
SLAPPED AND SANCTIONED:
THE HEAVY HAND OF THE TEXAS CITIZENS
PARTICIPATION ACT



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WHAT IS A SLAPP?

- SLAPP: Strategic Lawsuit Against Public Participation
- Anti-SLAPP (Tex. Civ. Prac. & Rem. Code § 27.002):

“The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.”

THE HEAVY HAND OF THE TCPA

- Defendant may move to dismiss within 60 days of being served.
- Discovery is automatically stayed.
- Discovery only permitted on a limited basis with Court order.

THE HEAVY HAND OF THE TCPA

- “Clear and specific *evidence*” required on each element.
- Every cause of action must be proven.
- Even if Plaintiff meets burden, “the court shall dismiss a legal action ... if the moving party establishes *by a preponderance of the evidence* each essential element of a valid defense.”

THE HEAVY HAND OF THE TCPA

- Motion must be granted if a *single* cause of action is not proven by clear and specific evidence.
- Mandatory attorney's fees.
- Mandatory sanctions.

THE HEAVY HAND OF THE TCPA

- If motion is denied, Defendant entitled to interlocutory appeal.
- If motion is granted, Plaintiff is **not** entitled to interlocutory appeal.

THE HEAVY HAND OF THE TCPA

- Dismissal is **with** prejudice.

Rauhauser v. McGibney, 508 S.W.3d 377, 380 (Tex. App.-Austin 2014, no pet.) (overruled on other grounds, 2017 WL 2839873, at *6 (Tex. 2017)).

- TCPA motions are like counterclaims; the motion remains live even if case is non-suited.

Duchouquette v. Prestigious Pets, LLC, No. 05-16-01163-CV, 2017 WL 5109341, at *3 (Tex. App.-Dallas Nov. 6, 2017, no pet.).

SLAP LAWSUITS?

August 10, 2014

Tim McGraw Slap Lawsuit Update: Country Singer And Fan Make 'Resolution'



The slap lawsuit filed by a disgruntled fan against Tom McGraw has been resolved.

<https://www.inquisitr.com/1402563/tim-mcgraw-slap-lawsuit-update-country-singer-and-fan-make-resolution/>

SLAP LAWSUITS?

Disney Settles Ass Slap Lawsuit with Good Luck Charlie Employee

27 December 2012 | by Karen Benardello | ShockYa



Disney has agreed to settle a lawsuit filed by fan Kellie Rodriguez, who alleged 'Good Luck Charlie' warm-up announcer [Ron Pearson](#) repeatedly slapped her on the ass during a taping of the show, TMZ is reporting. Rodriguez, an audience member at the Los Angeles taping on December 22, 2011, filed a lawsuit in January, saying the announcer also kissed her on the mouth in front of her two children. ABC Cable Networks reportedly paid Rodriguez between \$20-30,000 to drop the lawsuit against Perarson. The announcer didn't receive any major repercussions during the case, as he's still working on the sitcom, which stars [Jason Dolley](#), [Bridgit Mendler](#) and [Bradley Steven Perry](#). [[Read More](#)]

The post [Disney Settles Ass Slap Lawsuit with Good Luck Charlie Employee](#) appeared first on [Shockya.com](#).

<http://www.imdb.com/news/ni43628852/>

SLAP LAWSUITS?

Los Angeles Times | ARTICLE COLLECTIONS

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Metro Digest / Local News in Brief

Gabor, Police Officer Settle Suit, Lawyer Says

February 09, 1991

Zsa Zsa Gabor, sentenced last year to three days in jail for slapping a police officer, has reached an out-of-court settlement in a \$10-million lawsuit filed by the officer, his lawyer said Friday.

Attorney Richard Thomas would not reveal if any money was involved, but said of Beverly Hills Police Officer Paul Kramer: "My client is very satisfied with the settlement."

Gabor's publicist, Phil Paladino, said Gabor always proclaimed her innocence in the case.

Gabor was convicted of slapping Kramer, a motorcycle police officer who had stopped her while she was driving in Beverly Hills in June, 1989, because her Rolls-Royce had an outdated license tag.

