 (D. Md. July 12, 2010) (applying the Maryland 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); *Bible &*

The Ninth Circuit was the first appellate court to examine whether a state anti-SLAPP statute can be applied in a federal diversity action. 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 56.⁵⁶² 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.”⁵⁶³ 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.’”⁵⁶⁴ 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:

[I]f 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.⁵⁶⁵

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.”⁵⁶⁶

On the other hand, a minority of federal jurisdictions—in the District of Columbia, Massachusetts, and Georgia—have ruled that the *Erie* doctrine bars application of those jurisdictions’ anti-SLAPP statutes in federal court.⁵⁶⁷ the Massachusetts decisions have been called into question by the

Gospel Trust v. Twinam, No. 1:07-cv-17, 2008 WL 5245644 (D. Vt. Dec. 12, 2008) (applying the Vermont 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); *Card v. Pipes*, 398 F. Supp. 2d 1126, 1137 (D. Or. 2004) (applying the Oregon statute); *Buckley v. DIRECTV, Inc.*, 276 F. Supp. 2d 1271 (N.D. Ga. 2003) (applying the Georgia statute).

562. *Newsham*, 190 F.3d at 972.

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

564. *Id.* at 972–73 (quoting CAL. CIV. PROC. CODE § 425.16(a)).

565. *Id.* at 973.

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

567. *See Abbas v. Foreign Policy Grp., LLC*, No. 1:12-cv-01565, 2015 WL 1873140 (D.C. Cir., Apr. 24, 2015); *Sherrord v. Breitbart*, 843 F. Supp. 2d 83 (D.D.C. 2012); *3M Co. v. Boulter*, 842 F. Supp. 2d 85 (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); *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); *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 v. Schencks* decision reviewing the Maine anti-

more recent First Circuit ruling in *Godin v. Schencks* (reviewing the Maine anti-SLAPP law),⁵⁶⁸ and the Georgia case was reversed on appeal on other grounds.⁵⁶⁹ 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.⁵⁷⁰ A consistent approach to the application of anti-SLAPP statutes in federal court is critical to serve the purposes of the statutes and to avoid forum shopping.⁵⁷¹

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 an appropriate forum-selection clause mandating a different jurisdiction. For example, a federal district court in Seattle applied the state's comprehensive anti-SLAPP protections to a SLAPP case transferred from Florida.⁵⁷² The plaintiff, a Florida lawyer, sued a Seattle-based company, Avvo, in Florida, alleging defamation, arising in part from its description of his practice (Avvo said he was an employment lawyer and the plaintiff claimed to be a health care attorney).⁵⁷³ The plaintiff then amended his complaint and replaced this claim with claims of false advertising and misrepresentation.⁵⁷⁴ Relying on the Avvo.com website's terms of use and its forum selection clause, Avvo had the case transferred from Florida (which has a less comprehensive anti-SLAPP statute) to Washington.⁵⁷⁵ Avvo then filed a special motion to

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).

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

569. *See Bloomberg*, 552 F.3d at 1303 (finding no federal subject matter jurisdiction and remanding to the district court only to be removed to state court).

570. *Compare Abbas v. Foreign Policy Grp., LLC*, No. 1:12-cv-01565, 2015 WL 1873140 (D.C. Cir., Apr. 24, 2015); *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).

571. *See Daniel Castro and Laura Drees, Why We Need Federal Legislation to Protect Public Speech Online*, INFO. TECH. & INNOVATION FOUND. (May 4, 2015), <http://www.itif.org/publications/2015/05/04/why-we-need-federal-legislation-protect-public-speech-online>; Notice of Voluntary Dismissal Without Prejudice, *Dean v. NBC Universal*, No. 2011-CA-006055-B (D.C. Super. Ct., filed Mar. 15 2012). In that case, a libel plaintiff opposing a special motion to dismiss under the D.C. anti-SLAPP Act in the D.C. Superior Court sought to dismiss his claim voluntarily in order to re-file in the federal court. *Id.* The plaintiff explicitly identified the rulings in *3M* and *Sherrod* as the basis for his voluntary dismissal and professed forum shopping. *Id.*; *see also Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (discussing the twin aims of *Erie*).

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

573. *Id.* at *1.

574. *Id.* at *2-3.

575. *Id.*

strike under Washington's broad anti-SLAPP law.⁵⁷⁶ The Seattle federal court granted the Avvo motion, dismissing the case and awarding the mandatory attorney's fees and a \$10,000 statutory penalty.⁵⁷⁷

XV. CONCLUSION

The filing of meritless lawsuits designed to choke public criticism is a trend that weakens accountability and threatens the United States' modern communication marketplace—a marketplace made robust only with continued nourishment of First Amendment freedoms.⁵⁷⁸ The TCPA answers this abusive lawsuit chokehold by providing threshold protections for First Amendment rights.⁵⁷⁹ The Act furthers the exchange of truthful ideas and opinions unfettered by the prospect of being hauled into court for publicly voicing a critical view.⁵⁸⁰ With the TCPA's adoption, First Amendment liberties in Texas have a needed practical buttress against misuse of the judicial process.

To the extent that the TCPA removes litigation strategy from among the weapons for extinguishing public criticism, the Act is consistent with the framers' view of First Amendment rights.⁵⁸¹ 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 education, the remedy to be applied is more speech, not enforced silence.⁵⁸²

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

576. *Id.*

577. *Id.* at *8.

578. *See supra* Part I.

579. *See supra* Part II.A.

580. *See supra* Part II.A.

581. *See supra* Part II.A.

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

