

Striking a Balance

Changes to the Texas Citizens Participation Act.

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On September 1, 2019, significant changes to the Texas Citizens Participation Act, or TCPA, went into effect. The changes apply to actions filed on or after that date.

Background of TCPA

By way of background, courts, scholars, and free speech advocates have dubbed meritless lawsuits targeting the legitimate exercise of the rights to engage in truthful speech, lawful petitioning, and legal association as “Strategic Lawsuits Against Public Participation,” or SLAPP suits.¹ This acronym was developed more than a quarter century ago after professors George W. Pring and Penelope Canan identified a disturbing litigation trend that sought to chill the rights of ordinary citizens to speak and associate freely and to petition the government for redress of grievances—all fundamental rights protected by the First Amendment.² “After extensively studying this phenomenon, professors Pring and Canan concluded that tens of thousands of Americans had been victimized by such civil actions and that, although these lawsuits rarely succeeded on the merits, the mere fact of filing the lawsuit led to the goal of silencing those who had been speaking out.”³ Succinctly put, a SLAPP suit is the offensive use of a legal proceeding to prevent, or retaliate against, persons lawfully exercising their First Amendment rights.⁴

In response to the rise in retaliatory litigation, at least 33 states, the District of Columbia, and the U.S. territory of Guam have passed some form of anti-SLAPP legislation.⁵ In 2011, the Texas Legislature, like those in other states, recognized this trend and unanimously voted to enact the TCPA.⁶

It is important to note that an “Anti-SLAPP law acts as a gatekeeper, allowing a case to be quickly dismissed (before legal bills mount) if a judge finds no merit to the plaintiff’s arguments.” There is no prototypical SLAPP victim or type of claim, and anti-SLAPP laws are available to everyone. “Anti-SLAPP laws, including the TCPA, protect the conduct (protected speech), not individuals and entities. While these laws are primarily intended to help those with fewer resources defend against deep-pocketed plaintiffs, there are no income or other qualifications to meet to invoke anti-SLAPP” protections.⁷

TCPA: The First Eight Years

The TCPA had an immediate impact on Texas jurisprudence; this was especially true because, up until that time, Texas had no mechanism to file a motion to dismiss in state court. Before the Texas statute was passed, the first time a SLAPP victim could seek dismissal was through summary judgment (oftentimes after costly discovery). Because of this significant shift in how

the judiciary and the bar approached cases involving free speech, the law developed vocal supporters and outspoken detractors.

After eight years of jurisprudence, the expanse of the law had exceeded initial expectations and changes were sought to curtail its application, especially in business settings,⁸ and fend off other unintended consequences. All agreed the language needed to be modified so that the law could no longer be improperly used as a litigation tactic to thwart its purpose.⁹ Several bills were filed with varying approaches to the situation,¹⁰ and the cacophony of voices culminated in a three-and-a-half hour hearing on April 1, 2019, before the Texas House Judiciary & Civil Jurisprudence Committee.¹¹ Representatives of legal associations and former judiciary presented their view of problematic language under the current statute followed by droves of citizens from all over the state and country testifying about being retaliated against for speaking out about wrongdoing. A veteran who had been sued while serving overseas after his wife told the media about being ripped off by an air conditioning repair company; a citizen who had been sued multiple times for reporting on a dangerous product; an online commenter who had been sued for allegedly breaching a non-disparagement agreement he unknowingly signed by “clicking through” on a webpage, and more, told their truth and implored the committee to take a surgical approach to change so that the integrity of the statute would be preserved and the wrongful uses minimized. Lawmakers listened.¹² The 2019 changes to the TCPA limited its “scope of applicability by narrowing its definitions, expanding its exemptions, and providing more direction for the courts and litigants” about how and when it applies.¹³

The Legislature took a belt and suspenders approach to changes in the law, which emanate from three different directions: changes to when the TCPA can be used, how it can be used, and who can use it. While some will say that the changes went too far (with unnecessary exemptions and exemptions for areas in which no problems were presented), others will say that the changes did not go far enough (with the failure to decisively address its application to Rule 202 petitions or provide for reimbursement of fees in pro bono cases). Still, the Legislature did its best to balance the competing interests and preserve the integrity and purpose of the law.

