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The Dangers of Misclassifying Employees as Independent Contractors

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Recently, we have seen a rise in class actions filed against employers for improperly classifying their employees as independent contractors. While misclassification issues are nothing new, the proliferation of nontraditional jobs grows every year—especially with the advancement of technology and the ability of service providers to work remotely from anywhere in the world. In this brave new world, employers may struggle with how to define their workforce. Current labor laws recognize workers providing services can be categorized as either an independent contractor or an employee, and employees are generally protected by more employment rights. On one hand, classifying service providers as independent contractors can be more efficient and cost-effective for a company. On the other hand, misclassifying service providers can have dire consequences, leaving a company exposed to expensive class actions for wage, hour, and other Labor Code violations—not to mention staggering governmental fines and penalties.

In this article, we outline the current legal landscape governing classification of service providers and give guidance for employers on how to properly classify their work force.

Classification Standards

Both the federal government and various individual state governments have their own individual independent tests to determine whether a service provider is an employee or an independent contractor. To make things even more complicated, various departments within the federal and state governments may also have their own differing tests. However, at their common core, all these tests are primarily focused on the degree of control a company exerts over the service provider and the independence of the provider. By way of example, we highlight below the standards used by two federal departments most often interested in provider classification—*i.e.*, the United States Department of Labor and the United States Internal Revenue Service—as well as by a state agency.

United States Department of Labor

The Department of Labor ("DOL") is tasked with overseeing compliance with the Fair Labor Standards Act ("FLSA")[1]. The FLSA[2] includes minimum wage and overtime pay requirements for nonexempt employees.[3] The DOL generally relies on the six elements identified by the U.S. Supreme Court[4]

and subsequent case law to determine whether to apply the FLSA.[5] While the factors considered can vary and no one set of factors is exclusive, these are the following six elements generally considered when determining whether an employment relationship exists under the FLSA:

1. **The extent to which the work performed is an integral part of the employer's business.** If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself.
2. **Whether the worker's managerial skills affect his or her opportunity for profit and loss.** Analysis of this factor focuses on whether the worker exercises managerial skills and, if so, whether those skills affect that worker's opportunity for both profit and loss.
3. **The relative investments in facilities and equipment by the worker and the employer.** The worker must make some investment compared to the employer's investment, and bear some risk for a loss, in order for there to be an indication that he/she is an independent contractor in business for himself or herself.
4. **The worker's skill and initiative.** To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status.
5. **The permanency of the worker's relationship with the employer.** Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor.
6. **The nature and degree of control by the employer.** Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers.

United States Internal Revenue Service

The Internal Revenue Service ("IRS") administers federal payroll taxes, including social security, Medicare, federal unemployment insurance, and federal income tax withholding, and ensures that employers pay taxes, make the appropriate withholdings, and obtain certain insurance coverage on behalf of their employees. To determine whether a service provider is an employee or an independent contractor, the IRS utilizes a test different from the DOL's six-element test. Historically, the IRS utilized a 20-Factor Test, but the IRS has recently grouped the 20 factors into three primary categories of evidence to support the level of control and independence.[6]

The first category—"Behavioral"— refers to facts showing whether a company has a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. Within this category, the IRS examines four subcategories:

1. **Type of instructions given.** An employee is generally subject to the business's instructions about when, where, and how to work.
2. **Degree of instruction.** More detailed instructions indicate that the worker is an employee.
3. **Evaluation systems.** If an evaluation system measures the details of how the work is performed, then these factors would point to an employee.
4. **Training.** If the business provides the worker with training on how to do the job, this is strong evidence the worker is an employee.

The second category—Financial—refers to facts that show whether the business has the right to control the economic aspects of the worker's job. Within this category, the IRS examines five subcategories:

1. **Significant investment.** An independent contractor often has significant investment in equipment used in working for someone else.
2. **Unreimbursed expenses.** Independent contractors are more likely to have unreimbursed expenses than are employees.

3. **Opportunity for profit or loss.** Having the possibility of incurring a loss indicates that the worker is an independent contractor.
4. **Services available to the market.** An independent contractor is generally free to seek out business opportunities.
5. **Method of payment.** An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time, while an independent contractor is usually paid by a flat fee for the job.

