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Power Play: an Examination of Texas's Anti-SLAPP Statute and Its Protection of Free Speech through Accelerated Dismissal.

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COMMENT

POWER PLAY: AN EXAMINATION OF TEXAS'S ANTI-SLAPP STATUTE AND ITS PROTECTION OF FREE SPEECH THROUGH ACCELERATED DISMISSAL

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I. INTRODUCTION

Communication is evolving as rapid advances in technology change how we express thoughts, exchange ideas, and share information.[1] Smartphones, iPads, and laptop computers allow individuals to publish instantaneously and frequently to a potentially global audience from virtually any locale with a wireless hotspot.[2] As such, the bounds of speech are growing.[3] However, this seemingly unlimited ability to communicate is being countered with a growing threat to freedom of speech.[4] Those scorned by the ever-abundant commentary turn to the judicial system—often seeking not justice, but vengeance.[5]

Retaliatory lawsuits of this kind have become ubiquitous to the point of earning their own moniker—"strategic lawsuits against public participation" or in common parlance, "SLAPP suits."[6] However, simply because a lawsuit is unpleasant or unwelcome, as virtually all are, does not

1. *See, e.g.*, Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, 378 S.W.3d 519, 522 (Tex. App.—Fort Worth 2012, pet. denied) (involving a lawsuit stemming from a political campaign video posted on YouTube.com).

2. *See* Pete Kennedy, *Internet Libel—The Anonymous Writer and the Online Publisher*, 52 ADVOC., Fall 2010, at 59, 59 ("The Internet is the ultimate printing press, enabling virtually any person to speak to a worldwide audience, instantaneously and anonymously.").

3. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/analysis/pdf/HB02973H.pdf #navpanes=0 ("The Internet has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of public speech.").

4. *See* Michele Bowman, *Don't Get SLAPPed for Posting Your Opinions Online*, LAWYERS.COM INTERNET L. BLOG (Dec. 18, 2012), http://blogs.lawyers.com/2012/12/lawsuit-negative-internet-posts/ (warning of retaliatory litigation being filed against consumers who express their opinions online).

5. *See* Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1 (drawing a correlation between an increase in online commentary and the filing of lawsuits aimed at online speech).

6. *See Jennings*, 378 S.W.3d at 521 n.1 (recognizing that "SLAPP stands for Strategic Lawsuit Against Public Participation"). *See generally* Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1 (elucidating the prevalence of SLAPP lawsuits and efforts to thwart frivolous, retaliatory litigation).

mean it qualifies as a SLAPP suit.[7] Rather the term is reserved for those "lawsuits brought to discourage various activities associated with the exercise of the constitutional rights to free speech and to petition the government."[8] Plaintiffs who file SLAPP suits have a precise tactical intent—to silence vocal opponents or intermediaries who express unfavorable and disparaging opinions by instigating financially oppressive and meritless litigation.[9] SLAPP plaintiffs typically use claims such as trademark infringement, intentional infliction of emotional distress, interference with contract, and most commonly defamation to effectuate their ulterior motives.[10]

To counter this speech-chilling phenomenon, anti-SLAPP advocates have lobbied for laws that block meritless lawsuits in the early stages of litigation, lessening the financial blow to defendants who were merely exercising their fundamental right of free speech.[11] One of the most vocal advocates in Texas has argued that "[a]nti-SLAPP legislation has broad-based appeal because it protects the little guy, promotes judicial economy, provides for tort reform[,] and advances the First Amendment rights of all citizens."[12]

In 2011, Texas became the latest state to enact an anti-SLAPP statute.[13] Entitled the Texas Citizen Participation Act (TCPA), its dual aim is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to

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7. *See* Kristen Rasmussen, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists*, REPS. COMM. FOR FREEDOM OF THE PRESS 1, 2 (Summer 2011), http://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf (summarizing the distinctive characteristics of SLAPP suits and categorizing the level of anti-SLAPP protection afforded in each state).

8. *Id.*

9. *See id.* ("SLAPP suits generally target speech about issues of public interest or concern, or public participation in government proceedings.").

10. *See id.* ("Although most are brought under the guise of a defamation claim, SLAPP suits could just as easily come as accusations of trademark infringement, emotional distress[,] or . . . conspiracy or interference with some type of process or business relationship, as in a claim of interference with contract or economic advantage.").

11. *See* PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org (last visited Nov. 10, 2013) (describing the Public Participation Project as a group working to protect citizens from lawsuits designed to chill speech, including the ability to "speak out on issues of public interest").

12. Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1.

13. *See* Texas Citizen Participation Act, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 961–64 (amended 2013) (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West Supp. 2013)); *see also* Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1 (providing information on Texas's anti-SLAPP statute).

the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury."[14] However, critics of the law claim its provisions, which permit an expedited motion to dismiss, also stifle legitimate lawsuits, leaving no remedy for the injured.[15] Furthermore, differing appellate court interpretations of the TCPA initially created uncertainty as to its effectiveness,[16] thereby prompting the Texas legislature to clarify the statute in June of 2013.[17]

This Comment delves into the dimensions of Texas's anti-SLAPP statute and addresses how its powerful dismissal function should be utilized to protect the right of free speech and the ability to pursue lawsuits with merit. Part II provides a brief background of free speech rights and defamation law in Texas. Part III discusses the growing movement in the United States to pass anti-SLAPP legislation, including the impetus behind the TCPA. Part IV details the crucial components of Texas's anti-SLAPP statute. Part V explores how the law has been applied by analyzing three early cases involving TCPA motions. Finally, Part VI concludes with recommendations of how to approach the law in light of its provisions, court interpretations, and subsequent amendments.

14. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West Supp. 2013) (asserting the purpose of the TCPA).

15. *See* Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Presentation at the 4th Annual Business Torts Institute, at 1 (Sept. 20–21, 2012), *available at* http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/ (referring to one judge's view of the TCPA as a "'draconian' motion to dismiss that places a heavy burden on the aggrieved plaintiff to prove that its suit is not frivolous at the inception of the litigation without the benefit of any meaningful discovery"); *see also* Steven C. James, *The New Litigation Rules—What You Need to Know*, Presentation at the State Bar of Texas State Bar College 14th Annual Summer School, at 1 (July 19–21, 2012) (noting concerns that the TCPA "could be used to intimidate legitimate plaintiffs").

16. *See* Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, 378 S.W.3d 519, 521, 529 (Tex. App.—Fort Worth 2012, pet. denied) (analyzing whether the TCPA authorizes an interlocutory appeal of expressly denied motions); *see also* Lipsky v. Range Prod. Co., No. 02-12-00098-CV, 2012 WL 3600014, at *1 (Tex. App.—Fort Worth Aug. 23, 2012, pet. denied) (mem. op.) (denying the interlocutory appeal for lack of jurisdiction in light of the *Jennings* decision).

17. *See* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 1, 2013 Tex. Gen. Laws 2501, 2501 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 27.004 (West Supp. 2013)) (stating the change to the TCPA); House Comm. on State Affairs, Bill Analysis, Tex. H.B. 2935, 83d Leg., R.S. (2013), *available at* http://www.legis.state.tx.us/tlodocs/83R/analysis/html/HB02935H.HTM ("The purpose of [H.B. 2935] is to clarify the right of a party in such an action to file an interlocutory appeal if the court denies a motion to dismiss the action.").

II. FREE SPEECH & DEFAMATION LAW IN TEXAS: A BRIEF OVERVIEW

The right to speak freely without fear of retribution is a long-standing and venerable tradition in Texas.[18] While affirmatively promising an expansive right,[19] the Texas Constitution addresses responsibility for its abuse, heralding potential consequences for such transgressions.[20] Eventually, the Texas Legislature established a statutory remedy for the abuse of freedom of speech.[21] Section 73.001 of the Texas Civil Practice and Remedies Code states:

> A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead[,] or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt[,] or ridicule, or financial injury[,] or to impeach any person's honesty, integrity, virtue, or reputation[,] or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.[22]

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18. *See* TEX. CONST. art. I, § 8 ("Every person shall be at liberty to speak, write[,] or publish his opinions on any subject . . . and no law shall ever be passed curtailing the liberty of speech or of the press."). Dating back to the Republic, the founders of Texas expressly guaranteed certain fundamental rights, including freedom of speech and the press. *See* John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1127 (1995) (asserting that the core provisions in Article I date back to a bill of rights that was adopted in 1836). The current free speech promise in the Texas Constitution reflects combinations of provisions from prior state constitutions. *See* TEX. CONST. art. I, § 8 interp. commentary (West 2007) ("[T]he fundamental law since 1836 has recognized the transcend[e]nt importance of such freedom to the search for truth, the maintenance of democratic institutions, and the happiness of individual men."). As a matter of pure historical interest, the Texas State Library and Archives Commission provides digital images of the original Texas Constitution of 1876 on its website. *See Texas Constitution of 1876*, TEX. ST. LIBR. & ARCHIVES COMM'N, https://www.tsl.state.tx.us/treasures/constitution/1875-01.html (last modified Aug. 29, 2011) (showing the authentic handwritten Bill of Rights in Article I of the Texas Constitution of 1876).

19. *Compare* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."), *with* TEX. CONST. art. I, § 8 ("Every person shall be at liberty to speak, write[,] or publish his opinions on any subject . . . ."). The semantics of the free speech guarantee in the Texas Constitution markedly differ from the language used in the First Amendment of the United States Constitution. *See* Jones v. Mem'l Hosp. Sys., 746 S.W.2d 891, 893 (Tex. App.—Houston [1st Dist.] 1988, no writ) (distinguishing the free speech provisions of the Texas Constitution and the United States Constitution). "The Texas Constitution, in positive terms, guarantees that every person has the right to speak, write, or publish their opinion on any subject. The federal constitution, on the other hand, expresses first amendment freedoms in negative terms, simply restricting governmental interference with such freedoms." *Id.*

20. *See* TEX. CONST. art. I, § 8 (establishing that individuals may voice their "opinions on any subject" but are "responsible for the abuse of that privilege"); *see also* Turner v. KTRK Television, Inc., 38 S.W.3d 103, 117 (Tex. 2000) ("Unlike the United States Constitution, the Texas Constitution expressly guarantees the right to bring reputational torts.").

21. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 73.001–.006 (West 2011) (outlining tort liability for libel).

22. *Id.* § 73.001. In 1985, the Texas Legislature added a provision to specifically address

The strong, illustrative language in section 73.001 sets the bar high, making it clear that expression that is merely upsetting, hurtful, or even offensive does not provide adequate grounds for recovery.[23]

The specific elements of a libel claim were further and more clearly delineated through case law.[24] Accordingly, the target of defamatory expression must prove "the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement."[25] Thus, the standard is altered depending on the plaintiff's status as either a public or private figure.[26] As a public official or figure,[27] the plaintiff has an elevated burden to prove the defamatory statement was published "'with knowledge that it was false or with reckless disregard of whether it was false or not.'"[28] The distinction serves the overriding

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defamation in the context of television and radio mediums. *See id.* § 73.004 (limiting broadcasters' liability by requiring a complaining party to prove that "the broadcaster failed to exercise due care to prevent the publication or utterance of the [defamatory] statement in the broadcast"). There is no statutory counterpart expressly addressing defamation on the Internet. *See generally id.* §§ 73.001–.006 (containing no specific reference to the Internet).

23. *See id.* § 73.001 (setting the threshold for libel claims); *see also* Rawlins v. McKee, 327 S.W.2d 633, 635 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.) ("It is universally recognized that an appellation may be quite false, abusive, unpleasant[,] and objectionable to the person designated without being defamatory.").

24. *See* WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998) (enumerating the elements of a libel claim).

25. *Id.* (citing Carr v. Brasher, 776 S.W.2d 567, 569 (Tex. 1989)). Fault must be clearly established to engender a successful libel claim. *See id.* (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974)) ("Fault is a constitutional prerequisite for defamation liability."). In addition, plaintiffs must prove they truly suffered damages as a proximate result of the defamatory expression. *See* Brown v. Swett & Crawford of Tex., Inc., 178 S.W.3d 373, 382 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *WFAA-TV, Inc.*, 978 S.W.2d at 571) (incorporating the damages requirement into the elements of a defamation claim). However, a plaintiff does not need to prove specific injury or damages if the statements are "of a nature that the law considers so damaging to reputation that harm to the plaintiff's reputation is presumed." *See* Neely v. Wilson, 331 S.W.3d 900, 913 (Tex. App.—Austin 2011), *rev'd on other grounds*, No. 11-0228, 2013 WL 3240040, at *1 (Tex. June 28, 2013) (citing Bentley v. Bunton, 94 S.W.3d 561 (Tex. 2002)) (contrasting "defamatory per se" with "defamatory per quod").

26. *See WFAA-TV*, 978 S.W.2d at 571 (analyzing whether the plaintiff is a public figure "[b]ecause a defamation plaintiff's status dictates the degree of fault he or she must prove to render the defendant liable").

27. Public figures may either be "general-purpose"—those who are famous or notorious "for all purposes and in all contexts"—or "limited-purpose"—those who fall in the public spotlight "for a limited range of issues surrounding a particular public controversy." *See id.* (categorizing public figures).

28. *See id.* at 573–74 (Tex. 1998) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964)) (defining "actual malice"). To prove recklessness, the public official or figure must establish

purpose of revering an individual's right to speak freely while expecting public figures, who are often placed in the public eye through their own volition,[29] to tolerate criticism, complaints, and feedback.[30]

The reluctance to limit free speech rights while providing an avenue for recovery for its abuse is also reflected in the traditional defense to defamation claims—the truth.[31] If a plaintiff is not charged with the task of proving falsity,[32] a defendant may effectively assert the truth of any defamatory expression as an affirmative defense.[33] As an underlying consideration, plaintiffs seeking to recover damages for harm caused by defamation have limited time to act; they must heed the running of a one-year statute of limitations.[34]

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that the publisher of the defamatory material "entertained serious doubts" as to its truth. *See id.* at 574 (citation omitted) (defining "reckless disregard").

