

PRESENTED AT

Live Webinar

May 7-8, 2020

**THE TEXAS CITIZENS PARTICIPATION ACT:
THE EFFECT OF THE 2019 AMENDMENTS
AND THE USE OF THE ACT IN
EMPLOYMENT LITIGATION**

David C. Holmes

Author Contact Information:
David C. Holmes
Law Offices of David C. Holmes
Houston, Texas
dholmes282@aol.com

TABLE OF CONTENTS

I.	What Is the TCPA?	1
II.	The 2019 Amendments	1
III.	How the TCPA Works: Before and After	1
A.	When Does the TCPA Apply?	1
1.	The Old Law	1
2.	The New Law	2
3.	Surveying the Coverage Issues: Some Are Resolved, Some Are Still Open	3
B.	What Are the Underlying Substantive Rights?	4
1.	Exercise of the Right of Free Speech	5
a.	The Old Law	5
b.	The New Law	5
c.	What Does This Mean for Employment Cases?	6
2.	Exercise of the Right of Association	9
a.	The Old Law	9
b.	The New Law	10
c.	What Does This Mean for Employment Cases?	10
3.	Exercise of the Right to Petition	12
a.	The Old Law	12
b.	The New Law	14
c.	What Does This Mean for Employment Cases?	14
4.	The New Right	14

C.	What Are the Procedural Rules?	15
1.	Filing the Motion	15
	a. The Old Law	15
	b. The New Law	15
2.	Effect on Discovery	16
	a. The Old Law	16
	b. The New Law	16
3.	Non-Suits	16
	a. The Old Law	16
	b. The New Law	17
4.	Getting a Hearing and a Ruling	17
	a. The Old Law	17
	b. The New Law	18
5.	Types of Motions and Proof Requirements	19
	a. The Old Law	19
	b. The New Law	20
6.	Evidence	20
	a. The Old Law	20
	b. The New Law	21
7.	Burdens of Proof	21
	a. The Old Law	21
	b. The New Law	23

8.	Discovery	23
	a. The Old Law	23
	b. The New Law	24
9.	Exemptions	24
	a. The Old Law	24
	b. The New Law	25
10.	Fees and Sanctions	26
	a. The Old Law	26
	b. The New Law	26
11.	Findings of Fact	27
	a. The Old Law	27
	b. The New Law	27
12.	Effect of Ruling	28
	a. Old Law	28
	b. New Law	28
D.	When Does This Apply in Federal Court?	28

I. What Is the TCPA?

The Texas Citizens Participation Act (TCPA) is an anti-SLAPP statute. SLAPP stands for Strategic Lawsuit Against Public Participation. This term was coined in the 1980s by Professors Penelope Canan and George Pring of the University of Denver. In 1996, they published a book, *SLAPPs: Getting Sued for Speaking Out*. In a nutshell, Professors Canan and Pring argued that lawsuits were being abused to suppress free speech and the exercise of constitutional rights.

This led to a legislative response in the form of anti-SLAPP statutes. Twenty-eight states, the District of Columbia, and Guam have passed anti-SLAPP statutes, which vary from state to state. Congress has not yet passed a federal anti-SLAPP statute. The Uniform Law Commission has discussed creating a Uniform Anti-SLAPP statute, but this has not yet happened.

The Texas legislature passed the TCPA in 2011. The TCPA is Chapter 27 of the Texas Civil Practice and Remedies Code.

II. The 2019 Amendments

The Texas legislature passed extensive amendments to the TCPA in May 2019. Governor Abbott signed the amendments into law on June 2, 2019.

Warning: The amendments are not retroactive. The old TCPA will continue to apply to any action filed before September 1, 2019.

SECTION 11. Chapter 27, Civil Practice and Remedies Code, as amended by this Act, applies only to an action filed on or after the effective date of this Act. An action filed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 12. This Act takes effect September 1, 2019.

This means that the trial courts will still be seeing motions under the old law through the end of 2019 and that the appellate courts will still be grappling with the old law for at least the next couple years.

III. How the TCPA Works: Before and After

A. When Does the TCPA Apply?

1. The Old Law

The starting point for the old statute (and the new statute) is section 27.003(a), which defines the types of actions that are subject to a TCPA motion:

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, that party may file a motion to dismiss the legal action.

On its face, that sounds narrow. How many cases involve the right of free speech or the right of association, right?

In fact, every aspect of that section was subject to broad definitions. Section 27.001(6) defines a "legal action" to include counterclaims, crossclaims, and more:

"Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

The three substantive rights (free speech, association, and petition) are discussed below in subpart III(B).

2. The New Law

Section 27.003(a) was significantly altered by the 2019 amendments. Here are the changes:

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 or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b), that party may file a motion to dismiss the legal action. A party under this section does not include a government entity, agency, or an official or employee acting in an official capacity.

There are three major changes here:

- (1) "Relates to" is removed, which significantly narrows the scope of the statute just by itself.
- (2) A new category of covered conduct (section 27.010, which is discussed below in Subpart III(B)) is added.
- (3) The government and its officials can no longer file TCPA actions.

In addition, section 27.001(6) is modified to clarify the definition of a "legal action":

"Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief. The term does not include:

(A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;

Also available as part of the eCourse

[Litigation Strategies and Employment Law](#)

First appeared as part of the conference materials for the
2020 Litigation Strategies and Employment Law session

"Texas Citizen's Participation Act: Recent Statutory and Decisional Developments"