ANTI-SLAPP FROM THE DEFENSE PERSPECTIVE

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WITH THE PROLIFERATION OF TCPA OPINIONS in the courts of appeals, most defense counsel are aware of the powerful tool available to them in the anti-SLAPP statute. Our goal for this paper is a modest one: to highlight some TCPA issues that are still in their formative stages and that practitioners should keep in mind as they prepare to file TCPA motions (or, in some cases, defend against them). Defense counsel should be aware of (1) the implications of a partial or complete nonsuit for a pending TCPA motion; (2) the applicability of TCPA in federal court; (3) the types of filings that are subject to the TCPA; (4) the showing a plaintiff must make to obtain discovery; and (5) several other potentially important issues thus far addressed in only a handful of cases.

1. Your TCPA motion survives the plaintiff's nonsuit

What happens if a plaintiff simply drops his or her claim in response to a defendant's TCPA motion to dismiss? Generally, a plaintiff may dismiss a case or take a nonsuit at any time before she introduces all of her evidence, excluding rebuttal evidence.[1] Any such dismissal, however, "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief" and "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of the dismissal."[2] Accordingly, several courts have held that a TCPA motion to dismiss constitutes such a claim for affirmative relief and survives any nonsuit by the plaintiff.[3]

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Faced with a TCPA motion, some plaintiffs amend their pleadings to drop dubious claims, rather than nonsuiting the case entirely. This puts a plaintiff in a precarious situation. If a plaintiff nonsuits a claim and fails to present prima facie evidence of the nonsuited claim, the TCPA motion should be granted (and fees and sanctions awarded). In a case in which a plaintiff "made no attempt" to present evidence of a nonsuited conspiracy claim, arguing that the claim was "no longer part of this case," the Austin Court of Appeals held that "the district court had no discretion but to grant appellees' TCPA motion."[4]

2. TCPA is not just for state court

Is the TCPA limited to state court cases? Although the Fifth Circuit has not yet decided whether the TCPA applies in federal court,[5] a defendant would nonetheless be wise to consider filing such a motion in appropriate federal cases, including state-law claims removed to federal court and cases sitting in diversity. Faced with this uncertainty, several district courts have opted to apply the TCPA. In *Khalil v. Memorial Hermann Health System*, the district court recognized that the Fifth Circuit has not decided whether the TCPA is substantive or procedural, but found persuasive the Fifth Circuit's "previous assumption that the [TCPA] applies in federal court and its application of the similar Louisiana anti-SLAPP statute."[6] The court in *Banik v. Tamez* noted plaintiffs' citation to contrary decisions in district courts outside this circuit and in the D.C. Circuit but was persuaded (as the *Khalil* court was) by the Fifth Circuit's previous approach to anti-SLAPP statutes.[7] And in *Williams v. Cordillera Communications*, the court noted that although the "TCPA is procedural in that it has specific time constraints, places a stay on discovery, and requires an expedited decision with accelerated appellate process . . . 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 regarding defamation."[8]

However, federal courts have been reluctant to apply the TCPA to federal claims. In *Mathiew v. Subsea 7 (US) LLC*, for example, Magistrate Judge Palermo determined that the TCPA is procedural and thus did not apply to plaintiff's federal Title VII claims.[9] The court also held that the TCPA's burden-shifting framework conflicts with the evidentiary requisites of Federal Rules 12 and 56.[10] Similarly, the court in *Misko v. Backes* held that the TCPA does not apply to a plaintiff's federal claim for violation of the Lanham Act.[11]

3. A TCPA motion is applicable to a broad array of pleadings and filings

What is subject to an anti-SLAPP motion? Given the advantages of filing TCPA motions to dismiss, it comes as no surprise that creative litigants have attempted to file them in response to an increasingly broad array of pleadings and filings. The statute provides that a party may move to dismiss a "legal action," which is broadly defined as: "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief."[12] Courts have wrestled in particular with the meaning of the catch-all language at the end of the definition as they define the contours of the universe of "legal actions" subject to the TCPA. Defense counsel should familiarize themselves with recent holdings not just to know what TCPA motions they might be able to file, but also to be aware of the risk of TCPA motions that plaintiffs might file. Following is a synopsis of some of the key rulings:

Rule 202 petitions for pre-suit discovery are subject to dismissal. Given the severe repercussions for a plaintiff who files a lawsuit that implicates the TCPA, some plaintiffs attempted to seek pre-suit discovery under Texas Rule of Civil Procedure Rule 202 to obtain the "clear and specific evidence" needed to withstand a motion to dismiss. A 2016 opinion from the Austin Court of Appeals cut off that strategic option.[13] The court observed that Rule 202 itself refers to the filing of a "petition," and also results in "equitable relief" in the form of an order for a person to be deposed. It concluded that "the TCPA's broad definition of 'legal action' encompasses [the] Rule 202 petition." The court explained that its holding honored the legislature's intent to prevent litigation, including depositions ordered under Rule 202, from discouraging public participation through the exercise of protected rights. Given the ruling, a prospective plaintiff who needs to investigate a potential claim finds himself in an intractable quandary: he lacks the evidence to draft a lawsuit that would overcome a TCPA motion to dismiss, but would draw a motion to dismiss if he attempts to obtain that evidence through pre-suit discovery. In short, applying the TCPA to Rule 202 petitions may effectively sound the death knell for a large swath of pre-suit discovery. Because Rule 202 petitions are frequently filed precisely because facts are unclear to the movant, many such petitions will be subject to attack if there must be satisfaction of all elements of a claim to overcome the TCPA. More recently, Houston's Fourteenth Court of Appeals has assumed without deciding that a Rule 202 petition is subject to the TCPA.[14]

Motions for sanctions are subject to dismissal. The Austin court has held that a TCPA motion may be filed to dismiss a defendant's motion seeking sanctions for the plaintiff's allegedly frivolous pleading.[15]

Some declaratory claims may not be subject to dismissal. The Austin court has held that, where declaratory claims "merely concern issues subsumed within" a cause of action such as breach of contract, a TCPA motion challenging the declaratory claims does not implicate any independent "legal action," and was thereby waived by the defendant's failure to challenge the broader claims and causes of action in its motion.[16]

Appellate briefs are not subject to dismissal. In *Amini v. Spicewood Springs Animal Hospital, LLC*, the defendant appealed the trial court's denial of her TCPA motion by operation of law. On appeal, the plaintiffs/appellees responded with a motion to dismiss the appeal pursuant to the TCPA, arguing that the appeal itself constitutes a "legal action" that is "based on, relates to, or is in response to" their exercise of the right to petition or exercise of the right of free speech.[17] The Austin Court of Appeals denied the appellees' anti-SLAPP motion, holding that the legislature "intended the TCPA's dismissal mechanisms to operate against 'legal actions' at the trial-court level and not against appeals."[18]

TCPA motions to dismiss are not subject to dismissal. Some creative plaintiffs have responded to anti-SLAPP motions by filing counter-SLAPP motions; in other words, they move to dismiss the motion to dismiss. Plaintiffs in such cases have argued that a TCPA motion to dismiss is a "legal action" that is "based on, relates to, or is in response to a party's exercise of the . . . right to petition" under Section 27.001(6). Accordingly, the argument goes, a TCPA motion to dismiss is itself subject to the TCPA, requiring the defendant to satisfy the Act's evidentiary burdens with respect to *its motion to dismiss*. In the *Hotchkin* case, the Fort Worth Court of Appeals suggested that such a procedural move is possible, assuming in its decision "that filing a motion to dismiss is a procedurally proper manner to attack another motion to dismiss."[19] More recently, however, two courts of appeals have provided some comfort to defendants that they need no longer worry that by filing a TCPA motion, they will be met with a counter-SLAPP motion to dismiss. In the *Paulsen* and *Roach* cases, both of the Houston courts of appeals have rejected attempts by plaintiffs to "counter-SLAPP," applying the doctrine of *ejusdem generis* (when general words follow an enumeration of two or more things, they apply only to things of the same general kind or class).[20] Based on that principle, the courts concluded that, by listing "lawsuit,"

"cause of action," "petition," "complaint," "cross-claim," and "counterclaim" as legal actions, the legislature indicated that the TCPA is meant to apply to "a procedural vehicle for the vindication of a legal claim, in a sense that is not true for a motion to dismiss." The courts further justified their result by noting that any other conclusion might give rise to "piecemeal or seriatim 'motions to dismiss' attacking myriad 'legal actions' that consist merely of individual filings within or related to a lawsuit, as opposed to the underlying lawsuit and substantive claims that are the Act's core focus."

