DISCOVERY OF DAMAGES IN TCPA CASES

COLLIN J. COX, *Houston*
Yetter Coleman LLP

Co-author:
SHANE PENNINGTON, *Houston*
Yetter Coleman LLP

State Bar of Texas
32ND ANNUAL
ADVANCED EVIDENCE AND DISCOVERY
Houston – April 11-12, 2019
San Antonio – May 23-24, 2019

CHAPTER 14

YetterColeman LLP
TRIALS | APPEALS

COLLIN J. COX

Partner
Yetter Coleman LLP
811 Main St., Suite 4100, Houston, Texas
713.632.8000 | ccox@yettercoleman.com

Collin is a business trial lawyer who represents plaintiffs and defendants in high-stakes commercial cases. He has been a lead trial lawyer in computer software trade secrets cases, several actions related to the Bernard L. Madoff fraud, royalty disputes, patent litigation, and other business crisis situations. For the third year in a row, Collin is the youngest trial lawyer in Texas to receive an official ranking from Chambers USA in General Commercial Litigation.

Professional Honors & Affiliations

- Board of Directors: Houston Bar Association (Membership Committee Co-Chair), 2017-2019
- Chair Emeritus: Buffalo Bayou Partnership (Chairman, 2015-2016)
- Past Chairman: Texas Lyceum (Chairman, 2014)
- 2012 Woodrow B. Seals Outstanding Young Lawyer Award, Houston Young Lawyers Association
- Board Member: Texas General Counsel Forum, Houston Chapter, 2019
- Member: Duke Law School Board of Visitors, 2017 - 2020
- Presidential Leadership Scholar, Fourth Annual Class, 2018
- Board Member: UTHealth Development Board, 2015-present
- *Best Lawyers in America*® in Commercial and Intellectual Property Litigation, 2016-2019
- *Chambers USA: America's Leading Business Lawyers* in Texas Commercial Litigation, 2015-2018

Selected Presentations & Publications

- Adjunct Professor (Wintersession), Hearings Practice, Duke Law School, 2017-2019
- "Commercial Litigation Trends in Texas," *Financier Worldwide*, November 2016
- "Trends in Commercial Litigation," State Bar 8th Annual Business Disputes Conference (presenter and co-author), September 2016
- "Trends in Commercial Litigation," Texas Center for the Judiciary, Civil Justice Conference (presenter and co-author), April 2016
- "Business Torts Update: Recent Trends and Developments in Eight Litigation Topics," State Bar of Texas, 37th Annual Advanced Civil Trial Course (co-author), 2014
- The Federal Law Update, the Harris County Judicial Education Conference, Houston, Texas, 2010

Education and Professional Background

- Duke University, J.D., *summa cum laude*, 2001 (Order of the Coif, Editor-in-Chief, 2000-2001, Duke Law Journal)
- University of Cambridge, M.Phil., *First Class Honors*, 1999
- Baylor University, B.A., *magna cum laude*, 1997 (Phi Beta Kappa, Outstanding Graduate, College of Arts & Sciences, Student Body President, Permanent Class President)
- Law Clerk to The Hon. Anthony J. Scirica, U.S. Court of Appeals for the Third Circuit, 2001-2002

YetterColeman LLP
TRIALS | APPEALS

SHANE PENNINGTON

Associate
Yetter Coleman LLP
811 Main St., Suite 4100, Houston, Texas
713.632.8000 | spennington@yettercoleman.com

Shane's practice is focused on appeals and regulatory litigation for clients in a diverse array of industries, including energy, shipping, aviation, pharmaceuticals, and healthcare. Recent matters have involved challenges to federal agency action under the Administrative Procedure Act, preemption issues under the Airline Deregulation Act, and EPA rule-making challenges under the Clean Air Act.

Shane is the founder of admin.law, a legal blog focused on administrative appeals decided in the U.S. Court of Appeals in the Fifth Circuit. Prior to joining the firm, Shane was an associate with Baker Botts.

Presentations & Publications

- "Questions Raised By Law That Use Copyrighted Standards," *Law360*, August 2, 2018 (co-author)
- "The End of the Dance? The *Chevron* Two-Step and New Directions for Administrative Law," 12th Annual Advanced Texas Administrative Law Seminar, The University of Texas School of Law, August 2017 (co-presenter)
- "Completing Ely's Representation Reinforcing Theory of Judicial Review by Accounting for the Constitutional Values of State Citizenship," *Texas Review of Law & Politics*, 2010
- "Identity Burglary," *Texas Review of Law & Politics*, 2009

Education and Professional Background

- The University of Texas School of Law, J.D., *with high honors*, 2010 (Order of the Coif, Articles Editor, 2009-2010, Texas Law Review, Managing Editor, 2009-2010, Texas Review of Law & Politics)
- University of Houston, B.A., *summa cum laude*, Political Science, 2006 (Founder's Foundation Scholar, Arete Award Recipient)
- Law Clerk to the Hon. David B. Sentelle, U.S. Court of Appeals for the D.C. Circuit, 2012-2013
- Law Clerk to the Hon. Jennifer Walker Elrod, U.S. Court of Appeals for the Fifth Circuit, 2011-2012
- Law Clerk to the Hon. Royce Lamberth, U.S. District Court District of Columbia, 2010-2011

TABLE OF CONTENTS

DISCOVERY OF DAMAGES IN TCPA CASES

I. INTRODUCTION

In 2011, the Texas Legislature passed H.B. 2973, the Texas Citizens Participation Act ("TCPA"). *See* Tex. H.B. 2973, 82d Leg., R.S., H.J. of Tex., 4916, 4623 (2011), *available at* http://www.journals.house.state.tx.us/hjrnl/82r/pdf/82rday82final.pdf, Tex. H.B. 2973, 82d Leg., R.S., S.J. of Tex., 2513, 2432 (2011), *available at* http://www.journals.senate.state.tx.us/sjrnl/82r/pdf/82RSJ05-18-F.pdf. The purpose of the Act was to "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." Tex. Civ. Prac. & Rem. Code § 27.002. To accomplish those goals, the TCPA established an early-dismissal procedure applicable to all claims relating to the exercise of three broadly defined expressive rights. *Seeid.* § 27.003 (early-dismissal procedure); *id.* § 27.001(2)-(4) (defining protected conduct).

