THE TEXAS ANTI-SLAPP STATUTE: ARE EMPLOYMENT LAWYERS GETTING SLAPP-HAPPY?

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In 2011, the Texas legislature unanimously passed the Texas Citizens Participation Act ("TCPA"), a law designed to deter so-called Strategic Lawsuits Against Public Participation—lawsuits aimed at silencing citizens from exercising their First Amendment rights.

Since its passage, however, the Texas Supreme Court has broadly construed the statute to apply to a variety of cases untethered from the law's stated purpose. For example, recently, the statute's powerful, procedures and remedies have been applied to employment discrimination and trade secret misappropriation cases.

The TCPA's Dismissal Procedures and Remedies

The TCPA allows a defendant to file an expedited motion to dismiss that forces the plaintiff, at the beginning of a lawsuit, to prove its case without extensive (or any) discovery.[i] The motion to dismiss must be granted unless the movant can produce "clear and specific evidence" to support each element of every cause of action nt.

The mere filing of the motion has an immediate and tangible impact on the litigation. Discovery is automatically stayed while the motion is pending and can only be permitted on a limited basis upon a showing of good cause. If the motion is even partially granted, the court must award reasonable attorneys' fees, court costs, and other expenses, and may also award sanctions.[ii] While a TCPA movant may immediately appeal from an order denying its motion to dismiss, a non-movant may not appeal unless a final judgment disposes all claims and parties.[iii]

The TCPA Extends to Discrimination, Trade Secret, and Other Employment Cases

The TCPA applies to any "legal action" that "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. Texas courts initially took the position that these TCPA-protected rights were limited to activity protected by the First Amendment, and did not extend to employment-related claims.

In *Cheniere Energy, Inc. v. Lotfi*,[iv] the TCPA's broad definition of "right of association" was at issue: "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests."[v] In that case, a former employee asserted a wrongful termination claim and sued two former co-workers for tortious interference.[vi] The co-workers filed an anti-SLAPP motion to dismiss and asserted that their right to association included deliberations about terminating plaintiff's employment.[vii] The Houston Court of Appeals denied the motion.[viii] Relying on the title and intent of the TCPA, the court reasoned that the plaintiff's claims did not implicate the legislature's purpose behind the law, which requires a nexus between the communication and the First Amendment.[ix] Otherwise, the Court explained, any communication that is part of the employment decision-making process could be subject to the TCPA, even if the communication is not constitutionally protected and does not concern citizen or public participation.[x]

In *ExxonMobil Pipeline v. Coleman*, the Texas Supreme Court held, one and for all, that constitutional principles do not restrict the scope of the TCPA.[xi] *Coleman* concerned a defamation suit filed by a former employee who claimed that he was terminated based on false statements made by two former supervisors about his alleged failure to complete maintenance on petroleum tanks.[xii] At issue was whether the internal communications by the coworkers were an "exercise of the right of free speech," defined as "a communication made in connection with a matter of public concern," which includes, *inter alia*, an issue related to health or safety, environmental, economic, or community well-being.[xiii] The court of appeals held that the TCPA did not apply because the communications related to a "private employment matter" with only a "tangential relationship" to a matter of public concern.[xiv]

The Texas Supreme Court reversed. Emphasizing a strict, textual construction of the statute, the Court rejected efforts to narrow the TCPA based on the statute's stated purpose (to protect First Amendment rights). According to the Court, the communications among ExxonMobil employees related to a matter of public concern because they concerned Coleman's purported failure to complete a job duty that helped prevent a potential environmental risk.[xv]

TCPA's Application to Employment and Unfair Competition Cases

Because of *Coleman*, the TCPA has since been extended to employment and unfair competition cases. Late last year, the Houston Court of Appeals and the Southern District of Texas each held that the TCPA applied to private deliberations among Memorial Hermann's staff about a physician's job performance. In *Memorial Hermann v. Khalil*,[xvi] the Houston Court of Appeals applied the TCPA to defamation, fraud, tortious interference, and conspiracy claims, while in *Khalil v. Memorial Hermann*, the Southern District of Texas applied the statute to a state-law age discrimination claim.[xvii] As both courts explained, although the First Amendment generally does not reach private communications about job performance, the TCPA's broader definition of the right of free speech includes issues related to "health or safety," and statements concerning a healthcare professional's competence.[xviii] In *Lippincott v. Whisenhott*, the Texas Supreme Court reached a similar conclusion about a defamation claim that hinged on whether a nurse anesthetist properly provided medical services to patients.[xix]

Coleman, *Memorial Hermann*, and *Lippincott* may not provide employers a new arrow in their defense quiver. In a discrimination or wrongful discharge case, a plaintiff may be forced to immediately proffer clear and specific evidence in support of the *prima facie* elements of a claim. A plaintiff could face the difficult task of proving, without discovery, that he suffered an adverse employment action based on an unlawful basis, and that any legitimate, nondiscriminatory reason for the action was pretextual. *Khalil v. Memorial Hermann* reflects this is no easy task. In that case, plaintiff's age-discrimination claim was dismissed, in part, because he could not show pretext in Memorial Herman's concerns about patient safety and its alleged decision to remove plaintiff's physician credentials.[xx]

Coleman has also been extended to trade secret misappropriation and unfair competition claims. In *Elite Auto Body LLC v. Autocraft Bodyworks*, the plaintiff auto-repair shop alleged that a competing auto-repair business and its former employees misappropriated trade secrets and solicited employees.[xxi] Relying on *Coleman*, the court held that the TCPA applied because

plaintiff's claims hinged on whether defendants communicated the information in support of a competitive business enterprise.[xxii] Thus, the court reasoned that defendants' communications involved their right of association. Because the plaintiff could not produce clear and specific evidence with "element-by-element, claim-by-claim exactitude," the court of appeals reversed the trial court's ruling and remanded the case for an award of attorneys' fees and sanctions.[xxiii]

Elite Auto Body and the application of the TCPA to trade secret misappropriation cases has significant implications. Notably, companies will be forced into a Catch-22. If a company files suit too quickly without gathering enough evidence to survive a TCPA motion to dismiss, it could be forced to pay substantial attorneys' fees and costs. On the other hand, if a company waits too long to seek an injunction, a defense of laches could bar relief.