The third category—Relationship—refers to facts showing how the worker and business perceive their relationship to each other. Within this category, the IRS examines four subcategories:

1. **Written contracts.** A contract stating that the worker is an employee or an independent contractor is helpful but not determinative of worker status.
2. **Employee benefits.** Businesses generally do not grant benefits such as insurance, pension plans, paid vacation, sick days, and disability insurance to independent contractors.
3. **Permanency of the relationship.** If a worker is hired with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.
4. **Services provided as key activity of the business.** If a worker provides services that are a key aspect of the business, it is more likely that the business will have the right to direct and control his or her activities.

The company must weigh all these factors and there is no "magic" or set number that makes the worker an employee or an independent contractor. The key is to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination. If a company is still unable to determine worker status after using this test, it can request the IRS to make a determination by filing a Form SS-8; but beware, the IRS may be quick to classify a service provider as an employee.

Individual States

In addition to the various federal tests, each state also may have its own test to determine worker status, and each may differ from the federal standard. Additionally, the exact test used by the state may depend on which agency is interested in the classification. In California, for example, the Employment Development Department ("EDD"), the Division of Workers' Compensation, the Contractors State Licensing Board, the California Department of Labor Standards Enforcement, and the Franchise Tax Board each have their own test.

By way of illustration, consider the test used by the California EDD, which administers California's payroll taxes, including Unemployment Insurance, Employment Training Tax, State Disability Insurance and California Personal Income Tax withholding. The EDD utilizes a "Main Test" and then ten secondary factors.[7] The Main Test used by the EDD asks whether the company has the right to control the manner and means in which the worker carries out the job. Under this test, the right of direction and control, whether or not exercised, is the most important factor in determining an employment relationship. The right to discharge a worker at will and without cause is strong evidence for the right of direction and control. When it is not clear whether the company has the right to direct and control the worker, the company must look further into the actual working relationship by weighing the ten secondary factors:

1. Is the worker engaged in a distinct trade or occupation? Does the worker make his or her services available to the general public? Does the worker perform work for more than one firm/company at a time? Does the worker hire, supervise, or pay assistants? Does the worker have a substantial investment in equipment and facilities?
2. Is the work done without supervision? In the geographic area and in the occupation, is the type of work usually done under the direction of a principal without supervision?

3. Is the work highly skilled and specialized? Is the worker trained by the principal? Does the worker personally perform the services?
4. Does the principal furnish/provide the tools, equipment, materials, supplies, and place of work? Does the worker perform the services on the principal's business premises?
5. Are the services provided on a long-term or repetitive basis?
6. Method of payment; is the worker paid based on time worked or on completion of the project?
7. Are the services an integral part of the principal's business?
8. What type of relationship do the parties believe they are creating?
9. What is the extent of actual control by the principal? Does the worker have the right to terminate the relationship without liability? Does the principal provide instructions on how to do the work? Does the principal establish the work hours or the number of hours to be worked? Does the principal require the work to be done in a particular order or sequence? Does the principal require oral or written reports from the worker?
10. Is the work performed for the benefit of the principal's business?

Consequences of Misclassification

A service provider mischaracterized as an independent contractor can bring wage, hour, and other violations under the various federal and state employment statutes. For example, a service provider may be owed unpaid overtime, waiting time penalties, wage statement violations, or missed meal and break penalties. These claims may be brought by an individual or as part of a state-wide or nation-wide collective class action, and claims may be brought in state court or federal court depending upon what statute the claims are asserted under.[8] Awards may be significant if a plaintiff succeeds on the merits of his or her lawsuit, particularly where the underlying statute provides for some form of punitive damages. Under the FLSA, for example, plaintiffs can seek liquidated damages and recover up to double what is owed to them.

Currently, we are experiencing an uptick in employer misclassification lawsuits—especially class actions. This increase in litigation is likely due to both (1) an increase in businesses characterized by a fissured workplace and a business model relying upon independent contractors or other contingent workforce arrangements (*e.g.*, ride share companies, food and other goods delivery services, high technology companies, and start-ups), and (2) an increase in the number of employee protection laws allowing civil liability for misclassification.