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http://articles.latimes.com/1991-02-09/local/me-525_1_police-officer

SLAP LAWSUITS?

Ahed Tamimi: Palestinian slap video teen gets eight months in plea deal



Is a slap terrorism?

THE LONG REACH OF THE TCPA

- Right to Free Speech
- Right to Petition
- Right of Association

RIGHT TO FREE SPEECH

TEX.CIV.PRAC. & REM CODE 27.001(3):

“Exercise of the right of free speech” means a communication made in connection with a matter of public concern.

RIGHT TO FREE SPEECH

Intuitive meaning:

- Suits retaliating against someone for speaking out.

- Exemplar causes of action:
 - Defamation
 - Business Disparagement

RIGHT TO ASSOCIATION

TEX.CIV.PRAC. & REM. CODE 27.001(2):

“Exercise of the right of association” means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

RIGHT TO ASSOCIATION

Intuitive meaning:

- Suits retaliating against someone for associating with a political party or social cause.

- Exemplar causes of action:
 - Injunctions against gatherings / meetings.
 - Suits interfering with civic organizations.

RIGHT TO PETITION

TEX.CIV.PRAC & REM CODE 27.001(4):

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

RIGHT TO PETITION

Intuitive meaning:

- Suits brought to retaliate against someone for participating in a public forum.

- Exemplar causes of action:
 - Malicious prosecution.
 - Abuse of Process.
 - Vexatious litigation.
 - Antitrust based on petitioning government.

THE LONG REACH OF THE TCPA

- *ExxonMobil Pipeline v. Coleman*, 512 S.W.3d 895 (Tex. 2017) (per curiam).
 - Plaintiff was fired after internal investigation for failing to gauge a storage tank but reporting that he did.
 - Plaintiff sues supervisors for defamation based on allegedly false statements made during course of internal investigation .
 - Statements were private, only between employees, had a tenuous connection to matter of public concern.

THE LONG REACH OF THE TCPA

- **Issue:** How does first amendment jurisprudence apply to TCPA?
 - Plaintiff: Statements were private, not related to matter of public concern, not related to constitutional rights which statute is designed to protect.
 - Defendant: Nothing in text of TCPA contains those limits.

THE LONG REACH OF THE TCPA

- **Texas Supreme Court Holding:** Scope of TCPA governed by plain text.
- *Cavin v. Abbott*, 03-16-00395-CV, 2017 WL 3044583, at *11 (Tex. App. – Austin July 14, 2017, no pet.) (Pemberton, J.):

“More recently, in *ExxonMobil Pipeline Company v. Coleman*, the Texas Supreme Court confirmed that **we must apply a plain-meaning construction of the TCPA definitions’ literal language, without regard to the TCPA’s broader purposes or background jurisprudence, even when this results in a vastly expansive application of the ‘exercise of the right of free speech’ to reach a business’s internal personnel matters having only an indirect relationship to the “matter[s] of public concern” made the basis for the motion.**”

UNEXPECTED APPLICATIONS

Right to Free Speech

- Breach of Non-Disclosure Agreement
- Disclosure of Trade Secrets
- Fraud

UNEXPECTED APPLICATIONS

Right to Association

- Conspiracy Claims
- Non-Compete Injunctions
- Breach of Contract Claims

UNEXPECTED APPLICATIONS

Right to Petition

- Filing fraudulent UCC-1
- Filing fraudulent lis pendens

TCPA IS EXPANDING

Almost two dozen reversals or partial reversals of TCPA denials in 2017 alone:

- *Hersh v. Tatum*, 16-0096, 2017 WL 2839873 (Tex. June 30, 2017);
- *Bedford v. Darin Spasoff & 6 Tool, LLC*, No.16-0229, 2017 WL 2492005 (Tex. June 9, 2017);
- *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017);
- *Camp v. Patterson*, 03-16-00733-CV, 2017 WL 3378904 (Tex. App.--Austin Aug. 3, 2017, no pet. h.);
- *Mission Wrecker Serv., S.A., Inc. v. Assured Towing, Inc.*, 04-17-00006-CV, 2017 WL 3270358 (Tex. App.--San Antonio Aug. 2, 2017, no pet. h.);
- *Glob. Tel*link Corp. v. Securus Techs., Inc.*, 05-16-01224-CV, 2017 WL 3275921 (Tex. App.-- Dallas July 31, 2017, no pet. h.);
- *Moricz v. Long*, 06-17-00011-CV, 2017 WL 3081512 (Tex. App.--Texarkana July 20, 2017, no pet. h.);
- *Cavin v. Abbott*, 03-16-00395-CV, 2017 WL 3044583 (Tex. App.--Austin July 14, 2017, no pet. h.);
- *Dorfman v. Proactive Inv. et al.*, 05-16-01286-CV, 2017 WL 2953058 (Tex. App.--Dallas July 11, 2017, no pet. h.);
- *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191 (Tex. App.--Austin 2017, no pet. h.);
- *Elliott v. S&S Emergency Training Sols., Inc.*, No. 05-16-01373-CV, 2017 WL 2118787 (Tex. App.--Dallas May 16, 2017, no pet. h.);
- *Long Canyon Phase II & III Homeowners Ass'n, Inc. v. Cashion*, 517 S.W.3d 212 (Tex. App.--Austin 2017, no pet.);
- *Quintanilla v. West*, No. 04-1600533-CV, 2017 WL 1684832, at *12 (Tex. App.--San Antonio Apr. 26, 2017, no pet. h.);
- *Mem'l Hermann Health Sys. v. Khalil*, 01-16-00512-CV, 2017 WL 3389645 (Tex. App.--Houston [1st Dist.] Aug. 8, 2017, no pet. h.);
- *Urban Eng'g v. Salinas Constr. Techs., Ltd.*, No. 13-16-00451-CV, 2017 WL 2289029 (Tex. App.--Corpus Christi May 25, 2017, no pet. h.);
- *MacFarland v. Le-Vel Brands LLC*, No. 05-1600672-CV, 2017 WL 1089684 (Tex. App.--Dallas Mar. 23, 2017, no pet. h.);
- *Trevino v. Cantu*, No. 13-16-00109-CV, 2017 WL 1056404 (Tex. App.--Corpus Christi Feb. 2, 2017, no pet. h.);
- *Serafine v. Blunt*, No. 03-16-00131-CV, 2017 WL 2224528 (Tex. App.--Austin May 19, 2017, no pet. h.);
- *Spencer v. Overpeck*, No. 04-16-00565-CV, 2017 WL 993093 (Tex. App.--San Antonio Mar. 15, 2017, pet. filed);
- *Schofield v. Gerda*, No. 02-15-00326-CV, 2017 WL 2180708 (Tex. App.--Fort Worth May 18, 2017, no pet. h.);
- *Cox Media Group, LLC v. Joselevitz*, 14-16-00333-CV, 2017 WL 1086572 (Tex. App.--Houston [14th Dist.] Mar. 21, 2017, no pet. h.)

TCPA IS EXPANDING

Elite AutoBody LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191 (Tex. App. – Austin 2017)

- In October 2014, Plaintiff (auto repair shop) sued Defendant (competitor) based on wrongfully obtaining confidential information from ex-employee. Claims include theft of trade secrets, unfair competition, breach of fiduciary duty, and conspiracy.
- Defendant moves to dismiss under TCPA arguing that this implicates “right of association” (conspiring to steal secrets) and “right to free speech” (actual disclosure of secrets).
- Trial court denied motion.
- In January 2015, Defendant files interlocutory appeal.
- May 2017, Austin Court of Appeals: “This case illustrates that the Texas Citizens Participation Act . . . can potentially be invoked successfully to defend against claims seeking to remedy alleged misappropriation or misuse of a business’s trade secrets or confidential information.”
- Affirmed in part, reversed and rendered in part, and remanded for an award of fees and sanctions.

TCPA IS EXPANDING

Serafine v. Blunt, 466 S.W.3d 352 (Tex. App. – Austin 2017, no pet.)

