



# BRENT TURMAN WEIGHS IN ON CHANGES TO TEXAS'S ANTI-SLAPP LAW

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**Senior Associate Brent A. Turman authored the article, "How Changes in Texas Anti-SLAPP Statute Affect the Entertainment Industry" for Entertainment Law & Finance, an ALM publication. In the piece, Turman explores the impactful legislative changes to the Texas anti-SLAPP statute and how the statute has discouraged many would-be plaintiffs from filing legal actions over the past eight years. Turman points out that under the revised statutory language, the Texas Citizens Participation Act (TCPA) "no longer applies to specific causes of action including deceptive trade practices actions, employment disputes (including contractual non-disparagement provisions and covenants not to compete), allegations of misappropriation of trade secrets, common-law fraud claims, and claims relating to attorney discipline matters."**

Turman goes on to explain that the TCPA is among the strongest anti-SLAPP statutes in the United States, and he advises that "both plaintiffs' and defendants' counsel should pay close attention to how these revisions could potentially impact their clients' interests."

Full text of the article is below.

## How Changes in Texas Anti-SLAPP Statute Affect Entertainment Industry

Approximately 30 states have enacted anti-SLAPP statutes, which are intended to deter lawsuits that impede the right to free speech and other related activities. Essentially, these statutes attack SLAPPs (Strategic Lawsuits Against Public Participation) by creating a vehicle through which defendants can

protect their rights by filing a dispositive motion to dismiss at the earliest stage of a case, before enduring expansive and invasive discovery. Arguably the most significant aspect of many anti-SLAPP statutes is that a movant who files a successful motion to dismiss could be entitled to its attorney fees. Undeniably, that aspect alone provides tremendous value to media outlets, publishers, public figures and others.

Texas's anti-SLAPP law, the Texas Citizens Participation Act (TCPA), which has similarities to — and some differences from — California's, has been one of the most defense-friendly anti-SLAPP statutes in the nation. Enacted in 2011, the TCPA seeks to “encourage and safeguard the constitutional rights” of people to “petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law.” Tex. Civ. Prac. & Rem. Code §27.002. While statutes from various states apply to speech in only limited scenarios, courts have interpreted the TCPA to apply to a wide array of actions, as long as the underlying 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 to association. ...” §27.003(a). Notably, the right to free speech “means a communication made in connection with a matter of public concern.” §27.001(3).

This broad language resulted in application of the TCPA to “matters of public concern” such as online reviews for a wedding photographer, trade secret disputes between competing companies and President Donald Trump’s tweets accusing porn star Stormy Daniels of falsely reporting crimes (see, *Clifford v. Trump*, 339 F.Supp.3d 915 (C.D.Calif. 2018), applying the TCPA in granting the defense motion to dismiss Daniel’s defamation claim).

In the past eight years, Texas attorneys have become increasingly creative in their attempts to use the TCPA to their clients’ advantage. However, the Texas legislature recently determined it should rein in several aspects of the TCPA. While previous attempts to narrow the TCPA have been unsuccessful, this was no hotly-contested battle. The Texas legislature exhibited bipartisan support: the House passed the bill with just one nay and only two present but not voting. The Senate then unanimously voted in favor of passing the bill. Following Gov. Greg Abbott’s signature, Texas House Bill 2730 will limit the TCPA in ways that will impact individuals and entities, ranging from bloggers to media conglomerates, as of Sept. 1, 2019.

This new legislation explicitly carved out various types of disputes. First, the term “legal action” now excludes alternative dispute resolution proceedings and post-judgment enforcement actions. H.R. 2730, 86th Leg. (Tex. 2019), at §27.001(6)(B)-(C). Moreover, the revised TCPA no longer applies to specific causes of action, including deceptive trade practices actions, employment disputes (including contractual non-disparagement provisions and covenants not to compete), allegations of misappropriation of trade secrets, common-law fraud claims and claims relating to attorney discipline matters. See, §27.010(a)(5)-(12).