In the wake of *Paulsen* and *Roach*, citing courts have sent conflicting signals regarding whether the reasoning of the two Houston courts will gain traction outside of the fairly extreme case in which a TCPA motion is filed against another TCPA motion. In response to a party's argument that it would be absurd to interpret the TCPA so broadly that it would apply to other TCPA motions, the Austin Court of Appeals recently acknowledged that the TCPA has a broad reach, but must be applied "as written."[21] Although the discussion is *dicta* (the court was considering applicability of the TCPA to a motion for sanctions, not a motion to dismiss) and does not take a specific position on the issue, it leaves the reader with the impression that the court might not have reached the same result as *Paulsen* (which it cited with a "*cf.*" notation). However, the Texas Supreme Court very recently cited *Paulsen* for the proposition that the definition of "legal action" is broad and appears to encompass any "procedural vehicle for the vindication of a legal claim."[22] The parenthetical information accompanying the cite might suggest that the Texas Supreme Court has a favorable view of the *Paulsen* holding, explaining that it "not[es], however, that a TCPA dismissal motion is not itself a TCPA 'legal action.'" The *Paulsen* rationale provides some ammunition for litigants to argue that routine motions (as opposed to substantive petitions and counterclaims) are not subject to the TCPA.

4. If discovery is requested, consider contesting the showing of "good cause" and ensure the discovery requests are specific to the TCPA motion

What showing must a plaintiff make to obtain discovery? "Except as provided by Section 27.006(b)," the filing of a TCPA motion to dismiss suspends "all discovery in the legal action" until the court rules on the TCPA motion to dismiss.[23] Section 27.006(b) provides a limited exception to the mandatory stay of discovery by allowing "specified and limited discovery relevant to the motion" on the court's own motion or a party's motion "and on a showing of good cause."

Few appellate courts have evaluated what is required to show "good cause" for discovery, or defined the scope of "specified and limited discovery relevant to the motion to dismiss." However, the Dallas Court of Appeals has provided some parameters for whether discovery should be granted, and on what issues. For example, where no good cause is stated in a motion for discovery, merely arguing that limited depositions of the defendants were necessary in order to defend the motion to dismiss is not sufficient to show good cause for discovery under the TCPA.[24]

Defendants should also ensure that if discovery is ordered in advance of the hearing on the TCPA motion, the discovery is limited to the issues raised in the motion. The Dallas court has held: "Some merits-based discovery may . . . be relevant . . . to the extent it seeks information to assist the non-movant to meet its burden to present a prima facie case for each element of the non-movant's claims to defeat the motion to dismiss. But such merits-based discovery must still be 'specified and limited' because a prima facie standard generally 'requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'"[25] Thus, a party would "not need multiple or lengthy depositions or voluminous written discovery in order to meet the low threshold to present a prima facie case."[26]

5. Other emerging issues to watch

Exemptions to the TCPA should be narrowly construed. The TCPA does not provide specific standards regarding how to construe exemptions (such as the commercial-speech exemption found in Section 27.010). However, the Texas Supreme Court recently provided a sound bite that defendants would be wise to cite: "We must construe the TCPA liberally to effectuate its purpose and intent fully. Construing the TCPA liberally means construing its exemptions narrowly."[27]

Citations to California cases should be viewed with skepticism. Dozens of states had anti-SLAPP statutes in place before Texas promulgated the TCPA in 2011, and Texas litigants often cite to holdings from other jurisdictions – particularly from California, which has a robust body of anti-SLAPP case law. Some courts have accepted the invitation to rely upon California decisions, despite some notable differences between the two states' statutes.[28] In weighing the TCPA's commercial-speech exemption, the Texas Supreme Court recently determined that the California statute was unreliable for comparison.[29]

