

PRESENTED AT
THE UNIVERSITY OF TEXAS SCHOOL OF LAW
29TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS
June 20-21, 2019
Austin, Texas

A Deep Dive Into Selected Issues Under the Texas Citizens Participation Act

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I. INTRODUCTION

The Texas Citizens Participation Act (“TCPA”) protects citizens exercising their rights to petition, speak, and associate freely “from retaliatory lawsuits that seek to intimidate or silence them,” *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015), providing defendants in cases targeting certain statutorily defined rights a vehicle for dismissing a case at an early stage. *See* Tex. Civ. Prac. & Rem. Code § 27.002. Like the anti-SLAPP¹ statutes passed in over 30 other states, the TCPA accomplishes its dual purposes of safeguarding the protected rights and the right “to file meritorious lawsuits for demonstrable injury[,]” *id.*, by expediting dismissal of cases that fail to clear the threshold established by the statute. Enacted in 2011 and first amended in 2013, the TCPA is a much-litigated statute, and appellate courts have faced a number of interpretive challenges. Defendants have increasingly 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 has continued to apply the TCPA broadly, as written.

The Texas Legislature recently passed HB 2730, however, which aims to ease the interpretive challenges of the previous version of the TCPA and brings with it new interpretive challenges. Because HB 2730 applies prospectively, *i.e.*, only to actions filed on or after September 1, 2019, this paper initially discusses the TCPA as passed in 2011 and amended in 2013 and then the potential effects of HB 2730. **An asterisk denotes those sections of the paper that will likely be affected by the 2019 amendments in HB 2730.***

* Asterisks indicate sections of analysis that will likely be affected by the amendments contained in HB 2730. HB 2730 was signed into law on June 2, 2019, takes effect on September 1, 2019, and applies to actions filed on or after that date. A discussion of these amendments begins on page 51.

¹ “SLAPP” stands for “strategic lawsuits against public participation.”

II. THE LAW UNDER THE TEXAS CITIZENS PARTICIPATION ACT, AS PASSED IN 2011 AND AMENDED IN 2013*

Consistent with its stated goals, *see* Tex. Civ. Prac. & Rem. Code § 27.002, 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 by a preponderance of the evidence that the TCPA applies 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 motion and automatically stays discovery. For these reasons, the TCPA is a valuable tool for defendants to secure dismissal of unmeritorious claims before incurring even more significant legal fees and costs.

A. *The TCPA’s Burden-Shifting Framework**

As the Texas Supreme Court 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”² unless there is good cause shown for permitting such a motion after the deadline.³ Tex. Civ. Prac.

² While this deadline may be extended when a plaintiff amends the complaint to include new factual allegations or claims, several courts have indicated that an amended complaint that merely supplements factual allegations with additional detail or adds additional defendants without seeking new substantive relief does not extend the deadline. *See e.g., Campone v. Kline*, No. 03-16-00854-CV, 2018 WL 3652231, at *1, *6, *13 (Tex. App.—Austin Aug. 2, 2018, no pet.) (finding timely defendants’ TCPA motion filed as to new claims and defendant added in amended complaint, but untimely as to claim alleged in original complaint). Additionally, at least one Texas court of appeals has held that, where the plaintiff never formally served the defendants, the 60-day window to file a TCPA motion began when the defendants made general appearances in court. *Skidmore v. Gremillion & Co. Fine Art, Inc.*, No. 01-18-00829-CV, 2019 WL 1119401 (Tex. App.—Houston [1st Dist.] Mar. 12, 2019, no pet. h.).

³ For example, a federal district court in California recently dismissed the defamation claim of Stephanie Clifford (also known as Stormy Daniels) under the TCPA even though the motion was filed after the 60-day deadline. *Clifford v. Trump*, 339 F. Supp. 3d 915, 924-25 (C.D. Cal. 2018). In finding good cause to

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First appeared as part of the conference materials for the
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