

**PRESENTED AT THE**  
26<sup>th</sup> Annual Conference on State and Federal Appeals

June 9-10, 2016  
Austin, Texas

**SLAPP-happy: The Broad Reach of  
Texas Citizens Participation Act Appeals**

**Thomas S. Leatherbury**  
**Margaret Dunlay Terwey**  
**Meredith S. Jeanes**

VINSON & ELKINS LLP  
2001 Ross Avenue, Suite 3700  
Dallas, Texas 75201  
tleatherbury@velaw.com  
Tel: 214.220.7792  
Fax: 214.999.7792

## I. INTRODUCTION

The Texas Citizens Participation Act (“TCPA”) “protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them.” *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015). Like the anti-SLAPP<sup>1</sup> statutes passed in a number of states, the TCPA accomplishes this goal by expediting dismissal of cases that fail to meet the threshold established by the statute. Enacted in 2011 and amended in 2013, the TCPA is still a relatively new statute, and appellate courts continue to face a number of interpretive challenges. In particular, the TCPA has become a popular tool for defendants to seek early dismissal of lawsuits. Defendants have invoked the TCPA in cases outside the typical defamation context and have used it to dismiss diversity or supplemental jurisdiction claims in federal court. Though some of Texas’s intermediate courts have attempted to stem this tide, the Supreme Court of Texas and the Fifth Circuit continue to apply the TCPA broadly.

## II. THE TEXAS CITIZENS PARTICIPATION ACT

The purpose of the TCPA is to provide a defendant in cases targeting certain constitutional rights a vehicle for dismissing a case at an early stage, while also protecting a plaintiff’s right to bring a meritorious lawsuit. Tex. Civ. Prac. & Rem. Code § 27.002. To this end, the TCPA provides a burden-shifting framework for an early motion to dismiss a “legal action [that] 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.” *Id.* § 27.003(a). The defendant must first show the TCPA applies to his case before the burden shifts to the plaintiff to present “clear and specific evidence [of] a prima facie case for each essential element of the claim in question.” *Id.* § 27.005(b),(c). In addition to this framework, the TCPA also expedites proceedings on the

---

<sup>1</sup> “SLAPP” stands for “strategic lawsuits against public participation.”

motion and automatically stays discovery. For these reasons, the TCPA is a valuable tool for defendants to secure dismissal of unmeritorious claims before incurring significant legal costs.

***a. The TCPA's Burden-Shifting Framework***

As the Texas Supreme Court recently explained in *In re Lipsky*, the TCPA provides a two-step, burden-shifting framework for resolving TCPA motions. 460 S.W.3d at 586. The moving party must file the TCPA motion “not later than the 60th day after the date of service of the legal action.” Tex. Civ. Prac. & Rem. Code § 27.003(b). The statute broadly defines “legal action” to include “a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.” *Id.* § 27.001(6). Upon filing a TCPA motion, the initial burden is on the moving party to show by a “preponderance of the evidence” that the legal action “is based on, relates to, or is in response to the [movant’s] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.” *Id.* § 27.005(b).

The TCPA specifically defines each of these rights. The statute defines the “exercise of the right of free speech” as “a communication made in connection with a matter of public concern,” which includes issues 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.” *Id.* § 27.001(7). The statute defines the “exercise of the right to petition” as a communication in or pertaining to a judicial or other official proceeding. *Id.* § 27.001(4). And, finally, the statute defines the “exercise of the right of association” as “a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.” *Id.* § 27.001(2).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: SLAPP-Happy: The Broad Reach of Texas Citizens' Participation Act Appeals

Also available as part of the eCourse

[2016 State and Federal Appeals eConference](#)

First appeared as part of the conference materials for the  
26<sup>th</sup> Annual Conference on State and Federal Appeals session

"SLAPP-Happy: The Broad Reach of Texas Citizens' Participation Act Appeals"