



## State Anti-SLAPP In Federal Court: An Update From Texas

By April Farris and Matthew Zorn

November 1, 2018

The Texas Citizens Participation Act<sup>[1]</sup> is an “across-the-board game-changer in Texas civil litigation,”<sup>[2]</sup> creating a sweeping dismissal mechanism that extends far beyond the traditional anti-strategic lawsuits against public participation realm of protecting First Amendment rights. Yet the question remains: Can litigants use this powerful tool in the Fifth Circuit? Thanks to recent developments in the Fifth Circuit and the U.S. Supreme Court, litigants may soon have an answer.

The TCPA is the broadest anti-SLAPP statute in the nation. With some carveouts, it encompasses any “lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief” that is based on or relates to a communication made in connection with a “matter of public concern.”<sup>[3]</sup> A “matter of public concern” is defined expansively to include an issue related to such topics as “health or safety”; economic or community “well-being”; and even a “good, product, or service in the marketplace.”<sup>[4]</sup> What is more: The communication need not be public to trigger the TCPA’s protection.<sup>[5]</sup> The TCPA also protects a party’s exercise of the “right to petition” and the “right of association” — statutory terms that are defined much more broadly than their constitutional counterparts.<sup>[6]</sup>

Given its broad reach, the TCPA crops up everywhere, from run-of-the-mill trade secrets cases to the Stormy Daniels defamation lawsuit against President Donald Trump.<sup>[7]</sup> For plaintiffs and counterclaimants, the TCPA’s consequences can be devastating. Once a moving party demonstrates that a claim or counterclaim falls within the TCPA’s ambit, the court must dismiss the cause of action unless the claimant supplies prima facie evidence to support each essential element of the claim in question.<sup>[8]</sup> Meanwhile, discovery is suspended unless the respondent demonstrates good cause for limited discovery relevant to the motion.<sup>[9]</sup> If the movant prevails, the TCPA mandates an award of attorney fees to the prevailing movant and sanctions against the party who brought the legal action.<sup>[10]</sup>

For obvious reasons, plaintiffs would prefer to keep this weapon out of federal court. Whether it applies there, however, remains an undecided question in the Fifth Circuit. For years, the Fifth Circuit has assumed, without deciding, that the TCPA applies in federal court.<sup>[11]</sup> The court is finally poised to answer the question in *Klocke v. Watson*, heard last month.<sup>[12]</sup>

*Klocke* invites the Fifth Circuit to weigh in on the brewing circuit split over whether state anti-SLAPP statutes apply in federal court.<sup>[13]</sup> The First, Second and Ninth Circuits have found that anti-SLAPP statutes apply in federal court as state substantive policy.<sup>[14]</sup> On the other hand, the Tenth and D.C. Circuits have deemed anti-SLAPP statutes to be inapplicable under *Erie* or the Rules Enabling Act.<sup>[15]</sup> And within an individual circuit, judges often express disagreement.<sup>[16]</sup>

As a general matter, anti-SLAPP statutes protect substantive free speech rights through procedural rules. These types of statutes raise thorny *Erie* and REA questions. The *Erie* question is whether an anti-SLAPP statute is procedural or substantive. If a state anti-SLAPP law is procedural, it doesn’t apply. The REA inquiry is similar but distinct, as the U.S. Supreme Court explained in

Shady Grove Orthopedic Associates PA v. Allstate Insurance Co.[17] If a federal rule “really regulates procedure” and conflicts with state law, then the federal rule controls.[18] Because there can be no serious dispute that Federal Rules of Civil Procedure 12 and 56 regulate procedure, the REA question boils down to whether applying state anti-SLAPP motions to dismiss conflicts with Rules 12 and 56.[19]

Klocke is likely to resolve this question for the Fifth Circuit.[20] The Klocke case arose when Thomas Klocke’s estate sued defendant Watson based on disparaging remarks in an email Watson purportedly authored naming Klocke. Watson answered and moved for dismissal solely under the TCPA. The district court granted the motion and overruled Klocke’s objection to the applicability of the TCPA in a federal court proceeding. On appeal, Klocke disputes the TCPA’s applicability on the basis that it directly collides with the federal rules; therefore, it cannot apply in federal court. Watson responds that the TCPA creates significant substantive rights under Texas law that would be abridged if the statute does not apply. Watson also points out that the Fifth Circuit has previously held that a Louisiana anti-SLAPP statute was substantive in *Henry v. Lake Charles American Press LLC*.[21]