Since its passage, the TCPA has become a favorite tool of defendants who have used it to bring a wide variety of legal claims to an early end. *See, e.g.*, *Lippincott v. Whisenhunt*, 462 S.W.3d 507 (Tex. 2015) (internal employment communications about employee performance); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017) (same); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 194 (Tex. App.—Austin 2017, pet. dism'd) (misappropriation of trade secrets); *Craig v. Tejas Promotions, LLC*, No. 03-16-00611-CV, 2018 WL 2050213, at *6 (Tex. App.—Austin May 3, 2018, pet. filed) (same); *Quintanilla v. West*, 534 S.W.3d 34 (Tex. App.—San Antonio 207, pet. granted) (fraudulent lien and slander of title claims); *Bilbrey v. Williams*, No. 02-13-00332-CV, 2015 WL 1120921 (Tex. App.—Fort Worth 2015, no pet.) (dispute over comments of a youth baseball coach); *Young v. Krantz*, 434 S.W.3d 335, 340 (Tex. App.—Dallas 2014, no pet.) (dispute over Angie's List review); *Backes v. Misko*, 486 S.W.3d 7, 18-21 (Tex. App.—Dallas 2015, pet. denied) (dispute over Facebook post). Given the TCPA's broad coverage, any litigant bringing a "legal action" in a Texas court – meaning every plaintiff – needs to be prepared to respond to a TCPA motion. 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.").

This article discusses an emerging issue in the ever-expanding body of TCPA jurisprudence: Discovery of damages. It begins with an overview of the mechanics of the TCPA's early-dismissal procedure. Next, it explains why discovery of damages is particularly important in TCPA cases and discusses some of the key cases on what it takes to establish a prima facie case of damages sufficient to avoid dismissal under the Act. Finally, it provides tips regarding discovery of damages under the TCPA for movants and nonmovants alike.

II. THE TCPA'S EARLY-DISMISSAL PROCEDURE

The TCPA's expedited procedures, including a discovery stay and interlocutory appeal, allow courts to dismiss claims before judicial resources are wasted and unnecessary attorney fees mount. Tex. Civ. Prac. & Rem. Code § 27.003(c) (automatic discovery stay), § 27.008 (interlocutory appeal). To this end, the statute sets forth specific deadlines for the motion, hearing, ruling and possibly an appeal. A party "seeking the TCPA's protections must comply with the[se] requirements." *Braun v. Gordon*, No. 05-17-00176-CV, 2017 WL 4250235, at *1 (Tex. App.—Dallas Sept. 26, 2017, no pet.). The following subsections provide a high-level overview of the motion-to-dismiss procedure established under the Act.

A. The Motion to Dismiss

If a meritless lawsuit has been filed in response to one's exercise of any of the Act's three statutorily defined expressive rights, a motion to dismiss is warranted under Section 27.003 of the Act. *See* Tex. Civ. Prac. & Rem. Code § 27.003 ("If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action."). The movant bears the initial burden to establish that the suit implicates the exercise of his protected rights. *See id.* § 27.005(a) ("Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action 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." (formatting modified)). To meet that burden, the movant may rely on the initial pleading to demonstrate that the claim relates to a protected right, or may provide affidavit support. *Id.* § 27.006(a) ("In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."). Pleadings thus are considered evidence for purposes of determining whether the claim falls within the TCPA. *See, e.g.*, *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) ("Section 27.006(a) … plainly states that '[i]n

determining whether a legal action should be dismissed ..., the court *shall* consider the pleadings' as well as affidavits." (quoting Tex. Civ. Prac. & Rem. Code § 27.006(a)); *id.* ("Indeed, it would be impossible to determine the basis of a legal action, and thus the applicability of the Act, *without* considering the plaintiff's petition. As we have observed, "the plaintiff's petition ..., as so often has been said, is the 'best and all-sufficient evidence of the nature of the action.'" (quoting *Stockyards Nat'l Bank v. Maples*, 95 S.W>2d 1300, 1302 (Tex. 1936) (quoting *Oakland Motor Car Co. v. Jones*, 29 S.W.2d 861, 865 (Tex. Civ. App.—Eastland 1930, no writ))))). In 2017, the Texas Supreme Court held that, even if the defendant denies making the statement alleged, the statute can apply if the petition alleges actions that are covered by the Act and seeks to recover based on those allegations. *Id.* In so holding, the Court explained that "the basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations .... When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more." *Id.*

A motion to dismiss under the TCPA must be filed "not later than the 60th day after the date of service of the legal action." Tex. Civ. Prac. & Rem. Code § 27.003(b). The court may extend the deadline upon a showing of good cause by the movant. *Id.* Courts have not established what is required for "good cause" under this provision, but it is clear that the matter is left to the trial court's discretion. *See Schimmel v. McGregor*, 438 S.W.3d 847, 856 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (where the motion was one day late and movant sought leave for late filing, and the trial court expressly noted in the order that the motion was timely filed, it constituted an implied finding of good cause to grant leave for an untimely filing); *Summersett v. Jaiyeola*, 438 S.W.3d 84, 92 (Tex. App.—Corpus Christi-Edinburg 2013, pet. denied) (trial court did not abuse its discretion in denying motion for leave, which was based on claim of lack of notice, where there was conflicting evidence, some of which indicated that movant had intentionally avoided service of suit, and had already appeared through an attorney). In one case, for example, although the movant's TCPA motion arrived one day late, the Fourteenth Court of Appeals held that "in making a statement ... [that the motion was timely], the trial court implicitly ruled that if [the movant] technically filed the motion late he had good cause for the late filing." *Schimmel*, 438 S.W.3d at 856.

