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TCPA: UPDATES ON SCOPE OF THE STATUTE'S APPLICATION

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I. INTRODUCTION.

A motion to dismiss under the Texas Citizens Participation Act (TCPA) provides Texas civil litigators a powerful tool available to seek prompt dismissal of adverse claims. This paper focuses on application of the TCPA, which is considered “step 1” of the TCPA analysis. The paper covers the 2019 amendments and case law updates through May 25, 2021 on this topic. Notably, in April and May 2021, the Texas Supreme Court issued three opinions related to issue, which are covered below in Sections IV.C(5) and IV.E(5).

II. TCPA BACKGROUND.

The TCPA was enacted in 2011 (H.B. 2973, 82nd R.S.) and codified under Chapter 27 of the Texas Civil Practice and Remedies Code (CPRC). It was amended in 2013, largely to address procedural issues (H.B. 2935, 83rd R.S.). Many substantive amendments were made in 2019 (H.B. 2730, 86th R.S.). The TCPA has a broad scope that has significantly impacted Texas civil litigation.

A. Purpose.

The TCPA's dual purposes are (1) “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, (2) “protect the rights of a person to file meritorious lawsuits for demonstrable injury.” CPRC § 27.002; *Langley v. Insgroup, Inc.*, No. 14-19-00127-CV, 2020 WL 1679625, at *2 (Tex. App.—Houston [14th Dist.] Apr. 7, 2020, no pet.) (discussing purpose).

The supreme court recently clarified that the TCPA's “purpose provision says nothing about promoting the ‘early’ or ‘expedited’ dismissal of claims.” *Montelongo v. Abrea*, -- S.W.3d --, No. 19-1112, 2021 WL 1705210, *6 (Tex. Apr. 30, 2021). Although the Act's procedures and deadlines demand swift action, this promotes the early dismissal of a “legal action,” not necessarily the entire “lawsuit,” meaning the TCPA may be invoked for the first time “even if it's not ‘early’ in the litigation.” *Id.*

B. Not Limited to Protecting Constitutional Rights.

The TCPA is often referred to as an ‘anti-SLAPP’ statute, meaning that it is designed to dismiss Strategic Lawsuits Against Public Participation (*i.e.*, lawsuits that threaten the exercise of First Amendment rights). *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (citing House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82nd

Leg., R.S. (2011)). Still, neither the title “TCPA” nor the term “anti-SLAPP” appear anywhere in the statute.

The statute is officially called, “Actions Involving the Exercise of Certain Constitutional Rights.” Consistent with this, when enacted in 2011, many perceived the TCPA as simply a “media defense” statute to protect journalists from retaliatory defamation claims.

However, Texas courts broadly interpreted the TCPA to apply to a variety of claims that were likely not intended at the time of the statute's enactment—*i.e.*, claims that would not traditionally be considered “SLAPP” suits. *See, e.g., Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018) (Just because “the TCPA professes to safeguard the exercise of certain First Amendment rights” does not mean “that it should only apply to constitutionally guaranteed activities.”); *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at *12 (Tex. App.—Austin Apr. 7, 2015, no pet.) (J. Field, concurring) (warning that under an overly-broad interpretation, “any skilled litigator could figure out a way to file a motion to dismiss under the TCPA in nearly every case”).

C. The TCPA Packs a Powerful Punch.

Dismissal under the TCPA has been a very powerful tool in civil litigation because it affords movants a swift mechanism to stop or vastly curtail discovery, potentially dismiss adverse claims with prejudice, obtain monetary relief against the party who filed the claim, and stay all trial proceedings to pursue an interlocutory appeal if the motion is denied in whole or in part. This means that a defendant, who might otherwise have no right to recover its fees for successfully defeating a claim, now has the ability to not only avoid trial altogether but also to shift the fees and costs, and possibly recover sanctions against the plaintiff. *See Kawcak v. Antero Res. Corp.*, 528 S.W.3d 566, 569 (Tex. App.—Fort Worth 2019, pet. denied) (“No one can doubt the power of the TCPA to rock a claimant back on its heels. Once in the grip of the TCPA, a party may staircase down increasingly dire consequences that most litigants do not face: [outlining consequences.]”); *Serafine v. Blunt*, 466 S.W.3d 352, 365 (Tex. App.—Austin 2015, no pet.) (The TCPA is “less an ‘anti-SLAPP’ law than an across-the-board game-changer in Texas civil litigation.”) (Pemberton, J., concurring).

