The Texas Anti-SLAPP Statute

An effective statute, but is it too broad?

TEXANS FOR LAWSUIT REFORM FOUNDATION

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Introduction

The Texas Legislature passed the Texas Citizens Participation Act (TCPA) in 2011 with the goal of protecting citizens' right of free speech, right to petition, and right of association.[1] The statute provides a mechanism by which a defendant who is exercising one of these constitutionally protected rights may achieve the early dismissal of an action brought to silence him.[2] The idea is that early dismissal will prevent a defendant who has engaged in constitutionally protected activities from being inundated with litigation costs by a plaintiff who is pursuing the lawsuit largely for the purpose of silencing objectional speech or activities by the defendant (referred to as a Strategic Lawsuit Against Public Participation or SLAPP).

Texas was the twenty-eighth of thirty-one states to pass an anti-SLAPP law.[3] The legislature noted that the Internet age created a rise in SLAPPs, as it "has created a searchable record of public participation."[4] It also pointed out that the only protection for victims of SLAPPs up to that point was summary judgment, which is available only after a lengthy and costly discovery process.[5] Proponents of the anti-SLAPP bill noted that if the legislature were to provide a mechanism for the quick dismissal of the case, it "would allow frivolous lawsuits to be dismissed at the outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system."[6]

The goals of protecting constitutional rights and quickly ending harassing litigation are laudable ones, and appellate court opinions interpreting the TCPA indicate that it is an effective tool for achieving its goals. But case law also indicates that because the wording of the TCPA is broad, it is being used in many lawsuits in which core constitutional rights have not been invaded.

This paper will outline the TCPA's provisions, discuss appellate court opinions interpreting the statute, review other jurisdictions' anti-SLAPP statutes, and suggest possible changes to Texas's statute.

The Anti-SLAPP Statute in Texas

The TCPA provides that "[i]f a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action."[7] Instead of referring to existing case law interpreting the Texas and United States Constitutions to define these rights, the statute itself provides definitions.

The phrase "exercise of the right of association" is defined in the statute to mean "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests."[8] The phrase "exercise of the right of free speech" is defined to mean "a communication made in connection with a matter of public concern,"

and a "matter of public concern" includes "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." [9] The phrase "exercise of the right to petition" is given a detailed definition that includes 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; (vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue; (vii) a proceeding of the governing body of any political subdivision of this state; (viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or (ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;
>
> (B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;
>
> (C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;
>
> (D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and
>
> (E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.[10]

The TCPA provides that a motion to dismiss an action based on the TCPA must be filed [11] not later than the 60th day after the date of service of the legal action, although this deadline may be extended on a showing of good cause.[12] Discovery in the lawsuit is suspended until the court has ruled on the motion to dismiss,[13] although the court may allow discovery related to the motion itself.[14]

Generally speaking, a hearing on a motion to dismiss filed under the TCPA must be held not later than the 60th day after the date the motion is served on the plaintiff [15] and the court must rule on the motion not later than the 30th day following the hearing.[16] On a showing of good cause, however, the court may allow "specified and limited discovery relevant to the motion" and the deadline for hearing the motion is then extended to the 120th day after the date the motion to dismiss was served.[17] If the court does not rule on the motion to dismiss in the time provided by the statute, the motion is considered denied by operation of law.[18]

In determining whether a lawsuit should be dismissed, the court is directed to consider "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." [19] The statute provides for a shifting burden between the parties, placing a higher burden on the plaintiff than the defendant. Under the statute, a court "shall dismiss" a lawsuit against the defendant if she shows by a preponderance of the evidence that the lawsuit is based on, relates to, or is in response to her exercise of the right of free speech, the right to

petition, or the right of association.[20] But the court may not dismiss the lawsuit if the plaintiff "establishes by clear and specific evidence a *prima facie* case for each essential element of the claim in question," unless, of course, the defendant "establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim," in which case the court must grant the motion to dismiss.[21] Thus, a plaintiff's burden to avoid dismissal is substantially higher than a defendant's burden to secure a dismissal.

Another section of the TCPA, however, appears to create a different standard for deciding whether to dismiss a lawsuit. It suggests that the court should consider the plaintiff's subjective intent by providing that, at the defendant's request, "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, including to harass or to cause unnecessary delay or to increase the cost of litigation." [22]

The TCPA includes an ambiguous provision about the speed of appellate proceedings: "An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss … or from a trial court's failure to rule on that motion in the time prescribed …." [23] In 2013, the Legislature amended a different chapter of the Civil Practice and Remedies Code to provide that an order denying a motion to dismiss filed under the TCPA could be immediately appealed (instead of seeking a writ of mandamus) and that such an appeal would stay all further trial court proceedings until the appeal's resolution.[24]

The TCPA also is an attorney fee-shifting statute, but one that applies different standards to plaintiffs and defendants. It provides that if the trial court orders dismissal of a lawsuit, the court *shall* award the defendant: (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 plaintiff determined sufficient by the court to deter the plaintiff from bringing similar actions in the future.[25] On the other hand, if the court finds that a TCPA motion to dismiss is frivolous or solely intended to delay, the court *may* award court costs and reasonable attorney's fees to the plaintiff.[26]

The TCPA Allows Quick Disposition of Meritless Cases

Viewed narrowly, an anti-SLAPP statute like the TCPA is intended to allow a person to free herself from a lawsuit that seeks to prevent her from speaking freely about a matter of public concern. An anti-SLAPP law presumes that a lawsuit being pursued for the purpose of squelching on-going speech about a matter of public concern is an unconstitutional and invalid action that should be dismissed. As will be discussed below, the plain language of Texas's anti-SLAPP statute makes it applicable in many other contexts, including when the speech was private (not public) and in the past (not on-going). This use of the statute beyond the stated intent, however, is not *per se* illegitimate and has had the beneficial effect of providing for early disposition of meritless claims.

The TCPA is an efficient mechanism for disposing of lawsuits in which the plaintiff is unlikely to prevail under the substantive law. The statute imposes a procedure that requires a plaintiff to show—at an early point in the case—a substantial likelihood of success on the merits. The failure to meet that burden results in dismissal of the plaintiffs' lawsuit. Even when used in what might be regarded as non-traditional contexts, the statute's quick dismissal benefits those facing meritless lawsuits.

For example, in *ExxonMobil Pipeline Co. v. Coleman*, an at-will employee who was fired for allegedly failing to perform his job duties sued his former employer for defamation based on

internal company communications.[27] The internal communications did not say disparaging things about the employee. Instead, the employee's supervisors simply stated that the employee had not performed his required tasks.[28] The lawsuit was, at best, of questionable merit. The fact that the case could be dismissed at an early stage, before the court, the parties, or citizens serving on a jury spent substantial time dealing with the lawsuit, should be regarded as a positive outcome.

In *Youngkin v. Hines*, a dispute about the ownership of a parcel of real property arose among descendants of a common ancestor.[29] At trial, the parties entered into a settlement that was recited to the court reporter. Hines, a defendant in the original lawsuit, later sued the original plaintiffs for failing to fulfill their obligations under the parties' settlement. Hines subsequently added his opponents' attorney, Youngkin, as a defendant, alleging, among other things, that Youngkin entered into the settlement knowing that his clients had no intention of complying with it, and that he helped his clients avoid compliance by preparing a document in a way that was favorable to them. Youngkin invoked the TCPA and moved to dismiss the claims.[30]

The Texas Supreme Court held that Youngkin was entitled to a dismissal of the claims against him under the attorney immunity doctrine, which provides that an attorney is immune from liability to nonclients for conduct within the scope of his representation of his clients.[31] An attorney may be liable to nonclients only for conduct outside the scope of his representation of his client or for conduct foreign to the duties of a lawyer.[32] Thus, Hines had no hope of prevailing on his claims against Youngkin and an early dismissal of those claims was appropriate.

