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FIVE YEARS OF ANTI-SLAPP IN TEXAS

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THE TEXAS CITIZENS PARTICIPATION ACT – FIVE YEARS AFTER PASSAGE

by Laura Prather

On June 17, 2011, the Texas Citizens Participation Act was signed into law by then Governor Rick Perry, a watershed moment that provided greater protection to Texas citizens who have been plagued with frivolous lawsuits aimed at stymieing their ability to discuss their opinions, report on governmental activities or uncover corporate wrongdoing. HB 2973/SB 1565 was filed by State Rep. Todd Hunter (R – Corpus Christi) and Sen. Rodney Ellis (D- Houston) and Sen. Kevin Eltife (R-Tyler). The bill was passed out of both chambers unanimously making it effective immediately upon the Governor's signature. Passed unanimously by the Texas Senate and House and known as the Texas Anti-SLAPP[1] statute, the law protects citizens (whether they are individuals, businesses, media organizations, political candidates) who exercise their First Amendment rights from meritless claims aimed at silencing them, subjecting them to paying expensive attorneys' fees and defending against exhaustive legal proceedings.

Texas Before and After Passage of Anti-SLAPP

Until then, if an individual, newsroom or business got sued for what they said, they had three choices – none of which were terribly attractive. They could retract what they said – even if they believed it to be true – to appease their accuser. They could choose not to fight the lawsuit and allow a default judgment to be entered against them and then have their property seized and liens placed against their assets. Or, they could spend a significant amount of money hiring a lawyer to represent them in a case that generally took years to defend and tied up a great deal of their time with discovery until a motion for summary judgment was filed and hopefully won. This was especially a problem in Texas where media did not have an option to file a motion to dismiss in state courts. Historically, the first opportunity to get a lawsuit dismissed was through a summary judgment motion, which often comes after a lengthy and costly discovery process.

The anti-SLAPP statute offers a powerful new deterrent against frivolous lawsuits. The plaintiff who files a meritless lawsuit against someone for the purpose of intimidating them into being quiet will now be on the hook for attorneys' fees expended in defending against the meritless claim. The law provides a mechanism by which a judge can dismiss a frivolous lawsuit filed against one who speaks out about a matter of public concern within the first 120 days. It

[1] SLAPPs (the acronym for "Strategic Lawsuits against Public Participation") are civil claims or counterclaims filed against individuals or organizations based on their communications about issues of public interest or concern.

THE ANTI-SLAPP STATUTE OFFERS A POWERFUL NEW DETERRENT AGAINST FRIVOLOUS LAWSUITS.

provides for an immediate right to an interlocutory appeal if the anti-SLAPP motion is denied and creates a stay of discovery in the lawsuit while the Anti-SLAPP motion is pending and/or appealed so as to not unnecessarily run up the defense costs.

In a nutshell, the Texas anti-SLAPP statute offers an expedited motion to dismiss when someone tries to squelch another's First Amendment rights by retaliating against them through the filing of a baseless lawsuit. A large coalition of groups joined together to support the passage of the law, including: the American Civil Liberties Union, the Better Business Bureaus of Central Texas, Coalition for HOA Reform, Consumers Union, Homeowners for Better Building, Freedom of Information Foundation of Texas, Institute for Justice, Public Citizen, Texas Association of Broadcasters, and Texas Press Association. Historically significant is the fact that it passed with support of both the Texans for Lawsuit Reform and the Texas Trial Lawyers Association.