No sanctions should be awarded against a defendant who files a TCPA motion unless it was "solely" intended for delay. Very seldom has a court granted sanctions against a

defendant who filed a TCPA motion. While sanctions against a non-movant "shall" be awarded if the motion is granted, the movant "may" receive sanctions only if the motion to dismiss was frivolous or "solely intended to delay."[30] The Austin Court of Appeals made sure to give meaning to the word "solely" in a recent case, reversing an award of sanctions against a TCPA movant because, "[w]hile these circumstance[s] might support a finding that delay was a factor in [the] decision to file the motion, they do not support a reasonable finding that delay was the only factor, in light of the entire record and our conclusion that his motion was not frivolous."[31]

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[1] TEX. R. CIV. P. 162.
[2] *Id.*
[3] *See The IOLA Barker v. Hurst*, No. 01-17-00838-CV, 2018 WL 3059795, at *5-6 (Tex. App.—Houston [1st Dist.] June 21, 2018, no pet. h.); *Duchouquette v. Prestigious Pets, LLC*, No. 05-16-01163-CV, 2017 WL 5109341, at *3 (Tex. App.—Dallas Nov. 6, 2017, no pet.); *Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC*, No. 05-14- 00299-CV, 2015 WL 1519667, at *3 (Tex. App.—Dallas Apr. 1, 2015, pet. denied) (mem. op.) (holding that, under express language of rule 162, nonsuit had no effect on pending motion to dismiss under TCPA); *see also CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 300 (Tex. 2013) ("A motion for sanctions is a claim for affirmative relief that survives nonsuit if the nonsuit would defeat the purpose of sanctions.").
[4] *Craig v. Tejas Promotions, LLC*, 03-16-00611-CV, 2018 WL 2050213, at *7 (Tex. App.—Austin May 3, 2018, no pet. h.).
[5] *See Block v. Tanenhaus*, 867 F.3d 585, 589 (5th Cir. 2017) ("The applicability of state anti-SLAPP statutes in federal court is an important and unresolved issue in this circuit.").
[6] Civil Action No. H-17-1954, 2017 WL 5068157, at *14 (S.D. Tex. Oct. 30, 2017) (citing *Cuba v. Pylant*, 814 F.3d 701, 706-07 (5th Cir. 2016) and *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir. 2009)).
[7] Civil Action No. 7.16-cv-462, 2017 WL 1228498, at *2 (S.D. Tex. Apr. 4, 2017) ("Since the Fifth Circuit has previously ruled on state anti-SLAPP statutes, and Plaintiff has not identified any contrary precedent in this Circuit, this Court has determined that the TCPA should apply in this case.").
[8] Civil Action No. 2:13-cv-124, 2014 WL 2611746, at *1 (S.D. Tex. June 11, 2014); *see also Dr. C, A Pseudonym v. E. Houston Reg'l Med. Ctr., d/b/a Bayshore Med. Ctr.*, Civil Action No. 4:17-CV-3277, 2018 WL 2392200 (S.D. Tex. Apr. 25, 2018) (following the "lead of other courts in the Southern District of Texas by applying the TCPA to Plaintiff's state law business disparagement claim").
[9] *Mathiew v. Subsea 7 (US) LLC*, No. 4:17-cv-3140, 2018 WL 1515264 (S.D. Tex. Mar. 9, 2018), *report and recommendation adopted*, 2018 WL 1513673.
[10] *Id.*; *see also Rudkin v. Roger Beasley Imports, Inc.*, No. A–17–CV–849–LY, 2017 WL 6622561, at *3 (W.D. Tex. Dec. 28, 2017) ("It is a procedural statute and thus not applicable in federal court.").
11 No. 3:16-CV-3080-M (BT), 2018 WL 2335466, at *2 (N.D. Tex. May 4, 2018) (citing *NCDR LLC v. Mauze & Bagby, PLLC*, 2012 WL 12871954, at *2 (S.D. Tex. Oct. 5, 2012), *aff'd on other grounds*, 745 F.3d 742 (5th Cir. 2014) (holding that the TCPA does not apply to plaintiff's federal Lanham Act claims because it would create an obstacle to the federal rights in violation of the Supremacy Clause)).
[12] TEX. CIV. PRAC. & REM. CODE § 27.001.
[13] *In re Elliott*, 504 S.W.3d 455 (Tex. App.—Austin Oct. 7, 2016, orig. proceeding).
[14] *Puig v. Hejtmancik*, No. 14-17-00358-CV, 2017 WL 5472781, at *2 (Tex. App.—Houston [14th Dist.] Nov. 14, 2017, no pet.) (citing *Elliott*).
[15] *Hawxhurst v. Austin's Boat Tours*, No. 03-17-00288-CV, 2018 WL 1415109, at *3 (Tex. App.—Austin Mar. 22, 2018, no pet.).
[16] *Craig v. Tejas Promotions, LLC*, No. 03-16-00611-CV, 2018 WL 2050213, at *11 (Tex. App.—Austin May 3, 2018, no pet. h.).
[17] *Amini v. Spicewood Springs Animal Hosp., LLC*, No. 03-18-00272-CV, 2018 WL 2248279 (Tex. App.—Austin May 16, 2018, no pet. h.).
[18] *Id.*, at *2.
[19] *Hotchkin v. Bucy*, No. 02-13-00173-CV, 2014 WL 7204496, at *5 (Tex. App.—Fort Worth Dec. 18, 2014, no pet.).
[20] *Paulsen v. Yarrell*, 537 S.W.3d 224, 231–33 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *Roach v. Ingram*, No. 14-16-00790-CV, No. 14-16-01016-CV, 2018 WL 2672546 (Tex. App.—Houston [14th Dist.] June 5, 2018, no pet. h.).
[21] *Hawxhurst*, 2018 WL 1415109, at *4.
[22] *State ex rel. Best v. Harper*, No. 16-0647, 2018 WL 3207125, at *4 (Tex. June 29, 2018).
[23] TEX. CIV. PRAC. & REM. CODE § 27.003(c).
[24] *In re D.C.*, No. 05-13-00944-CV, 2013 WL 4041507, at *1 (Tex. App.—Dallas Aug. 9, 2013, orig. proceeding)
[25] *In re SPEX Group US LLC*, No. 05-18-00208-CV, 2018 WL 1312407, at *4 (Tex. App.—Dallas Mar. 14, 2018, no pet.) (citing *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding), and *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (applying standard in Chapter 27 case and explaining that Legislature's use of "prima facie case" implies imposition of minimal factual burden)).
[26] *Id.*
[27] *State ex rel. Best v. Harper*, No. 16-0647, 2018 WL 3207125, at *6 (Tex. June 29, 2018) (emphasis added; internal quotations omitted).
[28] *See, e.g., Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*,

