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Surprise SLAPP: Applications and Consequences of the TCPA

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Surprise SLAPP:
Interesting, Unexpected, and Perhaps Unintended Applications and Consequences of the TCPA

I. INTRODUCTION.

The Texas Citizen's Participation Act (TCPA) was enacted in 2011 under Chapter 27 of the Texas Civil Practice and Remedies Code (CPRC). The legislative history calls the TCPA an "anti-SLAPP" statute, meaning that it is intended to prevent Strategic Lawsuits Against Public Participation (*i.e.*, lawsuits that threaten the exercise of First Amendment rights). *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (citing House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011)). The statute does not create any substantive cause of action. It is a procedural tool allowing for swift dismissal of certain "legal actions," and providing a mandatory award of attorneys' fees, costs, and sanctions to a successful movant. CPRC §§ 27.003(a), .005, .009.

At the time of enactment in 2011, many perceived this as simply a "media defense" statute to protect journalists from retaliatory defamation claims. That seemed like a reasonable purpose. But the reality has been markedly different. The TCPA has quickly become one of the most frequent subjects of civil litigation and appeals in this State.

This paper presumes its audience already has a baseline of familiarity with the statute's procedures and prior holdings interpreting it. The intention here is to go beyond those basics and address recent interpretations and applications of the statute; interesting fact patterns that teach an important lesson about the TCPA; many open questions that remain for resolution; and the consequences that the TCPA has had on Texas practitioners and courts in the seven years since its enactment.

II. RECENT INTERPRETATIONS AND APPLICATIONS OF THE TCPA.

This section is not meant to provide a comprehensive analysis of all TCPA precedent. Instead, it covers some foundational holdings about the statute's broad scope and provides updates on a handful of recent interpretations and applications that you might not have yet encountered.

A. Despite the Statute's Title and Purpose, It Is Not Limited to Protecting Constitutional Rights or Public Participation.

Neither of the terms "TCPA" nor "anti-SLAPP" appear anywhere in the statute. In the CPRC, the statute is actually titled "Actions Involving the Exercise of Certain Constitutional Rights." (Emphasis added). Consistent with this, the TCPA's express purpose is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." CPRC § 27.002 (emphasis added).

Nevertheless, the Texas Supreme Court has held that, just because "the TCPA professes to safeguard the exercise of certain First Amendment rights" does not mean "that it should only apply to constitutionally guaranteed activities." *Youngkin v. Hines*, No. 16-0935, 2018 Tex. LEXIS 348, *9 (Tex. Apr. 27, 2018); *see also* CPRC § 27.011 (mandating a liberal construction).

Previously, the Court held that the "communications" protected by the statute can be made either publicly or privately, and the subject-matter of "free speech" need only have a "tangential relationship" to

a matter of public concern.[1] *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017) (per curium) (leaving open whether there need be any connection to a matter of public concern for a communication to be protected as an exercise of the rights of petition or association); *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) (statute protects private communications); *see also, e.g*., *Memorial Hermann Health Sys. v. Khalil*, No. 01-16-00512-CV, 2017 WL 3389645 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied) (private statements made about an employment matter in the healthcare industry were sufficiently related to matter of public concern); *Mansik & Young Plaza LLC v. K-Town Mgmt., LLC*, 05-15-00353-CV, 2016 WL 4306900 (Tex. App.—Dallas Aug. 15, 2016, no pet.) (article about a private business transaction between private parties, which regarded a community center, was sufficiently connected to a matter of public concern). "Coleman's analysis makes clear that this Court is to adhere to a plain-meaning, dictionary-definition analysis of the text within the TCPA's definitions of protected expression, not the broader resort to constitutional context that some of us have urged previously." *Elite Auto Body LLC v. Autocraft Bodywerks, Inc*., 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. dism'd by agrmt) (rejecting non-movant's "attempts to limit TCPA 'communications' solely to those the First Amendment protects"; holding that a business's injunction suit to prevent its competitor from misappropriating trade secrets or other proprietary information, which was based on communications by company representatives to the employees of its competitor in an effort to lure them away, implicated the right of association).

Hence, "[t]he TCPA casts a wide net. … Almost every imaginable form of communication, in any medium, is covered." *Adams v. Starside Custom Builders, LLC*, No. 16-0786, 2018 Tex. LEXIS 327, *8 (Tex. Apr. 20, 2018). Justice Pemberton of the Third Court of Appeals described the statute as "less an 'anti-SLAPP' law than an across-the-board game-changer in Texas civil litigation." *Serafine v. Blunt*, 466 S.W.3d 352, 365 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring). Justice Field from the Third Court likewise noted that "[t]he hypothetical situations and communications to which the TCPA could apply are endless," and that "any skilled litigator could figure out a way to file a motion to dismiss under the TCPA in nearly every case." *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at *12 (Tex. App.—Austin Apr. 7, 2015, no. pet.) (Field, J., concurring).

A bill filed in 2017 sought amendments to limit the TCPA to only public speech and the exercise of constitutional rights, and to expressly exclude from its application statements made in discovery, certain dispositive motions, and other procedural actions taken during the course of a lawsuit. (H.B.3811, 85th R.S.). This was a non-starter. H.B.3811 never even made it to committee.

B. Liberal Preservation Standards Apply to TCPA Arguments.

The Texas Supreme Court recently commented on the liberal standard to be applied to preservation of legal arguments under the TCPA in light of the de novo standard of review. *Adams*, 2018 Tex. LEXIS 327, at *14-16. There, "[t]he court of appeals found that Adams failed to preserve arguments based on community or environmental well-being by failing to raise them in the trial court." *Id*. at *14. The supreme

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[1] "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." CPRC § 27.003(a). To understand application of the TCPA, you must start with the definitions of free speech, association, and petition. Each of these rights is defined as a form of "communication." CPRC § 27.001(2)-(4). "Communication" "includes the making or submitting of a statement or a document in any form or medium, including oral, visual, written, audiovisual, or electronic." CPRC § 27.001(1). The "'exercise of the right of free speech' means a communication made in connection with a matter of public concern." CPRC § 27.001(3). A "matter of public concern" includes any issue related to: health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or good, product, or service in the marketplace. *Id*. § 27.001(7).

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