

ARTICLE

SLAPPED AND SANCTIONED: THE HEAVY HAND OF THE TEXAS CITIZENS PARTICIPATION ACT

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I. INTRODUCTION

In 2011, the Texas legislature unanimously passed the Texas Citizens Participation Act (TCPA), a law designed to curb so-called Strategic Lawsuits Against Public Participation (“SLAPP” suits).¹ Though initially applied to defamation claims, the Texas Supreme

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1. TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011.

Court’s arguably groundbreaking decision in *ExxonMobil Pipeline Co. v. Coleman* opened up the door for application of the TCPA in a wide variety of commercial contexts.² Whether bringing suit or defending one, the TCPA’s powerful Anti-SLAPP remedies require it to be analyzed carefully in every case.

II. MOTIONS TO DISMISS UNDER THE TCPA: A BRIEF OVERVIEW

The TCPA allows defendants to file a motion to dismiss within sixty days of being served.³ Discovery is automatically stayed while the motion is pending, and can only be opened on a limited basis with permission of the court upon a finding of good cause.⁴ The motion to dismiss must be granted unless the plaintiff can produce “clear and specific *evidence*” to support each element of every cause of action asserted in the complaint.⁵ As a consequence, the plaintiff may face the catch-22 of having to marshal evidence at the outset of the case without the benefit of having any discovery.

Regardless of the outcome, the mere act of filing the motion to dismiss has far-reaching consequences. As a practical matter, the plaintiff may incur substantial legal fees collecting evidence and filing a response at the outset of the case. More importantly, if the motion to dismiss is even partially granted, the TCPA currently *requires* the court to award reasonable attorney’s fees and sanctions to the defendant.⁶ And even if the motion to dismiss is denied, the defendant has a statutory right to file an interlocutory appeal seeking reversal.⁷ In 2017 alone, denials of TCPA motions to dismiss were reversed *at least* twenty-one times, including multiple reversals by the Texas Supreme Court.⁸

2. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017) (per curiam).

3. TEX. CIV. PRAC. & REM. CODE § 27.003(a), (b).

4. *Id.* §§ 27.003(c), 27.006.

5. *Id.* §§ 27.005, 27.006 (emphasis added).

6. *Id.* § 27.009.

7. *Id.* § 27.008.

8. *E.g.*, *Hersh v. Tatum*, 16-0096, 2017 WL 2839873, at *1 (Tex. June 30, 2017); *Bedford v. Darin Spasoff & 6 Tool, LLC*, No.16-0229, 2017 WL 2492005, at *2 (Tex. June 9, 2017); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 897 (Tex. 2017); *Camp v. Patterson*, 03-16-00733-CV, 2017 WL 3378904, at *11 (Tex. App.—Austin Aug. 3, 2017, no pet. h.); *Mission Wrecker Serv., S.A., Inc. v. Assured Towing, Inc.*, 04-17-00006-CV, 2017 WL 3270358, at *6 (Tex. App.—San Antonio Aug. 2, 2017, no pet. h.); *Glob. Tel*link Corp. v. Securus Techs., Inc.*, 05-16-01224-CV, 2017 WL 3275921, at *1 (Tex. App.—Dallas July 31, 2017, no pet. h.); *Moricz v. Long*, 06-17-00011-CV, 2017 WL 3081512, at *7 (Tex. App.—Texarkana July 20, 2017, no pet. h.); *Cavin v. Abbott*, 03-16-00395-CV, 2017 WL 3044583, at *1 (Tex. App.—Austin July 14, 2017, no pet. h.); *Dorman v. Proactive Inv. et al.*, 05-16-01286-CV, 2017 WL 2953058, at *1 (Tex. App.—Dallas July 11, 2017, no pet. h.); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 207 (Tex. App.—Austin 2017, no pet. h.); *Elliott v. S&S Emergency Training Sols., Inc.*, No. 05-16-01373-CV, 2017 WL

Notably, the plaintiff does not enjoy a corollary right to an interlocutory appeal when the motion is partially granted, and will have to live with whatever attorneys' fees and sanctions have been awarded pending appeal of a final judgment.⁹ This puts plaintiffs in a less than ideal situation when it comes to negotiating a favorable settlement.