Narrowing the Scope of the TCPA

The Legislature narrowed the scope of the TCPA in several ways, but most directly through the changes to the definitions in TCPA § 27.001 and the removal of the “relates to” language in TCPA § 27.003(a). As originally enacted, one could file a motion to dismiss under the TCPA if the legal action at

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issue was “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.”¹⁴ The exercise of the “right of free speech” was further defined as a “communication made in connection with a matter of public concern.”¹⁵ And, what constituted a matter of public concern was itemized in a non-exhaustive list to include “an issue related to: (a) health or safety; (b) environmental, economic, or community well-being; (c) the government; (d) a public official or public figure; or (e) a good, product, or service in the marketplace.”¹⁶ The most sweeping change came in removal of this topical laundry list of what qualified as a “matter of public concern” and its replacement with a more subjective test derived from U.S. Supreme Court precedence. Even though this topical list came from prior judicial determinations about what constitutes a “matter of public concern,”¹⁷ the list combined with the broad “relates to” language found in TCPA § 27.003(a) had been seen as problematic to some. Together they had resulted in the statute’s application in what many believed to be unconventional and inappropriate settings, including in trade secret and employment disputes and attorney disciplinary proceedings.¹⁸

The new definition, taken in part from the U.S. Supreme Court case *Snyder v. Phelps*,¹⁹ provides a more generalized approach to determining whether something is a matter of public concern²⁰ and gives the courts more latitude in deciding when to apply the statute. The new definition of “matter of public concern” expressly includes “activity” not just communications, and it protects statements or activities regarding public officials, public figures, or other persons who have drawn substantial public attention due to their official acts, fame, notoriety, or celebrity; matters of political, social, or other interest to the community; and subjects of concern to the public.²¹ It does not, however, merely apply based on the topic of discussion.

Additionally, the definition of “right of association,” which was also being used to apply the statute in trade secret settings, was curtailed by tying its protection to matters relating to a governmental proceeding or a matter of public concern.²²

Additionally, under the original law, the TCPA applied and provided for a motion to dismiss “[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[.]”²³ Courts expressed the biggest concern with the breadth of the qualifier “relates to” because its ordinary meaning merely “denote[s] some sort of connection, reference, or relationship.”²⁴

In answer to this call, the new law narrows the scope of when the TCPA applies by removing the “relates to” language. Section 27.003 now provides that, in order to file a motion to dismiss, the legal action must be “based on” or “in response” to a party’s exercise of the right of free speech, right to petition, or right of association.²⁵

These two definitional changes combined with the removal of “relates to” from the scope addressed the vast majority of the identified concerns.

Narrowing the Types of Proceedings in Which the TCPA Can be Used

While modifying the definitions and narrowing the scope

may have been enough to address the bulk of the perceived problems with the statute’s applicability, there was still the issue of gamesmanship. In some instances, litigants had turned the purpose of the statute on its head by filing TCPA motions in response to a litany of procedural motions, unnecessarily tying cases up in the courts and burdening the judicial system.²⁶ For instance, in a few cases, litigants were filing TCPA motions in response to TCPA motions,²⁷ motions for sanctions,²⁸ and appeals.²⁹ While these incidents were the exception and not the rule, they certainly garnered significant attention among the bar and frustration in the courts.

Capitalizing on the problem, some have charged that TCPA cases are overburdening the courts; however, empirical data from 2011 to 2018 shows that only 0.32% of the 83,717 appeals court opinions and only 15 of the Texas Supreme Court’s opinions over that eight-year stretch were TCPA cases.³⁰ California’s anti-SLAPP statute faced similar criticism that it was too broad and adversely affected the judicial system; but there too objective data demonstrated that California’s anti-SLAPP law was not being systematically abused, either in the trial courts or on appeal.³¹ Instead, both statutes have operated successfully in accordance with the Legislature’s expectations by permitting thousands of litigants (if not more) to dismiss meritless lawsuits that targeted their exercise of First Amendment rights. And, one cannot measure the number of meritless claims that were not filed because the litigant decided to think twice before trying to use the judicial system to silence truthful speech.

However, because some lawyers were using the law as a sword in litigation rather than for its intended purpose, the Legislature attempted to narrowly target these exploitative uses by clarifying that the term “legal action” does not include procedural actions, alternative dispute resolution proceedings, or post-judgment enforcement actions.³² Further, consistent with the majority of appellate court opinions, the new definition also clarifies that the law does apply to lawsuits seeking declaratory relief.³³

The Addition of New Exemptions

In addition to narrowing the scope of applicability and the types of proceedings in which the TCPA can be used, the Legislature took the unprecedented (and some might say unnecessary) step of adding a laundry list of exemptions to the statute not found in any other state’s anti-SLAPP laws. The TCPA initially had two fairly common anti-SLAPP exemptions—for commercial speech and for enforcement actions—and two unique to Texas (at the time) exemptions—for insurance cases and bodily injury cases. In 2019, continuing in the belts and suspenders approach, the list of exemptions grew to 12. Some of the exemptions derived from fear of potential future unintended consequences, like the possibility that the TCPA could be used in the family court setting, and others were added to address atrocities where the law had been used to allow attorneys to avoid disciplinary rulings.³⁴ Even though some judges have indicated that removal of the “relates to” language, modifying the “matter of public concern” definition, and restricting the reach of the “right of association” should solve the vast majority of problems, express exemptions were