Anti-SLAPP Protection Trending Nationwide

California set the standard but conservative states and groups have joined the initiative recognizing the resulting judicial economy that comes from the passage of anti-SLAPP laws. Long before the internet became popular as a forum for public speech, California recognized the problem when well-funded companies were suing citizens who were holding the companies accountable. The solution California came up with in 1992 was the adoption of an anti-SLAPP law that made it easier for defendants to seek early dismissal of these suits at no cost to them. Since that time, 28 states, the District of Columbia and the territory of Guam have passed anti-SLAPP laws, and two states (Colorado and West Virginia) have adopted judicial procedures to protect against such suits. The trend for passage of anti-SLAPP legislation is ongoing. Prior to Texas but in the last decade, Arizona, Arkansas, Illinois, Missouri, New Mexico, New York, Oregon, Utah and Washington have all adopted anti-SLAPP statutes – again showing this is not a red or a blue state issue. It is a speech issue that transcends both parties and strikes at the heart of patriotism. Since the passage of the Texas law, the Nevada legislature amended its anti-SLAPP statute to broaden its scope. And, in 2014, the Oklahoma legislature passed a virtually identically version entitled the Oklahoma Citizens Participation Act, which became effective on November 1st. That same year, the American Legislative Exchange Council ("ALEC"), an organization of conservative legislators and corporate representatives, adopted a model anti-SLAPP law. Tech industry leader, Yelp, Inc., ignited the effort by ALEC to adopt a model bill after seeing the litany of abuses targeting the online publishing community. In 2015, Florida lawmakers adopted a comprehensive anti-SLAPP law, substantially revising their prior piecemeal efforts to provide limited protection. And, earlier this year, Georgia expanded its anti-SLAPP protection by amending its law to cover statements beyond those in a governmental proceeding.

Application of Anti-SLAPP in Federal Court

Although the Ninth Circuit decided nearly 20 years ago that California's anti-SLAPP statute applied in federal court, other jurisdictions are still weighing

whether anti-SLAPP laws apply in federal court. Over the last year, two such jurisdictions, D.C. and Texas, have addressed the issue. Both jurisdictions passed statutes in recent years and the nuances of how to interpret the laws are still being determined by the appeals courts. One such area of initial impression has been determining whether the state anti-SLAPP statutes apply in federal court where state law claims had been brought under diversity jurisdiction. In the Texas case of *Christopher Williams v. Cordillera Communications, Inc., et al.*,[2] in which a former teacher accused of inappropriate behavior with students sued a television station for its truthful reports on the allegations, the Southern District of Texas held that the Texas Citizens Participation Act ("TCPA") applies in federal court. Judge Nelva Ramos analyzed the statute under the Erie Doctrine and found that while there are procedural aspects to the TCPA, such as its time constraints and a stay of discovery, the procedures are "designed to prevent substantive consequences-- the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law regarding defamation." The court relied in part on prior holdings in the Fifth Circuit Court of Appeals, which has held that Louisiana's anti-SLAPP statute applies in federal court, and the court noted that there is no material difference between the Louisiana and Texas statutes.

In D.C., there has been a split of authority on the question of whether the anti-SLAPP statute applies in federal court. In 2013, a D.C. district court held that D.C.'s anti-slapp law did not apply in federal court, in the case of *3M Co. v. Boulter.*[3] However, since that case was decided, several other federal courts have held otherwise, agreeing that the anti-SLAPP law applies in federal court. The U.S. Court of Appeals for the District of Columbia Circuit is expected to make a determination on the issue in *Yasser Abbas v. Foreign Policy Group, LLC*,[4] a case in which a prominent businessman and a son of the Palestinian president filed a lawsuit over an opinion piece about Abbas and his brothers. The case was briefed earlier this year and oral arguments were held in the fall. At least eight anti-SLAPP cases in the District involved media defendants, and a coalition of media organizations filed an amicus brief in Abbas, urging the appeals court to find that the law applies in federal court.

The Deterrent Force of Anti-SLAPP Statutes Lie in the Fee Shifting

Finally, many scholars believe that the strength of an anti-SLAPP statute lies in the mandatory fee-shifting provision. The inherent problem anti-SLAPP statutes were adopted to correct is the misuse of the legal system to intimidate or retaliate against others for taking actions they have a legal right to take. While the anti-SLAPP statute provides the mechanism for the court to dismiss the meritless case, it is the fee-shifting provision that provides the deterrent effect needed to make a litigant think twice before filing suit simply out of vengeance. The Texas statute, and several others, provide a similar mechanism if the court finds the anti-SLAPP motion itself is frivolous or filed solely for the purposes of delaying the proceedings. Either way, the party misusing the legal system has exposure for doing so.

