

## Texas Citizens Participation Act: A Broad Dismissal Tool

By Dale Wainwright, Gregory Casas and Justin Bernstein

January 9, 2018, 4:40 PM EST

The Texas Citizens Participation Act (TCPA)[1] provides a motion to dismiss that has been successfully employed in a wide variety of cases, some of which are far removed from the constitutional-rights context mentioned in the TCPA's purpose section. An indication of the expansive use of this tool is the frequency at which it is appearing in Texas appellate opinions. For example, in the three months of August, September and October of 2017, the Texas courts of appeals issued seventeen opinions addressing the TCPA.

Due to this expansive application, it is important for litigators to know that, when it applies, the TCPA's motion to dismiss offers a number of advantages over the motion to dismiss provided in Rule 91a of the Texas Rules of Civil Procedure. For example, the TCPA's dismissal tool is not double-edged like the tool provided by Rule 91a, which imposes attorney's fees on all unsuccessful movants. In light of this threat, plaintiffs should consider using their experts, if engaged earlier on, to assist in drafting a more detailed petition. This article provides an overview of the TCPA's advantages, scope and procedures.

### Advantages of the TCPA

For the party seeking to dismiss, the TCPA offers numerous advantages over Tex. R. Civ. P. 91a. First, under the TCPA, while attorney's fees and sanctions are mandatory against the unsuccessful nonmovant, the unsuccessful movant can only be charged with attorney's fees if its motion was "frivolous or solely intended to delay." [2] Second, denial of a motion entitles the movant to file an accelerated interlocutory appeal. [3] Motions to dismiss without this advantage frequently leave defendants without an option to appeal until the appeal is essentially moot. Third, filing a motion stays discovery except for "specified and limited discovery" necessary for the motion. [4] Fourth, the nonmovant bears the burden of establishing by "clear and specific evidence" a prima facie case for every element of its claim. [5] The courts of appeals have given considerable heft to this burden, which has squashed a high percentage of the petitions it was imposed on. [6] In contrast, Tex. R. Civ. P. 91a permits dismissal only when the movant shows that the action has "no basis in law or fact."



Dale Wainwright



Gregory Casas



Justin Bernstein

## Scope of the TCPA

The TCPA's stated purpose and legislative history suggest the TCPA was designed to apply only to lawsuits filed to suppress the exercise of a First Amendment right. This leads many commentators and courts of appeals to refer to the TCPA as an "anti-SLAPP" statute, a category of statute designed to prevent strategic lawsuits against public participation.[7] However, the operative text of the TCPA is worded more broadly, and many courts of appeals have felt obligated to apply a literal, context-blind interpretation.

The legislation provides the context of the TCPA, suggesting limitations on the scope of its application, stating, "The purpose of this chapter 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." [8] The Texas Supreme Court has not directly addressed how this language impacts the scope of the TCPA; however, it has described the TCPA as intended to "expedite the dismissal of claims brought to intimidate or silence a defendant's exercise of these First Amendment rights." [9]

In application, courts have held that the TCPA authorizes motions to dismiss many types of claims, including claims alleging:

- violation of noncompete agreements, based on the argument that working for a competitor constituted the exercise of the "right to association" as that phrase is defined in the TCPA without regard to First Amendment jurisprudence; [10]
- fraud, based on the argument that the misrepresentations would constitute exercise of the "right of free speech" as that phrase is defined in the TCPA; [11]
- disclosure of trade secrets; [12]
- tortious interference; [13] and
- discrimination. [14]

Emboldened by the trend toward broad application, litigants have gone so far as to file a TCPA motion to dismiss another TCPA motion to dismiss, [15] and to file a TCPA motion to dismiss conversion and breach-of-contract claims arising from the sale of the assets of a business. [16]

Some courts view the broad application of the TCPA as required by its operative language; [17] others limit the operative language based on the purpose of the TCPA. [18] The first source of the TCPA's broadness is the use of "relates to" in Section 27.003, which allows invocation of the TCPA whenever "a legal action 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." The second source of the TCPA's breadth is its expansive definition of the protected rights. For example, the "right to association" is defined as a "communication between individuals who join together to collectively pursue common interests." [19] Similarly, the "right of free speech" is defined as "a communication made in connection with a matter of public concern," with "matter of public concern" defined to include broad issues such as health, economic well-being and "a good, product, or service in the marketplace." The phrase "in connection with" has so far been interpreted to mean that the communication need not (1) have more than a tangential relationship to the matter of public concern or (2) be made to the public. [20]