In *Hersh v. Tatum*, a young man with a history of mental health problems, Paul Tatum, committed suicide after wrecking his mother's car.[33] His parents believed that their son suffered a brain injury in the wreck, and that the injury was the catalyst for his decision to take his own life. The obituary they published in the newspaper said their son died as a result of injuries sustained in the wreck.[34]

Hersh is an advocate for mental health and suicide prevention. Much of Hersh's advocacy centers on removing the stigma associated with mental illness and suicide. She believes that families who conceal suicide from obituaries prevent awareness of mental-health issues. Eleven days after Paul's death, Hersh published a blog stating:

> As painful as it might be, honesty allows something positive to emerge from a devastating loss. Omission of the real cause of death allows mental illness to remain impersonal, a silent killer. … Omission prevents awareness, which inhibits funding for research. Omission allows the uneducated to remain uneducated, discarding mental illness as some idleness of the rich and famous or a character flaw; not a real disease.[35]

The blog did not mention Paul.[36]

Hersh also met with a newspaper writer, Steve Blow, to discuss her views on suicide. She was hoping he would write a column on the subject and mention her new book. Based in part on their conversation, Blow wrote a column three weeks after Paul's death calling for greater transparency in obituaries when suicide is the cause of death. The column did not mention the Tatum family, but quoted Paul's obituary and discussed the circumstances of his death in sufficient detail to allow a reader to identify him.[37]

The Tatums sued Hersh for intentional infliction of emotional distress, alleging that her conversation with Blow about Paul's death caused Blow's article. Hersh moved to dismiss the lawsuit under the TCPA on the basis that the claims involved her exercise of free speech regarding suicide prevention, a matter of public concern.[38]

Under Texas law, to prevail on a claim of intentional infliction of emotional distress, a plaintiff must show "extreme and outrageous" conduct by the defendant. The "extreme and outrageous" conduct element is satisfied only if the conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." [39] The Tatums had alleged that Hersh's encouraging Blow to write a column about Paul's suicide while the family was still mourning and vulnerable met the "extreme and outrageous" standard. The Texas Supreme Court disagreed. The conduct alleged—indirect actions aimed at addressing a matter of public concern—simply could not amount to extreme and outrageous conduct as a matter of law.[40]

Until 2011, Texas did not have a motion to dismiss procedure applicable to civil cases. In 2011, the Legislature enacted both the TCPA and another statute creating a motion to dismiss procedure.[41] Separately and together, these two statutes appear to reflect the Legislature's desire to weed non-meritorious cases out of Texas's courtrooms at an early stage in the litigation. The examples above demonstrate that Texas's anti-SLAPP statute is useful in achieving the Legislature's goal. It provides an efficient method for dismissing cases that, under the applicable law, simply have no hope of success.

Criticisms of the TCPA

"Matters of Public Concern" is Broadly Construed

One of the biggest issues with the TCPA is the breadth of what constitutes a "matter of public concern.." [42] As noted above, the TCPA protects the exercise of free speech, which means "a communication made in connection with a matter of public concern," [43] which is defined as something related to (1) health or safety; (2) environmental, economic, or community well-being; (3) the government; (4) a public official or a public figure; or (5) a good, product, or service in the marketplace.[44] This definition is not tied to actual citizen participation in public policy or government. As a consequence, the Texas Appellate courts have given it a broad reach.

In *Lippincott v. Whisenhunt*, the Texas Supreme Court held that the TCPA protects purely private communications.[45] The defendants in *Lippincott* allegedly made disparaging comments in internal company emails about the plaintiff, a certified registered nurse anesthetist.[46] These emails included allegations that the plaintiff represented himself to be a doctor, endangered patients for his own financial gain, and sexually harassed employees.[47] The plaintiff sued for defamation, tortious interference with existing and prospective business relations, and conspiracy to interfere in business relations. Invoking the TCPA, the defendants moved to dismiss all claims.

The trial court in *Lippincott* dismissed all of plaintiff's claims except for defamation claim because it found that the plaintiff was able to provide *prima facie* evidence to support the defamation claim but not the other claims.[49] The court of appeals reversed and remanded, holding that the TCPA does not apply to "private" communications such as internal emails, thereby reviving all of the plaintiff's claims.[50] The Supreme Court of Texas disagreed and ruled there is no requirement in the TCPA that the communications themselves be public. Instead, according to the Court, the statute requires only that the communication be made in connection with a matter of public concern:

> The allegations include claims that Whisenhunt "failed to provide adequate coverage for pediatric cases," administered a "different narcotic than was ordered prior to pre-op or patient consent being completed," falsified a scrub tech record on multiple

> occasions, and violated the company's sterile protocol policy. We have previously acknowledged that the provision of medical services by a health care professional constitutes a matter of public concern. … Thus, we conclude these communications were made in connection with a matter of public concern.[51]

The Court concluded that because the defendants had demonstrated the applicability of the act, the court of appeals had to consider whether the plaintiff met his *prima facie* burden of proof. The Court admonished that courts should not "judicially amend" a legislative act by adding words that are not there.[52]

Relying on *Lippincott*, the Texas Supreme Court then extended the TCPA's reach by applying it to any communications having even a tangential relationship to a matter of public concern, in *ExxonMobil Pipeline Co. v. Coleman*.[53]

The plaintiff, Travis Coleman, was assigned to record the fluid volume of various petroleum products and additives in storage tanks at Exxon's facility each night, a process referred to as "gauging the tanks." [54] When gauging the tanks, Coleman was required to handwrite the results and later record those results in Exxon's computer system so that the results would be available on an inventory planning report the following day.[55] Because Coleman allegedly failed to gauge a particular tank one night, yet reported that he did, Exxon terminated his employment.[56] Coleman sued Exxon and two of his supervisors for defamation based on the supervisors' statements in company records that Coleman did not gauge the tank as he was supposed to do.[57]

Exxon sought to dismiss Coleman's lawsuit under the TCPA because gauging the tanks was a matter of public concern. According to Exxon, gauging the tanks was necessary to avoid overfilling and to determine whether any tanks have leaks because either overfilling or failing to discover leaks creates serious safety and environmental risks.

The court of appeals held that the internal communications between the supervisors about Coleman had only a "tangential relationship" to health, safety, environmental and economic concerns, and were instead related to a private personnel matter, rejecting Exxon's argument that the case should have been dismissed.[58] The Texas Supreme Court reversed, holding that the TCPA does not contain language requiring more than a tangential relationship to a matter of public concern. It stated, "Coleman's final argument, in which he suggests the Legislature meant 'in connection with' to suggest something more than a tenuous or remote relationship, fails to rehabilitate the court of appeals' improper narrowing of the TCPA and instead highlights the error in the court of appeals' analysis." [59] "We do not substitute the words of a statute in order to give effect to what we believe a statute should say; instead, absent an ambiguity, we look to the statute's plain language to give effect to the Legislature's intent as expressed through the statutory text." [60]

A more-recent Texas Supreme Court opinion in *Adams v. Starside Custom Builders LLC* confirms that "[t]he TCPA casts a wide net." [61] In *Adams*, a disgruntled homeowner made allegedly defamatory statements about a developer who operated the homeowner's association, although the developer was not mentioned by name. The developer sued the homeowner for defamation.[62]

The court ruled that the defendant's statements about the developer's business practices qualified as matters of public concern because homeowners' associations exercise quasi-governmental authority over the community's residents.[63] The court considered the statements as "relate[d] directly to [developer]'s provision of homebuilding and neighborhood developing services, as does the accusation that [the developer] made life miserable for contractors and home

buyers."[64] The defendant's additional statements about tree removal related to environmental matters and the well-being of the development as a whole and, therefore, also were about matters of public concern.[65] The Supreme Court therefore determined that the TCPA applied to the facts presented and remanded the case to the court of appeals to determine if the plaintiff established a prima facie case for defamation.[66]

Relying on these decisions and the plain language of the statute, Texas's intermediate appellate courts have held that communications and conduct that is almost entirely private in nature and otherwise actionable under another Texas statute are protected by the TCPA.

In *Elite Auto Body LLC* v. *Autocraft Bodywerks Inc.*, the Third (Austin) Court of Appeals applied *Coleman* to a TCPA motion to dismiss in a traditional commercial trade secrets case[67] between two competing autobody repair shops.[68] Several employees left Autocraft to work for Elite. Elite sued Autocraft claiming the employees had stolen trade secrets (internal company information, including employee pay and personnel information, customer information and alleged compilations of proprietary technical data).[69] Autocraft filed a motion to dismiss under the TCPA, which was granted.

Addressing the argument that the statute's stated purpose was to protect constitutional rights, the court in *Elite* said: "the Texas Supreme Court in *Coleman* seems to have put to rest any notion that any constitutional connotations of 'right of association,' 'right of free speech,' or 'right to petition' should inform the meaning of the TCPA's corresponding 'exercise of' definitions (a conclusion perhaps also hinted at, but not entirely clear from, its earlier *Lippincott* decision)."[70] The court of appeals held that the lawsuit was properly dismissed because, under the plain words of the statute, the suit infringed on the departed employees' right of association. The employees were free to go to a new employer and their communication of their former employer's company information was held to be a "communication between individuals" who were joining together to "pursue common interests."[71]

Similarly, the Third Court of Appeals opinion in *Craig v. Tejas Promotions, LLC*, provides another example of the TCPA's broad application.[72] In Craig, Tejas Promotions shared trade secrets with potential purchaser Craig. Craig and his son then allegedly used those secrets to form a competing venture, Tejas Vending.[73] Tejas Promotions sued the Craigs for breach of the nondisclosure agreement and sued Craig, his son, and the new company for breach of the Texas Uniform Trade Secret Act (TUTSA), for conspiracy to misappropriate trade secrets, and for a declaratory judgment.[74] The defendants responded by filing a motion for dismissal under the TCPA directed at the plaintiff's claims for conspiracy and a declaratory judgment.[75] Tejas Promotions did not present a *prima facie* case in reply, but instead argued that the TCPA did not apply. The court of appeals, relying on its reasoning in *Elite Auto Body*, rejected the plaintiffs' argument. Under the plain words of the TCPA, the defendants were exercising their right of association—even if that association was to allegedly misappropriate Tejas Promotions's trade secrets and steal its business.[77]

