

Memo

To: TBLF Board of Directors and Members

From: Irene Kosturakis, TBLF member, Area Vice President – Chief IP Counsel, BMC Software, Inc.

Re: Texas Anti-SLAPP Statute's Effect on Trade Secret Misappropriation in Texas

The Texas Citizens Participation Act (TCPA or Texas Anti-SLAPP¹ statute) is intended to protect the exercise of First Amendment rights from harassing and chilling lawsuits. It permits defendants to dismiss a lawsuit “based on, relate[d] to, or in response to a party's exercise of the right of free speech, right to petition, or right of association.” Enacted in 2011 and updated in 2013, the breadth of the definitions in this statute, as interpreted by Texas state courts, has resulted in unintended consequences by cutting off legitimate claims of trade secret misappropriation.

Section 27.001 of the Texas Civil Practice and Remedies Code, which is part of the TCPA, has the following definitions:

- (1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.
- (2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.
- (3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.²

Under the TCPA, at least one court in Texas has already dismissed a plaintiff's claim of trade secret misappropriation when that communication was among the plaintiff's competitor and the plaintiff's employees who the competitor was trying to hire away.³ Any business can be a beneficiary of the effects of the TCPA when accused of misappropriation of trade secrets, but as a plaintiff, any business is subject to having its claims dismissed in a fashion inconsistent with traditional notions of trade secrecy enforcement.

Members of the State Bar of Texas Business Law Section and Intellectual Property Law Section have convened a working group to consider proposals to provide for a more reasonable interaction of the TCPA and trade secret law. One way would be to amend the Texas Uniform Trade Secrets Act, perhaps to the effect that trade secret information is not subject to the TCPA's dominion. Another approach could be to amend the TCPA to limit its effects to information it reasonably should cover.⁴ Other states with Anti-SLAPP laws have amended their statutes to rationalize the interface with trade secrecy law.⁵

¹ "SLAPP" is an acronym for "strategic lawsuits against public participation."

² "Matter of public concern" includes any issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product or service in the marketplace. Tex. Civ. Prac. & Rem. Code Ann. Sec. 27.001(7).

³ *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191 (Tex. App.--Austin 2017, no pet. h.) (applying the plain meaning of the TCPA to dismiss the plaintiff's claims, reasoning that a "communication" within the statute means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests).

⁴ An amendment to the TCPA was attempted during the last legislative session with support from the both the Texas Trial Lawyers Association and Texans for Lawsuit Reform, but the bill was unsuccessful because of opposition from media groups and ExxonMobil.

⁵ CA – amended to include a list of exemptions on results contrary to the purpose and intent of its act; AZ, AK, GA, HI, MO, NE, NM – limited free speech application to instances where there is a governmental proceeding or an influence of governmental action; IL, ME, MA – narrowed their act's application to apply only to claims "solely based on" protected speech and with no other basis than to chill speech; AK, CA, GA, IN, NY, OR, PA, UT, VT - limited the free speech application to instances where the speech is connected to a public interest or a public issue; and MN, WA - declared sections of their "anti-SLAPP" statutes unconstitutional.