The filing of an amended pleading that does not alter the essential nature of the relevant "legal action" does not restart the 60-day deadline. *E.g.*, *Bacharach v. Garcia*, 485 S.W.3d 600, 602-03 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("We join the El Paso Court of Appeals in declining to do so and hold that, for the purpose of a motion to dismiss filed under Chapter 27, the clock began running on the date on which Bacharach was served with the first pleading alleging a cause of action against her." (citing *Miller–Weisbrod, L.L.P. v. Llamas–Soforo*, No. 08-12-00278-CV, 2014 WL 6679122, at *10-11 (Tex. App.—El Paso Nov. 25, 2014, no pet.)); *Hicks v. Grp. & Pension Adm'rs, Inc.*, 473 S.W.3d 518, 530 (Tex. App.—Corpus Christi 2015, no pet.) ("Because these two claims against Hicks were first asserted in GPA's amended petition, we conclude that Hicks's Motion to dismiss was timely filed as to these two claims." (citing *In re Estate of Check*, 438 S.W.3d 829, 837 (Tex. App.—San Antonio 2014, orig. proceeding); *Better Business Bureau of Metropolitan Dallas v. Ward*, 401 S.W.3d 440, 445 (Tex. App.—Dallas 2013, pet. denied))). *But cf. Walker v. Hartman*, 516 S.W.3d 71, 78-79 (Tex. App.—Beaumont 2017, pet. denied) (where the claims were previously filed in a federal suit and then re-filed as a new matter in state court, the latter was a "legal action" that started the 60-day deadline for filing a TCPA motion).

B. An Automatic Stay of Discovery

The TCPA provides for an automatic stay of discovery in the case while a motion to dismiss is pending. *See* Tex. Civ. Prac. & Rem. Code § 27.003(c) ("Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss."). Trial court proceedings are also stayed while an interlocutory ruling denying the motion is on appeal. Tex. Civ. Prac. & Rem. Code § 51.014(b) ("An interlocutory appeal under Subsection (a)(3), (5), (8), or (12)[, which includes an interlocutory appeal of an order denying a motion to dismiss under the TCPA,] also stays all other proceedings in the trial court pending resolution of that appeal."). A bankruptcy stay, however, will preclude consideration of a motion to dismiss under the TCPA until the stay is lifted. In *Better Business Bureau of Metropolitan Dallas, Inc. v. Ward*, for example, the plaintiff nonsuited and declared bankruptcy after the case was remanded for consideration of attorney's fees, effectively staying proceedings in the trial court pending the outcome of the bankruptcy proceedings. 401 S.W.3d at 443. The purpose of both the bankruptcy stay and the stay of discovery under Section 27.003(c) of the TCPA "is to prevent costs associated with defending against a meritless claim." Laura Lee Panther & Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 Tex. Tech. L. Rev. 633, 644 (2018) (citing Tex. Civ. Prac. & Rem. Code § 27.003(c)).

For good cause, however, the trial court can, on its own motion or at the request of the parties, authorize limited discovery relevant to the motion. *See* Tex. Civ. Prac. & Rem. Code § 27.006(b) ("On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited

discovery relevant to the motion."). Courts have enforced the good cause requirement. *In re D.C.*, No. 05-13-00944-CV, 2013 WL 4041507, at *1 (Tex. App.—Dallas Aug. 9, 2013, no pet.) (granting writ of mandamus after trial court granted expedited discovery); *Ramsey v. Lynch*, No. 10-12-00198-CV, 2013 WL 1846886, at *1 (Tex. App.—Waco May 2, 2013, no pet.) (detailing that the trial court concluded there was no good cause for discovery). The Fifth Court of Appeals, for example, granted mandamus relief requiring a trial court to vacate an order granting discovery in a TCPA case in which there was "no good cause for the discovery." *In re D.C.*, 2013 WL 4041507, at *1. In that case, the non-movant sought depositions "in order to defend the motion to dismiss"; the appeals court held that a general need was insufficient to demonstrate "good cause for the discovery." *Id.*

The Sixth Court of Appeals also has held that it is not sufficient to ask for limited discovery the day of the hearing on the motion without also requesting a continuance. *See Whisenhunt v. Lippincott*, 474 S.W.3d 30, 41 (Tex. App.—Texarkana 2015, no pet.), *reh'g overruled* (Sept. 1, 2015). Trial courts that have ordered limited discovery have applied standard discovery rules under the TCPA's deadlines. *See, e.g.*, *Abraham v. Greer*, 509 S.W.3d 609, 617 (Tex. App.—Amarillo 2016, pet. denied) (upholding a journalist's privilege after granting limited and specified discovery under Section 27.006(b) of the TCPA).

C. The Nonmovant's Response

The TCPA does not contain a deadline by which the nonmovant must file a response to a motion to dismiss under the TCPA, and "[t]he Texas Rules of Civil Procedure include no general rule for when a response should be filed in relation to a hearing." *MVS Int'l Corp. v. Int'l Advert. Sols., LLC*, No. 545 S.W.3d 180, 191 (Tex. App.—El Paso Oct. 11, 2017, no pet.) (emphasis omitted). As a result, courts have permitted the response to be filed any time prior to the hearing. *See id.* ("[H]ad the Legislature intended a formal response deadline, such as with summary judgments, it could have included such a provision. We are not empowered to create such a rule by judicial fiat.").