In *Serafine v. Blunt*, the TCPA was applied to a property dispute.[78] Serafine asserted claims for trespass to try title, trespass, nuisance, negligence, and fraud by nondisclosure, and sought declaratory and injunctive relief.[79] The Blunts answered Serafine's suit and filed counterclaims asserting that Serafine tortiously interfered with a particular contract and filed a fraudulent lis pendens clouding title to the Blunts' property.[80] Serafine moved to dismiss the Blunts' counterclaims under the TCPA, which the trial court denied.[81] The Third Court of Appeals held the TCPA applied in part because the Blunts' tortious interference counterclaim was based on, related to, or in response to Serafine's filing of the suit and that their fraudulent-lien counterclaim was based on, related to, or in response to Serafine's filing of the *lis pendens*,

both of which filings were exercises of Serafine's "right to petition."[82] To the extent the Blunts' tortious-interference counterclaim was based on Serafine's alleged threats made outside the context of the lawsuit, then the TCPA did not apply, according to the appellate court.[83]

The Austin-based appellate court also has held that the TCPA applies to business torts, including tortious interference. In *Camp v. Patterson*, a contractor who provided interior design services to a business sued for defamation, business disparagement, tortious interference with prospective business relations, and intentional infliction of emotional distress, all based on emails and text messages the business owner sent to vendors.[84] The private email and text messages involved a matter of public concern related to "a good, product, or service in the marketplace" because they were related to alleged fraud in connection with invoices for those goods and products and to activity in purchasing goods and products from vendors.[85]

In *Quintanilla v. West*, the Fourth (San Antonio) Court of Appeals held that a creditor exercised his protected right to free speech under the TCPA when he filed a UCC financing statements in the public records to perfect a security interest in assets pledged as collateral.[86] The court of appeals noted that the statute defines free speech as "a communication made in connection with a matter of public concern" and that the parties agreed that the financing statements constituted "communications" as defined in the statute.[87] The court also found that because the filings provided notice to the public of an encumbrance on the plaintiff's mineral interests offered for sale in the public marketplace and were made "in connection with" issues related to real property offered for sale in the public marketplace, they therefore found the filings related to a "matter of public concern" under the statute.[88]

Additionally, in the "interest of completeness," the Court of Appeals further addressed whether the filing of the financing statements fell within the scope of the TCPA's right to petition.[89] Noting that the statute defines the exercise of the right to petition as a "communication in or pertaining to … a judicial proceeding," the court of appeals determined that, while there was no suit pending at the time Quintanilla filed the financing statements, because he had presented evidence that he filed the statements in anticipation of imminent litigation with West over the debt, they were made in exercise of his right to petition under the TCPA.[90]

In the employment context, the TCPA has been used to protect employers in the health care industry. In *Memorial Hermann Health System v. Khalil*, the First (Houston) Court of Appeals stated that statements concerning a healthcare professional's competence—even in a totally private employer-employee relationship—relate to matters of public concern under the TCPA because of the broad definition of public concern.[91]

"Legal Actions" has been Interpreted Broadly and Inconsistently

As stated earlier, the TCPA provides that "[i]f a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action." The TCPA defines a "legal action" 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."[92] Although this may seem straightforward, this provision has also been interpreted very broadly, but inconsistently as well.

The Texas Supreme Court has stated that the definition of "legal action" "appears to encompass any 'procedural vehicle for the vindication of a legal claim.'" [93] Pre-suit discovery has been held to be subject to the TCPA.[94] The Third (Austin) Court of Appeals held that a trial court should have ruled on a TCPA motion to dismiss prior to approving a person's request to take a pre-suit deposition.[95] This issue is currently pending at the Texas Supreme Court.[96]

Similarly, the Third Court of Appeals has held that a motion for sanctions, regardless of how characterized by the movant, is a "legal action" subject to a TCPA motion to dismiss.[97]

On the other hand, appellate courts have held that the TCPA does not apply to other, similar proceedings, including a motion to dismiss brought under Texas Rule of Civil Procedure 91a,[98] an appeal,[99] or a declaratory judgment claim.[100]

Interpretation of "Enforcement Actions" may Impede Enforcement of Rules

The TCPA provides that "[i]f a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action." [101] The act defines a "[l]egal action" 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." [102] By its express terms, the TCPA does not apply to an enforcement action brought in the name of the State of Texas or a political subdivision of the state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.[103] The characterization of a proceeding as a "legal action" or an enforcement action is a live topic in Texas's courts.

State v. Harper illustrates this issue.[104] Paul Harper ran for a position on the Somervell County Hospital District Board, campaigning on a pledge to eliminate the tax that supported the district and to replace the district's administrative employees.[105] After Harper won the election, joined the board, and began to try fulfill his campaign promises, a county resident sought to remove him from the board for alleged incompetency by filing a lawsuit under a statute that allows removal of county officials (the "removal statute").[106] The citizen plaintiff alleged Harper violated the district's bylaws at a board meeting by moving to set the district's tax rate at zero, which Harper knew would bankrupt the district.[107] He also alleged that Harper posted a blog that falsely accused the district's administrative employees of violating the law.[108] Because the removal statute requires the county attorney to "represent the state" in any proceeding to remove a county official, the State of Texas joined the lawsuit and the Somervell County Attorney took over the case.[109]

Harper filed a motion to dismiss the case under the TCPA. He argued that the removal petition was filed in response to his exercise of his right to petition and right of free speech. He contended that the State could not establish a *prima facie* case for removal because he did not formally move to set the district's tax rate at zero and did not author or publish the blog.[110] The trial court denied his motion to dismiss and Harper appealed.[111] The court of appeals reversed, holding that the TCPA applies to the state's removal action and that the state failed to establish a *prima facie* case for removal, remanding the case to the trial court "for rendition of an order granting Harper's motion to dismiss and for a determination of Harper's request for court costs, reasonable attorney's fees, and sanctions." [112]

On appeal to the Texas Supreme Court, the State argued that an action under the removal statute is not a "legal action" for purposes of the TCPA because the removal action seeks constitutional or political relief in the form of an order removing an elected official from office rather than legal or equitable relief, such as damages, an injunction, or declaratory relief.[113] Instead, the State argued that a removal action is an "enforcement action" to which the TCPA does not apply.[114] The Texas Supreme Court disagreed. According to the Court, the definition of "legal action" "appears to encompass any 'procedural vehicle for the vindication of a legal claim.'" [115] "A court order requiring the defendant's removal or ouster from office is undoubtedly a 'remedy' … [a]nd 'remedy' is another word for 'relief.' … Because a removal petition seeks legal relief in the form of a statutory remedy, the pleading is a 'legal action'

under the TCPA." [116]

The State also argued that applying the TCPA's expedited-dismissal procedure to the removal statute would create a conflict between the two statutory schemes because the removal statute provides its own protections against meritless petitions.[117] Thus, according to the State, the specific provisions in the removal statute govern the dismissal of a removal action, while the TCPA's more general dismissal provisions would not.[118] The Court rejected this argument, too. "The TCPA's dismissal provisions complement, rather than contradict, the removal statute. … The removal statute provides for dismissal when the trial court determines that citation should not issue. The TCPA's dismissal provisions provide the defendant the opportunity to argue for dismissal on other grounds—namely, his rights to free speech, to petition, and to associate. These provisions do not conflict." [119]

Additionally, the State argued that the removal action was an enforcement action to which the TCPA does not apply.[120] Although the term "enforcement action" is not defined in the act, the Court concluded that the term refers to a governmental attempt to enforce a substantive legal prohibition against unlawful conduct. "There is a range of conduct—some unlawful and some not—for which a public official may properly face removal under the removal statute. … [W]hen a removal action has its basis in unlawful conduct, the 'enforcement action' exemption renders the TCPA inapplicable." [121] The Court determined that the removal grounds alleging Harper's incompetency did not meet the definition of an enforcement. Thus, the TCPA's "enforcement action" exemption did not apply to them. But the State's additional ground alleging official misconduct based on violations of the Open Meetings Act was an enforcement action, according to the Court, and so the enforcement-action exemption rendered the TCPA inapplicable to this ground for removal of Harper.[122]

In *Sullivan v. Texas Ethics Commission*, the Third (Austin) Court of Appeals was faced with a case in which the Texas Ethics Commission fined an individual for failing to register as a lobbyist as required by Texas law.[123] The applicable statute provides for an appeal of a Commission decision through a de novo hearing in a district court.[124] The individual who had been subject to the Commission's action, Michael Quinn Sullivan, filed a lawsuit against the Commission in district court and then sought to realign the parties so that he would be the defendant.[125] Once the parties were realigned, he filed a motion to dismiss the Commission's action under the TCPA.[126] The district court refused to dismiss the case and Sullivan appealed.[127]