29. *But see id.* at 571–72 (Tex. 1998) (discussing voluntariness in terms of differentiating between "plaintiffs who have voluntarily injected themselves into a controversy and those who are involuntarily drawn into a controversy").

30. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

31. Truth as a defense in Texas dates back to 1876 as well. *See* TEX. CONST. art. I, § 8 ("In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence.").

32. A public figure plaintiff must prove falsity as an additional element of a defamation claim. *See* Turner v. KTRK Television, Inc., 38 S.W.3d 103, 117 (Tex. 2000) (addressing a burden of proof issue regarding falsity). Moreover, every plaintiff must prove falsity in cases involving a media defendant. *See* McIlvain v. Jacobs, 794 S.W.2d 14, 15 (Tex. 1990) (citing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)) (following the United States Supreme Court's holding that requires plaintiffs to prove "that the speech at issue is false before recovering damages for defamation from a media defendant"). Meanwhile, a media defendant can escape a defamation claim even if the broadcasted statement is not entirely true if it can establish the statement's "substantial truth." *See id.* at 15–16 (determining whether a broadcast was "substantially true" by considering whether "the alleged defamatory statement was more damaging to [the plaintiff's] reputation, in the mind of the average listener, than a truthful statement would have been"). If the defamatory statements stem from the reporting of a third party's allegations, the statements are considered substantially true "'if, in fact, those allegations have been made and their content is accurately reported.'" *See* Avila v. Larrea, 394 S.W.3d 646, 657 (Tex. App.—Dallas 2012, pet. denied) (quoting Neely v. Wilson, 331 S.W.3d 900, 922 (Tex. App.—Austin 2011, pet. granted)) (analyzing the substantial truth of two news reports).

33. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 73.005 (West 2011) (stating that the truth of a published statement is a defense to a libel claim); *see also* Neely v. Wilson, 331 S.W.3d 900, 913 (Tex. App.—Austin 2011), *rev'd on other grounds*, No. 11-0228, 2013 WL 3240040, at *1 (Tex. June 28, 2013) (citations omitted) ("[T]he Texas Supreme Court has not yet definitively resolved, for all fact situations, whether a plaintiff must prove the falsity of a statement as an element of his libel claim as opposed to the defendant having the burden of proving the statement's truth as an affirmative defense.").

34. *See* CIV. PRAC. & REM. § 16.002(a) (West 2002) ("A person must bring suit for malicious

Collectively, defamation law in Texas[35] leans heavily toward favoring freedom of speech and limiting defamation liability, affording a means of recovery for only those who are truly defamed to avoid a chilling effect on speech.[36] Yet, this interplay of protective law has proven insufficient. It has failed to quell SLAPP plaintiffs because they do not aim to actually prevail,[37] but rather to manipulate the justice system so their opponents suffer financially and fear retributive litigation to the point of reticence.[38] The enactment of the TCPA[39] was meant to end such manipulation and tip the scales of justice back into equilibrium.[40]

III. ANTI-SLAPP MOVEMENT

The typical SLAPP suit creates an exorbitant financial burden on an innocent party[41] who may have little means, particularly in comparison to

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prosecution, libel, slander, or breach of promise of marriage not later than one year after the day the cause of action accrues."). The one-year time period typically begins to accrue from the date of publication—whether in print, over the airwaves, or online. *See* Nationwide Bi-Weekly Admin., Inc. v. Belo Corp., 512 F.3d 137, 145 (5th Cir. 2007) ("[P]olicy considerations favor application of the single publication rule here .... [T]he continued availability of an article on a website should not result in republication, despite the website's ability to remove it."). The discovery rule may apply if "the publication is inherently undiscoverable." *See* Roberts v. Davis, 160 S.W.3d 256, 261 (Tex. App.—Texarkana 2005, pet. denied) (citing Kelley v. Rinkle, 532 S.W.2d 947 (Tex. 1976)) (evaluating the application of the discovery rule to letters placed in personnel files).

35. The overwhelming bounty of defamation authority—whether statutory or based in common law—is much more complex than the basic background information provided; such detail goes beyond the scope of this Comment.

36. *See Turner*, 38 S.W.3d at 119–20 (recognizing that public-figure plaintiffs must be required to show the defendant's actual malice "because the threat of a defamation judgment can chill discussion of public issues"); *Neely*, 331 S.W.3d at 919 (expounding that the substantial truth doctrine is not only necessary to comport with the First Amendment, but is the commonsense approach to avoid "the [incalculable] volume of litigation and concomitant chilling effect on the media").

37. *See* Kristen Rasmussen, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists*, REPS. COMM. FOR FREEDOM PRESS 1, 2 (Summer 2011), http://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf ("[T]he individuals who bring [SLAPP suits] meet their objective if they effectively prevent opponents from speaking out.").

38. *See Examples of SLAPP Suits in Texas*, SLAPP'ED IN TEX., http://slappedintexas.com/examples-of-slapp-suits-in-texas/ (last visited Nov. 10, 2013) (identifying numerous costly SLAPP suits filed in Texas prior to the passage of the Texas Citizens Participation Act).

39. CIV. PRAC. & REM. §§ 27.001–.011 (West Supp. 2013).

40. *See* Press Release, Sen. Rodney Ellis, Senate Passes Texas Citizen Participation Act: HB 2973 Protects Texas from Lawsuits Designed to Stifle Free Speech (May 18, 2011), *available at* http://www.senate.state.tx.us/75r/senate/members/dist13/pr11/p051811b.htm (quoting state Senator Rodney Ellis as saying that the newly passed TCPA "evens the playing field and ensures the little guy won't be put in the poor house for standing up for what he believes in").

41. *See* Kristen Rasmussen, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists*, REPS. COMM. FOR FREEDOM PRESS 1, 2 (Summer 2011), http://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf ("[M]ost suits of this nature would likely fail on their legal merits if fully litigated.").

the filing party.[42] Beyond that injustice, SLAPP suits cause a more far-reaching and throttling effect on speech:

> Retaliatory lawsuits filed against one who exercises his or her free speech rights not only threaten the defendant with financial liability, litigation costs, destruction of a business, loss of a home, and other personal losses, but also seriously impact our government, interstate commerce, and individual rights by significantly chilling public participation in public debate, governmental issues[,] and voluntary calls to action.[43]

As SLAPP suits became a common feature in American jurisprudence, breaking some defendants to the point of bankruptcy and threatening the fundamental right of free speech, a growing faction felt something had to be done about it.[44]

A. *The Impetus Behind the Anti-SLAPP Movement*

SLAPP suits have existed for quite some time, but their prevalence and notoriety have grown in recent years with increased utilization of and access to online speech.[45] The Internet age, including the current

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42. *See* Main v. Royall, 348 S.W.3d 381, 384 (Tex. App.—Dallas 2011, no pet.) (involving a commercial real estate developer who sued the author of a book discussing eminent domain); *see also* Editorial, *Anti-SLAPP: Texas Citizen Participation Act Protects Speech from Frivolous Suits*, LONGVIEW NEWS-JOURNAL (June 24, 2011, 4:00 AM), http://www.news-journal.com/opinion/editorials/article_d5312140-86c5-53b7-8184-e0fa0bbbd576.html (mentioning that housewives and small business owners have been targets of SLAPP suits). *But see, e.g.*, Tex. Beef Grp. v. Winfrey, 11 F. Supp. 2d 858, 860–61 (N.D. Tex. 1998), *aff'd*, 201 F.3d 680 (5th Cir. 2000) (involving a group of Texas cattle ranchers who sued television host Oprah Winfrey for remarks made during a segment regarding the safety of beef consumption); *see also* Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Presentation at the 4th Annual Business Torts Institute, at 2, 4–7 (Sept. 20–21, 2012), *available at* http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/ (noting that the concept of a SLAPP suit assumes a "David and Goliath" scenario, but arguing that protection of media defendants is the underlying purpose of Texas's anti-SLAPP statute).

43. Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1.

44. *See* PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org (last visited Nov. 10, 2013) ("The Public Participation Project works to protect citizens from Strategic Lawsuits Against Public Participation (SLAPPs) through the enactment of legislation in Congress and the states."); *see also* Editorial, *Anti-SLAPP: Texas Citizen Participation Act Protects Speech from Frivolous Suits*, LONGVIEW NEWS-JOURNAL (June 24, 2011, 4:00 AM), http://www.news-journal.com/opinion/editorials/article_d5312140-86c5-53b7-8184-e0fa0bbbd576.html ("Consumer groups, citizen groups, trial lawyers[,] and tort reformers were among those joining the media in supporting anti-SLAPP . . . legislation.").

45. *See* Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1 (suggesting that an increase in availability and viewership of online "comments, reviews, calls to action[,] and other statements" led to a spike in SLAPP suits); *see also* Michele Bowman, *Don't Get*

pervasiveness of smartphones and e-tablets, has spawned an unprecedented amount of self-publishing and citizen journalism.[46] The resulting backlash reared unwieldy SLAPP suits.[47] As the issue has grown more pressing, twenty-eight states,[48] the District of Columbia,[49] and Guam (a U.S. territory)[50] have gradually passed laws that aim to block SLAPP suits in early stages of the litigation—before attorney's fees and

SLAPPed for Posting Your Opinions Online, LAWYERS.COM INTERNET L. BLOG (Dec. 18, 2012), http://blogs.lawyers.com/2012/12/lawsuit-negative-internet-posts/ (identifying SLAPPs as a "growing problem for freedom of speech on the Internet" and advising individuals on preventative measures to avoid a SLAPP suit when expressing opinions online).

46. Press Release, Sen. Rodney Ellis, Senate Passes Texas Citizen Participation Act: HB 2973 Protects Texas from Lawsuits Designed to Stifle Free Speech (May 18, 2011), *available at* http://www.senate.state.tx.us/75r/senate/members/dist13/pr11/p051811b.htm.

47. *See A SLAPP Suit—The Bully's Weapon Against Democracy*, SLAPP'ED IN TEX., http://slappedintexas.com/about/ (last visited Nov. 10, 2013) ("The Internet age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism[,] and other forms of speech. Unfortunately, abuses of the legal system, aimed at silencing these citizens, have also grown.").

48. *See* ARIZ. REV. STAT. § 12-752 (LexisNexis 2012) (effective Apr. 28, 2006); ARK. CODE ANN. §§ 16-63-501–508 (2005) (effective Aug. 12, 2005); CAL. CIV. PROC. CODE §§ 425.16–.18 (Deering Supp. 2013) (initially effective in 1993 with multiple amendments through 2012); DEL. CODE ANN. tit. 10, §§ 8136–8138 (1999) (approved July 6, 1992); FLA. STAT. ANN. §§ 720.304(4), 768.295 (West Supp. 2013) (originally enacted in 1992, but amended multiple times through 2010); GA. CODE ANN. § 9-11-11.1 (2006) (enacted in 1996); HAW. REV. STAT. ANN. §§ 634F-1 to 634F-4 (LexisNexis 2012) (enacted in 2002); 735 ILL. COMP. STAT. ANN. 110/1–110/99 (LexisNexis 2009) (effective Aug. 28, 2007); IND. CODE ANN. §§ 34-7-7-1 to 34-7-7-10 (LexisNexis 2008) (enacted in 1998); LA. CODE CIV. PROC. ANN. art. 971 (2005), *amended by* Special Motion to Strike, 2012 La. Sess. Law Serv. Act 449 (West Supp. 2013) (originally enacted in 1999); ME. REV. STAT. ANN. tit. 14, § 556 (Supp. 2012) (enacted in 1995 and revised in August of 2012 after the constitutional validity of the prior version was challenged); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis 2013) (enacted in 2004 and amended in 2010); MASS. ANN. LAWS ch. 231, § 59H (LexisNexis 2009) (enacted in 1994 and amended in 1996); MINN. STAT. ANN. §§ 554.01–.05 (West 2010) (enacted in 1994); MO. ANN. STAT. § 537.528 (West Supp. 2013) (enacted in 2004 and amended in 2012); NEB. REV. STAT. §§ 25-21,241 to 25-21,246 (2008) (effective Apr. 12, 1994); NEV. REV. STAT. §§ 41.635–.670 (2009) (enacted in 1997); N.M. STAT. ANN. §§ 38-2-9.1 to 38-2-9.2 (LexisNexis 2004) (approved on Apr. 3, 2001); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (Consol. 2001) (effective Jan. 1, 1993); N.Y. C.P.L.R. 3211(g) (Consol. 2010) (effective Jan. 1, 2006); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2010) (effective Apr. 7, 1981); OR. REV. STAT. §§ 31.150–.155 (2011) (effective Jan. 1, 2010); 27 PA. CONS. STAT. ANN. §§ 7707, 8301–05 (West 2009) (effective Feb. 18, 2001); R.I. GEN. LAWS §§ 9-33-1 to 9-33-4 (2012) (approved on July 27, 1993); TENN. CODE ANN. §§ 4-21-1001 to -1004 (2011) (effective June 6, 1997); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West Supp. 2013) (effective June 17, 2011); UTAH CODE ANN. §§ 78B-6-1401 to 6-1405 (LexisNexis 2012) (effective Feb. 7, 2008); VT. STAT. ANN. tit. 12, § 1041 (2012) (approved on May 6, 2006); WASH. REV. CODE ANN. § 4.24.525 (LexisNexis 2011) (effective June 10, 2010).