Importantly, however, trial courts possess broad discretion to control to control their own dockets, which may mean that they may require parties to file their responses to motions to dismiss under the TCPA sooner. *See Mission Wrecker Serv., S.A. v. Assured Towing, Inc.*, No. 04-17-00006-CV, 2017 WL 3270358, at *3 (Tex. App.—San Antonio Aug. 2, 2017, pet. denied) (trial court did not abuse discretion in sustaining objection that response filed fifteen minutes prior to hearing was untimely because the absence of a deadline cannot be used as a tool to ambush opposing counsel). Litigants are thus well-advised to check the court's local rules to determine if a court-specific deadline may require filing the response by a particular date.

D. The TCPA Hearing

"A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion." Tex. Civ. Prac. & Rem. Code § 27.004(a). The hearing date may be extended if "the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties." *Id.* If one of those exceptions applies, then the hearing can "occur" at a later date, "but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c)." *Id.* If the trial court allows discovery under Section 27.006(b), then the hearing can "occur" up to but no more than 120 days from the date of service of the motion. *Id.* § 27.004(c); *see also Morin v. Law Office of Kleinhans Gruber, PLLC*, No. 03-15-00174-CV, 2015 WL 4999045, at *2 n.3 (Tex. App.—Austin Aug. 21, 2015, no pet.) (discussing preservation concerns regarding an extended hearing date).

E. The Trial Court's Ruling

The trial court must rule on any motion to dismiss filed under the TCPA on or before 30 days from the date of the hearing. Tex. Civ. Prac. & Rem. Code § 27.005(a). If the court does not rule by that date, then the motion is denied by operation of law. *Id.* § 27.008(a) ("If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal."); *Inwood Forest Cmty. Improvement Ass'n v. Arce*, 485 S.W.3d 65, 71-72 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (motion denied by operation of law 30 days after hearing, despite trial court's oral expression of intent at hearing to grant motion and its signing of orders granting motion more than 30 days later); *Avila v. Larrea*, 394 S.W.3d 646, 656 (Tex. App.—Dallas 2013, pet. denied) (motion denied by operation of law where, 28 days after hearing, court granted request for discovery and purported to extend hearing but did not rule on motion within 30 days).

If no hearing is conducted, then the motion cannot be denied by operation of law because there is no triggering date from which the ruling deadline could run. *Wightman-Cervantes v. Hernandez*, No. 02-17-00155-CV, 2018 WL 798163, at *3 (Tex. App.—Fort Worth Feb. 9, 2018, pet. denied) (agreeing with Fifth Court of Appeals and the United States Court of Appeals for the Fifth Circuit). On the other hand, trial courts should not deny TCPA motions sua sponte without a hearing or without considering them on the merits. *See Reeves v. Harbor Am. Central*, No. 14-17-00518-CV, 2018 WL 2727848, at *4 (Tex. App.—Houston [14th Dist.] June 7, 2018, no pet.) (trial court denied motion

without a hearing or response based on its perception that motion was being used to avoid discovery; appellate court reversed and remanded for consideration of TCPA's merits).

F. Evidence and Limited Discovery Under the TCPA

The TCPA expressly provides that the parties may rely on pleadings as evidence in the anti-SLAPP context. *See* Tex. Civ. Prac. & Rem. Code § 27.006(a) ("In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."). Often, movants rely on the pleadings to establish that the claims brought against them are based on, related to, or made in response to their exercise of the right of free speech, right to petition, or right of association—the showing required to obtain dismissal under the TCPA. *Id.* § 27.005(a). And as mentioned, the Texas Supreme Court has held that the facts asserted in the pleadings can demonstrate that the statute applies, even if the defendant denies making the statements, holding that "[w]hen it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more." *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). Importantly, though, the facts asserted in the pleadings must be specific enough to determine the applicability of the statute if the movant is relying on them alone to demonstrate that the TCPA applies. If the facts are unclear, an affidavit may be required.

On the filing of a motion to dismiss under the TCPA, all discovery in the legal action is suspended until the trial court rules on the motion, except as provided by § 27.006(b). Tex. Civ. Prac. & Rem. Code § 27.003(a). Under Section 27.006(b), the court may allow specified and limited discovery relevant to the motion upon a showing of good cause. One appellate court has defined "good cause" in this context as "the discovery necessary to further [a] cause of action." *Ramsey v. Lynch*, No. 10-12-00198-CV, 2013 WL 1846886, at *4 (Tex. App.—Waco May 2, 2013, no pet.). The plaintiff must show the trial court that the requested discovery would provide evidence of essential elements of the claim necessary to refute the motion to dismiss. *See Walker v. Schion*, 420 S.W.3d 454, 458 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("Walker asserts that the trial court's refusal to permit him to depose Schion deprived him of evidence of one element of his claim—the element of malice—but he has never argued that deposing Schion would have provided evidence of *every* essential element of the claim. And because he has not challenged the trial court's ruling effectively striking his affidavit and eliminating all of the evidence offered in support of the elements of his claim, he cannot show that the inability to obtain testimony from Schion in support of the single element of malice could have made any difference."). If discovery is permitted, the court may extend the hearing date to no longer than 120 days after the date the motion to dismiss was served. *See* Tex. Civ. Prac. & Rem. Code § 27.004(c) ("If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.").