Additionally, simply filing the motion to dismiss may undermine efforts to obtain injunctive relief. Under the TCPA, the defendant has an automatic right to interlocutory appeal, which stays all proceedings in trial court pending resolution of the appeal.[xxiv] Even under the TCPA's expedited appeals, a ruling from the appellate court will likely take several months, if not longer. By the time appeal is over, the TRO will have expired and the defendant will be free to resume competitive activities until a longer injunction can be obtained.

Limits to the TCPA's Reach

While the TCPA is broad, it does have several meaningful unresolved limitations. First, the Fifth Circuit has not decided whether the TCPA applies in federal court.[xxv] Some federal courts have held that the TCPA does not apply because the statute's principally procedure provisions are superseded by the Federal Rules of Civil Procedure. Other district courts have held that under the *Erie* doctrine, the law applies in federal diversity cases because its procedural features are, in fact, designed to prevent substantive consequences—the impairment of First Amendment rights.[xxvi] Until the Fifth Circuit resolves this split, litigants should consider filing certain lawsuits in federal court to avoid application of the TCPA and its powerful provisions.

The Supremacy Clause may also be used to bar application of the TCPA to federal discrimination claims. The Southern District of Texas recently held that the TCPA does not apply to Title VII discrimination and retaliation claims because the TCPA frustrates the federal statute's goal of eliminating employment discrimination.[xxvii]

Conclusion

The TCPA is still evolving as more and more state and federal courts address its application and limits. For defendants, there is likely little drawback to filing a motion to dismiss until and unless courts signal a greater willingness to find that motions have been filed on a frivolous basis. By simply filing the motion, a defendant can force the plaintiff to prove its causes of action without discovery and may place a plaintiff on the hook for substantial fees and sanctions. The mere threat of filing the motion can also leverage a favorable settlement. Even if the motion to dismiss is denied, the delay associated with an interlocutory appeal can thwart a plaintiff's efforts to obtain immediate, injunctive relief in unfair competition and trade secret litigation.

Plaintiffs, in turn, may avoid application of the TCPA altogether by suing in federal court, or by narrowly drafting petitions and gathering as much evidence as possible before filing suit.

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[i] *Id*. at § 27.005(b), (c).
[ii] *Id*. at §§ 27.009(a)(1), (2).
[iii] *Id*. at § 27.008(b); *Fleming & Associates, L.L.P. v. Kirklin*, 479 S.W.3d 458, 460 (Tex.App.—Hous. (14 Dist.), 2015).
[iv] 449 S.W.3d 210 (Tex.App. Houston [1 Dist.] 2014).
[v] Tex. Civ. Prac. & Rem. Code § 27.001(2).
[vi] *Cheniere*, 449 S.W.3d at 211-12.
[vii] *Id.* at 212.
[viii] *Id.* at 217.
[ix] *Id.* at 216-17.
[x] *Id.*
[xi] 512 S.W.3d 895 (Tex. 2017).
[xii] *Id.* at 896.
[xiii] *Id.* at 898; TEX. CIV. PRAC. & REM. CODE § 27.001(3), (7).
[xiv] *ExxonMobil Pipeline Co. v. Coleman*, 464 S.W.3d 841, 848 (Tex.App.—Dallas, 2015).
[xv] *Id.* at 901.
[xvi] *Memorial Hermann Health System v. Khalil*, No. 01-16-00512, 2017 WL 3389645, at *5-6 (Tex.App.—Houston, 2017).
[xvii] *Khalil v. Memorial Hermann Health System*, No. H-17-1954, 2017 WL 5068157, at *5-6 (S.D.Tex. 2017).
[xviii] *Memorial*, 2017 WL 3389645, at *5-6; *Khalil*, 2017 WL 5068157, at *5-6.
[xix] 462 S.W.3d 507, 509-10 (Tex. 2015)
[xx] *Khalil*, 2017 WL 5068157, at *7.
[xxi] 520 S.W.3d 191, 194 (Tex.App.—Austin, 2017).
[xxii] *Id.* at 205.
[xxiii] *Id.* at 206.
[xxiv] Tex. Civ. Prac. & Rem. Code § 51.014((b).
[xxv] Although the Fifth Circuit has not yet ruled on whether the TCPA is substantive or procedure, or whether it should apply in federal court, it has assumed, without deciding, that it controls as state substantive law. *See Cuba v. Pylant*, 814 F.3d 701, 706, & n. 6 (5th Cir. 2016). The Fifth Circuit has also held that a federal court defendant may bring a motion to dismiss under Louisiana's similar anti-SLAPP statute in diversity cases. *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir. 2009).
[xxvi] *See Khalil*, 2017 WL 5068157, at *5; *Banik v. Tamez*, No. 7:16-CV-462, 2017 WL 1228498, at *2 (S.D.Tex. April 4, 2017); *Williams v. Cordillera Commcn's, Inc.*, No. 2:13-CV-124, 2014 WL 2611746, at *2 (S.D. Tex. June 11, 2014); *see also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996) (holding that under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law).
[xxvii] *Mathiew v. Subsea 7 (US) LLC*, No. 4:17-CV-3140, 2018 WL 1515264, at *10 (S.D.Tex. Mar. 9, 2018).