49. *See* D.C. CODE §§ 16-5501 to 16-5505 (LexisNexis Supp. 2013), *amended by* Technical Amendments Act of 2012, D.C. Laws 19-171 (Act 19-376), 59 D.C. Reg. 6185, 6190–6262 (June 1, 2012) (originally effective Mar. 31, 2011).

50. *See* 7 GUAM CODE ANN. §§ 17101–17109 (2011) (effective Dec. 3, 1998).

expenses become astronomical.[51] Since 1993, California's law has been the model for broad anti-SLAPP legislation.[52] Meanwhile, Texas is a newcomer, enacting its Texas Citizen Participation Act (TCPA) nearly twenty years later during a recent resurgence of strong anti-SLAPP sentiment.[53]

B. *Passing an Anti-SLAPP Law in Texas*

It took more than two years of concerted effort to garner support for an anti-SLAPP statute in Texas.[54] During that time, tremendous backing of

51. *See* Kristen Rasmussen, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists*, REPS. COMM. FOR FREEDOM PRESS *passim* (Summer 2011), http://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf (reviewing all of the state anti-SLAPP statutes). Other states rely on other means for anti-SLAPP protection. *See* John C. Evans Project, Inc. v. Valley Nat'l Bancorp, No. L-4883-07, 2012 WL 1581148, at *6 (N.J. Super. Ct. App. Div. May 8, 2012) (per curiam) (internal citations omitted) ("The New Jersey Legislature has not enacted anti-SLAPP legislation. Our courts consider SLAPP-type litigation under the tort action of malicious use of process."); *see also* Kristen Rasmussen, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists*, REPS. COMM. FOR FREEDOM PRESS 1, 2 (Summer 2011), http://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf ("Moreover, courts in Colorado, Connecticut[,] and West Virginia, which do not have anti-SLAPP statutes, have addressed the problem in several decisions and extended protections somewhat similar to those under some anti-SLAPP statutes.").

52. Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1.

53. *See* TEX. CIV. PRAC. & REM. §§ 27.001–.011 (West Supp. 2013) (containing anti-SLAPP protections that have been effective for only a few years).

54. *See* Laura Lee Prather, *A Primer on the Texas Anti-SLAPP Statute*, SLAPP'ED IN TEX., http://slappedintexas.com/primer/ (last visited Nov. 10, 2013) (naming various supporters of the proposed legislation). Austin attorney Laura Lee Prather helped spearhead the effort to pass an anti-SLAPP statute in Texas. *See* Editorial, *Anti-SLAPP: Texas Citizen Participation Act Protects Speech from Frivolous Suits*, LONGVIEW NEWS-JOURNAL (June 24, 2011 4:00 AM), http://www.news-journal.com/opinion/editorials/article_d5312140-86c5-53b7-8184-e0fa0bbbd576.html (naming Prather as the leader of a coalition supporting the TCPA). Prather stated, "The irony of encroaching on a democratic exchange of ideas at a time when the ease to publish is at an all-time high . . . is what motivated us to try to get an anti-SLAPP statute passed in one of the most conservative states in the nation—Texas." Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1. Much of the support for the Texas Citizen Participation Act stemmed from journalism or media entities and affiliations. *See* Laura Lee Prather, *A Primer on the Texas Anti-SLAPP Statute*, SLAPP'ED IN TEX., http://slappedintexas.com/primer/ (last visited Nov. 10, 2013) (mentioning the abundant media support for the TCPA). Journalists have much at stake regarding whether anti-SLAPP laws are in place to protect their work. *See* Kristen Rasmussen, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists*, REPS. COMM. FOR FREEDOM PRESS (Summer 2011), http://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf (comparing anti-SLAPP laws among the states as a guide for journalists). However, the TCPA is not limited to SLAPP suits involving media defendants. *See* Editorial, *Anti-SLAPP: Texas Citizen Participation Act Protects Speech from Frivolous Suits*, LONGVIEW NEWS-JOURNAL (June 24, 2011, 4:00 AM), http://www.news-journal.com/opinion/editorials/article_d5312140-86c5-53b7-8184-e0fa0bbbd576.html ("The new law is a victory for the

the TCPA developed,[55] and ultimately, the legislation quickly passed both the Texas House and Senate with unanimous votes.[56] Governor Rick Perry signed the bill into law on June 17, 2011,[57] and it went into effect immediately because of sweeping approval from both chambers.[58]

The bipartisan backing of the TCPA could be attributed to the framing of the legislation as necessary to protect "citizens who are participating in the free exchange of ideas" and to curtail "abuses of the legal system."[59] However, critics of the TCPA argue that "[t]here was no data suggesting that there was any widespread abuse of suits involving speech issues, nor was there any indication that the bill was intended to correct any specific case."[60] Nonetheless, the TCPA acquired overwhelming support.[61]

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media, no doubt, but it will benefit any Texan who otherwise would be vulnerable to lawsuits that could cost them a great deal of time and money to defend, no matter how baseless the suits might be.").

55. *See* H.B. 2973, 82d Leg., R.S. (Tex. 2011) ("An act relating to encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights."). Representative Todd Hunter authored the bill in the house while Senator Rodney Ellis sponsored the bill in the senate. *See* History of Tex. H.B. 2973, 82d Leg., R.S. (2011), TEX. LEG. ONLINE, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB2973 (last visited Nov. 10, 2013) (providing information regarding H.B. 2973).

56. *See* S. J. of Tex., 82d Leg., R.S. 2532 (2011) (documenting the Texas Senate's accelerated and unanimous passage of Committee Substitute House Bill 2973, now known as the Texas Citizen Participation Act); *see also* Marilyn Tennissen, *Texas Senate Passes Citizen Participation Act to Eliminate SLAPP Suits*, SE. TEX. REC. (May 24, 2011, 10:00 AM), http://setexasrecord.com/news/235712-texas-senate-passes-citizen-participation-act-to-eliminate-slapp-suits (reporting the unanimous passage of the TCPA); *cf.* Press Release, Sen. Rodney Ellis, Senate Passes Texas Citizen Participation Act: HB 2973 Protects Texans from Lawsuits Designed to Stifle Free Speech (May 18, 2011), *available at* http://www.senate.state.tx.us/75r/senate/members/dist13/pr11/p051811b.htm (alerting the press to the Texas Senate's unanimous vote approving the TCPA and the Texas House's previous 142-0 vote approving the legislation).

57. *See* History of Tex. H.B. 2973, 82d Leg., R.S. (2011), TEX. LEG. ONLINE, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB2973 (last visited Nov. 10, 2013) (noting that the Governor signed the TCPA on June 17, 2011).

58. *See* Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, 378 S.W.3d 519, 524 (Tex. App.—Fort Worth 2012, pet. denied) (explaining that the TCPA applies to cases "filed on or after June 17, 2011"); *see also* Laura Lee Prather, *A Primer on the Texas Anti-SLAPP Statute*, SLAPP'ED IN TEX., http://slappedintexas.com/primer/ (last visited Nov. 10, 2013) (asserting that the TCPA became immediately effective with the governor's signature because both legislative chambers passed it with "more than a two-thirds majority").

59. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S., at 1 (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/analysis/pdf/HB02973H.pdf#navpanes=0 ("Citizen participation is the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, the involvement of citizens in the exchange of ideas benefits our society.").

60. *See* Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Presentation at the 4th Annual Business Torts Institute, at 4–7 (Sept. 20–21, 2012), *available*

C. *The Movement Continues—Proposed Federal Legislation*

There is much disparity among the states regarding anti-SLAPP protection.[62] The laws vary from state to state,[63] many states have not passed any anti-SLAPP legislation,[64] and "there is currently no protection at the federal level."[65] The present incongruity creates an auspicious environment for forum shopping.[66] Therefore, the anti-SLAPP movement has migrated to the federal frontier.[67] Most recently, United

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at http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/ (arguing that the TCPA was actually passed to protect large media entities and "could be used to intimidate legitimate plaintiffs").

61. *See* S.J. of Tex., 82d Leg., R.S. 2532 (2011) (documenting the Texas Senate's accelerated and unanimous passage of Committee Substitute House Bill 2973); *see also* Marilyn Tennissen, *Texas Senate Passes Citizen Participation Act to Eliminate SLAPP Suits*, SE. TEX. REC. (May 24, 2011, 10:00 AM), http://setexasrecord.com/news/235712-texas-senate-passes-citizen-participation-act-to-eliminate-slapp-suits (reporting the TCPA's unanimous passage); *cf.* Press Release, Sen. Rodney Ellis, Senate Passes Texas Citizen Participation Act: HB 2973 Protects Texans from Lawsuits Designed to Stifle Free Speech (May 18, 2011), *available at* http://www.senate.state.tx.us/75r/senate/members/dist13/pr11/p051811b.htm (alerting the press to the Texas Senate's unanimous vote to approve the TCPA).

62. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited Nov. 10, 2013) (providing an interactive United States map and information showing the differences between the states regarding anti-SLAPP laws). Proponents of anti-SLAPP legislation are advocating for the same protections to be available in every state. *See* Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1 ("We believe . . . every state in the Union can and should have an anti-SLAPP law.").

63. *Compare* CAL. CIV. PROC. CODE §§ 425.16–.18 (Deering Supp. 2013) (including language for broad applicability and a provision allowing for a "SLAPPback," i.e., a special "cause of action for malicious prosecution" that is available for SLAPP defendants), *and* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West Supp. 2013) (covering any "legal action [that] 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"), *with* 27 PA. CONS. STAT. ANN. §§ 7707, 8301–05 (West 2012) (applying only to people seeking government enforcement of environmental laws and regulations).

64. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited Nov. 10, 2013) (showing that twenty-two states have not passed anti-SLAPP legislation).

65. Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1.

66. *See* Emily Miller, *Anti-SLAPP Laws on Trial*, NEWS MEDIA & L. (Summer 2012), http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2012/anti-slapp-laws-trial (describing "tremendous differences" between states regarding anti-SLAPP protections and the consequent capability "to circumvent anti-SLAPP laws by choosing different jurisdictions").

67. Though no federal anti-SLAPP statute currently exists, a defendant may have success using the TCPA as one basis of a motion to dismiss a federal claim. *See* Order at 1, Monaco Entm't Grp., LLC v. City of El Paso, No. 3:11-CV-00561-DB (W.D. Tex. Apr. 3, 2012), ECF No. 46 ("Having considered the [p]arties' arguments, the [c]ourt finds that Plaintiffs' claims are frivolous, without merit, and made only to stifle opposition and to quiet the neighborhood."); *see also El Paso Federal*

States Senator Jon Kyl introduced a federal anti-SLAPP bill—the Free Press Act of 2012.[68] The bill was referred to the Committee on the

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Court Dismisses SLAPP Suit, SLAPP'ED IN TEX. (Apr. 5, 2012), http://slappedintexas.com/2012/04/05/el-paso-federal-court-dismisses-slapp-suit/ ("This precedent will pave the way for others sued in federal court to be able to get early dismissals under the anti-SLAPP statute."). A defendant neighborhood association in El Paso, Texas used the TCPA language to help substantiate its motion to dismiss defamation and tortious interference claims for lack of subject matter jurisdiction. *See* Defendant Cielo Vista Neighborhood Association's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 3, 4, 6–7, Monaco Entm't Grp., LLC v. City of El Paso, No. 3:11-CV-00561-DB (W.D. Tex. Mar. 15, 2012), ECF No. 41 (arguing that "the claim raises a novel or complex issue of state law" because the TCPA "is less than a year old" and lacks state appellate interpretation). A federal judge granted the motion, but did not include the TCPA as part of his reasoning. *See* Memorandum Opinion & Order at 5–7, Monaco Entm't Grp., LLC v. City of El Paso, No. 3:11-CV-00561-DB (W.D. Tex. Aug. 29, 2012), ECF No. 65 (finding that the court could not exercise supplemental jurisdiction over the state law claims). Another federal judge also left the issue untouched, granting a motion to dismiss on other grounds. *See* Order Adopting Report & Recommendation of U.S. Magistrate Judge at 1, Ward v. Rhode, No. 6:11-CV-531 (E.D. Tex. Sept. 27, 2012), 2012 WL 4483886 (dismissing the complaint "for lack of personal jurisdiction"); Report & Recommendation of U.S. Magistrate Judge at 3, 7, Ward v. Rhode, No. 6:11-CV-531 (E.D. Tex. Sept. 7, 2012), 2012 WL 4499307 (noting that the defendants filed a special TCPA motion to dismiss and that the plaintiffs failed to file a response, but not including the special motion in its recommendation). As a whole, federal courts are divided on whether to apply state anti-SLAPP laws to federal cases, depending on how the particular statute fares through an *Erie* analysis. *Compare* Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164, 168–69 (5th Cir. 2009) ("Louisiana law, including the nominally-procedural Article 971 [i.e., Louisiana's anti-SLAPP law], governs this diversity case."), *with* Sherrod v. Breitbart, 843 F. Supp. 2d 83, 85 (D.D.C. 2012) (citing Erie v. Tompkins, 304 U.S. 64 (1938)) ("The *Erie* doctrine requires federal courts sitting in diversity to apply state substantive law and federal procedural law, thus barring the application of the D.C. Anti-SLAPP Act in this [c]ourt."); *see also El Paso Federal Court Dismisses SLAPP Suit*, SLAPP'ED IN TEX. (Apr. 5, 2012), http://slappedintexas.com/2012/04/05/el-paso-federal-court-dismisses-slapp-suit/ ("Several jurisdictions, including California, have applied state anti-SLAPP laws to state claims brought in federal court[,] but not all jurisdictions have followed suit."). However, the United States Court of Appeals for the Fifth Circuit has upheld applying Louisiana's anti-SLAPP statute in federal court, even reversing an order that denied an anti-SLAPP motion to dismiss. *See Henry*, 566 F.3d at 168 (dismissing the claim and remanding the case for a calculation of the fees and costs to which the defendant-appellant was entitled). Fifth Circuit Judge Edward Prado wrote:

> The resulting interplay of defamation law and the First Amendment has substantially lessened the chilling effect of abusive tort claims for conduct stemming form the exercise of First Amendment rights. While these efforts have shielded individuals from the chill of liability, they have often failed to protect speakers from the similarly-chilling cost and burden of defending such tort claims. Concerned over the growth of meritless lawsuits that have the purpose or effect of chilling the exercise of First Amendment rights, a number of state legislatures have created a novel method for better striking the balance between interests in individual reputation and freedom of speech.

