



The Clock is Ticking:
Navigating the Texas Defamation Mitigation Act
By Nick Brown & Ethan Gibson

A case killer lurks in the Texas Defamation Mitigation Act (TDMA) that is often overlooked. Passed in 2013, the legislature hoped the TDMA would encourage victims of defamation to first seek out-of-court redress before rushing to file a lawsuit. And though often overshadowed by the sweeping procedural changes ushered in from the Texas Citizens Participation Act,¹ the TDMA imposes a distinct set of rules and deadlines in defamation cases.² Failure to comply with the TDMA's strict deadlines can destroy a defamation plaintiff's damage model, even in the most egregious defamation cases.

Broadly speaking, the TDMA requires a plaintiff to make a "timely and sufficient request for correction, clarification, or retraction from the defendant" and imposes severe penalties for failing to do so.³ There are two deadlines, and both run on short fuses.

I. The true case killer: failure to demand retraction within the statute of limitations.

First, a timely and sufficient demand must be made within the one-year statute of limitations in Texas.⁴ To be "sufficient," the request must be: 1) served on the publisher of the statement; 2) be in writing; 3) reasonably identify the person making the request; 4) be signed by the person who was defamed or that person's attorney or agent; 5) state with particularity the statement alleged to be false and defamatory; 6) to the extent known, identify the time and place of the publication; 7) include allegations showing the defamatory meaning of the statement; and 8) specifies the circumstances causing a defamatory meaning of the statement if it arises from something other than the express language of the statement.⁵ A defendant who does not receive this request is entitled to have the suit automatically abated for sixty days.⁶ Critically, however, filing suit by itself is not a "request for correction, clarification, or retraction" under the TDMA, and it is not entirely clear whether including such a request in a pleading is sufficient. Until additional case law develops, best practice dictates both filing suit and sending a separate request for correction, clarification, or retraction under the TDMA.

¹ Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.*

² Business disparagement cases, which seek only actual damages caused by the defamatory publication, are excluded from the statute. Tex. Civ. Prac. & Rem. Code § 73.054.

³ Tex. Civ. Prac. & Rem. Code § 73.055.

⁴ *Id.*; see also Tex. Civ. Prac. & Rem. Code § 16.002.

⁵ Tex. Civ. Prac. & Rem. Code § 73.055(d).

⁶ Tex. Civ. Prac. & Rem. Code § 73.062.

A split in authority has emerged with respect to whether missing this one-year deadline in the TDMA requires dismissal of a defamation claim altogether. Consider this common scenario: a plaintiff files suit within the one-year statute of limitations for defamation claims, but fails to make a request for retraction, clarification, or correction within that same deadline. The TDMA states that, under these circumstances, the plaintiff cannot “maintain” the defamation action.⁷ Construing this provision to be a prerequisite to bringing suit, one court in the Southern District of Texas, facing precisely these facts, dismissed defamation claims under this provision.⁸ The Fifth Circuit affirmed in an unpublished decision.⁹

However, in confronting the same issue just several months later, the Dallas Court of Appeals expressly rejected the Fifth Circuit’s construction of the TDMA.¹⁰ That court held that the failure to make a request for retraction under the TDMA within one year only permits the defendant “to have the suit abated until the request is made.”¹¹

It is unclear which of these two views will ultimately prevail. Under the general rule that federal courts must defer to state intermediate courts on state issues absent compelling reasons to the contrary,¹² the Fifth Circuit’s unpublished, non-precedential opinion will likely give way to the Dallas Court of Appeals, unless additional Texas authority develops. But the development of such authority is entirely possible. The defendants have filed a petition appealing the Dallas Court of Appeals’ decision to the Texas Supreme Court. Moreover, the Fifth Circuit certainly had a plausible interpretation that the absence of a right to “maintain” a suit requires dismissal. Whether other courts of appeal in Texas follow the Dallas Court of Appeals thus remains to be seen.

II. The practical case killer: failure to demand retraction within ninety days of publication.

Though the first deadline imposes legal hurdles that result in abatement or dismissal, the second deadline of the TDMA may have similarly severe practical consequences for defamation plaintiffs. If the plaintiff does not request correction, clarification, or retraction within ninety days that he or she obtained “knowledge of the [defamatory] publication,” the TDMA bars the recovery of exemplary damages.¹³

⁷ Tex. Civ. Prac. & Rem. Code § 73.055(a) (“A person may maintain an action for defamation only if [a timely and sufficient demand for retraction is made].” (emphasis added)).

⁸ *Tubbs v. Nicol*, 15-CV-00002, 2016 WL 7757386, at *3 (S.D. Tex. Apr. 19, 2016) (“Because Plaintiff did not provide a request for mitigation, Plaintiff’s claim for defamation fails as a matter of law.”).

⁹ *Tubbs v. Nicol*, 675 F. App’x 437 (5th Cir. 2017) (“Thus, because Tubbs failed to follow the requirements of the DMA, her defamation claim fails as a matter of law.”).

¹⁰ *Hardy v. Commc’n Workers of Am. Local 6215 AFL-CIO*, --- S.W.3d ----, 2017 WL 1192800, at *5 (Tex. App.—Dallas Mar. 31, 2017, pet. filed) (“[T]he Fifth Circuit failed to construe the DMA . . . Accordingly, we find Tubbs to be unpersuasive.”)

¹¹ *Id.* at *7.

¹² E.g., *Temple v. McCall*, 720 F.3d 301, 307 (5th Cir. 2013).

¹³ Tex. Civ. Prac. & Rem. Code § 73.055(c).