III. THE TCPA'S BROAD APPLICATION: *EXXONMOBIL PIPELINE CO. V. COLEMAN*

Given the TCPA's powerful remedies, both sides must ask the same question at the inception of the case: does the TCPA apply to any of my claims? In the context of commercial claims other than defamation, that question can only be answered after analyzing the TCPA itself, recent guidance provided by the Texas Supreme Court in decisions like *Coleman*, and subsequent authority interpreting those cases.

According to its text, the TCPA applies to any "legal action" that "is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association."¹⁰ Each of those terms is defined in the statute. The right of association "means a communication between individuals who join together to collectively express, promote, *pursue*, or defend *common interests*."¹¹ The right of free speech "means a communication made in connection with a matter of public concern."¹² The right to petition includes more than a dozen categories of communications, including those related to judicial proceedings, public meetings, and even those "reasonably likely to

2118787, at *1 (Tex. App.—Dallas May 16, 2017, no pet. h.); Long Canyon Phase II & III Homeowners Ass'n, Inc. v. Cashion, 517 S.W.3d 212, 224 (Tex. App.—Austin 2017, no pet.); Quintanilla v. West, No. 04-1600533-CV, 2017 WL 1684832, at *12 (Tex. App.—San Antonio Apr. 26, 2017, no pet. h.); Mem'l Hermann Health Sys. v. Khalil, 01-16-00512-CV, 2017 WL 3389645, at *1 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, no pet. h.); Urban Eng'g v. Salinas Constr. Techs., Ltd., No. 13-16-00451-CV, 2017 WL 2289029, at *8 (Tex. App.—Corpus Christi May 25, 2017, no pet. h.); MacFarland v. Le-Vel Brands LLC, No. 05-1600672-CV, 2017 WL 1089684, at *19 (Tex. App.—Dallas Mar. 23, 2017, no pet. h.); Trevino v. Cantu, No. 13-16-00109-CV, 2017 WL 1056404, at *4 (Tex. App.—Corpus Christi Feb. 2, 2017, no pet. h.); Serafine v. Blunt, No. 03-16-00131-CV, 2017 WL 2224528, at *7 (Tex. App.—Austin May 19, 2017, no pet. h.); Spencer v. Overpeck, No. 04-16-00565-CV, 2017 WL 993093, at *1 (Tex. App.—San Antonio Mar. 15, 2017, pet. filed); Schofield v. Gerda, No. 02-15-00326-CV, 2017 WL 2180708, at *27 (Tex. App.—Fort Worth May 18, 2017, no pet. h.); Cox Media Group, LLC v. Joselevitz, 14-16-00333-CV, 2017 WL 1086572, at *10 (Tex. App.—Houston [14th Dist.] Mar. 21, 2017, no pet. h.).

9. Schlumberger Ltd. v. Rutherford, 472 S.W.3d 881, 887 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

10. TEX. CIV. PRAC. & REM. CODE § 27.005.

11. *Id.* § 27.001(2) (emphasis added).

12. *Id.* § 27.001(3).

enlist public participation” in government proceedings.¹³

Each of these terms is afforded its statutory meaning, and the TCPA applies if any one of them is triggered. The courts of appeals had previously split on whether each of the rights listed in the TCPA was further restricted by First Amendment jurisprudence limiting their scope, given that the TCPA’s self-defined purpose is “to encourage and safeguard the *constitutional rights*” of citizens.¹⁴ This created ambiguity as to whether the “right of free speech” applied to private conversations, whether the “right of association” required a nexus with political activity, and a host of other questions concerning the breadth of the TCPA.

The Texas Supreme Court put these issues to rest in *Coleman*. There, the court found the TCPA applied to a defamation lawsuit based on private communications about an employee’s job performance, even though the statements in question had only a tangential relation to a matter of public concern.¹⁵ Perhaps the most important aspect of *Coleman* was the Texas Supreme Court’s rejection of any efforts to “narrow the scope of the TCPA” that could be inconsistent with the statute’s plain text.¹⁶ This was a clear indication by the Texas Supreme Court in favor of interpreting the TCPA expansively.