For example, California passed Senate Bill 459 (the "Worker Classification Bill") in 2011 to prohibit "willful misclassification" of employees as independent contractors.[9] This California law requires "willful" misclassification, which is defined to mean "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor." Violators who willfully misclassify are subject to civil penalties between $5,000-$15,000 per violation and if "pattern or practice" is shown, the penalties jump to $10,000-$25,000 per violation. Perhaps most concerning to California business executives is that this law also contains a provision that imposes "joint and several liability" on persons who knowingly advise an employer misclassify such individuals to avoid employee status.[10] Pursuant to this law, we are already seeing class actions filed against CEOs and board members of companies accused of misclassifying service providers.[11]

In addition to costly civil litigation, regulatory agencies such as the DOL and the IRS and their state equivalents may initiate an enforcement action against businesses that misclassify independent contractors.[12] These agencies have identified industries subject to targeted enforcement of independent contractor misclassification, including:[13]

- Construction;
- Transportation and trucking;
- Cable companies;

- Janitorial services;
- Landscaping and nurseries;
- Security services;
- Nursing;
- Child care;
- Home health care;
- Internet services;
- Restaurants and catering services;
- Staffing services;
- Hotels and motels; and
- Oil and gas.

Misclassification audits, investigations, and lawsuits are increasingly common and can result in steep costs and penalties. An employer who misclassifies may be on the hook for back payment of employee taxes, unpaid unemployment and disability insurance, unpaid worker's compensation coverage, and even large fines and penalties.[14]

It is worth noting that there has been recent speculation the DOL may be changing its position on enforcement. In June 2017, Alexander Acosta, the newly-confirmed Secretary of Labor in the Trump Administration, withdrew the DOL's independent contractor misclassification guidance issued in 2015.[15] Some believe that the decision by Secretary Acosta to withdraw the prior guidance on the six-element test signals the DOL will be more selective about what companies it goes after with its limited resources. But even if this demonstrates a shift in enforcement position by the DOL, it is unlikely to change the legal landscape of independent contractor misclassification, which is now dominated primarily by private class action lawsuits and administrative proceedings, not actions commenced by the DOL.

Advice for Employers

There are a number of steps that employers can take to minimize the risk of misclassifying service providers and to show that their classification was reasonable and made in good faith. These steps include:

- DO have an independent contractor agreement with the contractor, which must describe the scope of the work to be performed, the compensation paid, and the timing of the work, and clearly define the contractor's tax obligations.
- DON'T have the contractor complete an employee application.
- DO ensure that the contractor has liability insurance, particularly if the contractor is a professional.
- DO ensure that any professional contractor has a current professional license from the city/county in which he/she is operating.
- DON'T set the contractor's work hours.
- DON'T provide the contractor with tools, equipment, software or supplies with which to perform his/her work.
- DON'T provide the contractor any benefits that the business provides to its employees.
- DON'T retain or terminate or attempt to retain or terminate assistants or employees for the contractor.
- DO ensure that the contractor submits invoices for his/her work.
- DO require payment to be rendered upon completion of a certain task or job. Do not pay by the hour, week or month unless a flat fee is agreed to be paid at regular intervals.
- DO not pay contractor expenses. Businesses pay their own expenses, and expenses should be built into the contract for the cost of the entire job. The opportunity for profit or loss by the contractor helps to show financial independence from the employer.
- DO require the contractor to complete Form W-9, Request for Taxpayer Identification Number and Certification.
- DON'T complete an I-9.
- DON'T provide an employee handbook.
- DON'T conduct performance evaluations similar to employee evaluations.