III. LEGISLATIVE AMENDMENTS – 2019.

In response to the broad application, unintended consequences, and docket-clogging impact of the TCPA, many urged the Legislature to amend the statute. *See* Senate Research Ctr., Bill Analysis, Tex. H.B. 2730, 86th Leg., R.S. (2019); *ML Dev, LP v. Ross Dress for Less, Inc.*, -- S.W.3d --, No. 01-20-

00773-CV, 2021 WL 2096656, at *2 (Tex. App.—Houston [1st Dist.] May 25, 2021, no pet. h.) (“The prospect of summary dismissal with fees proved to be an attractive option to all types of defendants facing all kinds of legal claims.... A TCPA docket quickly developed with defendants (and, increasingly, plaintiffs) making novel arguments about how the TCPA might support the dismissal of unwanted claims and procedural actions.... [In response], [t]he TCPA was amended in 2019.”); *Universal Plant Servs., Inc. v. Dresser-Rand Group, Inc.*, 571 S.W.3d 346, 364-72 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (Keyes, J., concurring) (expressing concern with expansive interpretation of the statute and urging reform).

By way of overview, the 2019 amendments relate to (1) the scope of “legal actions” both subject to and exempt from dismissal; (2) the definitions of protected rights; (3) procedures for the motion, response, hearing, ruling, and findings; (4) burdens of proof; and (5) monetary relief under the TCPA.

The amendments are not retroactive. They apply “only to an *action* filed on or after the effective date” of September 1, 2019. H.B. 2730 §§ 11-12 (emphasis added). The statute does not define whether “action” means a “legal action,” a “lawsuit,” an individual “claim” within a suit, or something else.

The Fourth Court of Appeals interpreted “action” to mean “claim,” holding that, “if a party is added to an existing lawsuit by way of an amended petition, for purposes of a motion to dismiss under the TCPA, that party’s claims will be treated separately from the preexisting parties’ claims in any earlier petitions.... Therefore, we hold that the 2019 amendments to the TCPA, which exempt common law fraud from the Act, apply to a newly added party’s claims when the new party is added to a legal action on or after the effective date of the Act. On the facts of this case, a contrary conclusion would be absurd since it would mean that Straub would have had to file a motion to dismiss within sixty days after the original petition was filed when she was not yet a party to the suit.” *Straub v. Pesca Holding LLC*, No. 04-20-00276-CV, 2021 WL 881277, at *2 (Tex. App.—San Antonio Mar. 10, 2021, no pet. h.).

IV. DOES THE TCPA APPLY?

Determining whether the TCPA applies (or might apply) is a critical step in pleading or defending against any civil claim in a Texas trial court.

A. Movant’s Burden.

Under the 2019 version of the statute, the movant carries the initial burden to “demonstrate” that non-movant filed a “legal action [] based on or in response to” the movant’s exercise of a right protected by the TCPA. CPRC § 27.005(b).

This represents several amendments. First, the quantity of proof changed from meeting this burden by a “preponderance of the evidence” to “demonstrating.” Even under the old statute, “[w]hen it is clear from the plaintiff’s pleadings that the action is covered by the Act, the defendant need show no more.” *Hersh v. Tatum*, 526 S.W.3d 462, 466 (Tex. 2017) (non-movant’s pleading is often “the best and all-sufficient evidence of the nature of the action” to show the TCPA applies); *but see TN CPA, P.C. v. Nguyen*, No. 14-19-00677-CV, 2020 WL 5415593, at *5 (Tex. App.—Houston [14th Dist.] Sept. 10, 2020, no pet.) (where pleadings set forth merely “one liner” causes of action without any specificity, movant failed to demonstrate TCPA applied); *Damonte v. Hallmark Fin. Servs., Inc.*, No. 05-18-00874-CV, 2019 WL 30598884, *6 (Tex. App.—Dallas July 12, 2019, no pet.) (Whitehill, J., concurring) (although pleadings alone may satisfy initial burden, movant can also rely on evidence to “connect the dots”); *Encore Enters., Inc. v. Shetty*, No. 05-18-00511-CV, 2019 WL 1894316, at *3 (Tex. App.—Dallas Apr. 29, 2019, pet. denied) (Movant who relied solely on pleadings without presenting anything more in support of Step 1 burden failed to demonstrate application of the TCPA).

Second, the definition of “legal action” was amended to expressly include specified filings that seek “declaratory” relief and to exclude three categories of actions, as addressed below in Sections IV.C(1)-(2). *See* CPRC § 27.001(6). Because the movant carries the initial burden of demonstrating that the TCPA applies, which includes showing that the non-movant filed a “legal action” as that term is defined by the TCPA, there is a good argument that it should be the movant’s burden to establish that no exclusion to the definition of “legal action” applies—*i.e.*, to affirmatively disprove the exclusions. On the other hand, movants may argue that the new exclusions should be treated as the exemptions previously have been, placing the burden on the nonmovant. The statute is silent on this issue, and no opinion yet addresses it (as of May 25, 2021).

Third, the nexus requirement was amended to delete “relates to” and leave only “based on or in response to” as sufficient connections between the legal action and the protected right(s). This nexus is addressed further below in Section IV.D.

Fourth, the rights protected by the TCPA changed in several respects, as addressed below in Section IV.E. The definitions of “free speech” and “association” were amended (CPRC § 27.001(2), (3), (7)), and new categories of protected rights were added (*id.* §§ 27.005(b)(2), 27.010(b)).

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