A trial court's ruling that permits or denies specific and limited discovery is reviewed under an abuse of discretion standard. *See, e.g.*, *Schion*, 420 S.W.3d at 458 ("Although we have found no other cases specifically addressing the standard of review applicable to the denial of a motion for discovery under the Citizens Participation Act, we agree with Schion that the abuse-of-discretion standard applies."). To establish an abuse of discretion, a plaintiff must show that the inability to obtain the discovery prevented the plaintiff from prevailing. *Id.* Litigants have raised constitutional challenges to the provision restricting discovery during the pendency of a TCPA motion on the basis that it violates the open-courts doctrine in the Texas Constitution, but those challenges have been unsuccessful. Specifically, in both *Abraham v. Greer* and *Combined Law Enforcement Associations of Texas v. Sheffield*, the appellate courts noted that the restrictions on discovery were tempered by the ability for a litigant to obtain discovery upon a showing of good cause. *Abraham v. Greer*, 509 S.W.3d 609, 615 (Tex. App.—Amarillo 2016, pet. denied) (the provisions of the TCPA "evince legislative desire to have jurists quickly address motions to dismiss filed under § 27.003(a) …. Yet that desire did not foreclose the prosecution of a defamation suit" because "[m]easures were included within both Chapters 22 and 27 of the Texas Civil Practice and Remedies Code to assure that the defamed person had opportunity to garner necessary evidence"); *Combined Law Enf't Ass'ns of Tex. v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672, at *10 (Tex. App.—Austin Jan. 31, 2014, pet. denied) ("The provisions staying discovery are tempered by provisions permitting discovery upon a showing of good cause.").

III. DISCOVERY OF DAMAGES IN TCPA CASES

As courts and litigants have wrestled with the TCPA's early-dismissal procedure over the years, it has become clear that the Act is potent tool for the defense capable of catching unprepared plaintiffs off guard and stopping otherwise costly litigation in its tracks. As the Texas Supreme Court recently acknowledged, the TCPA's definition of "communication" is so broad that it covers "[a]lmost every imaginable form of communication, in any medium." *Adams v. Starside*

Custom Builders, LLC, 547 S.W.3d 890, 894 (Tex. 2018). Accordingly, defendants would be well-advised to consider carefully whether they can carry their burden to establish by clear and specific evidence a prima facie case for each essential element of their claims *before* bringing suit. And as the discussion below illustrates, one of the biggest challenges many plaintiffs will face in carrying that burden is establishing a prima facie case of damages.

Two aspects of the TCPA's expedited procedure explain why proving a prima facie case of damages under the TCPA can be so difficult. The first is that plaintiffs often are not prepared from the outset of a case to muster the type and quantity of evidence necessary to establish a prima facie case of damages under the TCPA. The second is that because of the constraints on discovery applicable to the TCPA process, unless the plaintiff has the necessary evidence in hand from the outset, getting it after a TCPA motion has been filed can be very difficult.

A. What Is Required to Establish a Prima Facie Case of Damages

The Texas Supreme Court examined the TCPA's "clear and specific" evidence requirement in the *Lipsky* decision. *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015). Although the statute does not define "clear and specific," the Court referenced "clear" as meaning "'unambiguous,' 'sure,' or 'free from doubt,'" and "specific" as "'explicit' or 'relating to a particular named thing.'" *Id.* at 590 (quoting *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2013, pet. denied), which, in turn, was quoting Black's Law Dictionary 268, 1434 (8th ed. 2004)). The Court also determined that "prima facie case" as used in the TCPA means evidence that is legally sufficient to establish a claim as factually true if it is not countered. *Id.* (citing *Simonds v. Stanolind Oil & Gas Co.*, 136 S.W.2d 207, 209 (Tex. 1940)). In other words, a prima facie case is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id.* (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (per curiam), which, in turn, was quoting *Tex. Tech Univ. Health Scis. Ctr. v. Apodaca*, 876 S.W.2d 402, 407 (Tex. App.—El Paso 1994, writ denied)). Direct evidence of damages is not required, but the evidence must be sufficient to allow a rational inference that some damages naturally flowed from the defendant's conduct. *See id.* at 591, 592.

Applying that standard, the Court determined that the plaintiff's affidavit was too uncertain to meet the TCPA threshold for a prima facie case. *Id.* at 593. The plaintiff averred that it had suffered economic harm, but did not set out specific facts showing how the defendant's conduct caused the harm. *See id.* The Court held that under the TCPA's clear-and-specific-evidence standard, such "general averments" of pecuniary loss and lost profits were not enough to establish prima facie damages. *Id.*

Lipsky offered little guidance for courts determining what type of evidence is necessary in any particular case. But, the evidence analyzed in *Lipsky* included affidavits and evidence of allegedly defamatory statements in a variety of formats. *Lipsky* also made clear that that circumstantial evidence may be used to respond to a motion to dismiss as well as opinion testimony that is "based on demonstrable facts and a reasoned basis"—not "[b]are, baseless opinions do not create fact questions[.]" *Id.*

Courts have considered many types of evidence when assessing whether a plaintiff has established a prima facie case by "clear and specific evidence" under the TCPA:

- Pleadings and affidavits, *see* Tex. Civ. Prac. & Rem. Code § 27.006(a); *Abraham v. Greer*, 509 S.W.3d 609, 617 (Tex. App.—Amarillo 2016, pet. denied) (examining pleadings and affidavits); *Moldovan v. Polito*, No. 05-15-01052-CV, 2016 WL 4131890, at *7 (Tex. App.—Dallas Aug. 2, 2016, no pet.) (examining affidavits); *Tex. Campaign for the Env't v. Partners Dewatering Int'l, LLC*, 485 S.W.3d 184, 190 & n.7, 194-96 (Tex. App.—Corpus Christi 2016, no pet.) (same); *Serafine v. Blunt*, 466 S.W.3d 352, 358 (Tex. App.—Austin 2015, no pet.) (noting that pleadings may be considered as evidence in support of motion); *but see Deaver v. Desai*, 483 S.W.3d 668, 677 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding that statements in pleadings regarding emotional distress were not clear and specific evidence);
- Exhibits of allegedly defamatory statements in articles, emails, websites, and social media posts, *see Moldovan*, 2016 WL 4131890, at *7-11; *Entravision Commc'ns Corp. v. Salinas*, 487 S.W.3d 276, 283-84 (Tex. App.—Corpus Christi 2016, pet. denied); *Deaver*, 483 S.W.3d at 673; *Hand v. Hughey*, No. 02-15-00239-CV, 2016 WL 1470188, at *4-7 (Tex. App.—Fort Worth Apr. 14, 2016, no pet.) (mem. op.);
- Discovery responses, *see Cruz v. Van Sickle*, 452 S.W.3d 503, 516 (Tex. App.—Dallas 2014, pet. denied);
- Business and public records, *see Tex. Campaign for the Env't*, 485 S.W.3d at 190 & nn.7-8 (detailing evidence related to TCPA motion to dismiss); *Moldovan*, 2016 WL 4131890, at *7-8 (examining terms of parties' contract); and