SLAPP suits chill public debate because they cost money to defend, even if the defendant was speaking the truth. The reason for mandatory fee shifting is to attempt to make the speaker whole after being forced to defend against a meritless claim. Most SLAPP statutes provide that only reasonable fees be awarded, and the reasonableness of the fees is for the trial court to determine. The question of whether pro bono fees can be reimbursed in a SLAPP order was recently raised in the case of *Baltasar D. Cruz v. Van Sickle, et al.*[5] In that case, the Dallas Court of Appeals held the statutory requirement that the fees be both "reasonable and incurred" prevented an award of $158,521.50 based on a prebill worksheet and invoice summary done for a pro bono client. In short, when a party is represented pro bono, they have not incurred any attorneys' fees as required under the statute and no such fees should be awarded. The mandatory nature of the fee shifting applies; but, if the law firm agrees to handle the representation pro bono, the statute does not provide a lagniappe after the fact.

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[2] *Christopher Williams v. Cordillera Communications, Inc., et al.*, No. 2:13-cv-00124, WL 2611743 (S.D. Tex. 2014).
[3] *3M Co. v. Boulter*, No. 11-cv-1527, 2012 WL 5245458 (U.S. D.D.C. 2012).
[4] *Yasser Abbas v. Foreign Policy Group, LLC,* No. 13-7171 (pending D.C. Cir.).
[5] *Cruz v. Van Sickle, et al.*, No. 05-13-00191-CV, (Texas App. - Dallas, December 3, 2014, no pet. h.).

CASE LAW SHAPING TEXAS' ANTI-SLAPP LAW

by Alicia Calzada

In the five years since Governor Rick Perry signed the Texas Citizens Participation Act (TCPA) into law, appellate interpretation of the law has been shaped by a series of important cases that now guide judges on everything from the application of the law to private communication, to the application of the law to cases brought in federal court.

Courts Determine Proper Application of the Statute:

One of the first questions faced by Texas courts was when to apply the statute. In ***Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.***,[1] a newspaper reported on regulatory compliance and official investigations of Crazy Hotel, an assisted living facility, which then sued the newspaper. Crazy Hotel asserted that the TCPA was barred from application to the suit based on the commercial speech exemption, which provides that the TCPA does not apply to suits against a person selling goods or services if the statement at issue arose out of that sale, and the audience is a potential buyer.[2] In evaluating the exemption, the First Court of Appeals in Houston adopted a four-prong analysis, now used by other courts, based on the analysis used for California's similar exemption. In determining whether to apply the exemption, the court asked 1) whether the suit is against a party selling goods or services, 2) whether the suit arises from representations about the business or a competitor, 3) whether the statement was made to further a commercial transaction, or during delivery, and 4) whether the intended audience is a potential buyer.[3] This four-prong analysis is now the standard in determining whether the commercial speech exemption applies.

Another conflict with the application of the TCPA arose because of a court's mistaken interpretation that the statute did not apply to privately communicated speech. In ***Lippincott v. Whisenhunt***,[4] the claim was based on private emails questioning the quality of the plaintiff's services. The Sixth Court of Appeals in Texarkana held

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[1] 416 S.W.3d 71, 88 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).
[2] Tex. Civ. Prac. & Rem. Code § 27.010(b)
[3] *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 88 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)
[4] 462 S.W.3d 507, 508 (Tex. 2015).

that "if a person is not exercising his right to speak freely ***in public***, the TCPA will not apply to suits filed against him."[5] The Supreme Court disagreed, and reversed, finding no basis for the limited view of the TCPA's applicability and explaining that "[t]he plain language of the statute imposes no requirement that the form of the communication be public… In the absence of such limiting language, we must presume that the Legislature broadly included both public and private communication."[6]