1. Although the FLSA sets the minimum wage and overtime standards, it does not prevent states from setting their own higher standards by enacting their own laws. Thus, many states additionally have their own versions of FLSA with more generous employee-friendly provisions.
2. In addition to the FLSA, there are a multitude of other frequently litigated federal laws that cover employees but not generally independent contractors, including Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, Americans with Disabilities Act, Occupational Safety and Health Act, Family and Medical Leave Act, and the National Labor Relations Act.
3. *See* 29 U.S.C. §§ 203(e) and 207(a)).
4. "The Supreme Court has indicated that there is no single rule or test for determining whether an individual is an employee or independent contractor for purposes of the FLSA. The Court has held that the totality of the working relationship is determinative, meaning that all facts relevant to the relationship between the worker and the employer must be considered." *See* https://www.dol.gov/whd/regs/compliance/whdfs13.htm.
5. *See* https://www.dol.gov/whd/regs/compliance/whdfs13.htm.
6. *See* IRS website: https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee.
7. *See* California Tax Service Center Website: http://www.taxes.ca.gov/icore.bus.shtml.
8. We also occasionally see these claims brought before an administrative law judge, depending upon whether this is required under the applicable statute.
9. Senate Bill No. 459, Chapter 706, An act to add Sections 226.8 and 2753 to the California Labor Code, relating to employment. Approved by Governor October 9, 2011. Filed with Secretary of State October 9, 2011.
10. (Cal. Labor Code § 2753).
11. In June 2017, a lawsuit was filed against Travis Kalanick, the former CEO and a current Board member, and Garrett Camp, the Chairman of the Board of Uber Technologies, Inc. *See James v. Kalanick*, No. BC666055 (Super. Ct. Los Angeles County, CA, June 22, 2017), assigned to Judge Maren E. Nelson.
12. "Independent Contractor Classification" by Gabrielle Wirth, Dorsey & Whitney LLP, with Practical Law Labor & Employment PLI Thompson Reuters. 2017.
13. *See* DOL's Wage and Hour Division Budget Justification for 2015-2016 at https://www.dol.gov/sites/default/files/documents/general/budget/2016/CBJ-2016-V2-09.pdf.
14. *See* IRS website: https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee; Internal Revenue Code section 3509.
15. United States Department of Labor News Release: "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance," June 7, 2017, found at: https://www.dol.gov/newsroom/releases/opa/opa20170607.

The Texas Anti-SLAPP Statute: A New Defense to Misappropriation Claims?

By Olivia Zimmerman Miller

Restrictive covenants, often imposed to protect the disclosure to competitors of a company's proprietary and trade secret information, no longer bind only highly-skilled, highly-paid employees. A May 2016 White House Report on Non-Compete Agreements cites research suggesting that about one in five employees (an estimated 30 million Americans) is currently bound by a non-compete clause, including approximately 15% of workers without a college degree, and 14% of individuals earning less than $40,000.[1] And employers have been more apt to enforce such restrictive covenants: one study concluded that from 2002 to 2013, the number of employees sued by former employers for breach of non-compete agreements increased by 61%.[2] Recently, in addition to California, which generally prohibits non-compete clauses, several states have taken action to limit the scope/enforceability of non-compete clauses, including Utah (limited to one year)[3], Oregon (limited to less than 18 months, and only for employees whose annual gross salary/commission equals more than the median family income for a family of four)[4], Hawaii (banned for technology jobs)[5], and New Mexico (banned for health care jobs)[6]. Although the enforceability of non-compete agreements in Texas is governed by the Texas Business and Commerce Code, recently the Austin Court of Appeals provided employees with a tool to expeditiously dismiss trade secret misappropriation claims (often brought in the context of an employee's non-disclosure restrictive covenant): the Texas Citizens Participation Act ("TCPA").[7]

Any employer (regardless of whether it is a Texas-based company) that manages, hires, or employs a Texas worker should be aware of this decision, and its potential to reshape trade secret litigation.

The TCPA: Overview and Recent Caselaw

The TCPA is Texas's version of an anti-SLAPP statute. "SLAPP" stands for "Strategic Lawsuit Against Public Participation" and is a lawsuit designed to chill protected speech by intimidating and censoring critics, often those who have spoken out against a government entity or on an issue of public interest, by requiring them to spend money to defend against a meritless suit. Anti-SLAPP legislation, enacted by over half of the states, protects persons who exercise their expression rights from such retaliatory lawsuits. The TCPA, like other anti-SLAPP statutes, provides for a burden-shifting expedited dismissal mechanism whereby the court must dismiss a legal action if the moving party shows by a preponderance of the evidence that the action is "based on, relates to, or is in response to" the party's exercise of the rights to free speech, petition, and association, unless the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim.[8] If a court grants dismissal under the TCPA, it must award court costs, reasonable attorney's fees, and other expenses to the moving party, along with sanctions against the party who brought the legal action.[9] In essence, the TCPA requires a claimant to offer summary-judgment-type evidence at the motion to dismiss phase.

