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ARE YOU SLAPP HAPPY YET?

LITIGATION UNDER THE TEXAS CITIZENS PARTICIPATION ACT (TCPA)

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ANTI-SLAPP STATUTES

- “SLAPP”: strategic lawsuit against public participation
- Anti-SLAPP statutes
- More than 30 states have anti-SLAPP laws.
- California as an anti-SLAPP model
- Texas Citizens Participation Act,
Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.*

THE TCPA – PROCEDURAL PROVISIONS

- Automatically stays discovery
- Deadline for hearing
- Deadline for ruling—or denied by operation of law
- Immediate appeal from denial of motion
- Attorneys' fees, costs, and sanctions available to successful movant

THE TCPA APPLIES BROADLY

- Defamation and business disparagement
- Tortious interference
- Trade secret misappropriation
- Breach of nondisclosure agreement
- Breach of contract and promissory estoppel
- Fraudulent lis pendens
- Legal malpractice

“LEGAL ACTION” IS DEFINED BROADLY

- “lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or *any other judicial pleading or filing that requests legal or equitable relief*”
- Rule 202 petitions
 - *In re Elliott*, 504 S.W.3d 455 (Tex. App.—Austin 2016, orig. proceeding); *DeAngelis v. Protective Parents Coalition*, 2018 WL 3673308 (Tex. App.—Fort Worth Aug. 2, 2018, no pet. h.)
 - *Glassdoor, Inc. v. Andra Grp., LP*, No. 17-0463 (argued September 19)
- “Motion” or “counterclaim” for sanctions
 - *Hawxhurst v. Austin’s Boat Tours*, 550 S.W.3d 220 (Tex. App.—Austin, 2018, no pet.)

THE TCPA – BURDEN-SHIFTING FRAMEWORK

- **Step One:** Movant must show by a *preponderance of the evidence* that the TCPA applies. § 27.005(b).
 - “Evidence” includes pleadings. § 27.006(a).
- **Step Two:** Nonmovant must show by *clear and specific evidence* a prima facie case for each essential element of the claim. § 27.005(c).
- **Step Three:** Movant can show by a *preponderance of the evidence* each essential element of a valid defense.

THE TCPA: STEP ONE

RIGHT OF FREE SPEECH

RIGHT OF ASSOCIATION

RIGHT OF PETITION

“RIGHT OF FREE SPEECH” DEFINED BROADLY

- “A communication made in connection with a matter of public concern”
- Statutory list of matters of public concern
 - health or safety;
 - environmental, economic, or community well-being;
 - the government;
 - a public official or public figure;
 - a good, product, or service in the marketplace
- “Communication” not limited to *public* speech
 - *Lippincott v. Whisenhunt*, 462 S.W.3d 507 (Tex. 2015)
- No more than a “tangential relationship” required.
 - *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017)

MOVANT NEED NOT ADMIT ALLEGATIONS

- Movant's denial that she made communications underlying plaintiff's suit does not preclude movant from showing TCPA applies to the suit.
- "The basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations."

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

RIGHT OF ASSOCIATION

- Right of association involves “a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.”
- Need not involve a matter of public concern
- Employment claims/trade secrets claims
 - *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017)
 - *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191 (Tex. App.—Austin 2017, pet. dism’d)
 - *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287 (Tex. App.—Austin 2018, pet. filed)

RIGHT TO PETITION

- Multi-part statutory definition
- Need not involve a matter of public concern
 - *Quintanilla v. West*, 534 S.W.3d 34 (Tex. App.—San Antonio 2017, pet. granted)
- In-court statements reciting settlement agreement under Tex. R. Civ. P. 11
 - *Youngkin v. Hines*, 546 S.W.3d 675 (Tex. 2018)

RIGHT TO PETITION

- Testimony

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

- Affidavits

- *Collins v. Collins*, 2018 WL 1320841 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018, pet. filed)

- Administrative complaints/lawsuits

- *Lona Hills Ranch, LLC v. Creative Oil & Gas Operating, LLC*, 549 S.W.3d 839 (Tex. App.—Austin 2018, no pet.)

RIGHT TO PETITION

- Counterclaim/motion for sanctions
 - *Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220 (Tex. App.—Austin 2018, no pet.)
- Reports to law enforcement
 - *Spencer v. Overpeck*, 2017 WL 993093 (Tex. App.—San Antonio Mar. 15, 2017, pet. denied)

PRE-SUIT DEMAND LETTERS

- **Pre-suit demand letters or communications with attorneys?**
- Pre-suit communications with attorneys in ongoing legal proceedings do not qualify.
 - *QTAT BPO Sols., Inc. v. Lee & Murphy Law Firm, G.P.*, 524 S.W.3d 770, 778 (Tex. App.—Houston [14th Dist.] 2017, pet. denied)
- Pre-suit demand letters are covered by TCPA catchall provision, but do not pertain to a “judicial proceeding” under Section 27.001(4)(A)(i)
 - *Moricz v. Long*, No. 06-17-00011-CV, 2017 WL 3081512, at *4 (Tex. App.—Texarkana July 20, 2017, no pet.); *Long Canyon Phase II & III Homeowners Ass’n, Inc. v. Cashion*, 517 S.W.3d 212, 220–21 (Tex. App.—Austin 2017, no pet.)