Beyond the still-evolving question of how the TCPA's stated purpose should affect its interpretation, there are several unresolved issues regarding the TCPA's scope. First, the Fifth Circuit has not decided whether the TCPA applies in federal court. However, all signs suggest that at a minimum the core protections in the TCPA will apply in federal court under an Erie analysis. In one of the several decisions in which the Fifth Circuit assumed without deciding that the TCPA applied, the Fifth Circuit noted that it previously held that "under the materially similar Louisiana anti-SLAPP statute, that a federal-court defendant may bring a motion to dismiss." [21] Adding to the force of that dicta, several federal district courts have held the TCPA can govern their proceedings. [22] The second unresolved scope issue is that courts have not yet reached a consensus regarding the interpretation and breadth of the exemptions provided in Section 27.010. [23] For example, while several courts have interpreted Section 27.010(b), sometimes referred to as the "commercial speech exemption," to require in all circumstances that the intended audience be an actual or potential buyer or customer, [24] other decisions have interpreted Section 27.010(b) as containing multiple independently sufficient prongs with only the last prong limited by the type of audience. [25]

The Supreme Court of Texas may ultimately curtail the TCPA by broadly interpreting the exemptions or retethering the TCPA to First Amendment jurisprudence. That would be consistent with the Court's statement that "[t]he TCPA's purpose is to identify and summarily dispose of lawsuits designed to chill First Amendment rights, not to dismiss meritorious lawsuits." [26] But until then, the TCPA is worth considering in most actions.

## **Procedures**

The TCPA operates on a short timeline to enable defendants to quickly shut down a meritless lawsuit. Subject to limited exceptions, a motion to dismiss must be filed within 60 days of service of the action, a hearing must be held within 60 days of the motion and the court must rule within 30 days of the hearing or the motion is considered denied by operation of law. Denial authorizes the movant to file an interlocutory appeal on the accelerated-appeal timeline.

The TCPA employs a two-step burden-shifting process. In the first step, the movant bears the burden to establish by a preponderance of the evidence that the nonmovant's action is within the scope of the TCPA. The movant may simultaneously deny making the alleged communications and argue those communications bring the action into the TCPA's scope. [27] If the movant carries that burden, the burden then shifts to the nonmovant to (1) establish by clear and specific evidence a prima facie case for each essential element of the challenged claim, or (2) establish by a preponderance of the evidence a valid defense. "[T]he words 'clear' and 'specific' in the context of this statute have been interpreted respectively to mean, for the former, 'unambiguous,' 'sure,' or 'free from doubt' and, for the latter, 'explicit' or 'relating to a particular named thing.'" [28] In both steps, pleadings count as evidence. [29]

---

***DISCLOSURE: Greenberg Traurig LLP and the authors of this article are involved in several pending TCPA appeals and have been involved in many TCPA cases in recent years, including the cited cases of ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895, 898 (Tex. 2017); In re Lipsky, 460 S.W.3d 579, 593 (Tex. 2015); Coal City Cob Company Inc. v. Heniff Transportation Systems LLC, No. 2017-13161 (127th Dist. Ct., Harris County, Tex. July 10, 2017); and Pivot v. Grant, No. D-1-GN-16-005731 (98th Dist. Ct. Travis County, Tex. April 18, 2017).***

*Dale Wainwright, Gregory J. Casas and Justin Bernstein are attorneys with Greenberg Traurig LLP in Austin. Wainwright is a shareholder and chair of the firm's Texas appellate practice, and a former Texas*

*Supreme Court justice. Casas is a trial shareholder and administrative shareholder. Bernstein is an associate.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Tex. Civ. Prac. & Rem. Code §§ 27.001-27.011 (effective June 17, 2011).

[2] TCPA § 27.009.

[3] TCPA § 27.008(b).

[4] TCPA § 27.006(b).

[5] TCPA § 27.005(c).

[6] See, e.g., *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (upholding dismissal because of insufficiently specific allegations regarding damages); *Mission Wrecker Serv., S.A., Inc. v. Assured Towing, Inc.*, 2017 WL 3270358, at \*5 (Tex. App.—San Antonio Aug. 2, 2017, pet. filed) (holding the plaintiff failed to establish a prima facie case for breach of contract because it did not provide enough to detail to show why failure to give notice violated specific contractual provisions); *Camp v. Patterson*, 2017 WL 3378904, at \*8 (Tex. App.—Austin August 3, 2017, no pet.) (holding the plaintiff failed to establish a prima facie case for tortious interference by alleging accusations “have negatively impacted my ability to start my own business and earn a living” and that but for the accusations there was a “reasonable probability that she would have entered into a business relationship with” the vendors).