In *Elite Auto Body LLC, v. Autocraft Bodyworks, Inc.*, the plaintiff auto-repair shop ("Autocraft") sued a competing auto-repair business ("Precision") and former Autocraft employees who went to work for Precision.[10] The plaintiff accused an individual defendant and another former employee of providing Precision with Autocraft's confidential, proprietary and trade secret information, and alleged that Precision and its employees were unlawfully using Autocraft's proprietary information, including to improperly solicit current Autocraft employees. In defense, the Precision defendants invoked the TCPA, seeking dismissal because the "legal action" "is based on, relates to, or is in response to" the defendants' exercise of the right of association and free speech. Autocraft sought to prevent application of the TCPA by arguing that its claims sought to remedy theft and misuse of trade secrets, which was distinguishable from "communications" or "free expression" under the TCPA, and that the First Amendment does not prohibit restrictions on the unauthorized disclosure of

confidential information. In ruling against Autocraft, the Austin Court of Appeals textually applied the TCPA and held that the bases for Autocraft's claims—the alleged communications between defendants and Precision employees, and between defendants and Autocraft employees—were "communications" within the meaning of the TCPA. Further, the court found nothing in the text of the TCPA limiting its application to lawsuits based on a party's exercise of constitutional rights. It remains to be seen whether the *Autocraft* decision will be further considered by the Texas Supreme Court, or if its analysis will be adopted by other Texas appellate courts.

The *Autocraft* opinion raises as many questions as it answers in terms of strategy and tactics when seeking to hold Texas employees accountable for misappropriation of confidential, proprietary, or trade secret information, including:

- **Should an employer file a misappropriation lawsuit?** An employer may be leery about filing a misappropriation claim based on speculation, not supported by evidence available at the time of filing. Although the TCPA authorizes "specified and limited discovery relevant to [the TCPA dismissal] motion,"[11] if an employer, at the dismissal stage, cannot establish by clear and specific evidence a prima facie case for each essential element of the claim, the action will be dismissed and the employer not only must pay court costs, attorney's fees, and expenses, but will be subjected to court-ordered sanctions.[12] On the other hand, the failure to file expeditiously may lead to a defense of laches if the plaintiff were to move for a preliminary injunction without due haste.
- **Is application of the TCPA dependent on choice of law/choice of venue?** In drafting contractual choice of law and venue provisions, especially when an *Erie* analysis may become applicable, employers must remember that the TCPA appears to provide a *procedural* mechanism for early dismissal inextricably tied to the *substantive* nature of the plaintiff's claims.[13] This means that an employer bringing a misappropriation claim in Texas state court, even if litigated under another state's law, could face dismissal under the TCPA if the court applies the TCPA as a procedural rule.[14] However, in an *Erie* analysis, both the Eastern and Southern Districts of Texas applied the TCPA to state law claims, finding the statute functionally substantive and not in conflict with dismissal rules under the Federal Rules of Civil Procedure.[15] In contrast, the D.C. Circuit held that a federal court exercising diversity jurisdiction could not apply the DC Anti-SLAPP Act, and instead was bound by the Federal Rules of Civil Procedure.[16] The Fifth Circuit has not ruled on the applicability of the procedural aspects of the TCPA, but allowed a federal-court defendant to bring a motion to dismiss "under the materially similar Louisiana anti-SLAPP statute" because the procedural special motion to dismiss was functionally substantive,[17] and, in another case, "assume[d], without deciding, that the state procedural rules [governing the TCPA] . . . do in fact apply in federal court."[18]
- **What if the misappropriation claim is arbitrable in Texas?** Many employment agreements contain mandatory arbitration provisions; courts are only to be used for injunctive relief. Arbitration typically occurs in the state where the employee resides—this is especially common in the employment agreements private equity companies require of key personnel in purchased companies. Parties can choose to have the procedural law of the place of arbitration apply; otherwise, arbitration procedure is determined by federal or state arbitration law, or the rules of the arbitral forum. If Texas procedural law governs the arbitration, the TCPA could be employed to quickly and summarily dismiss a misappropriation claim, which may cause employers to re-think the arbitral seat. A practical effect of the *Autocraft* ruling may be that employers seeking to hold an employee accountable for a non-disclosure/misappropriation violation may hesitate before running to the courthouse seeking injunctive relief prior to establishing a stronger factual foundation.
- **Will a new employer be more likely to hire/retain an employee bound by a non-disclosure covenant?** A new employer often is leery of hiring an employee bound by restrictive covenants, as it

