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The Evolution of the Texas Anti-SLAPP Statute

BY BRENT TURMAN

Approximately 30 states have enacted anti-SLAPP (Strategic Lawsuit Against Public Participation) statutes, which are intended to deter lawsuits that stifle free speech and other related activities. These statutes create a vehicle through which defendants can file a dispositive motion at the earliest stage of a case, before enduring invasive and costly discovery. Texas's anti-SLAPP law, the Texas Citizens Participation Act (the TCPA) is considered one of the most defense-friendly anti-SLAPP statutes in the nation. The TCPA, enacted in 2011, seeks to encourage and safeguard the constitutional rights of people to petition, speak freely, associate freely, and otherwise participate in government. Texas courts interpreted the TCPA to apply to a wide array of actions—far beyond traditional entertainment litigation actions for defamation or business disparagement—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 relating to a matter of public concern, right to petition, or right to association.

This broad aspect of the TCPA resulted in its application to wide-ranging "matters of public concern" such as trade secret disputes between competing companies, online reviews for a wedding photographer, internal corporate communications, non-compete issues after employees leave, and more. Texas attorneys have become increasingly creative in their attempts to use the TCPA to their clients' advantage.

However, litigators should consider adjusting their strategies going forward, because the Texas legislature recently revised several aspects of the TCPA. Some of the most important revisions, which went into effect on September 1, 2019, are discussed below.

First, the revised TCPA explicitly carved out various types of disputes. Under the new version of the statute, the term "legal action" now excludes alternative dispute resolution proceedings and post-judgment enforcement actions. Moreover, the revised statute no longer applies to several causes of action, including employment disputes, deceptive trade practices actions, claims relating to attorney discipline, allegations of common law fraud claims, and alleged misappropriation of trade secrets.

Next, perhaps the most impactful change to the TCPA can be found in what results after a judge grants a TCPA motion to dismiss. The previously mandatory award of attorney fees to a prevailing movant is now discretionary. The importance of this revision cannot be understated, as the mandatory fees provision discouraged many would-be plaintiffs from filing a lawsuit in the first place. This additional layer of discretion benefits plaintiffs because it gives the judge another opportunity to award less than the full amount of attorney fees incurred by a successful moving party.

Third, the updated TCPA provides clarity regarding the type of evidence to be considered in ruling on a TCPA motion to dismiss. Under the original statutory language, the court

could consider the pleadings and supporting and opposing affidavits. But now, a court can consider additional evidence, because the updated statute clarifies that courts can consider the same evidence they typically would under a motion for summary judgment (as governed by Rule 166a of the Texas Rules of Civil Procedure). Time will tell if changes in this evidentiary standard results in an increased tendency to allow for discovery at early phases of the dispute.

Finally, another change relates to procedural aspects of the TCPA. Since the TCPA was enacted, its rigid guidelines forced all parties to move at an expedited pace. Specifically, the moving party 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 substantial portion of the allotted 60 days. As a result of the updated statutory language, the parties may extend the deadline to file a motion to dismiss by agreement.

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 several provisions, the new statutory language carves out various causes of action and generally makes it less likely that a moving party will obtain recovery of attorney fees and related costs. Both plaintiffs' and defendants' counsel should pay close attention and consider how these revisions may impact their clients' interests. **HN**

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