Id. at 167–68. Thus, it appears that the judicial climate in the Fifth Circuit could be favorable for the application of the TCPA in federal diversity cases. *See id.* at 168–69 (applying a state anti-SLAPP statute to a case filed in federal court).

68. Free Press Act of 2012, S. 3493, 112th Cong. (2012), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s3493is/pdf/BILLS-112s3493is.pdf.

Judiciary, but no further action was taken,[69] and Kyl retired a few months later.[70] In any event, reaction to its particular provisions was mixed.[71] However, given the current anti-SLAPP climate, some sort of federal protection could be on the horizon.[72]

IV. THE TEXAS CITIZEN PARTICIPATION ACT

Meanwhile, how the TCPA will be interpreted and applied is beginning to play out in the state court system.[73] The TCPA formulates a somewhat mechanical dismissal analysis, but to truly effectuate its purpose, a principal consideration should be the goal of the statute:

> 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.[74]

Section 27.002 of the TCPA attempts to strike a balance—encouraging and safeguarding the right of free speech while providing an avenue for recovery for those who file meritorious lawsuits.[75] Therefore, its

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69. *See* Bill Summary & Status of S.3493, LIBR. CONG. THOMAS, http://thomas.loc.gov/home/thomas.php (under "Search Bill Summary & Status," select "Try the Advanced Search," select Congress "112," and search "Free Press Act") (furnishing status information about the Free Press Act of 2012).

70. *See* Catherine Ho, *Former Sen. Jon Kyl Joins Lobby Shop at Covington*, WASH. POST (Mar. 6, 2013, 12:01 AM), http://www.washingtonpost.com/blogs/capital-business/post/former-sen-jon-kyl-joins-lobby-shop-at-covington/2013/03/05/36df6a94-85e5-11e2-9d71-f0feafdd1394_blog.html (noting former United States Senator Jon Kyl retired in January 2013).

71. *Compare* Evan Mascagni, *American Bar Association Supports Federal Anti-SLAPP Legislation*, PUB. PARTICIPATION PROJECT (Aug. 27, 2012), http://www.anti-slapp.org/recent/american-bar-association-supports-federal-anti-slapp-legislation/ (reporting that the American Bar Association adopted a resolution to encourage Congress to enact anti-SLAPP legislation), *with* Eric Goldman, *We Need Federal Anti-SLAPP Legislation, But Sen. Kyl's "Free Press Act of 2012" Isn't the Answer (Yet)*, FORBES (Sept. 24, 2012, 11:52 AM), http://www.forbes.com/sites/ericgoldman/2012/09/24/we-need-federal-anti-slapp-legislation-but-sen-kyls-free-press-act-of-2012"-isnt-the-answer-yet/ (expressing disappointment with the Free Press Act of 2012 because it would protect only media defendants).

72. *See* Charles D. Tobin, *Help Restore Balance to Free Expression Litigation with AntiSLAPP Statutes*, 29 COMM. LAW. 2, 2–3 (2012) (urging support for a federal anti-SLAPP law).

73. *See* Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, 378 S.W.3d 519, 521, 523–29 (Tex. App.—Fort Worth 2012, pet. denied) (interpreting the appeals section of the TCPA); *see also* Lipsky v. Range Prod. Co., No. 02-12-00098-CV, 2012 WL 3600014, at *2 (Tex. App.—Fort Worth Aug. 23, 2012, pet. denied) (mem. op.) (reiterating that section 27.008 does not allow for an interlocutory appeal of an expressly denied motion to dismiss).

74. TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West Supp. 2013).

75. *See id.* (stating the purpose of the TCPA); *see also* Defendants' Brief in Support of Motion to Dismiss Pursuant to Chapter 27 of the Texas Civil Practice & Remedies Code, Subject to Plea to the Jurisdiction at 1–2, Flores v. Hous. Cmty. Coll., No. 2011-49084 (61st Dist. Ct., Harris County, Tex.

application should not equate to an automatic dismissal of any claim filed that "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."[76] Nor should trial courts blindly deny TCPA motions.[77] Instead, the provisions of chapter 27 "shall be construed liberally to effectuate its purpose and intent fully," i.e., to achieve an equitable balance of rights.[78]

A. *How the Texas Citizen Participation Act Works*

The TCPA is essentially a dismissal mechanism[79] with five crucial components: (1) early review in accordance with set timetables;[80] (2) the suspension of discovery;[81] (3) a two-step burden shift;[82] (4) the recovery of attorney's fees and imposition of sanctions;[83] and (5) an expedited appeal.[84]

1. Early Review

The first major construct of the TCPA is the early review of the motion to dismiss in line with a "60-60-30" timetable.[85] A defendant has sixty

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Dec. 15, 2011), 2011 WL 8609466 (stressing that the TCPA aims "to protect public participation in discussions about matters of public concern, and remedy the nationally recognized problem of abusive lawsuits that attempt to suppress speech on public issues by providing substantive rights and procedural mechanisms to dispense with meritless litigation, expeditiously and economically").

76. *See* CIV. PRAC. & REM. § 27.002 (emphasizing a balance of rights); *id.* § 27.003(a) (stating the threshold requirement to file a TCPA motion to dismiss).

77. *See id.* § 27.005(c) ("The 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.").

78. *See id.* § 27.011(b) (calling for a liberal interpretation of the TCPA in order to serve its purpose).

79. *See id.* § 27.003 (implementing an opportunity for early dismissal of a claim).

80. *See id.* § 27.003(b) (requiring a TCPA motion to dismiss to be "filed not later than the 60th day after the date of service of the legal action"); *id.* § 27.004 (mandating that a hearing on the TCPA motion "be set not later than the 30th day after the date of service of the motion"); *id.* § 27.005(a) (compelling a ruling on the TCPA motion "not later than the 30th day following the date of the hearing").

81. *See id.* § 27.003(c) (requiring a suspension of all discovery until the court rules on the motion); *id.* § 27.006(b) (allowing an exception to the discovery suspension for good cause).

82. *See id.* § 27.005(b) (asserting the first step, which encompasses the moving party's burden); *id.* § 27.005(c) (delineating the second step in which the burden shifts to "the party bringing the legal action").

83. *See id.* § 27.009 (asserting that the court must award "court costs, reasonable attorney's fees, and other expenses incurred" to the moving party and impose "sanctions against the party who brought the legal action" if the court grants the motion to dismiss).

84. TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(b) (West Supp. 2013) ("An appellate court shall expedite an appeal or other writ, whether interlocutory or not . . . .").

85. *See id.* § 27.003(b) (allowing sixty days to file a TCPA motion to dismiss); *id.* § 27.004,

days to file a motion to dismiss pursuant to the TCPA.[86] Originally, a hearing on the motion to dismiss had to be set within thirty days "of service of the motion."[87] The Texas Legislature later expanded the hearing deadline from thirty to sixty days[88] and provided additional leeway for four situations: (1) the court's docket requires a later hearing; (2) there is a showing of good cause; (3) the parties reach an agreement; or (4) the court allows discovery relevant to the TCPA motion.[89] However, that leeway to set a hearing is limited to a maximum of ninety days for the first three conditions or a maximum of 120 days when discovery is permitted.[90] The final time requirement directs the trial court to rule on the motion within thirty days of the hearing.[91] Thus, a SLAPP suit can potentially be disposed of within five to seven months of service of the claim.[92] In one of the first cases to be dismissed pursuant to the TCPA, the plaintiff filed suit three weeks after the original anti-SLAPP statute was enacted.[93] The trial court dismissed the case in its entirety less than three months later.[94]

Prior to the TCPA, SLAPP defendants were forced to endure a lengthy and pricey discovery process before filing no-evidence and traditional

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amended by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 1, 2013 Tex. Gen. Laws 2501, 2501 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.004 (West Supp. 2013)) (requiring a hearing within sixty days of the motion); *id.* § 27.005(a) (calling for a ruling within thirty days of the hearing). The TCPA expressly authorizes extensions regarding: (1) the deadline to file the motion to dismiss; and (2) the deadline for the hearing on the motion. *See id.* § 27.003(b) ("The court may extend the time to file a motion under this section on a showing of good cause."); *id.* § 27.004 (authorizing a later hearing if "the docket conditions of the court require a later hearing"); *see also* Avila v. Larrea, 394 S.W.3d 646, 653–56 (Tex. App.—Dallas 2012, pet. denied) (expressing that the TCPA does not allow time extensions to rule on the motion or for discovery).

86. *See* CIV. PRAC. & REM. § 27.003(b) ("A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action.").

87. *See id.* § 27.004 (West Supp. 2011) (containing an exception if "docket conditions of the court require a later hearing.").

88. *See* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 1, 2013 Tex. Gen. Laws 2501, 2501 (showing revisions to section 27.004(a) of the Texas Civil Practice and Remedies Code).

89. *See id.* (altering section 27.004 by adding subsections (a) and (c)).

90. *See id.* (revising sections 27.004(a), (b), and (c)).

91. CIV. PRAC. & REM. § 27.005(a) (West Supp. 2013).

92. *See id.* §§ 27.003(b), 27.004, 27.005(a) (implementing a 150-day period for TCPA motions).

93. *See* Plaintiff's Original Petition at 1, Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dall., Inc., No. 11-08382-A (14th Dist. Ct., Dallas County, Tex. July 8, 2011) (filing deceptive trade practices and business disparagement claims).

94. *See* Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dall., Inc., No. CC-11-08382-A, 2011 WL 7937903, at *1–2 (14th Dist. Ct., Dallas County, Tex. Sept. 30, 2011) (granting the defendant's TCPA motion to dismiss as to all claims filed by the plaintiff), *aff'd*, No. 05-11-01337-CV, 2013 WL 3024692 (Tex. App.—Dallas June 14, 2013, no pet.) (mem. op.).

motions for summary judgment to throw out the SLAPP suit.[95] The TCPA motion to dismiss affords SLAPP defendants a much earlier opportunity to dispose of these frivolous lawsuits without the expense of discovery.[96] Not only does this system of early review help alleviate the financial burden imposed on SLAPP defendants, it discourages SLAPP plaintiffs from filing frivolous lawsuits as it takes much of the "sting" out of their retaliatory motive.[97]

2. Suspension of Discovery

Furthermore, discovery is suspended upon the filing of a TCPA motion to dismiss.[98] The suspension continues until the court rules on the motion.[99] However, if a party moves, or the court *sua sponte* moves, "on a showing of good cause, the court may allow specified and limited

95. *See* TEX. R. CIV. P. 166a(b) (allowing parties to move for traditional summary judgment on claims); *Id.* 166a(i) ("After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial."); McClure v. Attebury, 20 S.W.3d 722, 729 (Tex. App.—Amarillo 1999, no pet.) (noting that what constitutes "adequate time for discovery for purposes of Rule 166a(i) is 'case specific.'"); *see also* Marilyn Tennissen, *Texas Senate Passes Citizen Participation Act to Eliminate SLAPP Suits*, SE. TEX. REC. (May 24, 2011, 10:00 AM), http://setexasrecord.com/news/235712-texas-senate-passes-citizen-participation-act-to-eliminate-slapp-suits ("SLAPP suits typically are tossed by motions for summary judgment which [are not] considered until well into the discovery process, meaning victims of the suit have usually racked up big legal expenses by that time.").

96. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003(b), 27.004, 27.005(a) (West Supp. 2013), *amended by* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 1, 2013 Tex. Gen. Laws 2501, 2501 (establishing a window of five months to address TCPA motions at the trial level); *see also* Jacob Sullum, *Conservative Historian's Defamation Suit Tests Texas Anti-SLAPP Law*, REASON (June 18, 2012, 6:05 AM), http://reason.com/blog/2012/06/18/conservative-historians-defamation-suit ("This process allows the victim of a 'strategic lawsuit against public participation' (SLAPP) to be rid of it within a few months, as opposed to a few years, which can make a huge difference, especially for defendants who do not have much money to pay a lawyer.").

97. *See* Charles D. Tobin, *Help Restore Balance to Free Expression Litigation with AntiSLAPP Statutes*, 29 COMM. LAW. 2, 2 (2012) ("[T]he standard litigation regime is an especially bad fit for freedom of expression."); *see also* Chad Baruch, *"If I Had a Hammer": Defending SLAPP Suits in Texas*, 3 TEX. WESLEYAN L. REV. 55, 57 (1996) ("[A] SLAPP is successful where it deters political expression, regardless of the actual legal outcome of the lawsuit. Thus, a lengthy and expensive legal *victory* by the SLAPP target is no victory at all.").

98. CIV. PRAC. & REM. § 27.003(c); *see also* Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Presentation at the 4th Annual Business Torts Institute, at 10–11 (Sept. 20–21, 2012), *available at* http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/ (recognizing that the discovery provision in the TCPA "appears to be an automatic suspension that requires no further order of the court" and suggesting that the denial of discovery may "violate the open courts provision in the Texas Constitution").

