

Reining in the Texas Citizens Participation Act

A look at recent trends, from protecting whistleblowers to aggravating litigation costs and abuse of judicial resources.

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The Passage and Development of the TCPA

In 2011, the Texas Legislature enacted the Texas Citizens Participation Act, or TCPA, which is a statute written to combat strategic lawsuits against public participation, or SLAPP. The TCPA is among the broadest anti-SLAPP statutes in the almost 30 states and the District of Columbia where they have been enacted. The TCPA's sweeping language creates a whole host of issues, and the full scope and application of the TCPA remains to be determined with certainty.

The Texas Legislature's official purpose in enacting the TCPA is to provide a tool with which to protect certain First Amendment rights and liberties—freedom of speech, association, and petition—from claims designed to intimidate and suppress those rights.¹ The TCPA provides an independent procedural mechanism to expeditiously dismiss lawsuits that fit within the scope of the statute, while protecting the rights of parties to file meritorious lawsuits. Despite the TCPA's stated dual purposes, courts' historical emphasis on only the TCPA's mandate to protect speech has provided litigants a significant new tool to summarily attack, and possibly dismiss with prejudice, all claims determined to fall within the ambit of the statute. The result is that the courts have implicitly encouraged the filing of a TCPA motion to dismiss in every conceivable instance possible, notwithstanding the legislative history and clearly stated purpose of the statute.

The TCPA's mechanics are relatively straightforward. Simply stated, the TCPA requires that courts implement a multistep process with shifting burdens.² This process is initiated by the respondent filing a TCPA motion to dismiss.³ In the first step, the movant has the burden to establish the TCPA's applicability.⁴ If it is determined that the TCPA applies to the asserted claims, the claimant must establish the merits of their case by "clear and specific" evidence—an altogether new standard.⁵ Then, if the claimant is able to carry their burden, the burden shifts again to the movant to prove their defenses.⁶ If the movant is ultimately victorious, the court will dismiss the claims with prejudice and move to step four—the mandatory award of attorneys' fees, costs, and sanctions.⁷ Prudent claimants should carefully contest a TCPA motion to dismiss every step of the way, including possibly amending their complaint as part of a response in step two, to avoid the dismissal with prejudice and the

mandatory award of attorneys' fees, costs, and sanctions allowed in step four.

Parties must file the initial motion to dismiss no later than 60 days after service of the claim.⁸ Similarly, the court must hold a hearing on the TCPA motion within 60 days of its filing, which can be extended up to 120 days under certain circumstances.⁹ Furthermore, in the event of an adverse ruling on their motion, the movant only has 20 days to file an interlocutory appeal.¹⁰ Be mindful of the fact that the entire process is supposed to run on a relatively expedited timeframe.

Step 1: Determining if the TCPA Applies to Your Claim

The TCPA applies when a movant can show that the "legal action," as that phrase is used in the TCPA, is "based on, relates to, or in response to" three identified categories of speech—the right of free speech, the right of association, and the right to petition.¹¹ Included within the definition of a "legal action" is each individual claim, cross claim, or any filing that seeks legal or equitable relief.¹² In fact, the TCPA mandates that courts interpret the statute to the broadest extent possible, and this mandate has been referenced many times in the relevant jurisprudence.¹³ The breadth of the TCPA is a hallmark of the statute. To this end, the caselaw currently reflects that "based on, relates to, or in response to" is interpreted so expansively that there needs to be only some connection between the lawsuit and the identified speech.¹⁴ Given the breadth of these elements, a movant's biggest hurdle in invoking the TCPA is to satisfy the gatekeeping function of the TCPA's categories of protected speech.

The three categories of protected speech are defined in the TCPA and include the rights to speak, associate, and petition. However, it is the TCPA's definitions, rather than any jurisprudence governing constitutional rights, that control.¹⁵ The TCPA broadly defines a movant's exercise of the right of free speech as a communication regarding matters of public concern, and the act gives a semi-all-encompassing list of matters of public concern, including health and safety; environmental, economic, or community well-being; the government; and goods and services in the marketplace.¹⁶ The TCPA's definition of a movant's exercise of the right to association is equally expansive; it is defined as "a communication made between individuals who join together to collectively express, promote, pursue, or defend

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common interests.”¹⁷ The definition of an exercise of the right to petition is somewhat more technical because the TCPA provides a litany of detailed instances that are covered by the statute, but may be generally defined as any communication regarding a then-existing adjudicatory, executive, or legislative proceeding.¹⁸ Because so many courts have embraced the breadth of the TCPA, the caselaw is at a point where the TCPA’s expansive nature is often difficult to reconcile with procedural and practical norms.