The Texas Supreme Court Interprets and Defines "Clear and Specific Evidence"

On the same day it released the *Lippincott* decision, the Texas Supreme Court issued another important opinion, ***In re Lipsky***,[7] which addressed the evidentiary standard a plaintiff must meet in order to overcome a TCPA motion to dismiss. The TCPA requires the non-moving party to "establish [ ] **by clear and specific evidence** a prima facie case" of each element of their claim.[8] For years courts had struggled with the interpretation of "clear and specific" evidence, and in particular, whether circumstantial evidence was also permitted. This confusion led a split among appeals courts on the issue.[9] In resolving the split, the *Lipsky* court acknowledged "the relevance of circumstantial evidence"[10] and specifically held that the TCPA "does not impose an elevated evidentiary standard or categorically reject circumstantial evidence. In short, [the TCPA] does not impose a higher burden of proof than that required of the plaintiff at trial."[11] Accordingly, circumstantial evidence can be used to meet the non-movant's evidentiary burden in responding to a TCPA motion to dismiss.

The Right to Reasonable Attorneys' Fees is Firmly Established

The successful TCPA movant is to be awarded "court costs, reasonable attorneys' fees, and other expenses incurred in defending against the legal action as justice

TEXANS HAVE BEEN ABLE TO SPEAK MORE FREELY ABOUT IMPORTANT MATTERS OF PUBLIC CONCERN.

[5] *Whisenhunt v. Lippincott,* 416 S.W.3d 689, 699-700 (Tex. App.—Texarkana 2013, pet. granted)., *judgment rev'd*, 462 S.W.3d 507 (Tex. 2015).
[6] *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015).
[7] 460 S.W.3d 579 (Tex. 2015).
[8] Tex. Civ. Prac. & Rem Code § 27.005(c).
[9] *In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015).
[10] *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015).
[11] *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015).
[12] Tex. Civ. Prac. & Rem. Code § 27.009. The statute also requires a mandatory award of sanctions. *Id.*

and equity may require."[12] The award of fees helps to make whole the defendant who has been sued for exercising his or her First Amendment rights, and acts as a deterrent against filing such suits in the first place. Yet courts have struggled with how much discretion they have in awarding fees.

One case affirmed the mandatory nature of the award. In *Avila v. Larrea*,[13] the trial court completely denied a successful TCPA movant's request for attorneys' fees, expenses and sanctions.[14] On appeal, the Dallas Court of Appeals reversed. *Avila* was the first case where a trial court's denial of attorneys' fees to a successful anti-SLAPP movant was overturned. The court held that successful TCPA movants are "statutorily entitled to an award of "reasonable attorneys' fees[ ] and other expenses incurred in defending against the legal action as justice and equity may require,"[15] thus firming up the principle that it is in fact mandatory for courts to award attorneys' fees to a successful anti-SLAPP movant.

The question remained as to how much discretion courts had in adjusting the attorneys' fee award based on the phrase "as justice and equity may require." In a stunning decision in 2016, the Supreme Court of Texas held that as a result of comma placement in the statute, the phrase "as justice and equity may require" does not refer to the award of attorneys' fees at all, but rather only gives discretionary power to the last item listed in the statute: "other expenses incurred." The impact of that interpretation is that the TCPA requires an award of "reasonable attorneys' fees" to the successful movant" with "reasonable" being "not excessive or extreme, but rather moderate or fair" and, while the court has sound discretion to determine what amount qualifies as "reasonable" attorneys' fees, the court may not include an adjustment based on considerations of "justice and equity" in their determination of attorneys' fees.[16]