Nevertheless, the new statutory language specifically protects those in the entertainment and media industries by noting that the statute still applies to legal actions arising from any act “related to the gathering, receiving, posting, or processing of information for communication to the public ... for the

creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work," regardless the means of distribution. §27.010(b)(1). This broad provision applies to television programs, radio programming, motion pictures, and articles published in newspapers, websites, magazines, or other platforms. Such explicit reference to those in the entertainment industry and media should prove comfort to content creators and publishers.

Along with these limitations, the Texas Legislature provided a silver lining for defendants by expanding the definition of "legal action" to explicitly include claims for declaratory relief. §27.001(6). This should be music to defense counsel's ears because it provides defendants another opportunity to contest declaratory relief actions, under which the plaintiff can potentially recover attorney fees.

The state legislature further revised the statutory meaning of "matter of public concern." The revised language replaced specific examples of matters of public concern found in the original statute with broad phrases such as "a subject of concern to the public," "a matter of political, social, or other interest to the community," or statements or activities relating to individuals such as celebrities, public figures and public officials. See, §27.001(7)(A)-(C). The vague nature of what now constitutes a "matter of public concern" will likely lead to continued creative arguments from Texas litigators seeking protection for their clients.

Perhaps the most impactful change to the TCPA can be found in what happens when a motion to dismiss is granted. While an award of attorney fees to a prevailing movant was mandatory under the original language of the statute, that is no longer the case. The importance of this revision cannot be understated, as the mandatory fees provision discouraged many would-be plaintiffs from filing legal actions over the past eight years. The extreme nature of the original remedy was evident by the tension in Texas courtrooms, where judges have been reluctant to pull the trigger on granting an anti-SLAPP motion to dismiss, primarily due to the financial consequence it would have by forcing the plaintiff to pay tens-to-hundreds of thousands of dollars in fees and costs. Plaintiffs' attorneys now have reason to rejoice because as of Sept. 1, any award of fees to a successful movant will be discretionary. See, §27.009(a)(2). This supplemental layer of discretion benefits plaintiffs because it gives the judge an additional opportunity to award less than the full amount of attorney fees incurred by the moving party.

While not as impactful as the transition of attorney fees awards from mandatory to discretionary, litigators also should recognize the adjustments to the applicable burdens of proof. The movant no longer has the initial burden to demonstrate by a "preponderance of the evidence" that the legal action was based on, related to or was in response to an exercise of specific rights. See, §27.005(b). Now, the movant must simply "demonstrate" that the legal action is based on or in response to the same exercise of rights. H.R. 2730 at §27.005(b).

However, the state legislature elevated the burden of proof with regard to affirmative defenses. Under the original statutory language, a movant was entitled to dismissal if it could prove each and every element of an affirmative defense "by preponderance of the evidence." §27.003(d). Starting this fall, the movant

will have to meet the enhanced burden to show it is “entitled to judgment as a matter of law.” H.R. 2730 at §27.003(d).

Additionally, the updated Texas legislation provides clarity with regard to the type of evidence that may be considered in ruling on an anti-SLAPP motion to dismiss. Under the original statutory language, the court could consider the pleadings and supporting and opposing affidavits (although additional evidence was often submitted). See, §27.006(a). But as of Sept. 1, a court can consider evidence that it otherwise would be able to consider under a motion for summary judgment. See, H.R. 2730 at §27.006(b) (incorporating by reference the types of evidence covered by Rule 166a of the Texas Rules of Civil Procedure). Previously, it was not unheard of for courts to order expedited, limited discovery in advance of briefing relating to a TCPA motion to dismiss. Time will tell if changes in evidentiary standard results in an increased tendency to allow for discovery at early phases of the dispute.

Finally, one welcome change relates to the procedural aspects of the TCPA. Since the TCPA was enacted, its rigid guidelines forced all parties to move at an expedited pace, further requiring expedited discovery — as well as hefty fee statements for clients — at times. Specifically, the defendant had to file a motion to dismiss within 60 days of receiving service relating to the underlying legal action. As litigators know, days or even weeks can pass before a defendant even retains counsel, burning through a considerable portion of the allotted 60 days.