The TCPA provides a handful of exceptions to its breadth, including those for suits in the name of a state political subdivision, suits for bodily injury and wrongful death, insurance suits, and a commercial speech exception.¹⁹ However, the Texas Supreme Court appears, thus far, to prefer a narrow view of these exceptions. For example, the Texas Supreme Court in *Castleman v. Internet Money Ltd.* promulgated a four-part test for the commercial speech exception that clarifies the exception, but also limits its application.²⁰ If the movant can establish the TCPA’s applicability, and the respondent is unable to show that one of the exceptions applies, the burden will shift to the respondent in step two.

Step 2: The Claimant’s Burden Under the TCPA

If a movant succeeds in satisfying its burden in step one, then the burden shifts in step two to the respondent to prove, by clear and specific evidence, a prima facie case for each element of each of its claims.²¹ The TCPA’s “clear and specific” standard has nothing to do with the well-established “clear and convincing” standard despite its nominal similarity.²² Rather, to meet their burden, a respondent must provide sufficient detail for each element of its claims to establish a factual basis for each.²³ The “clear and specific” standard is not an elevated evidentiary standard, nor does it prohibit courts from considering circumstantial evidence.²⁴ Rather, it is a standard that requires a plaintiff to establish the “who, what, when, why, and how” of their claims; conclusory allegations and mere notice pleading are not enough.²⁵ At least one appellate court has likened the TCPA’s “clear and specific” standard to a pleading standard, ostensibly similar to that imposed by Federal Rules of Civil Procedure Rule 9(b), which requires that “a party must state with particularity the circumstances constituting fraud or mistake.”²⁶ In discharge of the respondent’s burden, these allegations must be supported by pleadings and affidavits submitted in the case.²⁷ If the respondent is able to meet its burden in step two, it will have successfully defeated a TCPA motion to dismiss, unless the movant can reply by meeting its burden in step three.

Step 3: Establishing Defenses to the Claimant’s Legal Action

If the respondent is able to meet its burden in step two, the burden then shifts back to the movant to establish any defense they may have against the claimant’s causes of action by a preponderance of the evidence.²⁸ The Texas Supreme Court has made clear that the TCPA’s references to defenses are references to affirmative defenses, or defenses

that are “based on a different set of facts from those establishing the cause of action and defeats the [non-movant’s] claim without regard to the truth of the [non-movant’s] assertions.”²⁹ A defense which disputes the facts underlying a non-movant’s claim, such as a truth defense to a defamation claim, does not fall within the scope of the TCPA’s step three.³⁰ In evaluating whether a movant is able to establish a defense, courts look, again, to the pleadings and affidavits in the case.³¹ Accordingly, absent the assertion of an affirmative defense, a movant should consider the potential risks associated with filing affidavits in support of the TCPA motion in an effort to avoid conceding or establishing facts, even if only inadvertently, that could support the non-movant’s defense against the TCPA motion to dismiss.

If the movant does not assert any affirmative defenses in the case, then the non-movant that survived step two will have survived the motion to dismiss. However, if the movant is able to meet its burden at this phase of the proceeding, or if the non-movant claimant is not able to satisfy its burden in step two, then the court goes to step four—determining the amount of attorneys’ fees, costs, and sanctions owing to the movant under the statute’s mandatory fee award provision.

Step 4: The Award of Attorneys’ Fees, Costs, and Sanctions

One of the statute’s most critical features, beyond its core summary dismissal procedure, provides the victorious movant a mandatory award of attorneys’ fees and costs, along with sanctions, for successfully dismissing any of the legal actions pursuant to the TCPA. Every movant that is successful under the statute is automatically entitled to their reasonable attorneys’ fees, costs, and expenses in addition to a mandatory award of sanctions.³² It is this mandatory award that provides the TCPA its teeth for the benefit of the successful movant. However, the successful movant is not necessarily entitled to all of its attorneys’ fees in bringing the TCPA motion to dismiss. Rather, fee awards are subject to a determination of reasonableness, and courts may limit fee awards to an amount that is not viewed as being excessive and unfair.³³ Courts may also limit an award of costs under the TCPA, but not attorneys’ fees, as justice and equity may so require.³⁴ A sanctions award under the TCPA should be sufficient to deter an unsuccessful claimant from engaging in similar actions in the future.³⁵ Accordingly, where a court finds that an unsuccessful claimant is unlikely to engage in similar conduct again, it is within the court’s discretion to award only a nominal amount of sanctions.³⁶