MIXED CLAIMS

- How should courts evaluate causes of action involving covered and uncovered allegations?
- Courts have decided motions on a claim-by-claim basis.
- Treat entire cause of action the same
 - *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, 184 Cal. App. 4th 1539 (2010)
- Will Texas follow the California Supreme Court?
 - *Baral v. Schnitt*, 376 P.3d 604 (Cal. 2016)
 - *Robert B. James, DDS v. Elkins*, 2018 WL 2418457 (Tex. App.—San Antonio May 30, 2018, pet. filed)

“BASED ON, RELATES TO, OR IN RESPONSE TO”

- Tests the connection between protected conduct and the claim

Sloat v. Rathbun, 513 S.W.3d 500 (Tex. App.—Austin, 2015, pet. dismiss'd)

- “(1) what the factual bases for [the nonmovant’s] claims are, based on the pleadings and evidence viewed in the light most favorable to her; and
- (2) the extent to which these factual bases, as a matter of law, are protected expression within the TCPA’s definitions. Implicit in this analysis is that we do not blindly accept attempts by the [movants] to characterize [the nonmovant’s] claims as implicating protected expression.”

STATUTORY EXEMPTIONS

- Enforcement action brought by state
- Legal action involving commercial speech
- Legal action seeking recovery for bodily injury
- Legal action under Insurance Code

TEXAS COURTS CLARIFY EXEMPTIONS

- **Enforcement action exemption**
- “Enforcement action” “refers to a governmental attempt to enforce a substantive legal prohibition against unlawful conduct.”
 - *State ex rel. Best v. Harper*, 2018 WL 3207125 (Tex. June 29, 2018)

TEXAS COURTS CLARIFY EXEMPTIONS

- **Insurance Code exemption** partially applies to tort claims by medical practice for fraudulent overpayment of physician.
- Includes tort claims when the insurance contract was a “but for’ or motivating cause of the alleged facts entitling the plaintiff to relief, or [when] the alleged facts . . . have a nexus to or originate in a contractual relationship between an insurer and an insured. . . .”
 - *Robert B. James, DDS, Inc. v. Elkins*, 2018 WL 2418457 (Tex. App.—San Antonio May 30, 2018, pet. filed)

TEXAS COURTS CLARIFY EXEMPTIONS

- **Commercial speech exemption** does not apply to negative online posts by a plaintiff's customer.
- Exception applies to speech that “does no more than propose a commercial transaction.”
- Claims must arise directly out of “sale of goods or services or [nonmovant's] status as a seller of those goods and services.”
 - *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684 (Tex. 2018)
 - *Abatecola v. 2 Savages Concrete Pumping*, 2018 WL 3118601 (Tex. App.—Houston [14th Dist.] June 26, 2018, no pet. h.)

TEXAS COURTS CLARIFY EXEMPTIONS

- **Bodily injury exemption** applies to assault claim seeking damages for pain and medical expenses.
 - *Cavin v. Abbott*, 545 S.W.3d 47 (Tex. App.—Austin 2017, no pet.)
- Negligence claim seeking to recover for gunshot wounds
 - *Kirkstall Rd. Enters., Inc. v. Jones*, 523 S.W.3d 251 (Tex. App.—Dallas 2017, no pet.)

LIPSKY CLARIFIES “STEP TWO”

- *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015)
- “Clear and specific evidence” includes circumstantial evidence.
- But it requires more than mere notice pleading.

DISCOVERY

- All discovery is stayed. § 27.003(c).
- Timeline. § 27.004.
 - “[I]n no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.”

DISCOVERY

- “On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.” § 27.006(b).
 - *Charalambopoulos v. Grammer*, 2015 WL 390664, *18 (N.D. Tex. 2015); *IN RE INTELLICENTRICS, INC.*, 2018 WL 5289379, at *4 (Tex. App.—Fort Worth Oct. 25, 2018, no pet. h.) (discovery “should ... be sufficiently broad to uncover evidence of all essential elements of the challenged breach of contract and promissory estoppel claims”)
- Rule 11 agreement for discovery

DISCOVERY

- Discovery pursuant to requested injunctive relief vs. TCPA Discovery

We conclude the TCPA does not prohibit a trial court from considering and granting a temporary restraining order or a temporary injunction before deciding a motion to dismiss brought under the TCPA. Nevertheless, this does not mean that the trial court can permit unbridled discovery related to the request for injunctive relief before hearing and disposing of a motion to dismiss brought under the TCPA.