In an opinion handed down in May 2018—about a month before the Texas Supreme Court decided *Harper*—the Third (Austin) Court of Appeals concluded that the trial court did not err in overruling the motion to dismiss.[128] The Court noted that the TCPA did not provide unlimited protection; rather the TCPA protects rights only to the maximum extent permitted by law." [129] The lobby registration statute, according to the court, is a legally permissible restriction on constitutional rights. Thus, the individual exceeded the maximum extent of permissible exercise of his free speech and petition rights by failing to register as a lobbyist.[130]

Additionally, the court concluded that allowing the TCPA to override the lobby registration act would put the two laws in direct conflict. The court noted that the lobby registration statutes predate the TCPA "and provide a specific procedure for addressing allegations already admittedly related to one particular iteration of the exercise of First Amendment rights: lobbying. In light of this specific statutory framework, the only reasonable way to harmonize the TCPA and [the lobby registration statutes] is to conclude that the TCPA's catch-all term 'legal action' does not encompass de novo appeals of Commission orders enforcing the lobbyist-registration statute wherein the Commission seeks no new relief but prays only that the district court uphold the Commission's previous violation and penalty determinations. To hold otherwise

would allow [individuals] to end-run the specifically enacted scheme for enforcement of the lobbyist-registration statute, a result the legislature could not have intended when enacting the TCPA." [131]

The Texas Supreme Court's discussion in *Harper* about harmonizing arguably conflicting statutory schemes creates concern that the court of appeals' decision in *Sullivan* will not withstand further appellate review by Texas's highest appellate court.[132]

The *Sullivan* decision is playing a central role in another case involving at attempt by the State Bar of Texas, which is a quasi-governmental entity, to discipline an individual.

The Commission for Lawyer Discipline, a standing committee of the State Bar of Texas, sued attorney Omar Rosales after it received numerous complaints about demand letters he sent to healthcare businesses across Texas. The demand letters allege that the businesses' websites violate the Americans with Disabilities Act, threaten a lawsuit, and demand payment of $2,000 to settle the potential lawsuit.

Rosales moved to dismiss the Commission's lawsuit under the TCPA, arguing that his demand letters constitute the exercise of his right of free speech. The district court granted Rosales's motion and ordered the Commission to pay Rosales over $65,000 for attorney fees expended in achieving the dismissal.[133]

The Commission has appealed to the Third (Austin) Court of Appeals,[134] arguing that: (1) *Sullivan* compels the conclusion that the TCPA does not apply because Rosales, like the individual in *Sullivan*, exceeded the limits of permissible free speech; and (2) the TCPA does not apply to enforcement actions, including the Commission's effort to punish Rosales.[135] Rosales argues that the situation is distinguishable from *Sullivan* in that the Commission's disciplinary rules can be harmonized with the TCPA (as in *Harper*) and that the Commission's action is not an enforcement action as defined in *Harper* because "none of the conduct alleged … rises to unlawful conduct—in other words, it would not result in Rosales being charged with a crime." [136]

If Rosales is correct, the Commission's ability to discipline attorneys for unethical communications with clients or potential clients will be severely curtailed. Similarly, if Sullivan proves to be correct in his interpretation of the TCPA, the Texas Ethics Commission also will be significantly handicapped in doing its job. The full ramifications of applying the TCPA to these kinds of actions by governmental entities would be significant.

"Clear and Specifi Evidence" Standard in Unknown and Undefi

Another meaningful issue presented in TCPA lawsuits relates the act's direction that a court "may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." [137] The statute, however, provides no definition for "clear and specific evidence." [138] Some courts have attempted to tackle the dilemma presented by this omission,[139] but others have ignored the issue altogether.[140] These inconsistencies are problematic because they do not provide the party bringing the legal action any guidance as to what she must show in order to avoid dismissal and similarly do not provide courts with guidance as to how they must apply the standard.[141]

The Supreme Court has handed down only one opinion related to the standard. In *In re: Lipsky*, the Lipskys filed suit against a nearby fracking operator, Range Resources, for contamination of their water well.[142] Range counter-sued the Lipskys and another party, Alisa Rich, alleging defamation, business disparagement, and civil conspiracy. The Lipskys and Rich

filed a motion under the TCPA to dismiss Range's counter-suit.[143] The trial court denied the motions, but the court of appeals determined that some, but not all, of the claims brought by Range should have been dismissed.[144]

The Supreme Court addressed the burden "clear and specific evidence" imposes on a plaintiff. Lipsky argued the phrase elevated the evidentiary standard and required Range to produce direct evidence of each element of the claim. Range argued that circumstantial evidence and rational inferences may be considered by the court and that the TCPA does not impose a higher evidentiary standard than that used by the underlying claims.[145]

At oral argument, members of the Court expressed concern that the clear and specific evidence standard required the plaintiff to carry a higher burden to survive a motion to dismiss than to win the case at trial.[146] Chief Justice Hecht asked, for example, "What sense does it make that you have to prove more to survive than to win." [147]

In the end, the Supreme Court noted that while the standard set forth in the TCPA "is not a recognized evidentiary standard," [148] notice pleading is inapplicable to the TCPA and a "plaintiff must provide enough detail to show the factual basis for its claim." [149] The Court, however, specifically disapproved of prior appellate opinions requiring direct evidence, thus allowing parties to use circumstantial evidence to establish a *prima facie* case.[150] The Court also rejected the idea that a plaintiff must prove more to survive than to win, stating that it "seems nonsensical" that "the statute should create a greater obstacle for the plaintiff to get into the courthouse than to win its case." [151]

TCPA's Structure Encourages Filing of Motions to Dismiss

The structure of the TCPA encourages the filing of motions to dismiss, even in cases where, on the face of the statute, it does not appear to apply.

The defendant's initial burden under the TCPA is to establish by a "preponderance of the evidence" that the lawsuit is "based on, relates to, or is in response to" her exercise of the right of free speech, the right to petition, or the right of association (with "relates to" being an especially broad term).[152] Whether the plaintiff's lawsuit relates to the exercise of certain rights by the defendant often is established from the face of the plaintiff's pleading. But even if these facts are apparent on the face of the plaintiff's pleading, the defendant is allowed to search for the facts necessary to support her motion.[153]

The plaintiff's burden, on the other hand, is to establish by "clear and specific evidence" a *prima facie* case for each essential element of the claim in question.[154] Whatever "clear and specific evidence" means, it appears clear that the plaintiff's burden is heavier than the defendant's. The plaintiff must carry its burden without having the ability to conduct discovery to support her pleading.[155] Thus, under the TCPA, the plaintiff's search for evidence to support his pleading ends when the motion to dismiss is filed, while the defendant's search for evidence to support her pleading may begin at that time. Plainly, unless the plaintiff is armed with substantial evidence to support her case when she files her lawsuit, her chances of having her lawsuit dismissed have significantly increased.

The cost-shifting aspects of the TCPA also favor defendants. When a defendant achieves dismissal of a plaintiffs action under the TCPA, that defendant is entitled to an award of attorney fees, court costs and other expenses *and* sanctions against the plaintiff as the court determines sufficient to deter the party who brought the legal action from bringing similar actions in the future.[156] On the other hand, if the court finds in favor of the plaintiff and refuses to dismiss the action, the court *may* award court costs and reasonable attorney's fees to the plaintiff, but *only* if it finds that the motion to dismiss was frivolous or solely intended to

delay.[157]

Statutes setting forth different standards for awarding attorney fees are not unknown in Texas law. The Deceptive Trade Practices-Consumer Protection Act (DTPA), for example, provides that "[e]ach consumer who prevails [in an action brought under the DTPA] shall be awarded court costs and reasonable and necessary attorneys' feest." [158] On the other hand, "the court shall award to the defendant reasonable and necessary attorneys' fees and court costs" "[o]n a finding by the court that an action [brought under the DTPA] was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment."[159] Thus, it is easier for a DTPA plaintiff to recover fees than for a defendant to recover fees. But even in the DTPA—the state's most powerful consumer protection statute—the award of attorney fees is mandatory if the prerequisites to such an award exist, regardless of whether the prevailing party is the plaintiff or the defendant.

Under the TCPA, an award of attorney's fees is mandatory for a prevailing defendant but permissive for a plaintiff, and only then if the plaintiff establishes wrongful conduct by a defendant. As a consequence, a multi-national corporation that is sued by a former employee for defamation is entitled to an award of attorney fees against the former employee if the employee fails to establish a *prima facie* case of defamationt.[160] At the same time, a former employee who absconds with his employer's trade secrets is entitled to keep the trade secrets *and* be reimbursed for attorney fees when sued by the former employer to recover its stolen assets.[161] Furthermore, published opinions show that the attorney fees awarded under the TCPA can be in the tens of thousands of dollars for what is an early-in-the-case proceeding accompanied by limited discovery.[162]

These differing burdens, which favor the defendant, coupled with the statutes' broad application to "legal actions" presenting "matters of public concern" nearly invites defendants to file motions to dismiss. In a nutshell, a defendant has a reasonably good chance of prevailing on her motion to dismiss in many cases; and even if she does not prevail, the chances of having to pay the plaintiff's attorney fees are relatively slight.