- Income tax returns to show damages, *see Moldovan*, 2016 WL 4131890, at *10.1

The Texas Supreme Court recently elaborated on what is required to establish a prima facie case of damages under the TCPA in *S&S Emergency Training Solutions, Inc. v. Elliott*, 554 S.W.3d 843 (Tex. 2018). EMTS, a provider of paramedic training courses, sued its former employee, Elliott, for breaching a non-disclosure agreement she had signed when EMTS initially hired her. *Id.* Elliott moved to dismiss under the TCPA. *Id.* EMTS claimed that because of Elliott's disclosures, a company called ACI had terminated its consortium agreement with EMTS, which EMTS needed to be accredited to offer approved paramedic training courses. *Id.* The question in the case was whether EMTS had provided sufficient clear and specific evidence of damages in response to Elliott's TCPA motion sufficient to establish to establish a prima facie case. *Id.* The Dallas Court of Appeals had concluded that EMTS had not established its damages by clear and specific evidence. *Id.*

EMTS petitioned for review in the Texas Supreme Court, arguing that the court of appeals had applied an erroneous standard regarding the damages element of its claim—the court measured the evidence by whether EMTS produced evidence of the specific *amount* of damages the disclosures caused instead of properly determining whether EMTS produced prima facie evidence that the disclosures simply caused it *some* damages. *Id.* EMTS argued that it had met the proper standard by providing evidence that it had lost an important contract because of Elliott's disclosures, which in turn caused EMTS to be unable to conduct its profitable paramedic courses. *Id.*

The Texas Supreme Court agreed with EMTS. It explained that EMTS was "not required to provide evidence sufficient to allow an exact calculation of the lost profits." *Id.* (cites omitted). Instead, it was only required to present evidence sufficient to support a rational inference that Elliott's actions caused it to lose *some* specific, demonstrable profits. *See id.* (citing *Lipsky*, 460 S.W.3d at 592-93).

EMTS attached affidavits of ACI's CEO and its own CEO to its response to Elliott's TCPA motion. *Id.* In his affidavit, ACI's CEO stated that EMTS and ACI were required to enter into a consortium agreement for EMTS to be accredited and offer approved paramedic training courses. According to ACI's CEO's affidavit, ACI terminated the agreement "[i]n large part due to Elliott's disclosures of information protected by the NDAs." *Id.*

EMTS's CEO averred that the consortium agreement was necessary for EMTS to comply with regulatory guidelines and qualify to offer the paramedic training classes. *Id.* He also stated in the affidavit that because of EMTS's loss of ACI as a consortium partner, EMTS could no longer offer paramedic training courses to new students. *Id.*

Elliott had acknowledged in a letter that was in the record that under the consortium agreement, EMTS conducted approximately ten paramedic training classes of thirty students each and that each student paid tuition of nearly $5,000. *Id.* She also acknowledged that, "[w]ithout a consortium agreement, EMTS was not going to be able to offer future Paramedic courses." *Id.* Elliott had also written another letter when she was an EMTS employee in which she asked for a raise. *Id.* EMTS's CEO had attached Elliott's letter as an exhibit to his affidavit. In the letter, Elliott stated that when she worked there EMTS was "running smooth and [was] profitable." *Id.*

Assessing this evidence, the Texas Supreme Court concluded that

> Elliott's pre-resignation letter and the affidavits of [ACI's CEO and EMTS's CEO] support[ed], at minimum, rational inferences that (1) EMTS's paramedic classes were profitable before Elliott's disclosures of confidential information; (2) the disclosures were a cause of ACI's terminating the consortium agreement; and (3) termination of the consortium agreement caused EMTS to lose the ability to conduct the profitable paramedic training classes. Thus, EMTS provided prima facie evidence that Elliott's disclosures caused EMTS to lose profits. That evidence was sufficient to preclude dismissal of EMTS's suit.

Id. (cites omitted). "The court of appeals [had] analogized the evidence in this case to the 'general averments' of pecuniary loss and lost profits that failed to establish prima facie damages in *Lipsky*," but the Texas Supreme Court explained that "the pleadings and the record here reflect more than was present in *Lipsky*":

> [t]his record demonstrates that EMTS's lost revenues were susceptible to calculation with reasonable certainty based on data regarding what classes were provided under the consortium agreement and how much revenue EMTS was taking in per student. Moreover, Elliott managed the program and stated in her

[1] These examples and case citations were taken from Jody Sanders' excellent article, *The Plaintiff's Burden—What To Do When "Clear and Specific" Is Neither Clear Nor Specific*, 2016 TXCLE Advanced Civ. App. Prac. 12.IV, nn.36-40.

> December 2015 letter that EMTS was "profitable," not that it simply had students. The trial court could have reasonably inferred that as program director she had personal knowledge of both revenues and expenses, and thus whether EMTS's operation was profitable. *See* Tex. Civ. Prac. & Rem. Code § 27.006(a)(courts must consider "the pleadings and supporting and opposing affidavits" forming the basis for the claim). Thus, while the court of appeals also stated that EMTS "did not attempt to explain how any damages might have been the natural, probable, and foreseeable result of Elliott's disclosures." 559 S.W.3d at 579. In *Lipsky*, we determined that the plaintiff's affidavit was too uncertain to meet the TCPA threshold for a prima facie case. *See* 460 S.W.3d at 593. There the plaintiff averred that it had suffered economic harm, but did not set out specific facts showing how the defendant's conduct caused the harm. *See id*. Here, in contrast, EMTS provided Vecchio's affidavit in which he specifically related termination of the consortium agreement to Elliott's breach of the NDAs.

