

The Narrowed Texas Citizens Participation Act

A look at what it means for SLAPP suits.

WRITTEN BY AMY LEILA SABERIAN PRUEGER AND ZACKERY L. HORTON

The Texas Citizens Participation Act, or TCPA, was passed in 2011 and its purpose was to protect citizens from retaliatory lawsuits seeking to intimidate or silence them on matters of public concern.¹ But, as noted throughout appellate opinions interpreting the act, the statute's broad language could be applied expansively—far beyond what is typically considered a strategic lawsuit against public participation, or SLAPP, suit.²

In 2019, the Texas Legislature passed House Bill 2730, making several significant changes to the TCPA (effective September 1, 2019). The 2019 amendments sought to curtail unexpected applications of the broad language of the TCPA.³ The changes are numerous, but this article focuses on the amendments narrowing the TCPA's scope and application, which in turn narrow the ubiquitous application of TCPA motions.

Pre-amendment, the TCPA permitted dismissal of legal actions “based on, relate[d] to, or [] in response to a party's exercise of the right of free speech, right to petition, or right of association.”⁴ The 2019 amendments narrowed this language, removing the vague “relates to” language—now, the action must be “based on” or “in response” to a party's exercise of certain rights.⁵ Furthermore, the amendments narrowed the definitions of the “exercise of the right of association” and a “legal action.”⁶ The Legislature redefined “matter of public concern,” incorporating it into the definition for “exercise of the right of association.” “Matter of public concern” was already in the definition of “exercise of right to petition.”⁷ And, due to governmental entities using the TCPA offensively, the Legislature specified “a government entity, agency, or an official or employee acting in an official capacity” cannot file a motion to dismiss.⁸

The amendments also include a lengthy list of exemptions to the TCPA for areas where the Legislature considered the statute to have been misused—i.e., trade secret misappropriation actions, enforcement of non-disparagement agreements or covenants not to compete, Texas Family Code cases, applications for protective orders, claims under the Texas Deceptive Trade Practices Act, medical peer review cases, eviction suits, attorney disciplinary proceedings, and common law fraud claims.

Meanwhile, some judicial narrowing of the TCPA began as courts reinterpreted the meaning of a “matter of public concern.” The Texas Supreme Court flipped its original interpretation of the phrase as early as December 2019—

shortly after the amendments became effective but before a case filed after the 2019 amendments had reached the court.

Previously, in *ExxonMobil Pipeline Co. v. Coleman*, the court concluded that the TCPA's phrase “in connection with” was one with “intentional breadth” requiring no more than a “tangential relationship” to a matter of public concern.⁹ However, in December 2019, the court changed course, offering a different interpretation of the pre-2019 amendment text—albeit, having the same narrowing effect that the 2019 amendments intended. In *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, it utilized a much narrower view of what qualifies as a “matter of public concern.”¹⁰ Without overruling *Coleman*, it held that misrepresentations about the termination of an oil and gas lease did not involve matters of public concern under the TCPA because there was no evidence of relevance to the broader marketplace, and they could not reasonably be characterized as involving public concerns—the communications were only to “two private parties concerning modest production at a single well.”¹¹

Creative Oil's interpretation of matters of public concern has not been overruled and has instead been affirmed by numerous courts of appeals, even as recently as September 2021.¹²

Recently, the first round of appellate cases interpreting the 2019 amendments has surfaced, recognizing that the amendments impose a higher threshold “connection between the legal action and the communications made to invoke the TCPA's dismissal procedures.”¹³ An appellate court noted one significant amendment involved the “narrowing of the categories of connections a claim could have to the exercise of a protected right to enable the movant to seek dismissal.”¹⁴ Originally, the connection was sufficient if the claim was “based on, relates to, or is in response to” the exercise of a protected right; but under the 2019 amendments, the most expansive connection—“relates to”—was deleted.¹⁵

In *Ross*, Ross Dress for Less entered into a purchase sale agreement with ML Dev and, after the closing, was informed that it would have to pay extra to obtain easements necessary to utilize the land as intended from ML Dev's associates.¹⁶ Ross then demanded easement access as part of the original transaction—unsuccessfully.¹⁷ Ross sued, and ML Dev's associates moved for TCPA dismissal.¹⁸ The trial court denied the motion for failure to properly identify the TCPA-protected communications, and the movants appealed.¹⁹ On

appeal, they pointed at their statements about easement access.²⁰ In evaluating the connection between Ross' claims and the movants' protected communications, the court of appeals concluded that statements about the denied easement generally may have *related to* the Ross suit, but the movants failed to show that the Ross suit was based on or in response to their communications—a higher standard than before.²¹