Loss of exemplary damages can serve as a death knell in many defamation cases. Successful pursuit of a defamation claim necessitates a significant investment of time to overcome the numerous legal hurdles and opportunities for dismissal.¹⁴ Lost profits (and other forms of so-called special damages) and general reputational damages are sometimes difficult to prove in significant amounts.¹⁵ Without the threat of exemplary damages, many plaintiffs may find it economically impractical to pursue otherwise strong claims for defamation.

The ninety-day exemplary damage clock starts ticking on the day the plaintiff obtains “knowledge of the publication.” Establishing this date can be more difficult than it sounds. For example, what if the client knew the defendant sent letters to third parties, but did not know those letters were defamatory until months later? Must the plaintiff have knowledge just of the communication or of the actual defamatory statement?

Few cases have answered these questions or even interpreted the TDMA. The earliest written opinion on the issue appears to be Judge Sparks’s decision in *Bancpass, Inc. v. Highway Toll Admin., LLC*, No. A-14-CA-1062-SS, 2016 WL 4491736, at *8 (W.D. Tex. Aug. 25, 2016). There, the defendant sent defamatory letters to the plaintiff’s business partners. The plaintiff soon discovered the letters had been sent when one of those partners suspended its relationship with the plaintiff, but the plaintiff did not know what exactly was said in those letters until months later. The plaintiff successfully argued that the 90-day clock starts running when the plaintiff obtained knowledge of the specific words that were used. Because the plaintiff sent a retraction request on behalf of the client within 90 days of the date the language of the letters was actually discovered, it preserved its claims for exemplary damages.

Another recent Western District of Texas case provides guidance as to what the correction, clarification, or retraction must include to be effective under the statute. In *Hammond v. United States*,¹⁶ the court held that, at an absolute minimum, any correction, clarification, or retraction requires “some disavowal of the allegedly defamatory statement.” Plaintiffs hoping to settle a dispute without litigation must therefore walk a thin line; while a clear demand to disavow a defamatory statement could prompt a declaratory judgment action in a less-than-friendly venue, anything less could be ineffective to meet the statutory deadline. In an unpublished opinion, the Fifth Circuit held that this request must be made, even if it is futile, because the statute contains no exception for futility.¹⁷

¹⁴ The Texas Citizens Participation Act, for example, gives defendants the opportunity to obtain early dismissal and an interlocutory appeal.

¹⁵ See, e.g., *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142 (Tex. 2014).

¹⁶ 5:15-CV-00579-RP, 2016 WL 9049578, at *1 (W.D. Tex. May 2, 2016).

¹⁷ *Tubbs v. Nicol*, 675 F. App’x 437 (5th Cir. 2017). The Dallas Court of Appeals has disagreed with the Fifth Circuit on other grounds. See *Hardy v. Comm’n Workers of Am. Local 6215 AFL-CIO*, 05-16-00829-CV, 2017 WL 1192800, at *5 (Tex. App.—Dallas Mar. 31, 2017, pet. filed).

III. Other dangers & best practices on both sides of the bar.

Because the deadline to request retraction, correction, or dismissal is directly linked to the statute of limitations for defamation claims,¹⁸ many practitioners may therefore assume that the TDMA only applies to a cause of action for defamation. But the analysis is not so straightforward. Instead, the TDMA applies to “a claim for relief, however characterized, from damages arising out of harm to personal reputation caused by the false content of a publication.”¹⁹

The danger of this broad definition is illustrated by the defendant’s attempt to invoke the TDMA in the case of *In re InduSoft, Inc.*²⁰ There, the defendant argued that the TDMA applied to breach of contract, tortious interference, and business disparagement claims brought by the plaintiff, on the theory that each of those claims was based on publication of a false statement to the plaintiff’s customers causing harm to reputation.

The court ultimately rejected the application of the TDMA for a variety of reasons. The court found the plaintiff’s allegations too vague to conclude they fell within the scope of the statute; that the alleged statements created causes of action regardless of their truth or falsity; and that the harm at issue related to the plaintiff’s business rather than personal reputation. Nonetheless, it is easy to imagine a scenario in which a plaintiff brings a tortious interference, disparagement, or fraud claim based on false statements causing harm to the plaintiff’s personal reputation. In such a case, the plaintiff may find itself blindsided by an argument that the TDMA applies, and important deadlines have run requiring abatement, dismissal, or, at a minimum, the loss of exemplary damages.

As such, each party must analyze whether the plaintiff’s petition arguably alleges claims based on harm to personal reputation caused by false statements, regardless of the causes of action ultimately pursued. If any one of the claims even arguably falls within the scope of the TDMA, best practice for plaintiffs may require that a request for correction, retraction, clarification be sent within each of the TDMA’s deadlines. Moreover, until additional clarity exists as to whether failure to comply with the TDMA requires dismissal, plaintiffs should ensure they make a request for retraction, correction, or clarification within the one-year statute of limitations for defamation claims.

Many questions about the TDMA remain. But one thing is certain: the 90-day and one-year deadline can fundamentally alter the value of any defamation case. Whether bringing a defamation claim or defending against one, the clock will be ticking. Both sides must know exactly when time runs out.

Ethan Gibson is a partner at [Fulkerson Lotz LLP](#) and a seasoned commercial litigator. [Nick Brown](#) joined Fulkerson Lotz LLP as an associate after finishing his clerkship with Fifth Circuit Judge Gregg Costa. Fulkerson Lotz handles a wide variety of commercial and intellectual property matters, including cases involving claims for defamation and disparagement.

¹⁸ Tex. Civ. Prac. & Rem. Code § 73.055(b) (“A request for a correction, clarification, or retraction is timely if made during the period of limitation for commencement of an action for defamation.”).

¹⁹ Tex. Civ. Prac. & Rem. Code § 73.054(a) (emphasis added).

²⁰ Case No. 03-16-00677-CV, 2017 WL 160918, at * 1 (Tex. App.—Austin Jan. 10, 2017, no pet.).