As a result of the updated language in the statute, the parties may extend the deadline to file a motion to dismiss by agreement. See, H.R. 2730 at §27.003(b). The responding party also gets some welcome breathing room, as it is now entitled to notice of any hearing on the motion to dismiss at least 21 days before the hearing, unless otherwise provided by either agreement of the parties or a court order. See, §27.003(d). Now, the responding party must file the response no later than 7 days before the hearing date, just as with Texas summary judgment practice. See, §27.003(e). This change creates a more fair and equitable procedure because under the older version of the law, the responding party could receive notice of the hearing as little as three days beforehand.

### **Anti-SLAPP In Other States**

Even after the narrowing of the TCPA, it is still more expansive than the anti-SLAPP statutes of states like New York, which focus on narrow areas where disputes may arise, to the exclusion of many types of issues and conflicts that commonly arise in the media. New York's statute does not have teeth when it comes to the entertainment industry, as the defendant must show that the plaintiff is a “public applicant or permittee.” N.Y. C.P.L.R. 76-a(1)(a)-(b). industry, as the defendant must show that the plaintiff is a “public applicant or permittee.” N.Y. C.P.L.R. 76-a(1)(a)-(b).

And in Georgia, which has been a center of film production due to favorable tax credit opportunities (though its recent anti-abortion legislation has drawn sharp criticism from Hollywood and the entertainment industry, as well as threats to relocate productions to other states), the anti-SLAPP law has done little to protect media and content creators. For almost 20 years, a defendant could utilize

Georgia's statute only when it was sued based on the exercise of free speech that is about "an issue under consideration or review by a governmental body." Ga. Code Ann. §9-11-11.1. In order to fall within the protection of this statute, the statements at issue had to: 1) have been made in official government proceeding; 2) relate to issues that are currently under consideration or review in an official government proceeding; or 3) call for review or consideration by the government. See, §9-11-11.1(c). Stated otherwise, if the statements leading to the legal action did not relate to an issue currently under review and the defendant was not calling for review or consideration, then the statute did not apply.

But things are getting better for the entertainment industry in Georgia, at least when it comes to the state's anti-SLAPP statute. In 2016, the Georgia Legislature enacted a new statute that applies to "[a]ny written or oral statement or writing or petition made in a place open to the public or a public forum in connection with an issue of public interest or concern" and "[a]ny ... conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public concern." §9-11-11.1(c)(3). Additionally, the revised statute contains a mandatory award of attorney fees for the prevailing party. See, §9-11-11.1(b.1). However, because the expansive revised statute is in its infancy, there is little guiding Georgia case law regarding the scope of the statute.

On the other hand, California's statutory anti-SLAPP provisions are closely aligned with the TCPA. In addition to various categories of conduct, the statute applies to "any written or oral statement made in a place open to the public or a public forum in connection with an issue of public interest ...." Calif. Code. Civ. Proc. §425.16(e)(3). Courts have found the statute applied to situations such as lawsuits relating to statements about people voluntarily associating with celebrities and Facebook's failure to remove online content relating to a musician. As with the revised legislation from Texas, a successful movant in California may obtain attorney fees and court costs, but any award is discretionary.

The timeline according to the California motion to dismiss is strict, as the movant must file the motion within 60 days after being served with the complaint. See, §425.16(f). Unlike the California statute, new revisions to the Texas anti-SLAPP statute provide more flexibility in this particular area to extend the deadline to file a motion to dismiss (albeit only by agreement). Accordingly, it is even more important for a California defendant to retain counsel and move expeditiously to protect its rights.

## **Conclusion**

Even though the Texas Legislature decided to pare back the TCPA, it is still among the strongest anti-SLAPP statutes in the United States. In addition to adding clarity to multiple provisions, the new statutory language carves out various specific causes of action and generally makes it less likely a defendant using the statute will obtain recovery of attorney fees and related costs. Both plaintiffs' and defendants' counsel should pay close attention to how these revisions could potentially impact their clients' interests.

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