does not want to be subjected to potential claims (tortious interference, misappropriation, etc.) itself, nor does it want to be drawn into expensive, time-consuming litigation as a third-party. If the new employer does not know about the restrictive covenant, it may need to terminate the employee's position once notified by the former employer that the employee may have misappropriated the former employer's trade secret information. However, if the employee can use the TCPA to expeditiously dismiss any misappropriation claim, the new employer may be more apt to hire/retain such employee.

- **Considerations of the Departing Employee:** Employees accused of trade secret theft may be less likely to settle with their former employer, and instead, will seek dismissal through the TCPA. However, the TCPA cannot save employees who have actually committed misappropriation, because clear and specific evidence of the employee's theft, which can be obtained through targeted discovery at the TCPA-dismissal stage, defeats a TCPA defense.

Practice Pointers

Application of an anti-SLAPP statute to defend against trade secret misappropriation claims is novel, yet could have far-reaching effects—both on every employer with Texas workers, and on every employee subjected to a misappropriation claim under Texas law/procedure. Although an anti-SLAPP defense could result in a decrease of misappropriation suits (perhaps the true aim of the Austin Court of Appeals), it should not deter employers who possess/obtain specific evidence of unlawful misappropriation, but it should cause drafters of restrictive covenant agreements (typically found in employment agreements) to carefully consider potential pitfalls in accompanying provisions such as choice of law, choice of venue, dispute resolution, etc.

1. The White House, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 3 (May 2016).
2. *Id.* (citing Ruth Simon and Angus Loten, *Litigation Over Noncompete Clauses is Rising,* THE WALL STREET JOURNAL, Aug. 14, 2013, https://www.wsj.com/articles/litigation-over-noncompete-clauses-is-rising-does-entrepreneurship-suffer-1376520622?tesla=y).
3. UTAH CODE ANN. § 34-51-201 (2016).
4. OR. REV. STAT. 653.295 (2016).
5. HAW. REV. STAT. §480-4(d) (2015).
6. N.M. STAT. ANN. §24-1I-1, *et. seq.*
7. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001-.011.
8. *Id.* §§ 27.005.
9. TEX. CIV. PRAC. & REM. CODE §27.009(a).
10. No. 03-15-00064-CV, 2017 WL 1833495 (Tex. App.—Austin, May 5, 2017, pet. filed).
11. TEX. CIV. PRAC. & REM. CODE § 27.006(b).
12. *Id.* §27.009(a).
13. *Banik v. Tamez*, No. 7:16-CV-462, 2017 WL 1228498, at *3 (S.D.Tex. Apr. 4, 2017); *Allen v. Heath*, Civil Action No. 6:16-cv-51 MHS-JDL, 2016 WL 7971294, at *3 (E.D. Tex. May 5, 2016); *Haynes v. Crenshaw*, 166 F. Supp. 3d 773, 776-77 (E.D.Tex. 2016).
14. Several Texas courts have referred to the TCPA as a "procedural" mechanism. *See, e.g.*, *Mem'l Hermann Health Sys. v. Khalil*, No. 01-16-00512-CV, 2017 WL 1149684 at *3 (Tex. App.—Houston [14th Dist.] Mar. 28, 2017, no pet.) (explaining that TCPA creates "a new set of procedural mechanisms through which a litigant may require, by motion, a threshold testing of the merits of legal proceedings or filings that are deemed to implicate the expressive interests protected by the statute, with the remedies of expedited dismissal, cost-shifting, and sanctions for any found wanting") (quoting *Serafine v. Blunt*, 466 S.W.3d 352, 369 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring).
15. *See Allen v. Heath*, No. 6:16-cv-51 MHS-JDL, 2016 WL 7971294, at *3 (E.D. Tex. May 6, 2016).
16. *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).
17. *Id.* (citing *Henry v. Lake Charles Am. Press, LLC*, 556 F.3d 164, 169 (5th Cir. 2009)).
18. *Cuba v. Pylant*, 814 F.3d 701, 706 n.6 (5th Cir. 2016).

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