416 S.W.3d 71, 89-90 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) ("We follow the California Supreme Court's analysis . . . .").
[29] *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 687 (Tex. 2018); *see also NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 755 (5th Cir. 2014) ("[T]he California Supreme Court's holding rested on a clause in the California statute that is not present in Texas's . . . statute."); *Redflex Traffic Sys., Inc. v. Watson*, No. 02-16-00432-CV, 2017 WL 4413156, at *10, *12 (Tex. App.—Fort Worth, Oct. 5, 2017, no pet. h.) (noting "substantial differences" between the California and Texas exemptions make the California test not "particularly helpful" and concluding that the Texas exemption is not inapplicable merely because "the intended audience of the notice of violation at issue here was not an actual or potential buyer or customer of [the movant]"); *Roach v. Ingram*, No. 14-16-00790-CV, 2018 WL 2672546, at *10 (Tex. App.—Houston [14th Dist.] June 5, 2018, no pet. h.) ("Regardless of any perceived salutary purposes of California's law, however, this court is guided by the plain and unambiguous text of the TCPA, which does not include a similar exemption for public interest lawsuits.").
[30] TEX. CIV. PRAC. & REM. CODE § 27.009(b). While it is a rare occurrence, at least one court has granted fees and costs to a plaintiff that overcame a TCPA motion to dismiss. *Miller v. Talley Dunn Gallery, LLC*, No. 05-15-00444-CV, 2016 WL 836775, at *4 (Tex. App.—Dallas Mar. 3, 2016, no pet.).
[31] *Sullivan v. Texas Ethics Comm'n*, No. 03-17-00392-CV, 2018 WL 2248275, at *6 (Tex. App.—Austin May 17, 2018, no pet. h.).