Whatever the Fifth Circuit’s answer is in Klocke, that answer could be short-lived if the United States Supreme Court steps in to resolve the circuit split over state anti-SLAPP applicability. Recently, the Supreme Court requested a response to a petition for writ of certiorari in *Americulture Inc. v. Los Lobos Renewable Power LLC*.[22] Despite the circuit split, the Tenth Circuit had no difficulty concluding that New Mexico’s anti-SLAPP statute was an inapplicable law that governed procedure rather than substance. Mincing no words, the court ruled that it “need not rely on any complex Erie analysis here because, assuming one is able to read, drawing the line between procedure and substance in this case is hardly a ‘challenging endeavor.’”[23] Further, the “plain language of the New Mexico anti-SLAPP statute reveals the law is nothing more than a procedural mechanism designed to expedite the disposal of frivolous lawsuits aimed at threatening free speech rights.”[24]

But should both Klocke or Los Lobos not sound the death knell for the TCPA in federal court, lurking beneath is another unaddressed issue — the Seventh Amendment.[25] Of course, the jury trial right guaranteed by the Seventh Amendment is not absolute. As explained in *Tellabs*, Congress can regulate the manner or mode of pleading requirements it wants.[26] Heightened pleading standards do not offend the Seventh Amendment. Likewise, summary judgment practice does not offend the Seventh Amendment because it has a 1791 common law analogue: the demurrer. As the court explained in *Parklane Hosiery Co.*, the procedural devices of summary judgment and directed verdict descend from the common-law demurrer.[27]

TCPA motions to dismiss (and similar motions provided by other state anti-SLAPP statutes)[28] may go beyond heightened pleading standards or demurrer analogues. For example, on a TCPA motion to dismiss, the movant must show by a “preponderance of the evidence” that the claim relates to the right of free speech, the right to petition or the right of association (as defined by the TCPA).[29] If the movant meets that burden, then the respondent must establish, based on the pleadings and supporting and opposing affidavits, “clear and specific evidence” establishing a prima facie case for each essential element of the claim in question.[30] If the respondent clears that hurdle, the movant can still secure a dismissal by establishing each element of a valid defense by a “preponderance of the evidence.”[31]

The Supreme Court's opinion in *Byrd v. Blue Ridge Rural Electric Cooperative Inc* suggests that a challenger might have a good argument. The court in *Byrd* not only determined that the Seventh Amendment applies in diversity cases, but that once the right to a jury trial attaches — i.e., the pleadings are sufficient — the judge cannot resolve factual uncertainties in favor of the movant.[32] A footnote in the Supreme Court's recent *Atlantic Marine* decision lends further support in a different context. There, the court noted that enforcing a forum selection clause through a Rule 12(b)(6) motion might be problematic, because factual issues relating to the validity of the forum-selection clause could implicate a jury trial right.[33]

Although infrequently raised, this Seventh Amendment issue has garnered interest in certain cases outside of Texas. Interpreting the Massachusetts anti-SLAPP statute, Judge William Young of the District of Massachusetts held that anti-SLAPP statutes that require judges to make factual findings and credibility determinations do not pass Seventh Amendment muster.[34]

Given these developments, respondents who face TCPA motions in federal court should take note. And should the TCPA be kept out of federal court, litigants might be presented a new and important choice. For plaintiffs, a federal action might be preferable to an analogous state law claim. By the same token, defendants ought to think carefully about removal. The right to file a TCPA motion to dismiss — with attorney fees, automatic sanctions and a discovery stay — is not something a defendant ought to pass up so easily.

April Farris is a partner and Matthew Zorn is an associate at Yetter Coleman LLP.

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

---

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

[2] *Serafine v. Blunt*, 466 S.W.3d 352, 365 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring)

[3] Tex. Civ. Prac. & Rem. Code § 27.001(3) (defining “exercise of the right of free speech”) and (6) (defining “legal action”).