IV. THE TCPA: A TOOL IN THE ARSENAL OF COMMERCIAL LITIGATORS

Though decided in the context of defamation claims, the *Coleman* decision has potentially far-reaching implications for commercial claims, especially in light of the TCPA’s expansive definition of “the right of association.” As noted, the right of association includes communications between individuals joining together to pursue common interests.¹⁷ This definition appears to encompass virtually all business enterprise as commerce itself is rooted in individuals joining together to pursue success in the marketplace and profit.

The Austin Court of Appeals recently reached precisely this conclusion in *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*¹⁸ The court’s opening line perfectly sums up the decision: “This case illustrates that the Texas Citizens Participation Act . . . can potentially be invoked successfully to defend against claims seeking

13. *Id.* § 27.001(4).

14. *Id.* § 27.002 (emphasis added).

15. *Coleman*, 512 S.W.3d at 901.

16. *Id.*

17. TEX. CIV. PRAC. & REM. CODE § 27.001(2).

18. *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191 (Tex. App.—Austin 2017, no pet. h.)

to remedy alleged misappropriation or misuse of a business's trade secrets or confidential information.”¹⁹ The court reasoned that the defendant allegedly communicated the information “in furtherance of the . . . business enterprise relative to [the defendant's] competitive position.”²⁰ Such communications fell within the TCPA's definition of “the right of association,” and therefore required the plaintiff to produce clear and specific evidence with “element-by-element, claim-by-claim exactitude.”²¹ The plaintiff failed to meet that burden on certain claims.²² The court of appeals reversed the trial court's ruling to the contrary and remanded the case for an award of attorney fees and sanctions.²³

This logic extends to a number of business contexts. Consider a run of the mill breach of contract claim against an ex-employee for violations of non-competition, non-solicitation, and anti-poaching provisions of an employment agreement. Even before the *Coleman* decision, several courts had found such claims within the purview of the TCPA.²⁴ The logic of *Coleman*, and subsequent cases like *Autocraft*, make the case for application of the TCPA even stronger.

Under similar reasoning, other courts have applied the TCPA to everything from claims for trade secret misappropriation,²⁵ breach of non-disclosure agreements,²⁶ breach of contract and promissory estoppel,²⁷ harassment and negligence,²⁸ falsely filing financing forms to perfect a security interest,²⁹ fraud and tortious interference,³⁰ business disparagement,³¹ filing a fraudulent *lis*

19. *Id.* at 193.

20. *Id.* at 205.

21. *Id.* at 206.

22. *Id.*

23. *Id.* at 207.

24. *See, e.g.,* Fleming & Associates, L.L.P. v. Kirklín, 479 S.W.3d 458, 460 (Tex. App.—Houston [14th Dist.] 2015); Schlumberger Ltd. v. Rutherford, Cause No. 2014-13621 (Tex. D. Ct., 127th Dist., Aug. 14, 2014).

25. Elite Auto Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 205 (Tex. App.—Austin 2017, no pet. h.).

26. Elliott v. S&S Emergency Training Sols., Inc., 05-16-01373-CV, 2017 WL 2118787, at *1 (Tex. App.—Dallas May 16, 2017, no pet. h.)

27. Forsterling v. A&E Television Networks, LLC, CV H-16-2941, 2017 WL 980347, at *2 (S.D. Tex. Mar. 9, 2017).

28. Long Canyon Phase II & III Homeowners Ass'n, Inc. v. Cashion, 517 S.W.3d 212, 215 (Tex. App.—Austin 2017, no pet.).

29. Quintanilla v. West, 04-16-00533-CV, 2017 WL 1684832, at *12 (Tex. App.—San Antonio Apr. 26, 2017, no pet. h.).

30. Mem'l Hermann Health Sys. v. Khalil, 01-16-00512-CV, 2017 WL 338964, at *5 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, no pet. h.).

