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Anti-SLAPP Statute and Noncompete Agreements

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The tension between Texas's anti-SLAPP statute, the Texas Citizens Participation Act, and the Texas Covenant Not to Compete Act has the potential to dramatically alter the Texas noncompete landscape by significantly increasing both the difficulty and risk associated with enforcing noncompete agreements.

Traditionally, employers seeking to enforce a noncompete agreement could file suit for breach of the noncompete and quickly obtain injunctive relief against a former employee. And while parties often litigate over the reasonableness of the noncompete agreement's restrictions (geographic area, time, and scope of activity), they are seldom fatal to an employer's ability to obtain injunctive relief and ultimately enforce the noncompete agreement (at least to a limited degree). This is because the CNCA requires courts to reform restrictive covenants that they find to be overly broad "and enforce the covenant as reformed," the Second Court of Appeals in Fort Worth said in 2014 in *Tranter, Inc. v. Liss*, holding that because applicant provided evidence that the noncompete could



be reformed to contain reasonable limitations as to time, geographic area, and scope of activity that did not impose a greater restraint than was necessary, the applicant established a probable right to recovery on its permanent injunction claim against former employee. The TCPA potentially turns this framework on its head by abrogating the CNCA's reformation requirement.

The TCPA provides a mechanism to dismiss a lawsuit that is "based on, relate[d] to, or is in response to a party's exercise of the right of free speech, right to petition,

or right of association." Tex. Civ. Prac. & Rem. Code §27.003(a). The TCPA's language is broad, and the Texas Supreme Court has repeatedly held that it should be given its broad meaning, making it easy for defendants to establish the application of the TCPA to a wide range of claims. Once the defendant has satisfied its initial burden, the plaintiff must then present clear and specific evidence of each element of its *prima facie* case. The failure to do so results in the dismissal of the claim, and the mandatory fee shifting provision of the TCPA requires that the

trial court award attorney's fees to the defendant.

If the TCPA can be used to challenge claims brought under the CNCA to enforce noncompete agreements, it would require employers to present clear and specific evidence that the restrictions as to time, geographical area, and scope of activity contained in their noncompete agreements are reasonable. See Tex. Bus. & Com. Code § 15.50(a). If any restriction were then deemed to be unreasonable, it would be fatal to the enforcement of the noncompete agreement and the employer would be liable for the employee's attorney's fees and costs. TCPA dismissal in this scenario would effectively abrogate the statutory reformation requirement of the CNCA and dramatically increase the difficulty and risk associated with the enforcement of noncompete agreements.

Currently, no court has directly addressed this tension between the CNCA and TCPA, but there is a strong argument that the CNCA preempts the TCPA. The CNCA's statutory language states in pertinent part:

The criteria for enforceability of a covenant not to compete provided by Section 15.50 of this code and the procedures and remedies in an action to enforce a covenant not to compete pro-

vided by Section 15.51 of this code are *exclusive and preempt any other criteria for enforceability* of a covenant not to compete or *procedures and remedies in an action to enforce a covenant not to compete* under common law or otherwise.

Tex. Bus. & Com. Code. § 15.52 (emphases added).

Advocates of preemption argue that the CNCA expressly states that its remedies are exclusive. The CNCA governs disputes involving noncompetes, and the statute does not contemplate a defendant's reliance on another statute like the TCPA. And if the TCPA were to apply to actions to enforce noncompetes, one of the core components of the CNCA—reformation—would be circumscribed leaving trial courts with the binary choice of either enforcing the noncompete agreement as drafted or dismissing the claims. This would inevitably prevent many employers from enforcing their noncompete agreements due to the high incidence of agreements that, as drafted, contain overly broad restrictions.

Employees favoring the TCPA's application in noncompetition lawsuits reject the CNCA's preemption provision based on a narrow reading of the CNCA's preemption language, contending that the TCPA neither governs A. the "criteria for enforceability of a covenant not to compete," nor

B. the procedures and remedies for its enforcement. Further, the opponents of preemption claim that the provision only applies to "procedures" specifically set forth within the CNCA's Section 15.51 — not all other possible rules of procedure such as the TCPA. Finally, employees argue that the TCPA is a broadly worded statute that contains enumerated exemptions from its coverage and there is no express exemption for CNCA claims; and the TCPA, therefore, preempts the CNCA's reformation requirement.

Trial and appellate courts have only recently begun to address the CNCA preemption issue, and the Supreme Court of Texas has yet to resolve the matter. The answer to whether the CNCA preempts the TCPA will either (i) upend the noncompete landscape in Texas—making enforcement much more challenging—or (ii) remove altogether the threat of TCPA dismissal facing employers attempting to enforce noncompetes. Until then, employers should be wary of the risks posed by the TCPA when seeking to enforce noncompete agreements with potentially overly broad restrictions.

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