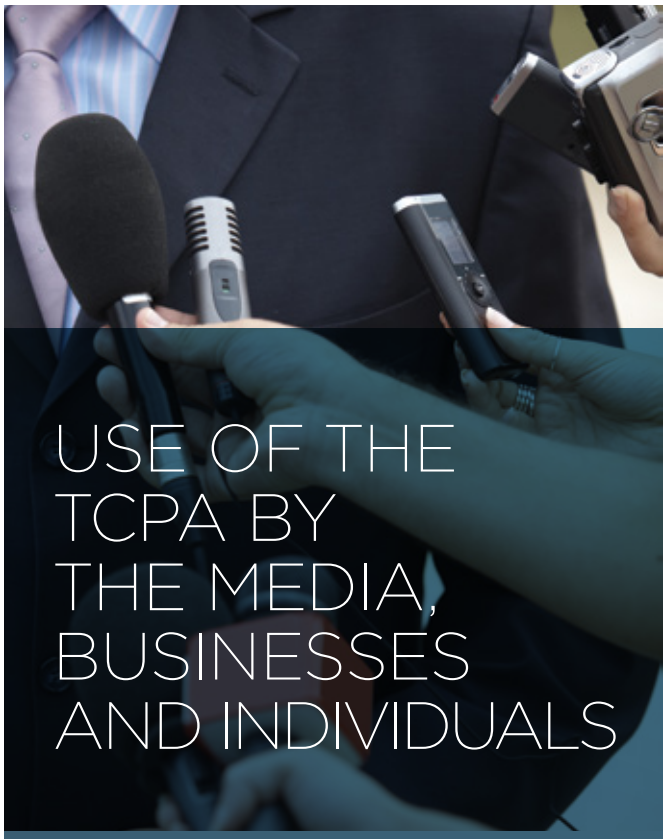
Federal Court Determines that the TCPA Applies in Federal Court

Another extremely critical question that is faced by all states with anti-SLAPP statutes is whether the statute should apply to claims brought in federal court. "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."[17] A majority of federal courts around the nation have held that anti-SLAPP laws are substantive and, therefore, should be applied to cases brought in federal courts sitting in diversity.[18] For the first few years of the statute's existence, federal courts in Texas had addressed anti-SLAPP motions without specifically answering the question of whether the statute applies in federal court. But in 2014, the Southern District of Texas addressed the question directly in ***Williams v. Cordillera Communications, Inc.***, and determined that, because the Fifth Circuit had applied Louisiana's anti-SLAPP statute in federal court, and because there is no material difference between the Louisiana and Texas statutes, federal courts sitting in diversity should apply the Texas anti-SLAPP statute.[19] The Fifth Circuit Court of Appeals has since applied the TCPA to dismiss state-law claims sitting in diversity.[20]

Conclusion

As courts continue to interpret the TCPA, more questions related to the proper application of the statute will arise, but courts have faithfully enforced the law, providing early, pre-discovery dismissal of baseless lawsuits that target protected speech. The result is that, for five years, Texans have been able to speak more freely about important matters of public concern.

[13] *394 S.W.3d 646* (Tex. App.—Dallas 2012, pet. denied).
[14] *Avila v. Larrea*, 05-14-00631-CV, 2015 WL 3866778, at *2 (Tex. App.—Dallas June 23, 2015, pet. denied)
[15] *Avila v. Larrea*, 05-14-00631-CV, 2015 WL 3866778, at *4 (Tex. App.—Dallas June 23, 2015, pet. denied)
[16] *See Sullivan v. Abraham*, 14-0987, 2016 WL 1513674, at *4 (Tex. Apr. 15, 2016)
[17] *Williams v. Cordillera Communications, Inc.*, 2:13-CV-124, 2014 WL 2611746, at *1 (S.D. Tex. June 11, 2014) (*quoting Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); 28 U.S.C. § 1652).
[18] *See, e.g., United States ex rel. Newsham v. Lockheed Missiles & Space Co. Inc.*, 190 F.3d 963 (9th Cir. 1999)(holding that California's anti-SLAPP statute applies in federal court); *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010) (holding that Maine's anti-SLAPP statute applies in federal court); *Brown v. Wimberly,* 477 Fed. Appx. 214, 216 (5th Cir. 2012) (applying Louisiana's anti-SLAPP statute in federal court. *But see Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) ("The first issue before the Court is whether a federal court exercising diversity jurisdiction may apply the D.C. Anti–SLAPP Act's special motion to dismiss provision. The answer is no.").
[19] *Williams v. Cordillera Communications, Inc.*, 2:13-CV-124, 2014 WL 2611746, at *2 (S.D. Tex. June 11, 2014). The Eastern District of Texas made a similar holding earlier this year. *See Walker v. Beaumont Indep. Sch. Dist.*, 1:15-CV-379, 2016 WL 1156852, at *1 (E.D. Tex. Mar. 24, 2016).
[20] *See Cuba v. Pylant*, 814 F.3d 701, 711 (5th Cir. 2016).