- *In re SPEX Group US LLC*, 2018 WL 1312407, at *4 (Tex. App.—Dallas Mar. 14, 2018, no pet.), mandamus dismissed (Mar. 16, 2018)

ATTORNEYS' FEES

- To successful TCPA movant, the court *shall* award “court costs, reasonable attorney’s fees, and other expenses incurred in defending against the legal action as justice and equity may require.”
§ 27.009(a)(1) (emphasis added).
- Attorneys’ fees limited by reasonableness, not by “as justice and equity may require.”
– *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016)

ATTORNEYS' FEES

- TCPA movant gets attorneys' fees even if TCPA motion only partially successful; how that affects calculation of fees remains unclear.

– *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017)

- Dallas Court of Appeals held a party may not recover fees for which party was not “liable for payment” due to contingency fee arrangement.

– *MacFarland v. Le-Vel Brands LLC*, 2018 WL 2213913 (Tex. App.—Dallas May 15, 2018, no pet. h.)

STRATEGIC CONSIDERATIONS

- Have your evidence ready *before* you file.
- Don't overplead.
- Be careful in responding to petition with motions or counterclaims that could trigger TCPA.
- A nonsuit doesn't make the TCPA pain go away.
- Be careful with Rule 202 actions, especially where TCPA would apply to the underlying claim.

THE TCPA IN FEDERAL COURT

APPLICABILITY OF TCPA IN FEDERAL COURT

- At least three pending cases in the Fifth Circuit:
 - *Klocke v. Watson*, No. 17-11320 (argued Sept. 5, 2018)
 - *Rudkin v. Roger Beasley Imports, Inc.*, No. 18-50157
 - *Van Dyke v. Retzlaff*, No. 18-40710

APPLICABILITY OF TCPA IN FEDERAL COURT

- Circuit split on whether anti-SLAPP laws apply in federal court
 - First and Ninth Circuits vs. D.C., Seventh, and Tenth Circuits
- The Supreme Court has repeatedly denied cert on this issue.
 - *AmeriCulture Inc. v. Los Lobos Renewable Power, LLC*, No. 18-89 (pending)
- The Ninth Circuit recently clarified *how* the California statute applies.
 - *Planned Parenthood v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018)
 - *Sarver v. Chartier*, 813 F. 3d 891 (9th Cir. 2016)
- Courts in the Fifth Circuit have generally applied TCPA deadlines.
 - *Cuba v. Pylant*, 814 F.3d 701 (5th Cir. 2016)

IMMEDIATE INTERLOCUTORY APPEAL

- Interlocutory appeal is available from the denial of a TCPA motion under the collateral order doctrine.
 - *NCDR, L.L.C. v. Mauze & Bagby*, 745 F.3d 742 (5th Cir. 2014)
- Most circuits agree, but the Second Circuit recently created a circuit split on the issue.
 - *Ernst v. Carrigan*, 814 F.3d 116 (2d Cir. 2016)

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Chambers USA, First Amendment Litigation (Nationwide), 2013–2018; Litigation: Appellate (Texas), 2009, 2010, and 2015–2018

Tom has a wide range of experience in state and federal appeals and trials. His experience includes commercial, tort, intellectual property, and health care litigation, as well as class actions. He has represented publishers and broadcasters in all aspects of media litigation throughout his career.

Tom is a practice group leader of the firm-wide Appellate practice, and currently serves as Chairman of Talent Management.

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Marc's practice focuses on media, Internet, and privacy law. He represents media and nonmedia companies in defamation, invasion of privacy, right of publicity, copyright, and commercial speech cases.

Marc has extensive experience litigating individual and class action cases involving claims under consumer protection and privacy laws, as well as helping companies mitigate their risks in these areas. He also regularly advises companies on social media, marketing, and open records issues.

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E. Phileda Tennant, a graduate of Harvard Law School, Texas native and fourth generation Houstonian, focuses on employment litigation before state and federal courts, and administrative agencies. Her practice includes counselling and investigations.

Phileda has particular experience litigating employee non-competition and non-solicitation agreements; seeking injunctive relief to protect employers' trade secrets; and defending employers from whistleblower claims.

During law school Phileda served as law clerk for the Texas Office of Solicitor General. Prior to her clerkship for the Office of Solicitor General, she worked as an intern both for former U.S. Senator Kay Bailey Hutchison, and former San Antonio Mayor Phil Hardberger.

While pursuing a Bachelor of Arts in Political Science at Brown University, Phileda was a student director for the Rhode Island Urban Debate League, a non-profit committed to teaching public high school students the skill of policy debate.

Prior to joining Vinson & Elkins, she was an associate at Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing, P.C. in Houston, Texas.

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