Other States' Anti-SLAPP Statutes

Thirty-one states have anti-SLAPP laws. There is a great deal of variety among the states' laws. To provide a basis for evaluating Texas's statute, this section reviews the anti-SLAPP statutes of the five most-populous states other than Texas.[163]

California

Under California's anti-SLAPP law, a defendant must show that he is being sued for "any act … in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." [164] The rights of free speech or petition in connection with a public issue include four categories of activities:

(A) statements made before a legislative, executive or judicial proceeding;

(B) statements made in connection with an issue under consideration by a governmental body;

(C) statements made in a place open to the public or a public forum in connection with an issue of public interest; and

(D) any other conduct in furtherance of the exercise of free-speech or petition rights in connection with a public issue or an issue of public interest.

California courts consider several factors when evaluating whether a statement is in connection with a public issue, including whether the subject of the statement at issue was a person or entity in the public eye, whether the statement involved conduct that could affect large numbers of people beyond the direct participants, and whether the statement contributed to debate on a topic of widespread public interest. A California court has held that statements about a person who is not in the public eye do not relate to an issue of public interest.[165]

The California anti-SLAPP law allows a defendant to file a motion to strike the complaint, which the court will hear within 30 days unless the docket is overbooked. Discovery activities are placed on hold from the time the motion is filed until the court has ruled on it, although the judge may order discovery to be conducted if the requesting party provides notice of its request to the other side and can show good cause for it. In ruling on the motion to strike, a California court will first determine whether the defendant established that the lawsuit arose from one of the statutorily defined protected speech or petition activities.[166] If that is the case, the judge will grant the motion unless the plaintiff can show a probability that he will prevail on the claim.[167]

If the court grants the motion to strike, it will impose costs and attorney fees on the other side. Additionally, the California anti-SLAPP statute gives a defendant who shows that the plaintiff filed the suit to harass or silence the speaker, rather than resolve a legitimate legal injury, the ability to file a so-called "SLAPPback" lawsuit against his opponent.[168] A SLAPP defendant who prevailed on his motion to strike may sue the person who filed the SLAPP lawsuit to recover damages for abuse of the legal process. If a motion to strike was frivolous and brought solely to delay the proceedings, the defendant who pursued the motion must pay the plaintiff's costs and attorney fees.[169] Either party is entitled to immediately appeal the court's decision on the motion to strike.

Although California's anti-SLAPP statute is regarded as being very strong, it has a more limited scope than Texas's statute. Under California's law, "A cause of action against a person *arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution* in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." [170] Thus, the scope, although broad, adheres to the stated goal of limiting "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." [171] This goal is similar to the Texas law's stated purpose of "encourage[ing] and safeguard[ing] the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time…." [172] The Texas Legislature's failure to include key language about the nature of the right to be protected is the significant difference between California's and Texas's statutes.

Florida

Florida is the only jurisdiction with two anti-SLAPP statutes. The scope of protection under each is relatively narrow. The first statute prohibits any governmental entity or person from suing "a person or entity without merit and solely because such person or entity has exercised the right to peacefully assemble, the right to instruct representatives, and the right to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and [the Florida Constitution]." [174] The second statute applies only to a homeowner in a homeowners' association and prohibits lawsuits by individuals and business and governmental entities based on a homeowner's

"appearance and presentation before a governmental entity on matters related to the homeowners' association."

Under Florida's anti-SLAPP laws, a defendant can file a motion to dispose of the claim, which the court will hear "at the earliest possible time." [175] The statutes do not address whether a SLAPP defendant's motion to dispose of the claim will halt discovery proceedings and neither statute specifies what standard a court will use to decide whether a claim was wrongly brought.

A SLAPP defendant who prevails under Florida's statutes is entitled to recover attorney fees and costs. Moreover, a court may—but is not required to—award the defendant any damages he sustained as a result of the lawsuit.[176] A defendant who prevails under Florida's homeowner anti-SLAPP law may be awarded treble damages, or three times his actual damages.[177]

Florida's anti-SLAPP laws are considered to be moderately strong. Like California's statute, they are less broad in that they are tied to rights protected under the federal or state constitution. Florida's anti-SLAPP laws, unlike Texas's, do not contain any special burden shifting, burdens of proof, or discovery provisions to help flesh out the details of SLAPP dismissals.

New York

The New York anti-SLAPP statute protects defendants in legal actions involving public petition and participation.[178] An action involving public petition and participation is a public applicant or permittee's action for damages "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." [179] A "public applicant or permittee" is defined as "any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission." [180]

The state's intermediate appellate court has construed these statutory definitions narrowly. For example, it reversed a trial court's finding that a defendant could avail herself of the anti-SLAPP statute, holding that the woman's statements to the press about the plaintiff's alleged misuse of funds were "not materially related to any efforts by her to report on, comment on, challenge, or oppose an application by the plaintiff for a permit, license, or other authorization from a public body." [181] Similarly, "merely advocating one's agenda at public meetings, or initiating legal action, does not bring an individual within the ambit of an applicant or permittee" as defined in the statute.[182]

The statute does not provide for a specific anti-SLAPP motion to dismiss. However, existing procedural rules state that a court considering a motion to dismiss a case involving public petition and participation must grant preference in hearing the motion.[183] New York's anti-SLAPP statute does not address the effect of a SLAPP defendant's motion to dispose of the claim on discovery proceedings. The rule requires the court to grant the motion unless the plaintiff can show that the claim has a substantial basis in law or is supported by a substantial argument for a modification of existing law. The plaintiff also must also establish by clear and convincing evidence that the communication was made with knowledge of or reckless disregard for its falsity if such truth or falsity is material to the underlying claim.[184]

The New York anti-SLAPP law does not allow for recovery of costs and attorney fees as part of the motion to dismiss. However, a successful defendant may file a SLAPPback lawsuit against the plaintiff to recover costs, attorney fees and actual and punitive damages.[185] To receive attorney fees and costs, a SLAPPback plaintiff must show that the lawsuit lacked a substantial basis in law and could not be supported by a substantial argument for a modification of

existing law. Actual damages require a showing that the plaintiff in the original action brought the claim "for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of petition, speech, or association rights." To recover punitive damages, a SLAPPback plaintiff must show that the plaintiff in the original action brought the claim solely to impair the SLAPPback plaintiff's rights of free speech, association or petition.

When compared with Texas, New York's law is significantly narrower. It reaches only a small class of those protected—essentially, persons who are seeking or have sought government entitlements and speech in connection with those applications. There are no statutory provisions that govern civil SLAPP suits or those brought by a private plaintiff against a private defendant based on the defendant's exercise of his constitutional rights of assembly or petition. Nor are there any special burden shifting, burdens of proof, or discovery provisions for the narrow classes of cases to which the law extends. New York's anti-SLAPP rules are considered extremely weak.

Pennsylvania

Pennsylvania has a narrow anti-SLAPP statute that applies only to individuals petitioning the government about environmental issues.[186] To challenge a lawsuit as a SLAPP lawsuit, a defendant must show that he is being sued for communications relating to the implementation or enforcement of an environmental law or regulation that are made to a governmental agency, or in a court action to enforce an environmental law or regulation, with the aim of procuring favorable governmental action.[187] Pennsylvania courts have interpreted this language broadly to include statements made directly to a governmental body and statements made to non-governmental representatives but aimed at procuring favorable governmental action on an environmental issue. Examples of statements in this latter category include:

> a letter to the editor of a local newspaper expressing concern about the possibility of contamination at a proposed development, a statement made to a newspaper reporter about the possibility of contamination at a proposed development, or a signboard which protests the development of a wetland. Although such oral and written statements are technically not made *directly* to the government, they are more likely than not, aimed at procuring favorable government action and may be entitled to the immunity [authorized by the anti-SLAPP law].[188]

However, the statute contains exemptions and does not apply to communications that are irrelevant or immaterial to the implementation or enforcement of an environmental law or regulation, and are knowingly false, deliberately misleading or made with malicious and reckless disregard for their falsity, made for the sole purpose of interfering with existing or proposed business relationships, or later determined to be a wrongful use of process.[189]

The Pennsylvania anti-SLAPP statute gives a defendant the ability to file a motion asking the court to determine whether the statements at issue are immune from liability.[190] The court is required to conduct a hearing on the matter. The statute does not specify what standard a court will use to decide these motions or what evidence it will consider in making this determination.

If the court denies the motion, the defendant is entitled to appeal the decision immediately, and discovery activities are placed on hold until the appellate court rules.[191] However, if it grants the motion, the court will impose costs and attorney fees on the other side.[192] Moreover, the court may—but is not required to—order a full or partial award of attorney fees to a defendant who partially prevails.