Although a successful movant may potentially receive a large windfall under the TCPA, the successful respondent may not receive an equivalent reward for successfully defending against a TCPA motion to dismiss. The TCPA provides a mechanism for respondents to recover their reasonable attorneys’ fees and costs in defending against a TCPA motion to dismiss (but not sanctions); however, it only applies when a court makes a finding that the TCPA motion to dismiss is frivolous or solely intended to delay the “legal action.”³⁷ Courts have generally been reluctant to

award successful respondents their reasonable attorneys' fees and costs in all but the most egregious circumstances of abuse by a movant.³⁸ In this regard, the "solely intended to delay" requirement has been taken at face value, awarding attorneys' fees only where there is no other possible justification than delay.³⁹ Likewise, the frivolous requirement has been found to be just as high and exacting a bar, requiring that a motion to dismiss pursuant to the TCPA have no basis in law or fact, where only some technical argument as to the statute's application would be sufficient to avoid an adverse fee award.⁴⁰

As Broadly Interpreted, Even Unsuccessful Movants Receive a Windfall

At present, there is no genuine bar to a knowledgeable and savvy movant filing a motion to dismiss in nearly every "legal action." By simply presenting a good faith argument as to the TCPA's application—which is a very low bar given the statute's breadth as presently interpreted—the movant receives a plethora of benefits. For example, filing a TCPA motion to dismiss all but guarantees that a respondent will have to provide insight into their case theories and strategy by means of their evidentiary submissions and arguments required in step two. In this way, the TCPA provides even an unsuccessful movant an early advantage in the case. Further, a movant may be able to take advantage of the potentially limited information in the non-movant's possession and push for dismissal before the non-movant is fully informed due to the practical limitations created by the TCPA's expedited timeline.

The unsuccessful movant enjoys the right to an interlocutory appeal and to stay the trial court case pending the appeal. Once the appeal is filed, the appellate courts review the evidence and briefing with respect to each of the TCPA's steps one, two, and three de novo—effectively re-litigating the same issues. Appellees should be aware that if the appellate court overrules the denial of a TCPA motion to dismiss, it may remand the dispute to the trial court for a determination of reasonable fees, costs, expenses, and sanctions to be awarded to the now-successful movant.⁴¹ Ample reason exists for movants to file a TCPA motion to dismiss.

Courts Should Give Credence to the TCPA's Competing Purposes

Although courts have been quick to realize the TCPA protects certain types of speech, this is not to be done at the cost of the TCPA's competing purpose—to protect meritorious lawsuits.⁴² Courts have largely lost sight of the horizon when interpreting the expanse of the TCPA by glossing over the statute's co-equal purpose of protecting meritorious lawsuits. This competing purpose is underscored by the legislative history that highlights the practices the TCPA was designed to combat, but which lacks the expansiveness generally attributed to the TCPA.

Indeed, when the Texas House Judiciary and Civil Jurisprudence Committee was taking testimony, it was represented that the TCPA's central purpose was to provide an expedited dismissal procedure for lawsuits "filed frivolously,

mainly aimed at retaliating against one who exercises their freedom of speech or right of petition." It was further described that the TCPA was primarily designed to protect whistleblowers. The committee heard testimony from numerous journalists, authors, home owner association members, and consumer advocacy groups who largely described instances of lawsuits being filed, principally alleging various defamation actions, to silence their whistleblower-type activities and speech. What is missing from the scenarios presented to the Legislature are commonplace claims bearing no relation to First Amendment rights and which are meritorious lawsuits. However, some courts have been willing to apply the TCPA in claims wholly unrelated to First Amendment rights citing only the expansive nature of the TCPA as justification.⁴³ As former Justice Bob Pemberton, of the 3rd Court of Appeals in Austin, recognized, courts "may have faltered into a blindly narrow and out-of-context reading of statutory language."⁴⁴ He went on to illustrate numerous instances when courts have given precedence to imposing an exceedingly broad interpretation of the TCPA while overlooking its co-equal purpose of protecting meritorious suits.⁴⁵

