

Changes to Texas Anti-SLAPP Statute

June 12, 2019 Laura Prather

PRACTICES Anti-SLAPP and First Amendment Rights, Media and Entertainment Litigation

On Sunday, June 2, 2019, Governor Greg Abbott signed HB 2730 into law. HB 2730 is the bill that makes changes to the Texas Citizens Participation Act (Texas' Anti-SLAPP statute). It goes into effect on September 1, 2019 and applies to actions filed on or after that date. The changes to the law narrow the scope of applicability by modifying when the TCPA can be used, how it can be used, and who can use it.

Currently, one can file an Anti-SLAPP motion if the “*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*.” “Exercise of right of free speech” means a communication made in connection with a “*matter of public concern*.” Significant changes are being made to these definitions which will change the applicability of the TCPA in future lawsuits.

- “**Legal Action**” - to prevent gamesmanship by attorneys the new definition clarifies that the term “legal action” does not include procedural actions, alternative dispute resolution proceeding, or post-judgment enforcement action. The new definition clarifies that the law does apply to lawsuits seeking declaratory relief – an issue about which Texas appellate courts are currently in conflict.
- “**Matter of Public Concern**” – the non-exclusive categorical list of what constitutes a “matter of public concern” will be replaced with a more generalized approach encompassing statements or activities about 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.
- “**Exercise of Right of Association**” – will be narrowed by requiring it to be tied to matters relating to a governmental proceeding or a matter of public concern.

The new law also narrows the scope of the TCPA by removing the “current provision that the legal action need only “relate to” a party’s exercise of their constitutional rights as defined by the TCPA. Instead, now, the action must be “based on” or “in response” to a party’s exercise of those rights.

New TCPA Exemptions – A number of exemptions to the TCPA are being added for: trade secret misappropriation and enforcement of non-disparagement agreements or covenants not to compete in an employment or independent contractor relationship; family code cases and applications for protective order; claims under the Texas Deceptive Trade Practices Act; medical peer review cases; eviction suits; attorney disciplinary proceedings; and common law fraud claims. There are, however, some exemptions to certain of these exemptions for the media and online business reviews and ratings.

Finally, the new law expressly states that a governmental entity, agency, or an official or employee acting in an official capacity does not qualify as a party who can invoke the law's protections.

From an evidentiary standpoint, the new law makes clear that courts may consider the type of evidence that would be admissible in a summary judgment proceeding. It also provides a filing framework timeline that is consistent with Texas and local rules regarding other dispositive motions, including a movant providing 21 days' notice for a hearing and a nonmovant's response being due no later than 7 days before the hearing. In addition to the more structured framework, the new law provides some much needed flexibility for litigants to be able to agree to file an Anti-SLAPP motion beyond the current 60-day deadline.

When applying the law, all references to "preponderance of the evidence" have been removed. The amended statute will now merely require a movant to demonstrate that the legal action in question is covered by the TCPA. When a movant seeks to prevail on an affirmative defense, it requires a party show they are entitled to judgment as a matter of law. Finally, although the new law will maintain the mandatory attorney's fees award, it now makes the award of sanctions discretionary.

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If you have any questions, please contact one of the lawyers listed below.