Since it relates only to immunity to suit for communications made with the government with respect to environmental issues, Pennsylvania's statute is significantly narrower than Texas's statute. Pennsylvania's statute does not contain any special burden shifting, burdens of proof, or discovery provisions for the narrow classes of cases to which the law extends. Further, awards of attorneys' fees to prevailing defendants are entirely discretionary, rather than mandatory as under the Texas law.

Illinois

The Illinois anti-SLAPP law immunizes from civil liability "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government … regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome."[193] The statute does not define these acts, although a number of anti-SLAPP lawsuits were decided in 2010 that provide guidance about the law's scope of protection, which is relatively broad.

In one case, the intermediate court affirmed the grant of a condominium owner's motion to dismiss pursuant to the anti-SLAPP law claims brought by her condo association over public statements the owner made to a Jewish newspaper about the association's rule prohibiting the display of a mezuzah outside her unit. In rejecting the condo association's assertion that the affairs of a private condo association and its board members do not constitute an ongoing attempt to petition a governmental entity for redress, the court said, "the Act does not protect only public outcry regarding matters of significant public concern, nor does it require the use of a public forum in order for a citizen to be protected. Rather, it protects from liability all constitutional forms of expression and participation in pursuit of favorable government action."[194]

In another case involving condominiums, the plaintiff attended a meeting at a local official's office regarding condo development in the area and participated in a "mingling session" where he expressed his concerns to a local newspaper reporter. The condo developer sued the plaintiff for defamation after his comments were published, and the trial court denied the plaintiff's motion to dismiss pursuant to the anti-SLAPP law because the statements were not made in the context of a governmental proceeding. The plaintiff appealed to the Illinois Supreme Court, which reversed and found that the plaintiff was entitled to immunity under the law because his statements to the reporter addressed a public matter in furtherance of his right to petition the government.

> These statements were in response to [the local official's] public notice and addressed the subject matter of his testimony and the public meeting. At the very least, these statements affected the 262 unit owners at the [developed condo]. They also potentially affected citizens of the [area] and the City at large. Therefore, [plaintiff's] statements were 'in furtherance of' his rights to speech, association, petition or otherwise participate in government because the Act expressly encompasses exercises of political expression directed at the electorate as well as government officials.[195]

The Illinois anti-SLAPP statute gives defendants the ability to move to dismiss or strike claims that infringe the exercise of these constitutional rights. The court will hear and decide the motion within 90 days.[196] If it fails to do so, the defendant is entitled to seek expedited review in the appellate court. Discovery activities are placed on hold from the time the motion is filed until the court has ruled on it, although the judge may order discovery to be conducted, assuming the requesting party can show good cause for it, on the question of whether the acts at issue are immune from liability. The court will grant the motion unless the plaintiff can

show by clear and convincing evidence that the defendant's acts are not in furtherance of the rights of petition, speech, association or participation in government and thus not immune from liability. If the court denies the motion to dismiss or strike, the defendant is entitled to appeal that decision immediately.[197]

Although Illinois has a relatively broad statute, it is more limited than Texas's law in that its protections are extended only to a defendant who has engaged in some action implicating her rights vis-à-vis the government. It is like the Texas law in that it provides a timeline for the hearing of the motion, a stay of discovery (that may be overridden by the court for good cause), the right to interlocutory appeal if an anti-SLAPP motion is not granted, and mandatory attorney fee award to a defendant who prevails on a motion.[198] The standard used to determine the motion is also one that courts are generally well equipped to deal with—"clear and convincing evidence." The act also contains a savings clause providing that it will not "limit or preclude any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions,"[199] which would appear to resolve any issues of conflicts between the anti-SLAPP law and laws like the uniform trade secrets act.

Attempts to Amendment the TCPA

Because courts have interpreted the TCPA so broadly, it is being used in litigation of all varieties. The numerous appeals in TCPA cases demonstrate that Texas's appellate courts are expending significant time reviewing and ruling on issues raised by the TCPA. To date, the Texas Supreme Court has written opinions in fifteen TCPA cases and ruled on petitions for review filed in countless others. Texas's fourteen courts of appeals have written opinions in at least 270 TCPA cases since the law took effect in June 2011. This level of activity in the courts has not gone without notice.

During the 2017 legislative session, a bill was filed in Texas to amend and narrow Texas's anti-SLAPP statute. H.B. 3811, by Representative J.M. Lozano, proposed to amend the definition of "communication" to public statements. "The term does not include a statement or document that is made or submitted privately, regardless of form." The bill proposed to delete the existing definitions for "exercise of the right of association," "exercise of the right of free speech," "exercise of the right to petition," and "matter of public concern" and to substitute for them a short definition: "the 'exercise of the constitutional right to petition, to speak freely, or to associate freely' means the exercise of any of those rights as they are provided by the constitutions of this state and the United States and applied by the courts of this state and the United States."

H.B. 3811 also sought to amend the definition of "legal action" to exclude: (a) motion or action related to discovery made or taken pursuant to the Texas Rules of Civil Procedure, including a motion to compel or an objection to discovery, a motion seeking a protective order related to discovery, and the issuance of a subpoena; (b) a motion for summary judgment; (c) a motion to dismiss a motion to dismiss under the TCPA; or (d) any other type of procedural action taken during the course of a legal action. The heart of the bill was to limit the applicability of the statute to those actions "based on, relat[ing] to, or is in response to a party's participation in the government by the exercise of the constitutional right to petition, to speak freely, or to associate freely." H.B. 3811 was filed and referred to committee, but never received a hearing, making opposition or support for the bill difficult to ascertain.

Conclusion

A motion to dismiss under the TCPA must be filed quickly, costly pre-trial discovery is limited, and the court must rule on the motion in a reasonably short amount of time. Its scope is far-reaching, allowing the dismissal of a broad range of case types, rather than being limited to only those that might be regarded as lawsuits against *public* participation.

As a result, the TCPA provides an effective and efficient mechanism for disposing of meritless cases, thus preventing the wasting of time and resources by courts, litigants, and citizens serving on juries in a wide variety of lawsuits.

On the other hand, the Texas Supreme Court has stated that "[t]he TCPA casts a wide net"[200] and that it applies to any "procedural vehicle for the vindication of a legal claim."[201] This far-reaching applicability, coupled with a significant disparity in the allocation of the burdens under the statute, the lopsided provisions for recovering attorney fees, and a defendant's right to take a time-consuming interlocutory appeal creates a statute that invites aggressive use by defendants. As a consequence, the TCPA has been used in cases that relate to private conduct having little to do with protecting constitutional rights. Indeed, one member of the Third (Austin) Court of Appeals has described the statute as "less an 'anti-SLAPP' law than an across-the-board game-changer in Texas civil litigation"[202] and another has noted that "[t]he hypothetical situations and communications to which the TCPA could apply are endless," and that "any skilled litigator could figure out a way to file a motion to dismiss under the TCPA in nearly every case."[203]

Although it is often used to achieve the early dismissal of lawsuits that infringe on protected constitutional rights, the TCPA also can cause the dismissals of cases having sufficient merit to warrant the invocation of the civil justice system's resources. Consequently, a legislative initiative to address the reach of the TCPA is warranted. ■

ENDNOTES

1 TEX. CIV. PRAC. & REM. CODE § 27.002 ("The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.").

2 *See* TEX. CIV. PRAC. & REM. CODE § 27.003.

3 Tex. H.B. 2973, 82nd Leg., R.S. (2011) ("H.B. 2973 Bill Analysis"); s*ee also SLAPP Stick: Fighting frivolous lawsuits against journalists*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, 3 (2011), https://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf (list of states having some form of anti-SLAPP laws).

4 H.B. 2973 Bill Analysis.

5 *Id.*

6 *Id.*

7 TEX. CIV. PRAC. & REM. CODE § 27.003(a). The TCPA does not apply to: (1) an enforcement action that is brought in the name of the State of Texas or a political subdivision of the state by the attorney general, a district attorney, a criminal district attorney, or a county attorney; (2) a lawsuit 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; (3) a lawsuit seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action; or (4) a lawsuit brought under the Insurance Code or arising out of an insurance contract. TEX. CIV. PRAC. & REM. CODE § 27.010.

8 TEX. CIV. PRAC. & REM. CODE § 27.001(2).

9 *Id.* §§ 27.001(3), (7).

10 *Id.* § 27.001(4).

11 Although it is true that there are many procedural postures in which a motion to dismiss may be filed, to simplify the discussion this paper will refer to the party filing a TCPA motion as the "defendant" and the party opposing the motion as the "plaintiff."

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

13 *Id.* § 27.003(c).

14 *Id.* § 27.006(b).

15 TEX. CIV. PRAC. & REM. CODE § 27.004(a). The 60-day deadline can be extended if the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties. Id. In no event, however, may the hearing occur more than 90 days after service of the motion. See also TEX. R. CIV. PRO. 21a (service of documents).

16 TEX. CIV. PRAC. & REM. CODE § 27.005(a).

17 *Id.* §§ 27.004(c), 27.006(b).

18 *Id.* § 27.008(a).

19 *Id.* § 27.006(a).

20 *Id.* § 27.005(b).