31. Urban Eng'g v. Salinas Constr. Techs., Ltd., 13-16-00451-CV, 2017 WL 2289029, at *8 (Tex. App.—Corpus Christi May 25, 2017, no pet. h.); MacFarland v. Le-Vel Brands LLC, 05-16-00672-CV, 2017 WL 1089684, at *1, *19 (Tex. App.—Dallas Mar. 23, 2017, no pet. h.); Trevino v. Cantu, 13-16-00109-CV, 2017 WL 1056404, at *4 (Tex. App.—Corpus Christi Feb. 2, 2017, no pet. h.).

pendens,³² abuse of process and wrongful injunction,³³ and, of course, defamation.³⁴

However, while the TCPA is broad, it does contain a number of important exemptions. It does not apply to claims under the Insurance Code, claims arising out of an insurance contract, or most personal injury claims.³⁵ The TCPA also contains a “commercial services exemption” that may bar its application when a claim arises solely out of statements made to customers, although the exemption contains so many caveats that, at this point, its application depends heavily on the facts of each individual case.³⁶

V. CONCLUSION: BEST PRACTICES ON BOTH SIDES OF THE BAR

A complete review of every TCPA case is beyond the scope of this Article. But the message sent by Texas courts is becoming increasingly clear: careful analysis of the TCPA should be undertaken by every plaintiff before filing suit, and by the defendant upon receiving service. A number of best practices can be used when bringing or defending against a TCPA motion.

For defendants in commercial litigation, the key takeaway is relatively simple: don’t assume the TCPA doesn’t apply to the plaintiff’s claims. The TCPA is a relatively recent statute, and many questions about its breadth have only recently been considered. Filing a motion to dismiss under the TCPA is overlooked in far too many cases as a potential avenue to stay discovery, open the door to an early settlement, or even to obtain dismissal of the case. So long as a motion to dismiss under the TCPA is not “frivolous or solely intended to delay,” defendants face

32. *Serafine v. Blunt*, 03-16-00131-CV, 2017 WL 2224528, at *7 (Tex. App.—Austin May 19, 2017, no pet. h.).

33. *Spencer v. Overpeck*, 04-16-00565-CV, 2017 WL 993093, at *1 (Tex. App.—San Antonio Mar. 15, 2017, pet. filed).

34. *Schofield v. Gerda*, 02-15-00326-CV, 2017 WL 2180708, at *27 (Tex. App.—Fort Worth May 18, 2017, no pet. h.); *Cox Media Group, LLC v. Joselevitz*, 14-16-00333-CV, 2017 WL 1086572, at *10 (Tex. App.—Houston [14th Dist.] Mar. 21, 2017, no pet. h.).

35. TEX. CIV. PRAC. & REM. CODE § 27.010(c)-(d).

36. *Id.* § 27.010(b). For example, in a suit against an attorney relating to work performed with respect to a governmental entity, the Houston Court of Appeals held that the commercial exemption did not apply because the communications at issue petitioned the government. *Schimmel v. McGregor*, 438 S.W.3d 847, 858 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Numerous courts have rejected the argument that merely because the communications arise in the business context, they are obviously within the commercial exemption; instead a rigorous four-part test must be applied. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 88 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

little risk in filing such a motion.³⁷

For plaintiffs, managing the risk of a TCPA motion to dismiss is more difficult. Practically speaking, attorneys should fully disclose the risks of a possible TCPA motion to clients, so they are not blindsided by the expense and delay caused by early motion practice, partial or complete dismissal, and a possible intervening interlocutory appeal.

Additionally, narrowly framing a petition to ensure that all claims exist outside the TCPA or, if possible, within the TCPA's exemptions, may avoid application of the TCPA altogether. Because even a partial grant of a TCPA motion to dismiss could result in an award of fees and sanctions, it may be advisable to plead fewer claims, survive the TCPA motion to dismiss, and amend only if discovery reveals additional causes of action for which a prima facie case can be shown before amending.

Finally, while several federal courts have applied the TCPA to Texas state law claims, suing in federal court only for violations of federal statutes—such as the recently passed federal Defend Trade Secrets Act³⁸ or Computer Fraud and Abuse Act³⁹—may avoid application of the TCPA altogether.

As one of the most powerful statutes in Texas, the TCPA will certainly play an increasingly large role in commercial litigation moving forward in Texas, as the TCPA appears to be here to stay. Litigators familiar with its provisions will be best positioned to keep their clients fully informed and pursue the best strategies to protect their interests.

37. TEX. CIV. PRAC. & REM. CODE § 27.009(b).

38. 18 U.S.C. § 1836-39.

39. 18 U.S.C. § 1030.