Id. Accordingly, the Texas Supreme Court held that "in response to Elliott's TCPA motion to dismiss, EMTS [had] established a prima facie case by clear and specific evidence of each essential element of a breach of contract cause of action." *Id.*

Lipsky and *S&S Emergency Training Solutions* clarify the TCPA's clear-and-specific evidence standard and shed much-needed light on what is required to demonstrate a prima facie case of damages sufficient to overcome a TCPA motion to dismiss. While general averments and conclusory assumptions are not enough, plaintiffs are not required to prove the specific amount of damages they have suffered. Instead, evidence that, if unrebutted, would support a rational inference that the plaintiff suffered *some* specific, demonstrable damages will suffice. *See S&S Emergency Training Sols.*, 564 S.W.3d at 843 (citing *Lipsky*, 460 S.W.3d at 592-93).

B. The Statutory Tools a Nonmovant May Use to Demonstrate a Prima Facie Case of Damages Under the TCPA

One problem that a party may have in responding to motion to dismiss under the TCPA is a lack of information due to the discovery stay imposed by Section 27.003(c). *See* Tex. Civ. Prac. & Rem. Code § 27.003(c) ("Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss."). But there is a remedy. If a party lacks information necessary to respond to a motion to dismiss under the TCPA, there is a limited exception to Chapter 27's discovery stay. As discussed above, on a motion by a party or the court, a court may allow "specified and limited discovery relevant to the motion" based upon a showing of "good cause." *Id.* § 27.006(b). A court's ruling on the motion is reviewed under an abuse-of-discretion standard, and a court's grant of discovery without a showing of "good cause" is subject to mandamus. *See In re D.C.*, No. 05-13-00944-CV, 2013 WL 4041507, at *1 (Tex. App.—Dallas Aug. 9, 2013, no pet.) (granting writ of mandamus after trial court granted expedited discovery); *Ramsey v. Lynch*, No. 10-12-00198-CV, 2013 WL 1846886, at *1 (Tex. App.—Waco May 2, 2013, no pet.) (detailing that the trial court concluded there was no good cause for discovery). Failing to request a continuance of a hearing on a motion to dismiss under the TCPA to obtain discovery may result in a waiver of the request for discovery. *Whisenhutt v. Lippincott*, 474 S.W.3d 30, 40-41 (Tex. App.—Texarkana 2015, no pet.). And even if discovery is granted, the hearing on the motion to dismiss must occur within 120 days after the motion is filed. *See* Tex. Civ. Prac. & Rem. Code § 27.004(c) ("If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.").

The TCPA does not define the scope of "specified and limited discovery relevant to the motion to dismiss." Tex. Civ. Prac. & Rem. Code § 27.006(b). While courts have not offered much guidance either, they have held that it is proper in certain situations to allow the non-movant to depose the movant and obtain limited document production. *E.g.*, *Lane v. Phares*, No. 02-17-00190–CV, 2018 WL 895455, at *4 (Tex. App.—Fort Worth Feb. 15, 2018, no pet.) (allowing three-hour deposition of TCPA movant); *see also Warner Bros. Entm't, Inc. v. Jones*, No. 03–16-00009-CV, 2017 WL 6757187, at *1 (Tex. App.—Austin Dec. 21, 2017, pet. filed) (allowing "limited discovery, including document production" and the deposition of one of the TCPA movants); *Abraham v. Greer*, 509 S.W.3d 609, 615-16 (Tex. App.—Amarillo 2016, pet. denied) (limited discovery under Section 27.006(b) could include deposing witnesses having relevant information).

At a minimum, the discovery ordered must be "relevant to the motion to dismiss." Tex. Civ. Prac. & Rem. Code § 27.006(b); *In re Elliott*, 504 S.W.3d 455, 465 (Tex. App.—Austin 2016, orig. proceeding) (granting a Rule 202 petition to allow pre-suit discovery 'was not the "specified and limited discovery *relevant to the [TCPA] motion [to dismiss]*' that the Act contemplates") (emphasis in original). "Discovery is relevant to the motion to dismiss if it seeks information related to the allegations asserted in the motion." *In re Spex Grp. US LLC*, No.

05-18-00208-CV, 2018 WL 1312407, at *4 (Tex. App.—Dallas Mar. 14, 2018, no pet.) (orig. proceeding). Although courts have not yet fleshed that standard out fully yet, they have held that expedited discovery that relates "solely to [a] request for injunctive relief" does not qualify as "specified and limited discovery relevant to the [TCPA] motion." *Id*.

Merits-based discovery "may … be relevant" but only "to the extent it seeks information to assist the non-movant to meet its burden to present a prima facie case for each element of the non-movant's claims to defeat the motion to dismiss." *Id.* (citing *Serafine v. Blunt*, 466 S.W.3d 352, 357-58 (Tex. App.—Austin 2015, no pet.) (TCPA requires the non-movant to present a prima facie case for each element of the non-movant's claims to defeat the motion to dismiss)). "But such merits-based discovery must still be 'specified and limited' because a prima facie standard generally 'requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *Id.* (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding) (internal quotation marks and citation omitted)); *see also, e.g., Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (Legislature's use of "prima facie case" in Chapter 27 implies imposition of minimal factual burden). "A party would, therefore, not need multiple or lengthy depositions or voluminous written discovery in order to meet the low threshold to present a prima facie case." *Id.*