21 *Id.* §§ 27.005(c), (d).

22 *Id.* § 27.007(a). The court must issue its findings not later than the 30th day after the date a request for findings is made. Id. § 27.007(b).

23 *Id.* § 27.008(b).

24 *See* Tex. H.B. 2935, 83rd Leg., R.S. (2013), codified as TEX. CIV. PRAC. & REM. CODE §§ 51.014(a)(12), (b); *see also State v. Harper*, No. 16-0647, slip op. at 4, --- S.W.3d --- (Tex. 2018) (citing section 27.008(b) as the authority for an interlocutory appeal in a TCPA action).

25 TEX. CIV. PRAC. & REM. CODE § 27.009(a) (emphasis added). A party who prevails on appeal from denial of her motion to dismiss under the TCPA is a prevailing party entitled to recover attorney fees under the statute. *See Harper*, slip op at 28-29.

26 *Id.* § 27.009(b) (emphasis added).

27 512 S.W.3d 895, 897-98 (Tex. 2017) (*per curiam*).

28 *Id.*

29 546 S.W.3d 675, 678-79 (Tex. 2018).

30 *Id.* According to the court of appeals, Youngkin was "relying on the expansive statutory definition of the 'exercise of the right to petition,'" when he argued that the TCPA applied to the plaintiff's claims against him:

> Youngkin argues that the TCPA applies here because Hines's claims stem from Youngkin's reciting the Rule 11 agreement in open court. Entering the agreement in the record, he continues, was a communication or statement made in a judicial proceeding, which constitutes the exercise of the right to petition as expressly defined in the statute. Hines responds that an attorney speaking for a client in a courtroom is not exercising any personal First Amendment rights at all. For that reason, Hines argues, his suit against Youngkin is outside the TCPA's purview. Courts must adhere to legislative definitions of terms when they are supplied. Substituting the statutory definitions for the defined terms, we see that the TCPA applies to a

legal action against a party that is based on, related to, or in response to the party's making or submitting of a statement or document in or pertaining to a judicial proceeding. Youngkin's alleged liability stems from his dictation of the Rule 11 agreement into the court record during trial. By any common understanding of the words, he made a statement in a judicial proceeding.

Id. at 680 (citations omitted).

31 *Id.* at 681-83 (citing Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015)).

32 *Id.* at 681.

33 526 S.W.3d 462, 463-64 (Tex. 2017).

34 *Id.*

35 *Id.* at 463-65.

36 *Id.*

37 *Id.*

38 *Id.* As noted, the TCPA applies to any "communication made in connection with a matter of public concern," and a "matter of public concern" includes "an issue related to … health or safety [or] community well-being" either of which might apply in this case. See TEX. CIV. PRAC. & REM. CODE §§ 27.001(3), (7).

39 *See Kroger Texas Limited Partnership v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006); Twyman v. Twyman, 855 S.W.3d 619, 621 (Tex. 1993).

40 *Hersh*, 526 S.W.3d at 467-68.

41 *See* Acts 2011, 82nd Leg., Ch. 201 (H.B. 274) (now codified as TEX. CIV. PRAC. & REM. CODE §§ 22.004, 30.021 (requiring the Texas Supreme Court to "adopt rules to provide for the dismissal of causes of action having no basis in law or fact on motion and without evidence" and providing for awarding of attorney fees to the prevailing party).

42 TEX. CIV. PRAC. & REM. CODE § 27.001(7).

43 *Id.* § 27.001(3).

44 *Id.* §§ 27.001(7)(A)–(E).

45 462 S.W.3d 507 (Tex. 2015) (per curiam)

46 *Id.* at 508.

47 *Id.*

48 *Id.* at 509.

49 *Id.*

50 *Id.* at 508-09.

51 *Id*. at 510.

52 *Id.* at 508.

53 512 S.W.3d 895 (Tex. 2017) (per curiam).

54 *Id.* at 897.

55 *Id.*

56 *Id.*

57 *Id.* at 897-98.

58 *Id.* at 900.

59 *Id.* at 901.

60 *Id.*

61 547 S.W.3d 890, 894 (Tex. 2018). Justice Pemberton of the Third Court of Appeals described the statute as "less an 'anti-SLAPP' law than an across-the-board game-changer in Texas civil litigation." *Serafine v. Blunt*, 466 S.W.3d 352, 365 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring). Justice Field from the Third Court likewise noted that "[t]he hypothetical situations and communications to which the TCPA could apply are endless," and that "any skilled litigator could figure out a way to file a motion to dismiss under the TCPA in nearly every case." *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at *12 (Tex. App.—Austin Apr. 7, 2015, no. pet.) (Field, J., concurring).

62 *Adams*, 547 S.W.2d at 892-94.

63 *Id.* at 896.

64 *Id.* at 895.

65 *Id.* at 895-97.

66 *Id.* at 898.

67 A number of the claims at issue were brought under another Texas statute—the Texas Uniform Trade Secrets Act, TEX. CIV. PRAC. & REM. CODE Ch. 134A.

68 520 S.W.3d 191, 196 (Tex. App.—Austin 2017, pet. dism'd).

69 *Elite Auto Body*, 520 S.W.3d at 196.

70 *Id.* at 202.

71 *Id.* at 205.

72 550 S.W.3d 287 (Tex. App.—Austin, May 3, 2018, pet. filed).

73 *Id.*, at 290.

74 *Id.*

75 *Id.* at 291-92. It is not clear why Craig did not file the TCPA motion for the TUTSA claims.

76 *Id.* at 292, 294.

77 *Id.* at 294-96. The defendants, however, could not assert a TCPA defense to the declaratory judgment claims because those claims were subsumed within Tejas Promotions's other causes of action, which Craig did not challenge. *Id.* at 301-02.

78 466 S.W.3d 352 (Tex. App.—Austin May 1, 2015, pet. denied).

79 *Id.* at 356.

80 *Id.*

81 *Id.*

82 *Id.* at 360.

83 *Id.*

84 No. 03-16-00733-CV (Tex. App.—Austin August 3, 2017, no pet.), slip op. at 1.

85 Id. at 11-12.

86 534 S.W. 3d 34, 46 (Tex. App.—San Antonio 2017, no pet.)

87 *Id.* at 43.

88 *Id.* at 45-46.

89 *Id.* at 46.

90 *Id.* at 45-46.

91 No. 01-16-00512-CV (Tex App.—Houston [1st Dist.] Mar. 28 2017, pet. denied).

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

93 *State v. Harper*, No. 16-0647, --- S.W.3d ---, --- (Tex. 2018) (*quoting Paulsen v. Yarrell*, 537 S.W.3d 224, 233 (Tex. App.—Houston [1st Dist.] 2017, pet. denied)).

94 *In re Elliot*, 504 S.W.3d 455 (Tex. App.—Austin 2016, orig. proceeding).

95 *Id.* at 457, 461, 464 (noting that Texas Rule of Civil Procedure 202 requires a person seeking order from trial court for pre-suit deposition to file "petition" (citing to TEX. R. CIV. P. 202.1)).

96 *See Glassdoor, Inc. v. Andra Group*, LP, No. 05-16-00189-CV, 2017 WL 1149668, at *1 (Tex. App.—Dallas Mar. 24, 2017, pet. granted) (mem. op.).

97 *Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220, 232 (Tex. App.—Austin 2018, no pet.).

98 *See Paulsen v. Yarrell*, 537 S.W.3d 224, 234 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) ("[T]he TCPA's dismissal mechanism does not authorize a countermotion to dismiss as a substitute for a standard response in opposition.").

99 *Amini v. Spicewood Springs Animal Hospital*, No. 03-18-00272-CV, --S.W.3d--, 2018 WL 2248279, at *1 (Tex. App.—Austin May 16, 2018, no pet.).

100 *Craig*, 550 S.W.3d at 301-02.

101 TEX. CIV. PRAC. & REM. CODE § 27.003(a).

102 *Id.* § 27.001(6).

103 *See Id.* § 27.010.

104 No. 16-0647, --- S.W.3d --- (Tex. 2018).

105 *Id.*, slip op. at 2.

106 *Id.*; see also TEX. LOC. GOV'T CODE §§ 87.001-.043 (providing mechanism for removing county official from office); TEX. CONST., art. V, § 24 (providing that a district court may remove a county official from office for incompetence, official misconduct, habitual drunkenness, and other causes defined by law).

107 *Harper*, slip op. at 2.

108 *Id.*

109 *Id.* at 3; see also TEX. LOC. GOV'T CODE § 87.018(d) (requiring county attorney to pursue removal of official); see also Garcia v. Laughlin, 285 S.W.2d 191, 194 (Tex. 1955) ("Individual citizens have no private interest distinguishable from the public as a whole and have no right to maintain an ouster suit without being joined by a proper state official.").

110 *Harper*, slip op. at 3-4.

111 *Id.* at 4.

112 *Id.* at 4; see also 493 S.W.3d 105, 111, 116, 118 (Tex. App.—Waco 2016).