USE OF THE TCPA BY THE MEDIA, BUSINESSES AND INDIVIDUALS

Since its passage five years ago, the Texas Citizens Participation Act (TCPA) has been used by citizens of all walks of life who have found themselves targeted by meritless claims aimed at silencing their exercise of First Amendment rights. Individuals, businesses, media organizations, political candidates, and more have availed themselves of the protections of the TCPA (known as the Texas Anti-SLAPP statute) to combat lawsuits aimed at punishing them for exercising their right of free speech, right of association, or right to petition — or attempting to prevent them from doing so. The targets of these suits face the prospect of paying expensive attorneys' fees in defending against exhaustive and meritless legal proceedings. Thankfully, the TCPA is an effective weapon against such suits, as illustrated by the following sampling of SLAPP lawsuits handled by Haynes and Boone.

MEDIA USE
of Anti-SLAPP Statute

Media entities have also availed themselves of the TCPA when sued for raising awareness on matters of public concern. In one such case, a concrete company sued Haynes and Boone's clients, an Austin radio station and their morning disc jockey, based on the DJ's on-air reporting about (and public comments on) the plaintiff's plans to build a concrete batch plant in a quiet neighborhood. Our clients' reporting notified the public about safety concerns that had been raised about the plant, as well as the fact that the plaintiff had violated rules for notifying the public about their plans. Through the timely filing of a TCPA Motion, we were able to avoid costly discovery and obtain an early dismissal of the suit, vindicating the DJ's and the station's right to speak out and to serve the important role of making the public aware of important issues of public concern.

In another case where Haynes and Boone used the TCPA statute on behalf of a media client, a San Antonio dentist and his chain of dental clinics sued our client, San Antonio television station WOAI, after the station ran a series of broadcasts on allegations of unnecessary and substandard dental treatment of children on Medicaid. On behalf of the station, we filed an answer and an anti-SLAPP motion asserting a variety of defenses, including substantial truth, accurate reporting of third-party allegations, fair comment privilege, and absence of actual malice. After a hearing, the Judge granted Defendants' anti-SLAPP motions and dismissed the case in its entirety. The judge also awarded attorneys' fees and sanctions against plaintiff.

"Anti-SLAPP not only protected me [in] fight[ing] this baseless lawsuit, but the law has allowed reporters like myself to expose fraud and corruption perpetrated against those who've entrusted us to tell their stories."

BRIAN COLLISTER
WOAI Investigative Reporter

BUSINESS USE
of Anti-SLAPP Statute

The Better Business Bureau of Austin ("BBB Austin") used the TCPA to effectively defend its right to educate consumers about questionable business practices. BBB Austin and the Council of Better Business Bureaus ("CBBB") were sued in Travis County for defamation, "interference with prospective contract," and negligence by an individual who ran a credit repair business and was unhappy with BBB Austin's reporting on his business practices and its rating of his business. The plaintiff sued in an attempt to punish BBB Austin for its truthful and informative reporting and to prevent BBB Austin from further reporting on such matters. Haynes and Boone filed a timely TCPA Motion asserting affirmative defenses of truth or substantial truth, privilege, opinion, and limitations. After a hearing, the TCPA motion was granted by the court, along with an award of attorneys' fees, thereby preserving BBB Austin's ability to continue to inform the public on matters of public concern in their community.