[7] See, e.g., *Laura Lee Prather and Justice Jane Bland, Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP In Texas*, 47 Tex. Tech L. Rev. 725 (2015); *Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 211 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Watson v. Hardman*, 497 S.W.3d 601, 603 (Tex. App.—Dallas 2016, no pet.); *Serafine v. Blunt*, 466 S.W.3d 352, 356 (Tex. App.—Austin 2015, no pet.).

[8] TCPA § 27.002.

[9] *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017); *Sullivan v. Abraham*, 488 S.W.3d 294, 295 (Tex. 2016) (similar).

[10] *Elite Auto Body LLC v. Autocraft Bodywerks Inc.*, 520 S.W.3d 191, 196 (Tex. App.—Austin 2017, pet. filed); *Coal City Cob Company, Inc. v. Heniff Transportation Systems, LLC*, No. 2017-13161 (127th Dist. Ct., Harris County, Tex. July 10, 2017).

[11] *Better Bus. Bureau of Metro. Houston Inc. v. John Moore Services Inc.*, 441 S.W.3d 345, 354, 360 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

[12] *Elite Auto Body LLC.*, 520 S.W.3d at 196.

[13] *Camp*, 2017 WL 3378904.

[14] Khalil v. Memorial Hermann Health System, 2017 WL 5068157 (S.D. Texas October 30, 2017).

[15] See, e.g., Paulsen v. Yarrell, 01-16-00061-CV, 2017 WL 4545864, at \*8 (Tex. App.—Houston [1st Dist.] Oct. 12, 2017, no pet. h.). Fortunately, the court declined this invitation to infinite recursion.

[16] Pivot v. Grant, No. D-1-GN-16-005731 (98th Dist. Ct. Travis County, Tex. April 18, 2017).

[17] See, e.g. Elite Auto Body, 520 S.W.3d at 204 (“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”).

[18] See, e.g., Retzlaff v. Klein, 2017 WL 3270368, at \*3 (Tex. App.—San Antonio August 2, 2017, pet. filed) (“If a court determines that the defendant’s constitutional rights are implicated and the plaintiff has not met its burden to establish a prima facie case, the plaintiff’s claim must be dismissed.”) (emphasis added); Redflex Traffic Systems, Inc. v. Watson, 2017 WL 4413156, at \*3 (Tex. App.—Fort Worth October 5, 2017, no pet. h.) (“Its purpose is to identify and dispose of lawsuits designed only to chill First Amendment rights”); La’Tiejira v. Facebook, Inc., 2017 WL 3426039, at \*1-2 (S.D. Tex. August 7, 2017).

[19] For an example of a literal interpretation of the “right of association,” see Apple Tree Café Touring Inc. v. Levatino, 2017 WL 3304641 (Tex. App.—Dallas August 3, 2017, pet. filed) (holding that a post on a Facebook fan page was protected right of association because it related to the common interest of the fans in that artist).

[20] ExxonMobil Pipeline Co., 512 S.W.3d at 899-900 (Tex. 2017); see also Camp, 2017 WL 3378904, at \*2 (applying the TCPA to emails sent to a limited number of people).

[21] Cuba v. Pylant, 814 F.3d 701, 706 n.6 (5th Cir. 2016).

[22] See, e.g., Khalil, 2017 WL 5068157, at \*4-5; La’Tiejira v. Facebook Inc., 2017 WL 3426039, at \*1 (“Although the TCPA is a state law, it applies to Texas law claims in a federal court sitting in diversity.”).

[23] Section 27.010 provides that the TCPA does not apply to “(b) a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer. (c) . . . a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action. (d) . . . a legal action brought under the Insurance Code or arising out of an insurance contract.”

[24] Better Bus. Bureau of Metro. Houston Inc., 441 S.W.3d at 354 (denying application of the exemption because the Better Business Bureau’s communications were to the public rather than to the entities to which it sells membership services).

[25] Redflex Traffic Systems, 2017 WL 4413156.

[26] In re Lipsky, 460 S.W.3d at 589.

[27] MVS International Corp. v. International Advertising, No. 08-16-00173, 2017 WL 4534331, at \*7

(Tex. App.—El Paso October 11, 2017, no pet. h.).

[28] *In re Lipsky*, 460 S.W.3d at 590.

[29] TCPA § 27.006 (“the court shall consider the pleadings and . . .”); *Serafine*, 466 S.W.3d at 360 (“the trial court may consider pleadings as evidence”).