113 *Harper*, slip. op. at 9.

114 *Id.* at 9, 13.

115 *Id.* at 8. (quoting Paulsen v. Yarrell, 537 S.W.3d 224, 233 (Tex. App.—Houston [1st Dist.] 2017, pet. denied)).

116 *Id.* at 9.

117 *Id.* For example, the removal statute permits a trial court to refuse to issue an order for citation against the county officer. TEX. LOC. GOV'T CODE § 87.016(c). If the trial court refuses to issue an order for citation, "the petition shall be dismissed at the cost of the person filing the petition," and the plaintiff may not appeal. *Id.* If the trial court does issue an order for citation, it must require the plaintiff to post security for the county officer's costs. *Id.* And if the trial court temporarily suspends the officer but later determines that the suspension was improper, the officer may recover damages and costs. *See id.* § 87.017(b).

118 *Harper*, slip op. at 10; see also TEX. GOV'T CODE § 311.026(b) (providing that when a general provision irreconcilably conflicts with a special or local provision, "the special or local provision prevails . . . unless the general provision is the later enactment and the manifest intent is that the general provision prevail").

119 *Harper*, slip op. at 11.

120 *Id.* at 8, 13; see also TEX. CIV. PRAC. & REM. CODE § 27.010.

121 *Harper*, slip op. at 16.

122 *Id.* at 19-20.

123 *Sullivan v. Texas Ethics Comm'n*, No. 03-17-00392-CV, --- S.W.3d --- (Tex. App.—Austin 2018, pet. filed); see TEX. GOV'T CODE § 305.003 (requiring a person to register with the Texas Ethics Commission as a lobbyist if certain conditions are met); see also id. §§ 305.001-.036, 571.061(a)(1) (governing lobbyist registration, reports and activities).

124 *See* TEX. GOV'T CODE § 571.133.

125 *Sullivan*, slip op. at 1.

126 *Id.*

127 *Id.*

128 *Id.* at 2.

129 *Id.* at 7.

130 *Id.*

131 *Id.* at 10-12.

132 Sullivan is seeking review from the Texas Supreme Court. See docket entries at http://www.search.txcourts.gov/Case.aspx?cn=18-0580&coa=cossup.

133 *See* David Barer, Misconduct lawsuit dismissed against Austin ADA attorney Omar Rosales, KXAN (Feb. 22, 2018, 8:17 AM), https://www.kxan.com/news/local/austin/misconduct-lawsuit-dismissed-against-austin-ada-attorney-omar-rosales/1031470789 (news reports regarding Commission for Lawyer Discipline's case against Rosales).

134 *See* docket entries at http://www.search.txcourts.gov/Case.aspx?cn=03-18-00147-CV&coa=coa03.

135 *See* Appellant's Brief at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=559f33ac-593d-49d0-b5b0-6344374a8e0f&coa=coa03&DT=Brief&MediaID=61f9210c-7a85-4a2e-84ee-4ec2003df98a.

136 *See* Appellee's Brief at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=998ab3da-a98c-4769-a7bb-77cf0295b41c&coa=coa03&DT=Brief&MediaID=c83f0e3b-0b2c-49eb-b117-5169ad6fefcc.

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

138 *Id.*; see TEX. CIV. PRAC. & REM. CODE § 27.001.

139 *See* KTRK Television, Inc. v. Robinson, 409 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (using the plain and ordinary meanings of the words "clear" and "specific" as they are defined in the eighth edition of Black's Law Dictionary); Alphonso v. Deshotel, 417 S.W.3d 194, 197 (Tex. App.—El Paso 2013, no pet.) (examining case law to determine the definition of clear and specific evidence).

140 *See* Avila v. Larrea, 394 S.W.3d 646, 658–62 (Tex. App.—Dallas 2012, pet. denied).

141 This burden is much more ambiguous than that set forth in California anti-SLAPP statute, which is often favorably compared to Texas's statute. The California statute provides that a court may not dismiss a legal action if the party bringing the legal action can show a probability of prevailing on the claim. *See* CAL CIV. PROC. CODE § 425.16.

142 460 S.W.3d 579, 585 (Tex. 2015).

143 *Id.* at 585.

144 *Id.* at 586.

145 *Id.* at 587.

146 *See* Geoff Gannaway, Does the Texas Anti-SLAPP Statute Apply to Your Lawsuit? You Might be Surprised, State Bar of Texas 32nd Annual Litigation Update Institute (2016), Ch. 9, p. 3.

147 See id.

148 *Id.* at 589; see also id. at 590.

149 *Id.* at 590-91.

150 *Id.* at 591.

151 *Id.* at 589.

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

153 *Id*. §§ 27.006(a), (b).

154 *Id.* §§ 27.005(b), (c).

155 *Id*. §§ 27.005(b)-(d).

156 *Id.* § 27.009(a). A party who prevails on appeal from denial of her motion to dismiss under the TCPA is a prevailing party entitled to recover attorney fees under the statute. *See Harper*, slip op. at 29-30.

157 TEX. CIV. PRAC. & REM. CODE § 27.009(b).

158 TEX. BUS. & COMM. CODE § 17.50(d).

159 I*d.* § 17.50(c).

160 *See*, e.g., ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895 (Tex. 2017) (per curiam).

161 *See*, e.g., Craig v. Tejas Promotions, LLC, 550 S.W.3d 287 (Tex. App.—Austin, May 3, 2018, pet. filed).

162 *See* discussion at notes 119-122, supra (Oscar Rosales awarded over $65,000 against the Commission for Lawyer Discipline).

163 This section of the paper duplicates much of the state-by-state analyses provided by the Committee for the Freedom of the Press. *SLAPP Stick: Fighting frivolous lawsuits against journalists*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, (2011), https://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.. The Committee notes that "[m]ost of the information was compiled by Laura Prather," a lawyer practicing in Austin, Texas, with Haynes & Boone, LLP. The Public Participation Project also has reviewed anti-SLAPP statutes nationwide and compiled a scorecard and comparison chart. *See Id.*

164 CAL. CIV. PROC. CODE § 425.16 (2010).

165 *Dyer v. Childress*, 55 Cal. Rptr. 3d 544 (Cal. Ct. App. 2007).

166 *Braun v. Chronicle Publ'g Co.*, 61 Cal. Rptr. 2d 58 (Cal. Ct. App. 1997).

167 CAL. CIV. PROC. CODE § 425.16.

168 *Id.* § 425.18.

169 *Id.* § 425.16.

170 *Id.* § 425.16(b)(1).

171 *Id.* § 425.16(a).

172 TEX. CIV. PRAC. REM. & CODE § 27.002.

173 *See* FLA. STAT. § 768.295 (2018) and FLA. STAT. § 720.304(4) (2011).

174 *See* FLA. STAT. § 768.295 (2018).

175 FLA. STAT. §§ 768.295(5), 720.304(4)(c).

176 FLA. STAT. § 768.295(4).

177 FLA. STAT. § 720.304(4)(c).

178 N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2015)

179 *Id.* § 76-a.

180 *Id.* § 76-a(b).

181 *Long Island Ass'n for AIDS Care v. Greene*, 702 N.Y.S.2d 914 (N.Y. App. Div. 2000).

182 *Hariri v. Amper*, 854 N.Y.S.2d 126 (N.Y. App. Div. 2008).

183 N.Y.C.P.L.R. 3211(g) (McKinney 2011).

184 N.Y. CIV. RIGHTS LAW § 76-a.

185 *Id.* § 70-a.

186 27 PA. CONS. STAT. § 7707, 8301—03 (2011).

187 *Id.* § § 8302.

188 Penllyn Greene Assocs., L.P. v. Clouser, 890 A.2d 424 (Pa. Commw. Ct. 2005).

189 27 PA. CONS. STAT. § 8302.

190 *Id.* § § 8303.

191 *Id.* §.

192 *Id.* § 7707.

193 735 ILL. COMP. STAT. § 110/15 (2011).

194 *See* Shoreline Towers Condo. Ass'n v. Gassman, 936 N.E.2d 1198, 1207 (Ill. App. Ct. 2010).

195 *See* Wright Dev. Grp., LLC v. Walsh, 939 N.E.2d 389, 398 (Ill. 2010).

196 ILL. COMP. STAT. § 110/20.

197 *See* ILL. SUP. CT. R. § 306(a)(9).

198 ILL. COMP. STAT. § 110/25.

199 *Id.* § 110/30(a).

200 Adams v. Starside Custom Builders LLC, 547 S.W.3d 890, 894 (Tex. 2018).

201 *State v. Harper*, No. 16-0647, --- S.W.3d ---, --- (Tex. 2018) (quoting Paulsen v. Yarrell, 537 S.W.3d 224, 233 (Tex. App.—Houston [1st Dist.] 2017, pet. denied)).

202 *Serafine v. Blunt*, 466 S.W.3d 352, 365 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring).

203 *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at *12 (Tex. App.—Austin Apr. 7, 2015, no. pet.) (Field, J., concurring).