added for: trade secret misappropriation, enforcement of non-disparagement agreements or covenants not to compete in an employment or independent contractor relationship, family code cases and applications for protective orders, claims under the Texas Deceptive Trade Practices Act, medical peer review cases, eviction suits, attorney disciplinary proceedings, and common law fraud claims.³⁵ While the use of TCPA motions in trade secret, employment, and attorney disciplinary cases were causing a stir, some of the exemptions, including for Texas Deceptive Trade Practices Act actions, were added without any examples of problems under the original law. Others, like the eviction exemption, were added at the 11th hour, despite testimony about the improper eviction of an assisted-living facility tenant after her family member reported the facility to the government for improper care and was slapped with a lawsuit for making the report.³⁶ Given this, and the fact that Texas stands alone in the myriad of exemptions, the courts could see a backlash of meritless retaliatory claims being filed within the confines of these new exemptions.

Other Noteworthy Changes

There are at least four other noteworthy changes to the TCPA, including some “clean up” procedural measures, clarification to the burdens of proof, and removal of mandatory sanctions. In TCPA § 27.003(b), parties can now agree to extend the time for filing a TCPA motion—to assist with circumstances where all agree that jurisdiction, recusal, or other preliminary matters need to be addressed first. In addition, summary judgment-like procedures were adopted in the amount of notice to be provided for a hearing (21 days), the deadline to file a response (seven days prior to a hearing), and the evidence to be considered when evaluating a TCPA motion.³⁷ The “preponderance of the evidence” standard has been removed entirely from the statute to do away with concerns raised about weighing of evidence. The Legislature adopted California’s language requiring a movant, in the first instance, to “demonstrate” that a legal action is based on or in response to the enumerated rights,³⁸ and when relying on a defense, a movant is to establish an affirmative defense or other grounds on which the movant is entitled to judgment as a matter of law.³⁹ Finally, although the mandatory attorneys’ fees provision was retained to make the SLAPP victim whole after facing a meritless claim, the award of sanctions is now discretionary so the court can consider things like tactics, oppression, harassment, and other appropriate indicia in determining whether to impose sanctions under the TCPA.⁴⁰

Conclusion

Although the changes to the TCPA were extensive, the Legislature preserved the core provisions of the law providing the deterrent effect to meritless retaliatory claims, i.e., the discovery stay, the interlocutory appeal, and the mandatory attorneys’ fees. There can be no doubt that the changes to the TCPA will narrow its applicability and improper uses, but only time will tell whether the pendulum has swung too far in the other direction in the name of reform.

