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Avoiding (or Using) Anti-SLAPP Motions to Dismiss

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Introduction

The Texas Legislature passed the Texas Citizens Participation Act (the “TCPA”) in 2011, intending it to be an early, pre-discovery dismissal mechanism for frivolous lawsuits against the media and others who express certain constitutionally-guaranteed rights. In recent years, however, use of the TCPA has exploded. It has far exceeded its original purpose by growing into an ever-changing beast that has been applied to almost every type of civil litigation, from Rule 202 petitions to trade secret and employment cases, and even to attorney disciplinary proceedings. Further, its alleged ‘quick dismissal’ advantage has been anything but, as TCPA-related litigation has engulfed the trial and appellate courts and stalled litigation in cases, sometimes for years.

Some trial and appellate courts have begun to rein in the monster, narrowing the act’s application in certain cases, most of them dealing with pure business matters. Nevertheless, precedent allowing for broad application of the TCPA holds strong; remedying these issues once and for all must therefore be addressed by the legislature. An attempt to amend the TCPA failed in the 2017 legislative session, but it appears—at least as of the time of printing—that a campaign to narrow the act could succeed during the 2019 session.

This article will give a brief overview of the TCPA, covering the substantive issues the act addresses as well as its unique procedural features. An update of selected recent caselaw will follow.

The Basics: Substance

The TCPA exists 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.” Tex. Civ. Prac. & Rem. Code § 27.002. To prevent “Strategic Lawsuits Against Public Participation” (hence the name Anti-SLAPP) from achieving their intended purpose of chilling and stifling these rights, the TCPA permits early dismissal after little or no discovery if a suit is “based on, relates to, or is in response to” a party’s exercise of those specifically-enumerated rights. Tex. Civ. Prac. & Rem. Code §§ 27.003, 27.005; *see id.* § 27.006; *see also, e.g., In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015). If a plaintiff’s theory, even if true, implicates rights specified in the TCPA, then the TCPA permits dismissal. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b).

The Movant’s Burden

In deciding whether to grant a TCPA motion and thus dismiss a lawsuit against a moving defendant, the statute directs the trial court to engage in a two-step inquiry. *See id.*, § 27.005(b), (c); *Beving v. Beadles*, 563 S.W.3d 399, 404 (Tex. App.—

Ft. Worth 2018, pet. filed). First, the defendant seeking dismissal must show “by a preponderance of the evidence that the legal action is based on, relates to, **or** is in response to the party’s exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.” Tex. Civ. Prac. & Rem. Code § 27.005(b) (emphasis added). For this first prong, doubts must be resolved in favor of the TCPA’s application, as under its own terms the TCPA “**shall be construed liberally to effectuate its purpose and intent fully.**” Tex. Civ. Prac. & Rem. Code § 27.011 (emphasis added). In keeping with this language, constitutional rights under the TCPA have been interpreted by Texas courts to be broader than the rights actually guaranteed under the United States and Texas constitutions. *See, e.g., Adams v. Starside Custom Builders* 547 S.W.3d 890, 894 (Tex. 2018) (“The TCPA casts a wide net.”); *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018).

Freedom of Speech

Under the TCPA, the “[e]xercise of the right of free speech’ means a communication made in connection with a matter of public concern.” Tex. Civ. Prac. & Rem. Code Ann. § 27.001(3); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017). “Matter of public concern,” in turn, “includes an issue 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 market place.” *Id.* § 27.001(7)(A), (B), (E); *Coleman*, 512 S.W.3d at 900–01 (holding that a lawsuit over private emails were TCPA-protected speech given that they related to health or safety or environmental or community well-being, and were therefore a matter of public concern).

Freedom to Petition

The TCPA defines the “[e]xercise of the right to petition” to mean any of the following:

- (A) a communication in or pertaining to:
 - (i) a judicial proceeding;
 - (ii) an official proceeding, other than a judicial proceeding, to administer the law;
 - (iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;
 - (iv) a legislative proceeding, including a proceeding of a legislative committee;

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