"BBB advances marketplace trust not only by celebrating marketplace role models but also by calling out substandard behavior. BBBs in Texas have been the subject of lawsuits unfairly challenging our right to publish our opinions and accurate information about marketplace conduct. The Anti-SLAPP Statute, which discourages frivolous lawsuits based on BBB publications, allows BBB to continue serving the public interest by warning consumers about questionable or fraudulent practices and leveling the playing field for ethical businesses."

CARRIE A. HURT, PRESIDENT & CEO
BBB serving Central, Coastal, Southwest Texas and the Permian Basin

INDIVIDUAL DEFENDANTS USE
of Anti-SLAPP Statute

We have also successfully utilized the Anti-SLAPP statute to help individual defendants defend against meritless suits that sought to threaten their First Amendment rights.

Haynes and Boone quickly filed a TCPA motion to dismiss after its client, Texas State Representative Carol Alvarado, was sued by her former political opponent for $1.5 million for a variety of claims related to her political campaign's website and social media communications. After threatening to amend her petition to include more claims, the plaintiff instead non-suited with prejudice on the morning of the hearing on the TCPA motion. Because Representative Alvarado had already been required to expend time and resources to defend against the baseless claims, the hearing went forward and our client obtained a ruling awarding her the full amount of her attorneys' fees and expenses.

Similarly, we represented a member of a condominium association who was sued by the association's management company when she raised questions about the management. Haynes and Boone prepared to file a TCPA motion, but in discussions with opposing counsel, and using just the threat of the TCPA motion, we were able to negotiate a favorable settlement on behalf of our client.

"The anti-SLAPP statute provided a mechanism for early dismissal of a meritless claim filed against me by a political opponent. Laura Prather and Haynes and Boone used the statute effectively. After they filed a motion on my behalf, a frivolous lawsuit against me was quickly dismissed, saving me time and money, and recovering attorneys' fees."

CAROL ALVARADO
State Representative, District 145

ANTI-SLAPP FACTS

67 DAYS

According to studies, the average time for a defamation case to be resolved was **four years**, prior to passage of anti-SLAPP laws. With the passage of the Texas Anti-SLAPP statute, Haynes and Boone has been able to get cases dismissed as quickly as **67 days**.

SLAPP cases are filed against individuals (including political candidates), corporations and media organizations. Haynes and Boone has handled SLAPP cases for all of these types of SLAPP victims.

Haynes and Boone has been successful in obtaining significant awards of attorneys' fees for its clients, substantially off-setting the cost of defending against the meritless litigation.

Haynes and Boone's Anti-SLAPP and First Amendment Rights Practice Group has handled dozens of SLAPP cases both at the trial court and appellate courts, provided experienced consultation, and organized and assisted with statewide and national efforts to obtain passage of anti-SLAPP laws.

RECENT SUPREME COURT CERT DENIAL HIGHLIGHTS NEED FOR PASSAGE OF FEDERAL ANTI-SLAPP STATUTE

Strategic Lawsuits Against Public Participation (otherwise known as "SLAPP" suits) are more prevalent than ever given the ease of communication and multitude of platforms available for getting messages out. It seems almost daily there are headlines about customers being sued for negative reviews on Yelp!, candidates being sued over campaign literature, or businesses being hauled into court for reporting safety concerns arising out of an employee's conduct. Couple this with the steady stream of legal action attempting to silence investigative reports uncovering wrongdoing and one can see why the passage of anti-SLAPP statutes is on the rise.

