

PRESENTED AT
14th ANNUAL CONFERENCE ON
ADVANCED ADMINISTRATIVE LAW

August 15-16, 2019
Austin, Texas

**The Texas Citizens Participation Act:
Implications in Administrative Law Cases**

Amanda Garrett Taylor

Amanda G. Taylor
Butler Snow, LLP
500 Congress Ave, Suite 1900
Austin, Texas 78701

amanda.taylor@butlersnow.com
737.802.1800

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. TCPA BACKGROUND.....	1
A. Professed Purpose to Protect Constitutional Rights.	1
B. Courts Have Broadly Interpreted the TCPA.....	1
C. The TCPA Packs a Powerful Punch.	1
D. Legislative Amendments in 2019.....	2
III. SCOPE: DOES THE TCPA APPLY?.....	2
A. Triggering Event: A Legal Action.....	2
1. Elimination of Use by Governmental Parties in 2019.....	2
2. Judicial Not Administrative Filings.	2
3. Not Administrative Appeals.....	3
4. Not Judicial Appeals.	3
5. Not Amended Pleadings If Substance Unchanged.....	3
6. Most Likely Not TCPA Motions.....	3
7. Maybe a Motion for Sanctions.	4
8. Maybe a Rule 202 Petition.	4
9. Likely Not a Discovery Subpoena.....	4
10. New Exclusions from “Legal Action” in 2019.	5
B. Nexus Requirement.	5
C. Rights Protected.....	5
1. Communication.	5
2. Free Speech.	6
3. Association.....	6
4. Petition.	7
5. New Categories of Protected Rights in 2019.	7
D. Exemptions.....	8
1. Governmental Enforcement Actions.	8
2. Commercial Speech.....	9
3. Personal Injury, Death, and Survival.....	9
4. Insurance Actions.....	10
5. New Exemptions in 2019.	10
E. Federal Court Application – Remains an Open Question in the Fifth Circuit.....	11
IV. ADMINISTRATIVE LAW IMPLICATIONS.	11
A. Evidence Outside the Administrative Order Can Be Considered in a Subsequent TCPA Proceeding. ..	11
B. Communications During an Administrative Hearing Are Protected by the TCPA.	12
C. Activities Subject to Administrative Regulation Are “Matters of Public Concern.”.....	12

V. PROCEDURE: KNOW THE RULES; AVOID THE LANDMINES.	13
A. Deadlines	13
1. Motion	13
2. Notice of Hearing	14
3. Response	14
4. Hearing	14
5. Ruling	15
6. Findings	15
B. Discovery and Stay	16
C. Shifting Burdens	17
1. Movant: TCPA Applies	17
2. Non-Movant: Exemption Applies	18
3. Non-Movant: Prima Facie Case	18
4. Movant: Valid Defense	18
5. Evidence / Proof Considered	19
6. Disposition	19
7. Effect of Ruling – New in 2019	19
VI. ATTORNEYS’ FEES, COSTS, & SANCTIONS.	19
A. Mandatory Awards to Successful Movant	20
1. 2019 Amendments	20
2. Proof of Fee Amounts	20
3. Appellate Fees	21
B. Discretionary Awards to Successful Non-Movants	21

I. INTRODUCTION.

When the Texas Citizen’s Participation Act (TCPA) intersects with your administrative law practice, you must understand the statute’s unique and fast-moving procedures to properly protect your client’s interests. In almost every type of civil case, counsel should analyze how the TCPA may apply—in both favorable and unfavorable ways—and advise their clients accordingly.

This paper provides a primer on the TCPA’s background, scope of application, deadlines, procedures, and monetary awards—inclusive of the sweeping amendments passed by our Legislature in 2019 and case updates through mid-2019. The paper also includes a section specifically addressing application of the TCPA to administrative matters to help you understand the potential impact of this statute on your cases.

II. TCPA BACKGROUND.

The TCPA was enacted in 2011 and codified under Chapter 27 of the Texas Civil Practice and Remedies Code (hereafter, CPRC). It allows parties to seek swift dismissal of certain “legal actions,” and provides mandatory monetary awards to successful movants. CPRC §§ 27.003(a), .005, .009.

A. Professed Purpose to Protect Constitutional Rights.

During the legislative debates preceding its enactment, the TCPA was depicted as an ‘anti-SLAPP’ statute, meaning that it was intended to prevent Strategic Lawsuits Against Public Participation (*i.e.*, lawsuits that threaten the exercise of First Amendment). *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)). However, neither of the terms “TCPA” nor “anti-SLAPP” appear anywhere in the statute. Its official, statutory title is the “Actions Involving the Exercise of Certain Constitutional Rights.”

The TCPA’s stated 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.

At the time of enactment in 2011, many perceived the TCPA as simply a “media defense” statute to protect journalists from retaliatory defamation claims. But the reality has been markedly different.

B. Courts Have Broadly Interpreted the TCPA.

Over the last eight years, the TCPA has become one of the most frequent subjects of civil litigation and appeals in Texas. This is because our courts have interpreted the statute’s “plain language” to have expansive scope,

allowing litigants to use the statute for dismissal of many types of claims not traditionally related to the *constitutional* rights of free speech, petition, or association. *See* CPRC § 27.011 (mandating a liberal construction); *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 892 (Tex. 2018) (The TCPA’s definition of free speech is broader than and “not fully coextensive with the constitutional free-speech right protected by the First Amendment to the U.S. Constitution and article I, section 8 of the Texas Constitution.”); *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018) (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.”); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. dism’d by agrmt) (“[The Texas Supreme Court’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.”) (rejecting non-movant’s “attempts to limit TCPA ‘communications’ solely to those the First Amendment protects”).

That said, some appellate courts (most notably Dallas and Fort Worth) have started to pull back on how broadly they are willing to interpret the TCPA’s application. *See, e.g., Lei v. Natural Polymer Internat’l*, No. 05-18-01041-CV, 2019 WL 2559756 (Tex. App.—Dallas June 21, 2019, no pet. h.) (narrowly construing definitions of “communication,” free speech,” “association,” and “petition” to conclude the TCPA did not apply); *Kawcak v. Antero Res. Corp.*, No. 02-18-00301-CV, 2019 WL 761480, *1 (Tex. App.—Fort Worth Feb. 21, 2019, no pet.) (holding that, to interpret communications made in a conspiracy as satisfying the definition of “association” would turn[] what many believe is a scalpel used to explore whether a lawsuit suppresses the exercise of constitutional rights into a maul that can be wielded against almost any conspiracy claim, theft-of-trade-secrets claim, or tortious-interference claim when that claim involves more than one actor producing the interference.”).

C. The TCPA Packs a Powerful Punch.

Dismissal under the TCPA has been a very powerful tool in civil litigation because it affords successful movants mandatory awards of attorneys’ fees and other monetary relief—although this has been slightly curtailed by the 2019 amendments, as discussed below. CPRC § 27.009. This means that a defendant, who might otherwise have no right to recover its fees for successfully defeating a claim, now has the ability to not only avoid trial altogether but also to shift the fees and costs, and possibly

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 \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: The Texas Citizens Participation Act: Implications in Administrative Law Cases

Also available as part of the eCourse

[2019 Advanced Texas Administrative Law eConference](#)

First appeared as part of the conference materials for the
14th Annual Advanced Texas Administrative Law Seminar session

"Texas Citizens Participation Act Update: Implications in Administrative Law Cases"