99. CIV. PRAC. & REM. § 27.003(c).

discovery relevant to the motion."[100] The "specified and limited discovery" issue has made its way to the appellate level. A TCPA movant petitioned the Eighth Court of Appeals to compel a trial judge to withdraw an order that granted discovery while its motion was pending.[101] The appellate court concluded the movant failed to show that "the trial court clearly abused its discretion" and accordingly denied its petition for writ of mandamus.[102] Thus, the trial court has discretion to allow some discovery following service of the motion, but such discovery should only be granted "on a showing of good cause," and then should be limited to matters "relevant to the motion."[103]

3. Two-Step Burden Shift

A two-step burden shift comprises the next major component of the TCPA.[104] In the first step, the moving party must establish "by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association."[105] If the movant does not meet this burden, the court cannot grant the motion, and the TCPA analysis ends at step one.[106] If the movant meets this burden, then the analysis moves to step two, in which the burden shifts to the party

100. *Id.* § 27.006(b) (establishing an exception to the stay of discovery provision of the TCPA); *see also* Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Presentation at the 4th Annual Business Torts Institute, at 10–11 (Sept. 20–21, 2012), *available at* http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/ ("[D]iscovery is likely limited to depositions, possibly with production of some record production, unless the opponent refuses to waive the response times contemplated in . . . [Texas Rules of Civil Procedure] 196.2 and 199.2(5).").

101. *See In re* Sierra Club, No. 08-12-00282-CV, 2012 WL 5949789, at *1 (Tex. App.—El Paso Nov. 28, 2012, no pet. h.) (mem. op.) (describing the request).

102. *See id.* (denying a petition for writ of mandamus and lifting a stay order).

103. *See* CIV. PRAC. & REM. § 27.006(b) (giving the trial court authority to allow some discovery on its own volition).

104. *See* Defendants' Brief in Support of Motion to Dismiss Pursuant to Chapter 27 of the Texas Civil Practice & Remedies Code, Subject to Plea to the Jurisdiction at 2, Flores v. Hous. Cnty. Coll., No. 2011-49084 (61st Dist. Ct., Harris County, Tex. Dec. 15, 2011), 2011 WL 8609466 (explaining the TCPA's two-step process).

105. *See* CIV. PRAC. & REM. § 27.005(b) (outlining the requirements to file a TCPA motion to dismiss); *see also* Defendants' Brief in Support of Motion to Dismiss Pursuant to Chapter 27 of the Texas Civil Practice & Remedies Code, Subject to Plea to the Jurisdiction at 2, Flores v. Hous. County Coll., No. 2011-49084 (61st Dist. Ct., Harris County, Tex. Dec. 15, 2011), 2011 WL 8609466 (referring to the first step described in section 27.005(b)).

106. *See* CIV. PRAC. & REM. § 27.005(b) (requiring the moving party to meet its threshold burden to grant the motion to dismiss).

filing the legal action.[107] This party is tasked with "establish[ing] by clear and specific evidence a prima facie case for each essential element of the claim in question" to prevent dismissal of the claim.[108] To rule on the motion, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."[109]

Therefore, SLAPP defendants should be prepared to prove in a TCPA motion to dismiss and attached affidavits that the lawsuit deals with their free speech rights, right to petition, or right of association[110] and then respond to the clear and specific evidence offered by the plaintiff.[111] Additionally, the SLAPP defendant should consider applicable defenses. As the legislature clarified in recent amendments to the TCPA, a court must also dismiss a claim if the TCPA movant "establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim."[112]

At the same time, plaintiffs pursuing legitimate claims should attempt to anticipate if their claims may be misconstrued as a SLAPP suit by considering whether the claims fall within the broad "based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association" language.[113] If so, plaintiffs should attempt to gather as much evidence as legally possible before filing their claims (keeping in mind the ticking statute of limitations

107. *See id.* § 27.005(c) (setting forth the filing party's subsequent burden); *see also* Defendants' Brief in Support of Motion to Dismiss Pursuant to Chapter 27 of the Texas Civil Practice & Remedies Code, Subject to Plea to the Jurisdiction at 2, Flores v. Hous. County. Coll., No. 2011-49084 (61st Dist. Ct., Harris County, Tex. Dec. 15, 2011), 2011 WL 8609466 (describing the burden shift that occurs in the second step of the TCPA).

108. *See* CIV. PRAC. & REM. § 27.005(c) (establishing the filing party's burden); *see also* Avila v. Larrea, 394 S.W.3d 646, 658 (Tex. App.—Dallas 2012, pet. denied) (citing CIV. PRAC. & REM. § 27.005(c)) ("The TCPA does not define 'clear and specific evidence.'").

109. CIV. PRAC. & REM. § 27.006(a).

110. *See id.* § 27.005(b) (describing a TCPA movant's burden).

111. *See id.* § 27.005(c) (asserting the types of claims in which the TCPA motion to dismiss is applicable).

112. Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 1, 2013 Tex. Gen. Laws 2501, 2501 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 27.005 (West Supp. 2013)).

113. *See* CIV. PRAC. & REM. §§ 27.001, 27.005(b) (defining the key terms relating to the filing party's burden to establish a prima facie case); *see also* Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Presentation at the 4th Annual Business Torts Institute, at 7–8 (Sept. 20–21, 2012), *available at* http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/ (predicting that the broad definitions within the statute may subsume even speech and expression that is "not afforded full protection under the First Amendment").

clock[114]), as they may face a TCPA motion to dismiss within a matter of days of filing suit[115] and then be forced to establish "by clear and specific evidence a prima facie case,"[116] likely without the benefit of any discovery[117] or at most four months of discovery.[118]

4. Recovery of Attorney's Fees & Imposition of Sanctions

If a court grants a TCPA motion and orders dismissal of the case, the court must award the moving party:

> (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and
>
> (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions . . . .[119]

These awards are mandatory.[120] The only discretion written into the statute involves the reasonableness of attorney's fees and the amount of sanctions that will serve as a sufficient deterrent.[121] The court costs, attorney's fees, and expenses incurred awards are intended to reimburse the SLAPP defendant for financial loss generated by the frivolous

114. *See, e.g.*, CIV. PRAC. & REM. § 16.002(a) (setting a one-year limitations period for libel claims).

115. *See, e.g.*, Plaintiff's Original Petition at 1, Wentworth v. Jones, No. 2012-CI-08201 (73d Dist. Ct., Bexar County, Tex. May 17, 2012) (asserting defamation claims); Defendant's Motion to Dismiss at 1, Wentworth v. Jones, No. 2012-CI-08201 (73d Dist. Ct., Bexar County, Tex. May 24, 2012) (responding with a TCPA motion one week after the plaintiff filed his original petition).

116. CIV. PRAC. & REM. § 27.005(c).

117. *See* Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Presentation at the 4th Annual Business Torts Institute, at 6 (Sept. 20–21, 2012), *available at* http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/ ("[The TCPA] could stifle suits brought legitimately under libel or slander laws because the plaintiff in such suits would have to overcome motions testing its pleadings.").

118. *See* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 4, 2013 Tex. Gen. Laws 2501, 2501 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 27.004 (West Supp. 2013)) (limiting the time for any discovery to 120 days prior to the hearing).

119. CIV. PRAC. & REM. § 27.009(a).

120. *See id.* (imposing a duty on the trial court to award reasonable attorney's fees, court costs, other expenses incurred, and sanctions). Additionally, "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" if the moving party so requests. *Id.* § 27.007(a).

121. *See* Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dall., Inc., No. CC-11-08382-A (14th Dist. Ct., Dallas County, Tex. Sept. 30, 2011) (finding $15,999 in attorney's fees was reasonable and necessary to defend against a SLAPP suit).

lawsuit.[122] Meanwhile, the purpose of the sanctions is clearly to discourage the plaintiff from filing more SLAPP suits in the future.[123]

With these monetary requirements incorporated into the TCPA, potential plaintiffs ought to think twice before filing a SLAPP suit. After granting a defendant's TCPA motion, one judge ordered the plaintiff to pay $15,000 in sanctions.[124] Furthermore, SLAPP plaintiffs may be forced to pay even if they drop their lawsuits before the trial court rules on a filed TCPA motion.[125] Meanwhile, defendants should thoroughly consider the potential consequences of pursuing a TCPA motion to dismiss. If the court determines that the motion "is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party."[126]

5. Expedited Appeal

The TCPA includes a section devoted to appeals.[127] However, as discussed more thoroughly below, a dispute initially arose as to whether a party is entitled to an interlocutory appeal when a judge expressly denies a TCPA motion to dismiss.[128] Nevertheless, the statute is clear that appellate courts must expedite any appeals or "[w]rit[s], whether interlocutory or not" stemming from a court order on a TCPA motion to dismiss.[129] Furthermore, such an appeal or writ must be filed within sixty

122. *See* Final Judgment Granting Defendant's Special Motion to Dismiss at 2, Rustic Cedar Cabins of Tex., Inc. v. Cortell, No. 28,500 (21st Dist. Ct., Bastrop County, Tex. Sept. 4, 2012) (ordering the plaintiff to pay $5,000 for the defendant's attorney's fees, $500 in sanctions, and all court costs).

123. *See* Susan Vance & Doug Alexander, *Punitive Damages, a Paradigm Shift: From Policing to Preventing Excessive Awards*, Presentation at the State Bar of Texas 35th Annual Advanced Civil Trial Course, at 22 (July 25–27, Aug. 22–24, Oct. 17–19, 2012) (addressing the TCPA's mandatory punitive element).

124. *See* Final Judgment at 3, Am. Heritage Capital, LP v. Gonzalez, No. DC-11-13741-C (68th Dist. Ct., Dallas County, Tex. Apr. 14, 2012) (ordering the plaintiff to pay $15,616 for the defendant's attorney's fees, setting amounts for additional attorney's fees in the event of unsuccessful future appeals, and requiring the plaintiff to pay $15,000 in sanctions to the defendant).

125. *See* Tom Williams, *Castroville Paper Awarded Attorney Fees in Anti-SLAPP Case*, TEX. PRESS MESSENGER (Aug. 17, 2012, 2:15 PM), http://texaspress.com/index.php/publications/publication-archives/2128-castroville-paper-awarded-attorney-fees-in-anti-slapp-case (reporting that a defendant was awarded $7,500 for attorney's fees even though the plaintiff voluntarily dismissed its claim after a TCPA motion was filed).

126. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(b) (West Supp. 2013).

127. *See id.* § 27.008 (addressing appeals of a court's order on a TCPA motion to dismiss).

128. *See* Petition for Review at 3, Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, No. 12-0776 (Tex. Sept. 27, 2012) (requesting an interpretation of the TCPA's appeals section).

129. *See* CIV. PRAC. & REM. § 27.008(b) (mandating accelerated appeals).

days of the court's signed order.[130] Or, if the court failed to rule on the motion within thirty days after a hearing on the matter, then an appeal or writ must be filed within sixty days of the expiration of the thirty-day ruling period.[131] Thus, the prevailing theme of quickly processing these claims continues in the appeals section of the TCPA.[132]

B. *Matters Excluded from the Texas Citizen Participation Act*

Certain legal actions may not be subjected to a TCPA motion to dismiss.[133] The statute clearly expresses that it does not apply to criminal prosecutions or other government actions.[134] Also, personal injury and wrongful death claims cannot be dismissed through the TCPA.[135] Furthermore, a TCPA motion to dismiss may not be filed in:

> [A] legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.[136]

Finally, in its recent amendments to the TCPA, the legislature added a provision specifically excluding claims "brought under the Insurance Code or arising out of an insurance contract."[137]

130. *See id.* § 27.008(c) (setting a deadline for filing an appeal).

131. *See id.* § 27.008(a) (addressing specifically the appeal deadline for motions "denied by operation of law").

132. *See* Karen S. Precella & Ryan Paulsen, *Mandamus: The Hurdles to Relief*, Presentation at the State Bar of Texas Civil Appellate Practice 101, at 33–34 (Sept. 5, 2012), *available at* http://www.haynesboone.com/files/Uploads/Documents/Attorney%20Publications/Mandamus-the-Hurdles-to-Relief.pdf (recommending that practitioners "follow the traditional expedited perfection times and consider whether, particularly with an express denial, to file a companion petition for writ of mandamus").

133. *See* CIV. PRAC. & REM. § 27.010 (granting exemptions to the TCPA).

134. *See id.* § 27.010(a) ("This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.").

135. *See id.* § 27.010(c) ("This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival[,] or to statements made regarding that legal action.").

136. Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 4, 2013 Tex. Gen. Laws 2501, 2501 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b) (West Supp. 2013)).

137. *Id.*

V. APPLICATION OF THE TEXAS CITIZEN PARTICIPATION ACT

Texas's anti-SLAPP statute "is being heralded as one of the strongest anti-SLAPP statutes in the nation."[138] Laura Lee Prather, an attorney who led the charge to push the TCPA through the Texas Legislature, called the statute a success "with no trend toward courts either granting or denying motions."[139] In researching this Comment, the author located examples of both granted and denied motions, but an exact distribution of all dismissals to all denials is unknown.[140] The following three cases demonstrate how the TCPA functions in application and showcase the primary issues raised in light of its use thus far.

A. *Jennings v. WallBuilder Presentations, Inc. ex rel. Barton*[141]

Petitioners in the first case involving the TCPA to knock on the door of the Supreme Court of Texas[142] sought an interpretation of the statute's

138. *See* Laura Lee Prather, *Anti-SLAPP Statutes Spread Across the Nation*, SEDGWICK LLP MEDIA L. BULL. (Nov. 2011), http://sedgwickmail.com/rv/ff00055aa405bdaa3782d135d24f9dd87bdf74b0/p=1 ("[P]arts of it are being considered for replication in the federal bill and other state proposals."). The TCPA is being likened to California's long-standing anti-SLAPP statute, which is "[c]ommonly recognized as the nation's strongest anti-SLAPP law." *See* Kristen Rasmussen, *SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists*, REPS. COMM. FOR FREEDOM PRESS 1, 2 (Summer 2011), http://www.rcfp.org/rcfp/orders/docs/ANTISLAPP.pdf (comparing the level of anti-SLAPP defense offered in each state).