SLAPP suits are meritless lawsuits brought to silence a critic. The Legislatures in 29 states, the District of Columbia and the territory of Guam have all seen the merit in passing anti-SLAPP legislation to curtail the ability of bullies from using the court system to squelch First Amendment rights. This has left a patchwork of protection that savvy plaintiffs have been known to work around by filing actions in jurisdictions that have not enacted anti-SLAPP statutes. Another quandary presented by this primarily state–born protection is whether it applies in federal court. For more than 15 years, federal courts have applied state anti-SLAPP statutes to federal cases when sitting in diversity jurisdiction, because they have viewed SLAPP statutes as being designed to prevent substantive consequences — the impairment of First Amendment rights and the time and expense of defending against meritless litigation. In 2014, however, the D.C. Circuit found the Erie doctrine barred the application of the D.C. anti-SLAPP statute in federal court. The conflict now results in a circuit split.

The U.S. Supreme Court had the chance solve this problem when petition for certification was filed in the *Mebo International v. Yamanaka*, D.C. No. 4:13-cv-03240-YGR, (9th Cir. 2015) case because the sole question presented in that proceeding was:

> Whether state anti-SLAPP statutes are properly applied in federal diversity cases, or whether doing so runs afoul of the Erie doctrine.

THE PASSAGE OF ANTI-SLAPP STATUTES IS ON THE RISE.

A split in the circuit courts on this question currently exists with the Ninth Circuit applying state anti-SLAPP statutes in diversity actions, but the D.C. Circuit refusing to do so. *Compare U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999) and *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

On March 21, 2016 the High Court declined the invitation making the need for a federal anti-SLAPP statute even more crucial.

Efforts to create a federal anti-SLAPP law started at least six years ago, but this year marks the first time that a sizable and bipartisan group is backing such a bill. After seeing the growing number of SLAPP suits aimed at web-based businesses (and their customers) that provide a forum for the public to discuss, rate and criticize the world around them, Silicon Valley stalwarts like Yelp! and TripAdvisor have decided to get involved in the debate. The proposal — HR 2304 – or the "SPEAK FREE Act" by Rep. Blake Farenthold (R-Texas) and Rep. Anna Eshoo (D-California) — has, at last count, 32 co-sponsors from both sides of the aisle. Groups that support the effort include: American Center for Democracy, American Society of News Editors, Avvo, Consumer Technology Association, Electronic Frontier Foundation, Information Technology & Innovation Foundation, Media Law Resource Center, Newspaper Association of America, Public Knowledge, Public Participation Project and the Reporters Committee for Freedom of the Press.

Borrowing heavily from the California and Texas SLAPP statutes, the bill would allow people sued in federal court or in states with little protection against SLAPPs to have a federal judge dismiss frivolous claims based on speech "made in connection with an official proceeding or about a matter of public concern." The bill has been referred to the House Subcommittee on the Constitution and Civil Justice and a hearing is anticipated in the near future. A consistent approach to the application of anti-SLAPP laws in federal court is critical to serve the purpose of anti-SLAPP statutes and to avoid forum shopping, and nothing would satisfy that need more efficiently than passage of the SPEAK FREE Act.

RESOURCES

- For up-to-date information about the Texas Anti-SLAPP statute, go to the Slapped In Texas blog – ***slappedintexas.com***.
- For up-to-date information about anti-SLAPP statutes throughout the nation, go to Public Participation Project's website – ***anti-slapp.org***
- For an overview of Texas' Anti-SLAPP statute, read Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas, 47 TEX. TECH L. REV. 725 (Summer 2015) at ***texastechlawreview.org/wp-content/uploads/Prather-Bland.PUBLISHED.pdf***.
- If you've been a victim of a SLAPP lawsuit and would like to sign on to a letter urging Congress to pass the SPEAK FREE Act, go to ***goo.gl/Lz9VXB***

For more information on Haynes and Boone's Anti-SLAPP and First Amendment Rights Practice Group

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