Notes

- George W. Pring & Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* 8–10 (Temple Univ. Press 1996). Professors Pring and Canan of the University of Denver are two of the primary scholars who analyzed this legal phenomenon and coined the term “SLAPP.”
- See Jeremy B. Rosen & Felix Shafir, *Helping Americans to Speak Freely*, 18 *Federalist Soc’y Rev.* 62 (2017).
- Id.* citing Pring & Canan, *Getting Sued for Speaking Out*; Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 *Social Problems* 506 (1988); Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 *Law & Soc’y Rev.* 385 (1988).
- See Chad Baruch, “If I Had a Hammer”: *Defending SLAPP Suits in Texas*, 3 *Tex. Wesleyan L. Rev.* 55, 56–58, 62–63 (1996).
- See Laura Lee Prather & Robert T. Sherwin, *The Changing Landscape of the Texas Citizens Participation Act*, 52 *Tex. Tech L. Rev.* 163, fn. 9. (Winter 2020).
- Tex. Civ. Prac. & Rem. Code Ann.* §§ 27.001–.010 (West 2017).
- See Rick Blum, *New legislation would imperil Texas anti-SLAPP law*, *Reporters Committee for Freedom of the Press* (Mar. 11, 2019), <https://www.rcfp.org/new-legislation-would-imperil-texas-anti-slapp-law/>. See also <https://protectfreepeechcoalition.com/new-legislation-would-imperil-texas-anti-slapp-law/>.
- See Joe Mullin, *Why We Can’t Support Modifications to Texas’ Anti-SLAPP Law*, *Electronic Frontier Foundation* (May 21, 2019), <https://www.eff.org/deeplinks/2019/05/why-we-cant-support-modifications-texas-anti-slapp-law>.
- See Blum, n. 7 *supra*.
- Tex. H.B. 2730*, 86th Leg. R.S. (2019); *Tex. S.B. 2162*, 86th Leg. R.S. (2019); *Tex. H.B. 3547*, 86th Leg. R.S. (2019); *Tex. H.B. 4575*, 86th Leg. R.S. (2019); *Tex. S.B. 1981*, 86th Leg. R.S. (2019).
- <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB2730>.
- <https://capitol.texas.gov/tlodocs/86R/witlistbill/pdf/HB02730S.pdf?navpanes=0>.
- See Prather & Sherwin, n. 5 *supra*.
- Tex. Civ. Prac. & Rem. Code* § 27.003(a) (West 2017).
- Id.* at § 27.001(3) (West 2017).
- Id.* at § 27.001(7) (West 2017).
- See *Means v. ABCABCO, Inc.*, 315 S.W.3d 209 (Tex. App.—Austin 2010, no pet.); see also Laura Lee Prather & Justice Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 *Tex. Tech. L. Rev.* 633, 684–85 (2018).
- Angela Morris, *Bill to Limit Attorneys’ Ability to Win Anti-SLAPP Dismissals Just Passed Texas House*, *Texas Lawyer* (Apr. 30, 2019, 1:50 PM), <https://www.law.com/texaslawyer/2019/04/30/bill-to-limit-attorneys-ability-to-win-anti-slapp-dismissals-just-passed-texas-house/>.
- 562 U.S. 443, 447, 131 S.Ct. 1207, 1211, 179 L.Ed.2d 172 (2011) (citations omitted).
- Tex. Civ. Prac. & Rem. Code* § 27.001(7).
- Id.*
- Id.* at § 27.001(2).
- Tex. Civ. Prac. & Rem. Code* at § 27.003 (West 2017).
- Cavin v. Abbott*, 545 S.W.3d 47, 69, n. 85 (Tex. App.—Austin 2017, no pet.), citing *American Heritage Dictionary of the English Language* 1482 (5th ed. 2011); see also *James v. Elkins*, 553 S.W.3d 596, 606 (Tex. App.—San Antonio 2018, pet. denied) (interpreting “relates to” as the broadest of the qualifiers).
- Tex. Civ. Prac. & Rem. Code* § 27.003(a).
- Morris, fn. 18 *supra*.
- See, e.g., *Paulsen v. Yarrell*, 537 S.W.3d 224, 234 (Tex. App.—Houston [1st Dist.] 2017, pet. denied), reh’g denied (Nov. 21, 2017) (holding filing of TCPA motion in response to TCPA motion invalid use of the statute); *Roach v. Ingram*, 557 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *Deepwell Energy Services, LLC v. Aveda Transp. & Energy Services*, 574 S.W.3d 925, 927 (Tex. App.—Eastland 2019, pet. denied); see also *Memorial Hermann Health System v. Khalil*, Cause No. 01-16-00512-CV, 2017 WL 3389645, *18 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied).
- Compare Hawxhurst v. Austin’s Boat Tours*, 550 S.W.3d 220, 226–228 (Tex. App.—Austin 2018, no pet.) (holding request for sanctions was a “legal action” as defined by the TCPA) with *Misko v. Johns*, 575 S.W.3d 872, 878 (Tex. App.—Dallas 2019, pet. denied) (holding TCPA does not apply to motion for sanctions).
- See, e.g., *Amini v. Spicewood Springs Animal Hospital*, 550 S.W.3d 843, n. 2 (Tex. App.—Austin 2018) (J. Pemberton, while also noting the litigant’s prior aggressive tactics in filing a TCPA motion in response to a TCPA motion, wrote, “[t]his pre-submission motion has jurisprudential novelty beyond the norm: it includes an appellate-level TCPA motion to dismiss Amini’s appeal. We conclude that the TCPA does not authorize that motion or relief.”) (emphasis in original).
- See Blum, n. 7 *supra*.
- See, e.g., Felix Shafir & Jeremy B. Rosen, *California’s Anti-SLAPP Law Is Not Systematically Abused*, *Law360* (June 30, 2016), <http://www.law360.com/articles/812761/california-s-anti-slapp-law-is-not-systematically-abused> (analysis showed anti-SLAPP motions in trial courts accounted for only 0.04% of all motions filed between 2014 and 2018, and only 1.2% of all appeals over the same period).
- Tex. Civ. Prac. & Rem. Code* § 27.001(6).
- Id.*
- See, e.g., *Commission for Lawyer Discipline v. Rosales*, 577 S.W.3d 305 (Tex. App.—Austin 2019, pet. filed).
- Tex. Civ. Prac. & Rem. Code* § 27.010(a)(5)-(12).
- The facts arise from case *LMV-AL Ventures, LCC v. Carol Hemphill*, No. 03-19-00164-CV (Tex. App.—Austin 2020, no pet. h.).
- Tex. Civ. Prac. & Rem. Code* § 27.003(d), (e), and § 27.006(a).
- Id.* § 27.005(b).
- Id.* § 27.005(d).
- Id.* § 27.009(a)(2).



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