Other courts have reached the same conclusion²² and applied the heightened post-2019 TCPA to reject TCPA dismissals.²³

Post-amendment TCPA cases continue to make their way through the court system, so the application and scope of the TCPA, while unquestionably narrowed, is still being determined.²⁴ **TBJ**

NOTES

1. See House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011).
2. "Citizen participation is the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, involvement of citizens in the exchange of idea benefits our society. Yet frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of our democracy. . . . These lawsuits are called Strategic Lawsuits Against Public Participation or 'SLA[P]P' suits." Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011). See *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 901 (Tex. 2017) (per curiam); *Serafine v. Blunt*, 466 S.W.3d 352, 365 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring) (noting the "elephant in the room" is that "as written, the TCPA is, at best, a vastly overbroad 'anti-SLAPP' law").
3. See House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2730, 86th Leg., R.S. (2019). ("[C]ertain statutory provisions . . . lend themselves to unexpected applications because they are overly broad or unclear. C.S.H.B. 2730 seeks to remedy this issue by clarifying the scope and applicability of those provisions.").
4. Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011.
5. Not every amendment narrowed the TCPA. One change expanded the TCPA's application to legal actions arising from a party's activity pertaining to the creation or sharing of "dramatic, literary, musical, political, journalistic, or otherwise artistic work" and to online business reviews and consumer opinions. Tex. Civ. Prac. & Rem. Code § 27.010(b).
6. The Legislature carved out "a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief"; "alternative dispute resolution proceedings"; and "post-judgment enforcement actions" from the definition of "legal action." The Legislature simply clarified what courts had already decided—that "legal actions" included declaratory relief. Tex. Civ. Prac. & Rem. Code § 27.001.
7. Tex. Civ. Prac. & Rem. Code § 27.001.
8. *Id.* at § 27.003(a).
9. 512 S.W.3d at 900-01 (concluding sufficient connection existed where employee working in oil and gas industry made comments with some connection to safety and performance, which are generally of public interest).
10. 591 S.W.3d 127, 137 (Tex. 2019).
11. *Id.* at 133, 136.
12. See, e.g., *Kirby, Mathews & Walrath, PLLC v. Kuiper Law Firm, PLLC*, No. 06-21-00040-CV, 2021 WL 4268291, at *1, 3 (Tex. App.—Texarkana Sept. 21, 2021) (mem. op.) (interpreting amended version of TCPA).
13. *ML Dev, LP v. Ross Dress for Less, Inc.*, --- S.W.3d ---, No. 01-20-00773-CV, 2021 WL 2096656, at *1 (Tex. App.—Houston [1st Dist.] May 25, 2021, no pet.).
14. *Id.* at *2.
15. *Id.* (citations omitted).
16. *Id.* at *1.
17. *Id.*
18. *Id.* at *2.
19. *Id.*
20. *Id.*
21. *Id.* at *4-5.
22. See *Mireskandari v. Casey*, --- S.W.3d ---, No. 05-20-00769-CV, 2021 WL 5410609, at *1, 7 n.8 (Tex. App.—Dallas Nov. 19, 2021, no pet. h.) (concluding current TCPA imposes a "more narrow standard than the prior version of the TCPA"); *Union Pac.*

R.R. Co. v. Chenier, --- S.W.3d ---, No. 01-21-00073-CV, 2021 WL 3919216, at *1, 5 (Tex. App.—Houston [1st Dist.] Sept. 2, 2021, no pet. h.) (agreeing with *Ross* decision that removal of "relates to" narrowed "categories of connections a claim could have" to exercise of protected rights).

23. *Chesser v. Aucoin*, No. 01-20-00425-CV, 2020 WL 7391711, at *1 (Tex. App.—Houston [1st Dist.] Dec. 17, 2020, no pet.) (mem. op.) (rejecting post-2019 TCPA dismissal because movant failed to establish how communications about a cybersecurity business venture qualified as speech on a matter of public concern under amended, narrowed scope of "matter of public concern").

24. See *In re Guardianship of Fairley*, 604 S.W.3d 450 (Tex. App.—San Antonio 2020), pet. granted, 64 Tex. Sup. Ct. J. 1460 (June 18, 2021) (argued on Sept. 30, 2021).



AMY LEILA SABERIAN PRUEGER,

a member in Enoch Keever, in Austin, focuses on commercial and regulatory litigation and appeals. She also represents telecommunications clients in administrative proceedings and litigation and provides general counsel to those clients on property and rights-of-way issues.



ZACKERY L. HORTON,

a recent law clerk for Texas Supreme Court Justice Jeffrey S. Boyd, is an associate of Enoch Keever, in Austin, assisting with commercial and business litigation matters and appeals, including oil and gas disputes, in state and federal court.