[4] Tex. Civ. Prac. & Rem. Code § 27.001(7) (defining “matter of public concern”).

[5] *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015).

[6] See Tex. Civ. Prac. & Rem. Code § 27.003(2), (4); see also *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 202 (Tex. App.—Austin 2017, pet. dismissed) (“The Texas Supreme Court in *Coleman* seems to have put to rest any notion that any constitutional connotations of “right of association,” “right of free speech,” or “right to petition” should inform the meaning of the TCPA's corresponding “exercise of” definitions....”).

[7] *Clifford v. Trump*, CV 18-006893 JFO (FFMx) (C.D. Cal. Oct. 15, 2018), <https://www.documentcloud.org/documents/5002740-Clifford-v-Trump-Order-Granting-Anti-SLAPP-Motion.html>

[8] Tex. Civ. Prac. & Rem. Code § 27.005(c).

[9] Id. § 27.003(c).

[10] Id. § 27.009(a)(1)-(2).

[11] See *Cuba v. Pylant*, 814 F.3d 701, 706 (5th Cir. 2016); *Diamond Consortium, Inc. v. Hammervold*, No. 17-40582, 733 Fed. App'x 151, 154 n.3 (2018) (noting that question "remains unresolved").

[12] *Klocke v. Watson*, No. 17-11320 (5th Cir.); see also *Rudkin v. Roger Beasley Imports, Inc.*, No. 18-50157 (5th Cir.) (presenting the same questions).

[13] *AmeriCulture Inc. v. Los Lobos Renewable Power, LLC*, No. 18-89 (10th Cir.).

[14] See *Godin v. Schencks*, 629 F.3d 79, 88–92 (1st Cir. 2010) (holding that Maine anti-SLAPP was sufficiently substantive, and declining to apply it would disservice Erie aims, including prevention of forum shopping); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 148 (2d Cir. 2013) (holding that California's anti-SLAPP reflected "substantive policy favoring the special protection of certain defendants from the burdens of litigation because they engaged in constitutionally protected activity"); *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972–73 (9th Cir. 1999) (holding that California's anti-SLAPP furthered "substantive" interests and served dual Erie purposes).

[15] See *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015) (Kavanaugh, J.) (holding that D.C. anti-SLAPP statute did not apply in federal court under REA, without reaching Erie); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 668–69 (10th Cir. 2018) (New Mexico anti-SLAPP law was procedural and therefore did not apply under Erie).

[16] See, e.g., *Cuba*, 814 F.3d at 718 (Graves, J., dissenting); see also *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 272 (9th Cir. 2013) (Kozinski, J., concurring) ("I join Judge Wardlaw's fine opinion because it faithfully applies our law . . . . But I believe Newsham is wrong and should be reconsidered.").

[17] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

[18] Id. at 406.

[19] Compare *Abbas*, 783 at 1336 (finding conflict) with *Godin*, 629 F.3d at 89 (no conflict).

[20] The court heard oral argument in *Klocke* on Sept. 5, 2018. The recording is available at [http://www.ca5.uscourts.gov/OralArgRecordings/17/17-11320\\_9-5-2018.mp3](http://www.ca5.uscourts.gov/OralArgRecordings/17/17-11320_9-5-2018.mp3).

[21] *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009).

[22] *Petition for a Writ of Certiorari, AmeriCulture, Inc. v. Los Lobos Renewable Power, LLC*, 2018 WL 3497538 (July 16, 2018) (No. 18-89).

[23] *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 668–69 (10th Cir. 2018).

[24] Id.

[25] *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974).

[26] See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328 (2007).

[27] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 349-50 (1979).

[28] See *Hi-Tech Pharms., Inc. v. Cohen*, 208 F. Supp. 3d 350 (D. Mass. 2016)

[29] *In re Lipsky*, 460 S.W.3d 579, 586-87 (Tex. 2015)

[30] *In re Lipsky*, 460 S.W.3d 579 at 587.

[31] Tex. Civ. Prac. & Rem. Code § 27.005(b).

[32] *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 531 (1958)

[33] *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 61, n.4 (2013).

[34] *Hi-Tech*, 579 F. Supp. 3d at 355-58.