139. *See* Morgan Smith, *Defamation Suit Puts New Law to the Test*, N.Y. TIMES (June 16, 2012), http://www.nytimes.com/2012/06/17/us/david-bartons-defamation-lawsuit-tests-new-texas-law.html?_r=0 ("This isn't supposed to be a statute intended to say you can never go forward in a case involving free speech."). *But see* Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Presentation at the 4th Annual Business Torts Institute, at 1 (Sept. 20–21, 2012), *available at* http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/ (criticizing the TCPA as "likely [to] trigger significant unintended consequences, especially for persons and entities who file suit to protect their reputation and various property interests").

140. *See, e.g.*, Lipsky v. Range Prod. Co., No. 02-12-00098-CV, 2012 WL 3600014, at *1 (Tex. App.—Fort Worth Aug. 23, 2012, pet. denied) (mem. op.) (involving a trial court's order denying a TCPA motion to dismiss); Final Judgment Granting Defendant's Special Motion to Dismiss at 2, Rustic Cedar Cabins of Tex., Inc. v. Cortell, No. 28,500 (21st Dist. Ct., Bastrop County, Tex. Sept. 4, 2012) (granting a TCPA motion to dismiss); *see also 2011: A Good Year for Texas Anti-SLAPP*, SLAPP'ED IN TEX. (Feb. 8, 2012), http://slappedintexas.com/2012/02/08/2011-a-good-year-for-texas-anti-slapp/ (providing examples of both granted and denied TCPA motions).

141. Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, 378 S.W.3d 519 (Tex. App.—Fort Worth 2012, pet. denied).

142. *See* Petition for Review at 4–5, Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, No. 12-0776 (Tex. Sept. 27, 2012) (petitioning the Texas Supreme Court to interpret section 27.008 to allow for an interlocutory appeal of expressly denied motions). In the alternative, petitioners requested that the Court consider a writ of mandamus. *See* Petition for Writ of Mandamus at 5–6, *In re* Jennings, No. 12-0775 (Tex. Sept. 27, 2012) (arguing that the lower court abused its discretion by failing to correctly apply the TCPA).

appeals provision.[143] A statute must expressly authorize an interlocutory appeal,[144] and the original wording of the TCPA proved to be problematic in terms of its clarity in this regard.[145]

The *WallBuilder* case stems from a 2010 campaign video,[146] which was produced by a political consultant on behalf of two Texas State Board of Education candidates—Judy Jennings and Rebecca Bell-Metereau.[147] The video linked Jennings and Bell-Metereau's campaign opponents to "David Barton—a conservative historian and activist,"[148] former educator,[149] and founder of WallBuilders.[150] Barton had served as an expert consultant for the Board,[151] and the campaign video stated that Barton was "known for speaking at white-supremacist rallies."[152] Consequently,

143. TEX. CIV. PRAC. & REM. CODE ANN. § 27.008 (West Supp. 2013).

144. *See* Ogletree v. Matthews, 262 S.W.3d 316, 319 n.1 (Tex. 2007) (citing Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992)) ("Texas appellate courts have jurisdiction only over final orders or judgments unless a statute permits an interlocutory appeal.").

145. *See* Petition for Review at 6, Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, No. 12-0776 (Tex. Sept. 27, 2012) ("The [l]egislature's choice of words was not ideal[,] but its intent was clear."); *see also* Morgan Smith, *Defamation Suit Puts New Law to the Test*, N.Y. TIMES (June 16, 2012), http://www.nytimes.com/2012/06/17/us/david-bartons-defamation-lawsuit-tests-new-texas-law.html?_r=0 ("'Unfortunately, the [l]egislature was "a little sloppy" in how it worded the statute,' said R. James George Jr., a lawyer representing Ms. Bell-Metereau and Ms. Jennings.").

146. *See* Petition for Review at 1, Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, No. 12-0776 (Tex. Sept. 27, 2012) (stating in the facts of the case that the YouTube video was posted in September of 2010).

147. *See* Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, 378 S.W.3d 519, 522 (Tex. App.—Fort Worth 2012, pet. denied) (describing the background of the case).

148. *See* Morgan Smith, *Defamation Suit Puts New Law to the Test*, N.Y. TIMES (June 16, 2012), http://www.nytimes.com/2012/06/17/us/david-bartons-defamation-lawsuit-tests-new-texas-law.html?_r=0 (providing a brief description of David Barton).

149. *See About Us*, WALLBUILDERS, http://www.wallbuilders.com/ABTOverview.asp (last visited Nov. 10, 2013) ("David [Barton] spent eight years as an educator and school administrator before founding WallBuilders.").

150. *See Jennings*, 378 S.W.3d at 522 (identifying David Barton as the president of WallBuilders). The WallBuilders' website states:

> WallBuilders' goal is to exert a direct and positive influence in government, education, and the family by (1) educating the nation concerning the Godly foundation of our country; (2) providing information to federal, state, and local officials as they develop public policies which reflect Biblical values; and (3) encouraging Christians to be involved in the civic arena.

About Us, WALLBUILDERS, http://www.wallbuilders.com/ABTOverview.asp (last visited Nov. 10, 2013).

151. *See* Morgan Smith, *Defamation Suit Puts New Law to the Test*, N.Y. TIMES (June 16, 2012), http://www.nytimes.com/2012/06/17/us/david-bartons-defamation-lawsuit-tests-new-texas-law.html?_r=0 (reporting David Barton's connection to the Texas State Board of Education).

152. *See Jennings*, 378 S.W.3d at 522 n.3 (stating the video's allegations and Barton's response).

Barton and his two WallBuilders entities[153] sued Jennings and Bell-Metereau for defamation, libel, and business disparagement.[154] In response, Jennings and Bell-Metereau turned to the then newly passed TCPA and quickly filed an anti-SLAPP motion to dismiss the case.[155] The trial court explicitly denied the motion.[156]

Jennings and Bell-Metereau sought an interlocutory appeal of the trial court's decision, but Barton argued that the TCPA did not allow for interlocutory appeal of an expressly denied motion to dismiss.[157] The Second Court of Appeals agreed with Barton,[158] emphasizing that "an interlocutory order is not appealable unless a statute explicitly provides for appellate jurisdiction."[159] Focusing on the plain meaning of section 27.008, the court determined that it did not create such authority.[160]

The appellate court then delineated three possible scenarios and the corresponding application of the TCPA for each one.[161] First, if a trial court grants a TCPA motion to dismiss, "the order dismissing the action may be appealable, or severable and appealable, as a final, noninterlocutory order disposing of all issues and all parties."[162] Second, if a trial court denies a TCPA motion to dismiss despite the plaintiff's failure "to provide any evidence showing a prima facie case for each element of his claim, it is possible that the moving party could seek a *writ of mandamus*."[163] Third, "if a trial court fails to timely rule on a timely-filed motion to dismiss, then the motion is denied by operation of law[,] and the party moving for dismissal may appeal."[164]

Thus, the Second Court of Appeals determined that section 27.008

153. The two entity-plaintiffs in the lawsuit were WallBuilder Presentations, Inc. and WallBuilders, LLC. *Id.* at 519.

154. *See id.* at 522 (listing the claims filed).

155. *See id.* (noting that the appellants timely filed the motion to dismiss within the sixty-day timeframe, as mandated by section 27.003).

156. *See id.* (citing section 27.005(a)) ("[T]he order was signed, as required by section 27.005, within thirty days of the date of the hearing on the motion.").

157. *See id.* ("Appellees assert that the TCPA does not grant this court jurisdiction over Appellants' interlocutory appeal.").

158. *See id.* at 521–22, 529 ("Once the trial court timely rules, even erroneously, on a chapter 27 motion to dismiss, the inquiry is over; this court possesses no interlocutory appellate jurisdiction to review the propriety of the trial court's timely ruling.").

159. *Id.* at 522.

160. *See id.* at 524–25 (analyzing the language of the statute).

161. *See* Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, 378 S.W.3d 519, 524 (Tex. App.—Fort Worth 2012, pet. denied) (outlining the types of appeals and writs available under the TCPA).

162. *Id.*

163. *Id.*

164. *Id.*

merely mandated that such appeals, original proceedings, and interlocutory appeals—each applicable only in these precise scenarios—be expedited.[165] Furthermore, the court noted that in the event that a court expressly denies a TCPA motion to dismiss, the defendant could eventually file a no-evidence summary judgment motion.[166]

Not content with the Second Court of Appeals' interpretation, Jennings and Bell-Metereau filed a petition for review with the Texas Supreme Court,[167] arguing that "[t]he legislature did not intend to create an artificial distinction between denials by signed order and denials by operation of law."[168] As for the no-evidence summary judgment alternative proffered by the appellate court, Jennings and Bell-Metereau called that option inadequate because it may only be used after a stint of discovery, and

165. *See id.* at 524, 526 ("[T]he short timetables established in the statute as well as the plain language of section 27.008(a) and (b) indicate a legislative intent to avoid at the very outset of the litigation the inevitable delay that an interlocutory appeal imposes . . . .").

166. *See id.* at 526–27 (citation omitted) ("In many instances, the trial court's denial of such a subsequent no-evidence motion for summary judgment will be subject to an interlocutory appeal.").

167. Petition for Review at 1, Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, No. 12-0776 (Tex. Sept. 27, 2012). The Texas Supreme Court received two other petitions for review that also dealt with the right to an interlocutory appeal under the TCPA. *See* Petitioner Alisa Rich's Petition for Review at 1, Lipsky v. Range Res. Corp., No. 12-0811 (Tex. Oct. 8, 2012) (requesting the Texas Supreme Court to interpret the anti-SLAPP statute to allow an interlocutory appeal of an expressly denied motion to dismiss); Petition for Review No. 2 at viii, Lipsky v. Range Res. Corp., No. 12-0811 (Tex. Oct. 8, 2012) (petitioning the Court to review the appellate court's interpretation of the TCPA). Three plaintiffs filed an interlocutory appeal with the Second Court of Appeals in an attempt to overturn a trial court's order that denied their anti-SLAPP motion to dismiss counterclaims. *See* Lipsky v. Range Prod. Co., No. 02-12-00098-CV, 2012 WL 3600014, at *1 (Tex. App.—Fort Worth Aug. 23, 2012, pet. denied) (mem. op.) (providing the procedural background of the case). Like Jennings and Bell-Metereau, the *Lipsky* plaintiffs contended that not allowing an interlocutory appeal of a trial court's express denial of a TCPA motion to dismiss would "defeat the purpose" of the statute. *See* Tom Korosec, *Range Wins Appeal in Suit Against Texas Landowners*, BUS. WK. (Aug. 25, 2012), http://www.businessweek.com/news/2012-08-24/range-wins-appeal-in-suit-against-texas-landowners (describing the legal battle over the right to an interlocutory appeal under the TCPA). Faced with the appellate court's response that it lacked jurisdiction, as decided in *Jennings*, the *Lipsky* plaintiffs filed petitions with the Texas Supreme Court eleven days after Jennings and Bell-Metereau. *See Lipsky*, 2012 WL 3600014, at *1 (citing Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, 378 S.W.3d 519 (Tex. App.—Fort Worth 2012, pet. denied)) ("We recently held that we do not possess jurisdiction over an interlocutory appeal from a trial court's timely-signed order denying a motion to dismiss under [the TCPA]."); Petitioner Alisa Rich's Petition for Review at 8, Lipsky v. Range Res. Corp., No. 12-0811 (Tex. Oct. 8, 2012) ("[P]recluding an immediate appeal of an interlocutory order denying a motion to dismiss . . . constitutes an unreasonable, unjust, and irrational construction of the Texas Legislature's intent."); Petition for Review No. 2 at ix, Lipsky v. Range Res. Corp., No. 12-0811 (Tex. Oct. 8, 2012) (presenting the issue of "[w]hether the Texas Citizens Participation Act . . . confers a right to take an interlocutory appeal not only from a failure to rule on a motion to dismiss brought under the Act[,] but also from the denial of such a motion").

168. *See* Petition for Review at 4, Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, No. 12-0776 (Tex. Sept. 27, 2012) (challenging the appellate court's interpretation of the TCPA).

"[t]he cost of discovery is exactly what the [l]egislature intended to avoid for defendants in meritless lawsuits."[169]

Though the wording of section 27.008 does not expressly authorize an interlocutory appeal of motions denied by court order, it hints at such a right in subsection (b).[170] This ambiguous effect was a byproduct of the statute's loose wording in this section rather than legislative intent.[171] The legislature intended to establish a means to dispose of SLAPP suits in an accelerated fashion to avoid the speech-chilling effect produced by time-consuming and money-draining litigation.[172] Without the ability to file an interlocutory appeal of a trial court's express denial of a TCPA motion, the new law was "effectively gutted."[173] Courts could incorrectly apply the TCPA, deny these motions in error, and leave SLAPP defendants with no means of recourse except to continue to pay their growing legal bills (throughout a costly discovery process) until the claims were thrown out

169. *See id.* at 10, 12 ("The [l]egislature's concern in passing this anti-SLAPP law was *not* that a defendant could not ultimately prevail against a meritless claim. Instead, the Act was intended to allow for the dismissal of such cases earlier than would otherwise be possible, 'thus limiting the costs and fees.'").

170. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(b) (West Supp. 2013) ("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 . . . .").

171. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S., at 1 (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/analysis/pdf/HB02973H.pdf#navpanes=0 (aiming to dispense with frivolous lawsuits quickly to stop the retaliatory effect of SLAPP suits); *see also* Matthew Ploeger & Travis Wimberly, *Appellate Jurisdictional Issues*, Presentation at the State Bar of Texas Civil Appellate Practice 101 Course, at 10 (Sept. 5, 2012), *available at* http://www.texasbarcle.com/Materials/Events/11378/150093.pdf (acknowledging that "the anti-SLAPP statute clearly contemplates an interlocutory appeal if the court denies the motion to dismiss").

172. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S., at 1 (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/analysis/pdf/HB02973H.pdf#navpanes=0 (providing the background and purpose of the TCPA). *But cf.* Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Presentation at the 4th Annual Business Torts Institute, at 22 (Sept. 20–21, 2012), *available at* http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/ (stating that the Second Court of Appeals correctly determined "that the [l]egislature did not use any language creating a right of interlocutory appeal in the event that an order was signed" as it has for other statutes that create interlocutory appeals).

173. *See* Petition for Review at 5, Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, No. 12-0776 (Tex. Sept. 27, 2012) (arguing that the TCPA will be largely ineffective without a right to an interlocutory appeal of a trial court's order denying a motion to dismiss); *see also* Steven D. Urban, *Defamation Case to Require Interpretation of Texas Citizens Participation Act*, L. OFFICES STEVEN D. URBAN (June 19, 2012), http://www.urbanlawoffices.com/defamation-case-to-require-interpretation-of-texas-citizens-participation-act ("It would seem absurd to have a right to an interlocutory appeal when a trial court denies a motion through inaction, but not have that right when the trial court exercises its jurisdiction and expressly denies the same motion.").

on summary judgment.[174] Beyond those immediate concerns, the TCPA would have become largely meaningless as far as encouraging and safeguarding the right to free speech because the fears of a long, costly legal battle would persist.[175] Thus, whether through an interpretation by the Texas Supreme Court or a legislative amendment,[176] interlocutory appeal of expressly denied motions was greatly needed.

Fortunately, while the Texas Supreme Court considered whether to grant Jennings and Bell-Metereau's petition for review, the Texas Legislature passed a housekeeping bill to expressly provide for the interlocutory appeal of denied TCPA motions.[177] Rather than modify the appeals section of the TCPA, the legislature added a provision to section 51.014 of the Texas Civil Practice and Remedies Code—the statute that expressly authorizes interlocutory appeals.[178] This amendment essentially rejects the limited interpretation of the TCPA by the Second Court of Appeals in *WallBuilder* and bolsters Texas's anti-SLAPP law, thereby helping fulfill its purpose.[179]

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174. *See* TEX. R. CIV. P. 166a(i) (requiring no-evidence summary judgment motions to be filed after "an adequate time for discovery"); Jennings v. WallBuilder Presentations, Inc. *ex rel.* Barton, 378 S.W.3d 519, 526–27 (Tex. App.—Fort Worth 2012, pet. denied) (interpreting the TCPA to not allow interlocutory appeals of an expressly denied motion to dismiss and offering no-evidence summary judgment motions as an alternative); *see also* Marilyn Tennissen, *Texas Senate Passes Citizen Participation Act to Eliminate SLAPP Suits*, SE. TEX. REC. (May 24, 2011, 10:00 AM), http://setexasrecord.com/news/235712-texas-senate-passes-citizen-participation-act-to-eliminate-slapp-suits (stating that prior to the passage of the TCPA, SLAPP suits were not dismissed until after discovery, which generated huge legal expenses).

175. *See* Morgan Smith, *Defamation Suit Puts New Law to the Test*, N.Y. TIMES (June 16, 2012), http://www.nytimes.com/2012/06/17/us/david-bartons-defamation-lawsuit-tests-new-texas-law.html?_r=0 (quoting attorney and TCPA advocate Laura Lee Prather as stating that without the right to appeal express denials under the anti-SLAPP statute, "the constitutional concerns would be 'grave'").

176. *See* Matthew Ploeger & Travis Wimberly, *Appellate Jurisdictional Issues*, Presentation at the State Bar of Texas Civil Appellate Practice 101 Course, at 11 (Sept. 5, 2012), *available at* http://www.texasbarcle.com/Materials/Events/11378/150093.pdf (recognizing the confusion over the TCPA's interlocutory appeal issue and suggesting a legislative amendment).

177. *See* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 1, 2013 Tex. Gen. Laws 2501–502 (codified at TEX. CIV. PRAC. & REM CODE ANN. § 51.014 (West Supp. 2013)) (adding TCPA actions to the list of those eligible for interlocutory appeal).

178. *Id.*

179. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.002, 27.011(b) (West Supp. 2013) (indicating that the TCPA should be interpreted "liberally" to fully "encourage and safeguard" the right of free speech and protect the right "to file meritorious lawsuits for demonstrable injury"); *see also* Laura Lee Prather, *Anti-SLAPP Update: Texas' Citizen Participation Act Gets Stronger*, FREEDOM INFO. FOUND. OF TEX. (June 21, 2013), http://www.foift.org/transparency/3259-2/ (describing how recent amendments to the TCPA in H.B. 2935 strengthened the anti-SLAPP law); Jeremy Heallen, *Defamation Suits Face High Bar in Texas Anti-SLAPP Law*, LAW360 (July 24, 2013, 10:16 PM), http://www.law360.com/articles/456593/defamation-suits-face-high-bar-in-texas-anti-slapp-law

B. *Jones v. Wentworth*[180]

The Texas Citizen Participation Act was thrown into the middle of a heated political battle in one of the first high-profile cases involving the new statute. With less than two weeks to the 2012 Republican primary, incumbent state Senator Jeff Wentworth filed suit against one of his challengers, Elizabeth Ames Jones, "for defamation of character and reputation."[181] Wentworth claimed that Jones falsely accused him of "double-dipping" in a radio advertisement.[182]

On the following day, Jones filed her Original Answer,[183] in which she denied all of Wentworth's allegations, asserted that the statements in the advertisement were true, and claimed that Wentworth filed the "lawsuit to grab political attention."[184] Within a week, Jones filed a motion to dismiss under the TCPA, claiming that Wentworth had filed a SLAPP suit against her despite his favorable vote for the anti-SLAPP statute.[185] However, the court denied the motion roughly two weeks later.[186] Jones then filed an interlocutory appeal with the Fourth Court of Appeals.[187] But two days before the case was set for oral argument,[188] the parties filed

(explaining how the TCPA, including its 2013 amendments, presents a high hurdle to clear for defamation suits).

180. Jones v. Wentworth, No. 04-12-00387-CV, 2012 WL 6041661 (Tex. App.—San Antonio Dec. 5, 2012, no pet.) (mem. op.).

181. *See* Plaintiff's Original Petition at 1, 3, Wentworth v. Jones, No. 2012-CI-08201 (73d Dist. Ct., Bexar County, Tex. May 17, 2012) (accusing Jones of making slanderous and libelous statements in a campaign advertisement); *see also* Reeve Hamilton, *Updated: Wentworth Files Defamation Suit, Jones Responds*, TEX. TRIB. (May 18, 2012, 5:30 PM), http://www.texastribune.org/2012/05/18/wentworth-files-defamation-suit-against-jones/ ("Wentworth has released ads depicting Jones as a puppet of Texans for Lawsuit Reform and filed ethics complaints against Jones and her husband. Jones has responded with harsh ads of her own, including accusations of 'ethical lapses.'").

182. *See* Plaintiff's Original Petition at 4, Wentworth v. Jones, No. 2012-CI-08201 (73d Dist. Ct., Bexar County, Tex. May 17, 2012) ("The clear implication is that [Wentworth] is committing a crime[,] i.e., theft from the State of Texas[,] by taking funds that lawfully must be reimbursed to the Senator's campaign account and instead keeping the funds for his personal use.").

183. Defendant's Original Answer, Wentworth v. Jones, No. 2012-CI-08201 (73d Dist. Ct., Bexar County, Tex. May 18, 2012).

184. *See id.* at 1–2, 4 (responding to the allegations).

185. *See* Defendant's Motion to Dismiss at 1, 5, Wentworth v. Jones, No. 2012-CI-08201 (73d Dist. Ct., Bexar County, Tex. May 24, 2012) (arguing that Wentworth was "using the civil justice system strategically to try to extend his political career").

186. *See* Reeve Hamilton, *Wentworth Lawsuit May Proceed, Judge Rules*, TEX. TRIB. (June 7, 2012), http://www.texastribune.org/texas-politics/2012-legislative-election/wentworth-lawsuit-may-proceed-judge-rules/ (reporting the denial of Jones's anti-SLAPP motion).

187. Jones v. Wentworth Case Records, FOURTH CT. APP., http://www.search.txcourts.gov/Case.aspx?cn=04-12-00387-CV (last visited Nov. 10, 2013) (providing records of case events including the date of when the case began in the Fourth Court of Appeals).

188. *See* Letter Issued by the Court, Jones v. Wentworth, No. 04-12-00387-CV (Tex. App.—

a joint motion to dismiss the appeal,[189] "stating that they have entered into a mutual agreement to dismiss the claims filed in the trial court."[190]

The *Wentworth* case demonstrates: (1) how quickly the TCPA motion process can transpire;[191] and (2) that the anti-SLAPP statute does not necessarily prevent futile lawsuits from being filed and played out in the media.[192] Whether Wentworth's claim was a SLAPP suit, political posturing, or a legitimate defamation claim, the TCPA could not block it from being filed and generating negative publicity.[193] However, this important limitation serves the second part of the TCPA's twofold purpose—allowing a means for recovery for demonstrable injury.[194] Furthermore, *Wentworth* showcases the swift nature of the TCPA.[195] The time from the filing of the lawsuit to the trial court's decision on the motion to dismiss spanned a mere three weeks.[196]

San Antonio Nov. 7, 2012), *available at* http://www.search.txcourts.gov/Case.aspx?cn=04-12-00387-CV (notifying the parties that oral argument was scheduled for November 29, 2012).

189. *See* Jones v. Wentworth Case Records, FOURTH CT. APP., http://www.search.txcourts.gov/Case.aspx?cn=04-12-00387-CV (last visited Nov. 10, 2013) (providing case documentation indicating that the joint motion to dismiss was filed on Nov. 27, 2012).

190. *See* Jones v. Wentworth, No. 04-12-00387-CV, 2012 WL 6041661, at *1 (Tex. App.—San Antonio Dec. 5, 2012, no pet.) (mem. op.) (granting the joint motion and dismissing the appeal); *see also* Wentworth v. Jones Case Records, BEXAR CNTY. DIST. CLERK, https://apps.bexar.org/dklitsearch/search.aspx (select "cause number"; then enter "2012CI08201" and click "Search Now") (indicating the defamation suit that Wentworth filed against Jones has been disposed). A spokesman for Wentworth had hinted at the possibility of some sort of settlement or agreement following the trial court's decision to deny Jones's motion to dismiss, which happened to occur after Jones's defeat in the Republican primary. *See* John W. Gonzalez, *'Defamed' Candidate Can Press His Claim*, SAN ANTONIO EXPRESS-NEWS (June 7, 2012, 11:57 PM), http://www.mysanantonio.com/news/local_news/article/Senator-s-defamation-suit-can-proceed-3616726.php ("It's not our intention to go to trial if a middle ground can be reached by the parties.").

191. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003(b), 27.004, 27.005(a) (West Supp. 2013) (establishing a maximum 150-day time frame to process TCPA motions).

192. *See id.* §§ 27.001–.011 (West Supp. 2013) (providing a means for early dismissal but no preventative procedural tool).

193. *See* Plaintiff's Original Petition at 1, Wentworth v. Jones, No. 2012-CI-08201 (73d Dist. Ct., Bexar County, Tex. May 17, 2012) (filing defamation claims for allegedly false accusations in radio advertisements).

194. *See* CIV. PRAC. & REM. § 27.002 (outlining the dual purpose of the TCPA, which includes ensuring that legitimate claims can be pursued).

195. *See id.* §§ 27.003(b), 27.004, 27.005(a) (creating a series of deadlines to ensure a TCPA motion to dismiss is filed, heard, and ruled on within five months).

196. *See* Plaintiff's Original Petition at 1, Wentworth v. Jones, No. 2012-CI-08201 (73d Dist. Ct., Bexar County, Tex. May 17, 2012) (asserting defamation claims based on statements made in political advertisements); Defendant's Motion to Dismiss at 1, 17, Wentworth v. Jones, No. 2012-CI-08201 (73d Dist. Ct., Bexar County, Tex. May 24, 2012) (moving to dismiss the case one week after it was filed); Reeve Hamilton, *Wentworth Lawsuit May Proceed, Judge Rules*, TEX. TRIB. (June 7, 2012), http://www.texastribune.org/texas-politics/2012-legislative-election/wentworth-lawsuit-may-proceed-judge-rules/ (stating that the court denied Jones's anti-SLAPP motion after a June 6, 2011 hearing).

C. *Avila v. Larrea*[197]

Another appellate court decision weighing in on the TCPA addresses multiple issues, including adherence to the "60-60-30" timetable, denials by operation of law, and media use of the anti-SLAPP law.[198] In *Avila v. Larrea*, a Dallas attorney sued a local Univision affiliate and one of its news reporters who had reported on complaints regarding the attorney's legal representation and his alleged solicitation of clients.[199] The station aired two reports, which were later posted on its website.[200]

The attorney filed defamation claims against the television station and the reporter, claiming the reports were false, the defendants acted with actual malice, and the broadcasts injured his reputation.[201] In response, the defendants filed a motion to dismiss pursuant to the TCPA, attaching an affidavit from the reporter as well as video copies and transcripts of the two reports.[202] Within thirty days of a hearing on the TCPA motion, the trial court issued an order for limited discovery and for a continuation of the hearing.[203] However, the trial court failed to rule on the motion to dismiss within thirty days of the original hearing.[204]

The defendants appealed, arguing that "the trial court reversibly erred by (1) failing to grant appellants' motion to dismiss on the merits and (2) authorizing discovery on appellants' motion to dismiss and continuing the hearing on the motion after the thirty-day period prescribed by the TCPA."[205] The Fifth Court of Appeals concluded that the trial court's failure to rule on the motion within thirty days of the original hearing effectively denied the motion by operation of law, and thus it had jurisdiction over the appeal.[206]

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

198. *See id.* at 650 (addressing two issues involving the trial court's continuation of the TCPA motion hearing and its order of discovery).