Courts are beginning to recognize the disparity between the Legislature's intended purpose in enacting the TCPA and the effect of the TCPA as implemented. For example, in 2019 Justice Dabney Bassel, of the 2nd Court of Appeals in Fort Worth, said a sister court "elevate[d] the TCPA's stated purpose of protecting constitutional rights and subordinate[d] the TCPA's other stated purpose to preserve the filing of meritorious lawsuits."⁴⁶ Continuing on, Bassel stated that such an interpretation "does not accomplish the legislature's directive that the TCPA shall be construed liberally to effectuate its purpose and intent fully."⁴⁷ Indeed, in *Dow Jones v. Highland Capital Management, L.P.*, the 5th Court of Appeals in Dallas recognized that, "[t]he TCPA was designed to reduce meritless litigation, not multiply it," in recognizing the flurry of TCPA filings that would flood courts as another basis to conclude that the TCPA does not apply to third party discovery.⁴⁸ Similarly, Justice Evelyn Keyes, of the 1st Court of Appeals in Houston, noted in a concurring opinion "the TCPA has come to be construed so expansively as to operate as a de facto summary dismissal procedure not only for retaliatory suits but for meritorious lawsuits that cannot colorably be construed as chilling First Amendment rights."⁴⁹ The Texas Supreme Court reaffirmed a holding that would effectively allow a non-movant to dismiss or nonsuit claims against a TCPA movant without the fear of incurring any of the attorneys' fees, costs, or sanctions under the TCPA.⁵⁰

The 2019 Amendment to the TCPA

The Texas Legislature has taken action. On April 30, 2019, the Texas House passed HB 2730 revising the TCPA, with a sole vote in opposition, which was also passed by the Texas Senate. Gov. Greg Abbot signed the bill to take effect September 1, 2019. The overbroad language of the TCPA, along with certain practices and an attendant waste of judi-

cial resources resulting from its application, spurred on the reform.

The amendment does not change core mechanics of the statute discussed above but does limit its application in certain respects. Among these reforms, the amendment clarifies certain procedural and “proof” standards and narrows the TCPA’s application by removing the expansive “relates to” language of section 27.003(a). The amendment also revised the definition of “exercise of the right of association” to require a nexus to a governmental proceeding or matter of public concern. Other revisions exempt additional statutes from the TCPA’s ambit and revise the definition of “matter of public concern” to tie it into established Texas Supreme Court precedent.

The amendment also makes changes which are likely to cause new challenges for litigators. For example, the amendment changes a movant’s burden to establish the applicability of the TCPA to a legal action from “by a preponderance of the evidence,” an established legal standard, to merely “demonstrates” that the statute applies. Not only is “demonstrates” not an established legal standard, the term is ambiguous, and some litigants may argue that the statute is now even broader in its application than before the amendment. Unfortunately, this change may create new opportunities to abuse the statute in situations that were otherwise foreclosed by the amendment.

While the amendment makes a number of improvements, it provides no greater emphasis upon the statute’s stated dual purposes. The House Judiciary and Civil Jurisprudence Committee discussed the rampant abuse of the TCPA and waste of judicial resources as a driving factor behind the amendment, but the amendment does nothing to bolster courts’ ability to award fees and costs or to otherwise combat abusive TCPA motions. Accordingly, while the amendment is a step in the right direction, it does little to discourage abusive TCPA motion filings, especially in the commercial context, to fully address the ambiguous and broad language of the statute, or to redirect courts to apply the statute in conformity with its competing purposes.

Conclusion

In the absence of the Legislature stepping in to provide further and meaningful direction on the TCPA’s proper boundaries, courts should continue down the path of giving dignity to its co-equal purpose of preserving meritorious claims. In so doing, courts will more accurately implement the Legislature’s purposes in enacting the TCPA of combating true SLAPP suits while preserving the rights of parties to seek resolutions of meritorious claims in our civil justice system, unhindered by opportunistic counterparties seeking to abuse the statute’s breadth.