Nor does a Rule 202 petition for presuit deposition provide plaintiffs a way to work around the TCPA's constraints on discovery. Courts have held that Rule 202 petitions themselves can qualify as "legal actions" subject to a TCPA motion. *See, e.g., DeAngelis v. Protective Parents Coalition*, 556 S.W.3d 836, 847-48 (Tex. App.—Dallas 2018, no pet.). They have also held that a TCPA motion stays discovery in a Rule 202 proceeding. *In re Elliott*, 504 S.W.3d 455, 463 (Tex. App.—Austin 2016, no pet.). Therefore, when a TCPA motion is filed in response to a Rule 202 petition, the court must resolve the TCPA motion *before* it can order a Rule 202 presuit deposition. *Id.*

IV. TIPS FOR MOVANTS AND NONMOVANTS

A. Movants

If you are the movant, it is in your best interest to file your TCPA motion as soon as possible after receiving service of a lawsuit. Not only does an early TCPA motion have the highest chance of catching your opponent off guard, but it also immediately stays discovery in the case and sets the Act's early-dismissal mechanism and expedited procedures in motion.

You should also challenge your opponent's ability to prove his prima facie case in your initial motion rather than waiting for your reply, because the Act does not guarantee you a right to file a reply. And, of course, part of your challenge to your opponent's prima facie case should focus on damages (assuming that is an element of any of the claims raised against you). That way, your opponent cannot simply duck the damages question.

Next, you should try to set your TCPA motion for hearing as soon as possible. Under statute, the court must rule on the motion within thirty days of the hearing or else the motion is denied by operation of law, triggering a movant's right to an immediately interlocutory appeal. When a TCPA movant seeks such an interlocutory appeal, all proceedings in the trial court are stayed until the appeal is resolved.

Setting up a quick TCPA hearing also maximizes the pressure on your opponent to provide evidence establishing a prima facie case for each essential element of each of his claims. The more time your opponent has, the more opportunity he has to conduct discovery, prepare affidavits, and otherwise get his wits about him so that he can demonstrate a prima facie case of damages in response to your TCPA motion. With extra time, he might even attempt and/or succeed in showing good cause for specified and limited discovery under Section 27.006(b). By acting quickly, you make his task in opposing your TCPA motion as difficult as possible.

Finally, in case your opponent does seek discovery under section 27.006(b), you should be prepared to challenge his attempt to demonstrate "good cause" for the discovery he requests. While few appellate courts have discussed what constitutes "good cause" for discovery or defined the scope of "specified and limited discovery relevant to the motion to dismiss," the Dallas Court of Appeals has provided some guidance. *See In re Spex Grp. US LLC*, No. 05-18-00208-CV, 2018 WL 1312407, at *4. It has explained merely arguing that limited depositions of the defendants were necessary to defend the motion to dismiss is not enough. Instead, the party requesting discovery must explain why the particular discovery sought is relevant to the TCPA motion. *Id.*

Defendants should also ensure that any discovery permitted in advance of the hearing on the TCPA motion is "specified and limited" to the issues raised in the motion. The Dallas Court of Appeals has held that "[s]ome merits-based discovery may ... be relevant ... to the extent it seeks information to assist the non-movant to meet its burden to present a prima facie case for each element of the non-movant's claims to defeat the motion to dismiss. But such merits-based discovery must still be 'specified and limited' because a prima facie standard generally 'requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id.* (quotes omitted). A party therefore would "not need multiple or lengthy depositions or voluminous written discovery in order to

meet the low threshold to present a prima facie case." *Id.*

B. Nonmovants

Given the TCPA's potency and broad applicability, plaintiffs must consider the prospect of a TCPA motion *before* filing suit. And as the discussion above illustrates, part of that due diligence should involve assessing whether the plaintiff has sufficient clear and specific evidence of damages to establish a prima facie case in response to a potential TCPA motion. Plaintiffs should work with their clients to nail down the damages they intend to seek in a lawsuit before drafting a petition so that they can be as specific as possible regarding damages in their petition. The more detail on damages that can be included in the petition the better. And if at all possible, plaintiffs should file affidavits with their petition that provide support for the detailed allegations regarding damages that they have included in the petition. Remember that it is not necessary to lay out exactly how much damages the plaintiff will prove at trial and how they will prove it, but it is necessary to establish that *some* specific damages occurred. Remember that proof of a decline in *gross* profits may not be sufficient to establish a prima facie case of damages.

If a TCPA motion is, in fact, filed, here are some other tips for nonmovants seeking to establish a prima facie case of damages:

- Be aware of the compressed statutory timetable. As the Dallas Court of Appeals has explained, "the plain language of [§] 27.004 applies to the setting, not the hearing or consideration, of a chapter 27 motion to dismiss." *In re Lipsky*, 411 S.W.3d 530, 540 (Tex. App.—Dallas 2013), *mandamus denied in In re Lipsky*, 460 S.W.3d 579 (Tex. 2015). For this reason, the nonmovant should schedule an early hearing so that the parties may request a continuance, if necessary, to review a response filed immediately before the hearing. A continuance will not upset the statutory scheme if the hearing is otherwise set within the Act's deadlines. *Id.* at 540-41.
- If you believe that there is a need for discovery, make a specific, tailored request outlining the needed discovery as soon as possible, obtain a ruling, and seek a continuance of the hearing if it is scheduled before your discovery is due. This should preserve the errors even if the trial court rules against your requests.
- Remember that mandamus may be proper if the trial court abuses its discretion in denying you access to discovery under Section 27.006(b).

V. CONCLUSION

The TCPA's expedited procedures and its constraints on discovery are key factors in making the TCPA such a potent defense-side weapon. In many cases, plaintiffs facing a TCPA motion will have a particularly hard time establishing a prima facie case of damages under the TCPA's demanding clear-and-specific evidence standard. Defendants should therefore consider filing a TCPA motion in *every* case, and plaintiffs should consider how they might respond to a TCPA motion *before* filing suit.