199. *See* Appellants' Brief at 1–2, Avila v. Larrea, 394 S.W.3d 646 (Tex. App.—Dallas 2012, pet. denied) (No. 05-11-01637-CV) (describing the factual background of the case).

200. *Id.* at 4–5 (providing information about the two news reports in question).

201. *See* Avila v. Larrea, 394 S.W.3d 646, 650 (Tex. App.—Dallas 2012, pet. denied) (discussing the plaintiff's allegations).

202. *See* Appellants' Brief at 5, Avila v. Larrea, 394 S.W.3d 646 (Tex. App.—Dallas 2012, pet. denied) (No. 05-11-01637-CV) (relating the procedural background of the case).

203. *See Avila*, 394 S.W.3d at 649, 652 (reciting the trial court's order).

204. *See* Appellants' Brief at 5–6, Avila v. Larrea, 394 S.W.3d 646 (Tex. App.—Dallas 2012, pet. denied) (No. 05-11-01637-CV) (declaring that the TCPA does not authorize continuations of a hearing on the motion, nor extensions on the deadline for a ruling).

205. *See Avila*, 394 S.W.3d at 650 (listing the reasons for the appeal).

206. *See id.* at 656 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(a) (West Supp. 2013)) ("Section 27.005(a) clearly states that the court must 'rule on' a motion to dismiss under the TCPA within thirty days following the date of the hearing on the motion.").

The appellate court then analyzed the case under the TCPA's two-step burden shift.[207] The court concluded that the appellants met their burden in the first step of the TCPA as the reports "were made in connection with a matter of public concern, i.e., [the attorney's] legal services . . . ."[208] Hence, the burden shifted to the attorney to present a prima facie case in the second-step of the TCPA.[209] However, the appellate court determined that the attorney failed to establish a prima facie case "by clear and specific evidence,"[210] particularly with regard to the falsity element of his claims,[211] and concluded that "the trial court erred by not granting appellants' motion to dismiss on the merits."[212] The appellate court therefore reversed the trial court's order, granted the TCPA motion to dismiss, and remanded the "case to the trial court for consideration of damages and costs pursuant to [the TCPA]."[213] Because the appellate court decided the first issue in favor of the appellants, it did not address the discovery issue.[214]

Avila reaffirms the TCPA's rigid adherence to the "60-60-30" timetable.[215] Such time constructs were designed to ensure early dismissal before legal fees become financially exhaustive, and fluidity of these deadlines—other than the exceptions expressly delineated in the statute[216]—would defeat the purpose of the TCPA.[217] Thus, the Fifth

207. *See id.* at 656–58 (analyzing the case under the confines of the TCPA).

208. *See id.* at 655 (citation omitted) ("[T]he record shows by a preponderance of the evidence that the broadcasts constituted an '[e]xercise of the right of free speech' and [the attorney's] action was one 'based on, relating to, or in response to' a party's exercise of the right of free speech.").

209. *See id.* at 657–62 (reviewing whether the attorney established a prima facie case).

210. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West Supp. 2013) (establishing the burden of the party bringing the legal action).

211. *See Avila*, 394 S.W.3d at 659 (citations omitted) ("[The appellee] does not demonstrate that the record shows appellants reported any allegations inaccurately.").

212. *Id.* at 662.

213. *Id.* at 650.

214. *See id.* (explaining why the discovery issue would not be addressed).

215. *See id.* at 653–56 (adhering to the TCPA's time constraints). At the time *Avila* was decided, the TCPA instituted a "60-30-30" timetable. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003(b), 27.004, 27.005(a) (West Supp. 2011) (mandating a 120-day time frame for TCPA motions). As discussed above, in 2013 the legislature expanded the amount of time to set a hearing on a TCPA motion from thirty days from the filing of the motion to sixty days. *See* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 1, 2013 Tex. Gen. Laws 2501, 2501 (codified at TEX CIV. PRAC. & REM. CODE ANN. § 27.004 (West Supp. 2013)). Therefore, the TCPA now imposes a "60-60-30" timetable. *Id.*

216. *See* CIV. PRAC. & REM. § 27.003(b) (authorizing an extension to file a TCPA motion "on a showing of good cause"); Act of May 24, 2013, 83d Leg., R.S., ch. 1042, § 1, 2013 Tex. Gen. Laws 2501, 2501 (codified at TEX CIV. PRAC. & REM. CODE ANN. § 27.004 (West Supp. 2013)) (creating additional exceptions for delayed hearings).

Court of Appeals correctly applied the TCPA to the facts of the case by determining that the failure to rule on the motion within thirty days of the set hearing denied the motion by operation of law.[218]

Avila also raised an interesting issue regarding the media's use of Texas's anti-SLAPP statute.[219] At the trial level, the court commented on the impropriety of media defendants utilizing the TCPA, noting that the purpose of the TCPA "was to protect the speech and associational rights of individuals against judicial attack by more powerful interests."[220] The trial court accentuated a role reversal—the media defendant was "a seemingly more powerful party" seeking "to squelch an individual's attempt to seek redress for allegedly defamatory statements made against him."[221] The plaintiff also argued "that by enacting the TCPA, Texas had followed the lead of other jurisdictions 'in leveling the playing field in David versus [Goliath] scenarios involving the First Amendment'" and called it "ironic that 'a large corporation is using this Act in defending itself against an ordinary citizen.'"[222]

Though the Fifth Court of Appeals did not address this media-use issue directly, it undoubtedly rejected its merit as the court determined that the case was "'based on, relate[d] to, or [was] in response to' [the media defendants'] 'exercise of the right of free speech'"[223] and accordingly, rendered judgment granting the TCPA motion in favor of the media defendants.[224]

In this case, the media defendants served as an extension of the voice of individuals who might have had no other effective means of expressing

217. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S., at 1 (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/analysis/pdf/HB02973H.pdf#navpanes=0 (stressing that the goal of the TCPA is "to encourage greater public participation of Texas citizens through safeguarding the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government by providing for an expedited motion to dismiss frivolous lawsuits").

218. *See Avila*, 394 S.W.3d at 656 (establishing jurisdiction over the appeal).

219. *See id.* at 651 (acknowledging the appellee's arguments regarding a media defendant's use of a TCPA motion to dismiss).

220. *See* Appellants' Brief at 6, Avila v. Larrea, 394 S.W.3d 646 (Tex. App.—Dallas 2012, pet. denied) (No. 05-11-01637-CV) (quoting the trial court's statements regarding the media's use of TCPA motions).

221. *See id.* (opining over the media defendants' motion to dismiss the case in accordance with Texas's anti-SLAPP statute).

222. *See Avila*, 394 S.W.3d at 650–51 (stating the appellee's arguments regarding whether media defendants should be able to file a TCPA motion to dismiss).

223. *See id.* at 655 (citation omitted) (determining that the movants met their burden under the TCPA).

224. *See id.* at 650 (rendering judgment in favor of appellants).

their opinions for the potential benefit of others.[225] The two broadcasts and the follow-up online post conveyed the views of concerned citizens who had approached the media outlet with their complaints.[226] Restricting use of the TCPA to non-media defendants would essentially silence individuals, like those in the *Avila* reports, as members of the media might cease to investigate and report viewer or subscriber complaints in fear of a costly battle in court.[227] This chilling effect would in turn deny the audience of these media outlets of any potential benefit from receiving such information.[228]

The TCPA must "be construed liberally to effectuate its purpose and intent fully."[229] Accordingly, certain entities, such as media companies, should not be restricted from its use as its purpose is to safeguard the free speech rights of all.[230] Though media companies typically have more resources than most individuals to defend against meritless litigation,[231] these companies are also forced to fend off numerous SLAPP suits each year simply because of the nature of their business.[232] Applying the TCPA in line with its dual purpose will ensure that media outlets and other entities will be held accountable if their work product is truly defamatory, yet free them from being held at the mercy of SLAPP suits.[233]

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225. *See id.* at 659 (finding no evidence in the record that the news reports were inaccurate).

226. *See* Appellants' Brief at 2, 4, Avila v. Larrea, 394 S.W.3d 646 (Tex. App.—Dallas 2012, pet. denied) (No. 05-11-01637-CV) (explaining why the news station reported the complaints).

227. *See* Turner v. KTRK Television, Inc., 38 S.W.3d 103, 119 (Tex. 2000) ("[T]he threat of a defamation judgment can chill discussion of public issues."); *see also* Charles D. Tobin, *Help Restore Balance to Free Expression Litigation with AntiSLAPP Statutes*, 29 COMM. L. 2, 2 (2012) ("Can anyone doubt that hesitation will fill a newsroom manager's mind when he approaches the next big story after spending half of his budget vindicating an entirely truthful story?").

228. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275 (1964) (quoting James Madison regarding the important role of the press in the exchange of ideas and free public discussion).

229. TEX. CIV. PRAC. & REM. CODE ANN. § 27.011(b) (West Supp. 2013).

230. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S., at 1 (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/analysis/pdf/HB02973H.pdf#navpanes=0 ("Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, the involvement of citizens in the exchange of ideas benefits our society.").

231. However, blogs and start-up web magazines are changing the definition of "the media" to include individuals and small businesses. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S., at 1 (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/analysis/pdf/HB02973H.pdf#navpanes=0 (noting the prevalence of self-publishing and citizen journalism).

232. *See* Charles D. Tobin, *Help Restore Balance to Free Expression Litigation with AntiSLAPP Statutes*, 29 COMM. L. 2, 2–3 (2012) (addressing the pervasiveness of SLAPPs filed against journalists and the phenomenon's effect on media companies).

233. *See* CIV. PRAC. & REM. § 27.002 (declaring that "protect[ing] the rights of a person to file meritorious lawsuits" is part of the TCPA's purpose).

VI. CONCLUSION

The enactment of the Texas Citizen Participation Act and its recent interpretations and amendments pose several notable considerations for both plaintiffs and defendants. Plaintiffs' counsel should attempt to anticipate whether their clients' claims might be attacked with a TCPA motion to dismiss, while defense counsel should deliberate over the prospective benefits and consequences of utilizing the statute. The first step for each side should be thoroughly analyzing the five key components of the statute—(1) early review in accordance with set timetables;[234] (2) the suspension of discovery;[235] (3) a two-step burden shift;[236] (4) the recovery of attorney's fees and the imposition of sanctions;[237] and (5) an expedited appeal[238]—in light of the particular fact situation of the case.

In particular, plaintiffs' attorneys must prepare for the possibility of needing to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim"[239] within a matter of weeks and without the benefit of discovery, or at most "limited discovery relevant to the motion."[240] Furthermore, they should advise their clients of this possibility and warn of potential financial consequences if the lawsuit is dismissed under the TCPA.[241]

Defense attorneys should by no means guarantee a TCPA motion to dismiss as a quick fix. Clients should be advised as to the possibility of its denial, either expressly or by operation of law.[242] Moreover, defendants should be aware that they might have to pay if the court finds the motion was frivolous or a time delay.[243]

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234. *See id.* §§ 27.003(b), 27.004, 27.005(a) (West Supp. 2013) (providing deadlines of sixty days to file the motion, sixty days to hold a hearing, and then thirty days to rule on the motion).

235. *See id.* §§ 27.003(c), 27.006(b) (West Supp. 2013) (mandating a stay of discovery and providing a limited exception).

236. *See id.* § 27.005 (addressing each party's burden of proof under the TCPA).

237. *See id.* § 27.009 (requiring that the court order payment of reasonable attorney's fees, court costs, expenses incurred, and sanctions if a TCPA motion is granted).

238. *See id.* § 27.008(b) (calling for any appeals or writs to be accelerated).

239. *See id.* § 27.005(c) (establishing the responding party's burden of proof); *see also* Mark C. Walker & David M. Mirazo, *The Texas Anti-SLAPP Statute: Issues for Business Tort Litigation*, Presentation at the 4th Annual Business Torts Institute, at 12–13 (Sept. 20–21, 2012), *available at* http://www.jdsupra.com/legalnews/the-texas-anti-slapp-statute-issues-for-73056/ (discussing the "clear and specific evidence" burden).

240. *See* CIV. PRAC. & REM. §§ 27.003, 27.006(b) (stating the TCPA motion discovery rules).

241. *See id.* § 27.009(a) (imposing a duty on the trial court to award reasonable attorney's fees, court costs, other expenses incurred, and sanctions).

242. *See id.* §§ 27.005, 27.008(a) (covering the two types of denials).

243. *See id.* § 27.009(b) (providing that the unsuccessful movant may have to pay "court costs and reasonable attorney's fees to the responding party").

Furthermore, courts applying the statute should do so with its twofold purpose in focus, especially in exercising the few arenas of discretion within the statute—whether to allow limited discovery relevant to the motion and the amount of sanctions to be imposed.[244] With proper application, the TCPA can be a powerful tool to stop harassing and retributive litigation at the outset while allowing plaintiffs with valid claims the ability to pursue a remedy.

244. *See id.* §§ 27.006(b), 27.009(a)(2) (giving the trial court some discretion in "allow[ing] specified and limited discovery" and in determining the amount of sanctions).