Notes

1. Tex. Civ. Prac & Rem. Code § 27.002.
2. *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015).
3. *Id.*; Tex. Civ. Prac & Rem. Code § 27.003(a).
4. *Lipsky*, 460 S.W.3d at 591.
5. Tex. Civ. Prac & Rem. Code § 27.003.
6. *Id.* at § 27.005(d).
7. *Id.* at § 27.009(a).

8. *Id.* at § 27.004(a).
9. *Id.* at § 27.004(c).
10. Tex. R. App. P. 26.1(b).
11. Tex. Civ. Prac & Rem. Code § 27.003(a).
12. See *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018), reh’g denied (June 22, 2018).
13. Tex. Civ. Prac & Rem. Code § 27.011(b).
14. See *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900-01 (Tex. 2017).
15. See *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018).
16. Tex. Civ. Prac & Rem. Code § 27.001(7).
17. *Id.* at § 27.001(2).
18. *Id.* at § 27.001(4).
19. *Id.* at § 27.010.
20. *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018).
21. Tex. Civ. Prac & Rem. Code § 27.005.
22. *Lipsky*, 460 S.W.3d at 591.
23. *Id.*; *Adams v. Starside Custom Builders, LLC*, 05-15-01162-CV, 2018 WL 6427640, at *4-6 (Tex. App.—Dallas Dec. 7, 2018, no pet. h.) [hereinafter *Adams III*].
24. *Lipsky*, 460 S.W.3d at 591.
25. *Id.*
26. *Adams II*, at *4 (i.e., “...a party must state with particularity the circumstances constituting fraud or mistake.”).
27. Tex. Civ. Prac & Rem. Code § 27.006(a).
28. *Id.* at § 27.005(d).
29. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 440-41 (Tex. 2017), reh’g denied (Sept. 29, 2017).
30. *Id.*
31. Tex. Civ. Prac & Rem. Code § 27.006(a).
32. *Id.* at § 27.009(a).
33. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).
34. *Id.*
35. Tex. Civ. Prac & Rem. Code § 27.009(a)(2).
36. *Tatum v. Hersh*, 559 S.W.3d 581, 587-88 (Tex. App.—Dallas 2018, no pet.).
37. Tex. Civ. Prac & Rem. Code § 27.009(a).
38. See, e.g., *Sullivan v. Texas Ethics Comm’n*, 551 S.W.3d 848, 857-58 (Tex. App.—Austin 2018, pet. filed.).
39. See *id.*
40. See *id.* at 857.
41. See, e.g., *Hawxhurst v. Austin’s Boat Tours*, 550 S.W.3d 220, 231-32 (Tex. App.—Austin 2018, no pet.).
42. Tex. Civ. Prac & Rem. Code § 27.002.
43. See, e.g., *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015); *Cavin v. Abbott*, 545 S.W.3d 47, 63-64 (Tex. App.—Austin 2017, no pet.); *Moricz v. Long*, 06-17-00011-CV, 2017 WL 3081512, at *4 (Tex. App.—Texarkana July 20, 2017, no pet.); *Kimney v. BCG Attorney Search, Inc.*, 03-12-00579-CV, 2014 WL 1432012, at *4-6 (Tex. App.—Austin Apr. 11, 2014, pet. denied).
44. *Serafine v. Blunt*, 466 S.W.3d 352, 379 (Tex. App.—Austin 2015, no pet.).
45. *Id.* at 392-93.
46. *Kawcak v. Antero Res. Corp.*, No. 02-18-00301-CV, 2019 WL 761480, at *14 (Tex. App.—Fort Worth Feb. 21, 2019, pet. denied).
47. *Id.* at *34 (internal marks omitted).
48. *Dow Jones & Co., Inc. v. Highland Capital Mgmt., L.P.*, No. 05-17-00770-CV, 2018 WL 5730148, at *5 (Tex. App.—Dallas Nov. 2, 2018, pet. filed).
49. *Universal Plant Services, Inc. v. Dresser-Rand Group, Inc.*, No. 01-17-00555-CV, 2018 WL 6695813, at *4 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet. h.).
50. *Glassdoor, Inc. v. Andra Group, LP*, No. 17-0463, 2019 WL 321934, at *6 (Tex. Jan. 25, 2019) (citing *State v. Harper*, 562 S.W.3d 1, 7-8 (Tex. 2018)).



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