



Texas narrows anti-SLAPP law

Employment Alert

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On June 2, 2019, Texas Governor Greg Abbott signed a bill into law that amends and drastically narrows the scope of the Texas Citizens Participation Act (TCPA), the state's anti-SLAPP (strategic lawsuits against public participation) law, which was previously considered one of the broadest such laws in the country. Governor Abbott's much-anticipated signing followed nearly unanimous bipartisan approval from the Texas Legislature.

Lawmakers believe the amendments will rein in the far-reaching scope of the TCPA, which has been stretched to apply to a vast array of claims that fall well beyond the scope of First Amendment rights – including trade secret misappropriation, non-compete, and employee and customer non-solicitation disputes – and which has created a significant backlog of cases in the state's courts. The new law will take effect on September 1, 2019.

The current TCPA

The TCPA currently permits plaintiffs to file an early-stage motion to dismiss on the basis that the legal action is wrongfully based on that party's exercise of their constitutional rights: namely, the right of free speech, right to petition, or right of association, as defined by the TCPA. Tex. Civ. Prac. & Rem. Code § 27.003 (a). Such a motion has the impact of staying the case, including all discovery, pending resolution of the motion by the trial court, and if that decision is appealed, pending an appeal of the trial court's decision.

If a moving party successfully shows that the action was based on, related to, or in response to the exercise of

one of the three enumerated rights, the burden then shifts to the non-movant to either (1) establish by clear and specific evidence a prima facie case for each element of the challenged claim(s) or (2) show the action is exempt from the TCPA. *Id.* at § 27.005 (c). If the non-movant cannot meet that burden, the court must dismiss the challenged claim(s). If the non-movant meets its burden, the court must still dismiss any claim for which the moving party can establish a valid defense by a preponderance of the evidence. *Id.* at § 27.005 (d).

Critics of the TCPA argue that the law has essentially created a heightened pleading standard for those seeking to bring claims to enforce contractual and other rights, and the stay imposed on cases once a motion to dismiss has been filed has resulted in significant delays in seeking injunctive relief.

Motions to dismiss under the TCPA are entitled to an expedited appeals process, but this process can still take months to resolve, which can be significant, particularly in cases where a party is seeking preliminary injunctive relief.

The TCPA also contains a unique fee shifting provision (its main deterrent force), which requires courts to award reasonable attorneys' fees and sanctions to a successful movant, but only makes an award of attorneys' fees permissive if the non-movant prevails and shows the motion was filed frivolously or with the intent to delay. *Id.* at § 27.009.

Changes on the horizon

Most significantly, the new law will narrow the scope of the TCPA, limiting its application to only those cases where constitutional rights are implicated. Below is a summary of 10 additional key changes to the TCPA. The new law will:

- Limit the scope of the TCPA by removing the current provision that the action need only "relate to" a party's right to petition, free speech or right of association.
- Narrow the definition of "exercise of the right of association" by requiring the activity to relate to a governmental proceeding or a matter of public concern.
- Clarify the definition of "matter of public concern" to include statements and activities regarding public officials or figures; matters of political, social, or other interest to the community; or that are a subject of concern to the public.
- Expand the definition of "legal action" to cover claims for "declaratory relief," while expressly excluding actions such as alternative dispute resolution proceedings and post-judgment enforcement actions.
- Exclude employment actions, among others, seeking recovery for trade secret misappropriation or corporate opportunities or to enforce a non-disparagement agreement or a covenant not to compete; certain family law matters; eviction suits; attorney disciplinary proceedings; and actions based on common law fraud.
- Lower the movant's burdens of proof to show that a legal action is based on or in response to the exercise of the right of free speech, the right to petition, or the right of association and requiring that the movant merely "demonstrates" (rather than show by preponderance of the evidence) that the legal action is covered.
- Heighten the movant's burden to prove an affirmative defense by requiring the party to show it is entitled to judgment as a matter of law.
- Specify that the court may consider evidence that would be admissible under the summary judgment standard, rather than just the pleadings and supporting or opposing affidavits.
- Eliminate the mandatory award of sanctions to a permissive award for a successful movant.
- Modify the filing framework timeline to require that the movant must provide at least 21 days' notice before the date of the hearing, and the non-movant's response is due no later than seven days prior to the date of the hearing.

You may learn about the potential impact of this new law by contacting any of the authors.

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