- Property dispute over boundary line and drainage ditch. Plaintiff files claims for trespass, nuisance, negligence, and fraud by non-disclosure. Defendant files a counterclaim under TCPRC 12 alleging Plaintiff fraudulently filed a lis pendens in Travis County Real Property Records.
- Plaintiff moved to dismiss counterclaim under TCPA arguing it is based on Plaintiff's "right to petition".
- Trial court denied the motion.
- Plaintiff files interlocutory appeal.
- Court of Appeals agrees TCPA applies to claim for filing fraudulent lis pendens under "right to petition" theory.
- Court of Appeals finds insufficient evidence of one element (*i.e.*, knowledge of the lien's invalidity).
- Affirmed in part, reversed in part, and remanded for an award of fees and sanctions.

AVOIDING THE TCPA

- TEX.CIV.PRAC. & REM. CODE 27.010 (“EXEMPTIONS”):
 - *Commercial Exemption:* TCPA “does not apply to 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.”
 - *Personal Injury Exemption:* TCPA “does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.”
 - *Insurance Code Exemption:* TCPA “does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.”

FIGHTING BACK

- TEX. CIV. PRAC. & REM. CODE 27.009(b):
 - “If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.”

- *Miller v. Talley Dunn Gallery, LLC*, No. 05-15-00444-CV, 2016 WL 836775, at *16 (Tex. App. – Dallas Mar. 3, 2016, no pet.):
 - “[T]he trial court did not sanction Miller under chapter 10 of the civil practice and remedies code or pursuant to rule of civil procedure 215. Rather, it awarded appellees attorney's fees and costs after determining Miller's motion to dismiss pursuant to the TCPA was frivolous within the meaning of section 27.009(b). The statute requires no further findings.”

RECOMMENDED PRACTICES FOR PLAINTIFFS

- Advise client of risk.
- Pre-suit investigation of merits.
- Obtain evidence for each claim (Consider TRCP 202).
- Plead narrowly.
- Consider non-Texas Claims (other state laws, federal law).

FEDERAL COURT IS NOT SAFE

Khalil v. Mem'l Hermann Health Sys., No. H-17-1954, 2017 WL 5068157, at *1 (S.D. Tex. Oct. 30, 2017) (Rosenthal, J.):

- Defendant, a hospital, placed Plaintiff, a physician, on administrative leave based on "patient safety issues"
- Plaintiff filed claims under Texas Commission on Human Rights Act for age discrimination
- Court holds that claim was in response to Defendant's statements about patient safety, which met TCPA's definition of "matter of public concern"
- Court holds TCPA applies, dismisses state discrimination claim, and finds fees / sanctions are appropriate.

BEST PRACTICES FOR DEFENDANTS

- Think creatively about whether TCPA applies to Plaintiff's claims.
- Careful with counterclaims.
 - Tex. Civ. Prac. & Rem. Code § 27.001(6) (“‘Legal action’ means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief”).

THERE IS HOPE

In re Spex Group US LLC et al., case number 05-18-00208-CV, in the Texas Court of Appeals for the Fifth District (March 14, 2018).

- Dallas Court of Appeals rules that trial court may proceed with temporary injunction hearing before deciding TRO or TCPA Motion to Dismiss.
- However, trial court cannot permit “unbridled” discovery on the injunctive relief.

ADDITIONAL RESOURCES

- *SLAPPEd and Sanctioned: The Heavy Hand of the Texas Citizens Participation Act*, HLRe: Off the Record (2017).
 - WestLaw Cite: 8 HLRe 46
 - <http://www.houstonlawreview.org/wp-content/uploads/2017/09/Brown-and-Gibson-FINAL.pdf>

- *SLAPPEd and Sanctioned: The long reach of the Texas Citizens Participation Act*, Texas Bar Journal (Dec. 2017).
 - WestLaw Cite: 80 Tex. B.J. 776
 - <https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/ContentDisplay.cfm&ContentID=38589>

CONCLUSION

➤ Q & A SESSION

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