

SLAPPING AND HOW TO HIT BACK IN THE HEALTHCARE ARENA

By: Noah Meek & LaVerne Chang

Cardwell & Chang, PLLC

Ch. 27 TCPA and SLAPP

- TEX. CIV. PRAC. & REM. CODE § 27 (2011)
- Texas Citizens Participation Act
- to deter Strategic Lawsuits Against Public Participation (Anti-SLAPP)
- TCPA (§ 27.003) creates a motion to dismiss a “legal action” which is “based on, relates to, or is in response to” the exercise of the:
 - **Right of free speech,**
 - **Right to petition, or**
 - **Right of association.**

Why does the TCPA matter in Health Law?

- The TCPA is a way for a health care defendant to stay all discovery and obtain early dismissal, attorney's fees, and sanctions.
- *The TCPA will be a potential basis for early dismissal in most health care-related civil actions that are not subject to a TCPA exception (i.e. for claims for bodily injury or for claims on insurance contracts).*

- TCPA motion must be filed no later than 60 days of service of a legal action (or subsequent claims; court may extend with good cause). § 27.003(b)
- If TCPA applies, the claim must be dismissed unless the plaintiff meets their burden - *“establishes by clear and specific evidence a prima facie case for each essential element of the claim.”* § 27.005 (b) and (c)
- The defendant can obtain dismissal by proving a valid defense (*e.g.* substantial truth or peer review privilege to defamation).

- TCPA stays all discovery until a ruling. § 27.003(c); the Court may allow limited discovery relevant to the motion § 27.006
- A prevailing movant is entitled to a mandatory award of attorney's fees and sanctions. § 27.009(a); see e.g., Landry's, Inc. v. Animal Legal Def. Fund, 14-17-00207-CV, 2018 WL 5075116, at *24 n.4 (Tex. App.—Houston [14th Dist.] Oct. 18, 2018, no pet. h.).
- If TCPA motion is denied, movant is entitled to an expedited interlocutory appeal. § 27.008.
- Respondent is not entitled to interlocutory appeal or attorney's fees (unless the motion is frivolous). § 27.008; § 27.009(b).

Definitions

- In the healthcare context, Anti-SLAPP motions will focus on the “right of free speech” and the “right of association.”
- All three “rights” are defined as a “communication.”

“Communication” includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

§ 27.001(1)

**“Exercise of the right of free speech”
means a communication made in
connection with a matter of public
concern.**

§ 27.001(3) (emphasis added)

“Matter of public concern” includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

§ 27.001(7)

KEY POINT

- *“The provision of medical services by a health care professional constitutes a matter of public concern.”*

Batra v. Covenant Health Sys., 562 S.W.3d 696, 708 (Tex. App.—Amarillo 2018, pet. filed), reh'g denied (Nov. 5, 2018)

“Exercise of the right of association” means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

§ 27.001(2)

- The “rights” protected by the TCPA and the “legal actions” which can be dismissed are defined broadly.
- “legal action” includes “any ... judicial pleading or filing that requests legal or equitable relief.” Rule 202 requests for pre-suit depositions have been held to constitute “claims.” In re Elliott, 504 S.W.3d 455, 463 (Tex. App.—Austin 2016, no pet.); §27.001(6)
- **A communication does not have to be made in public to be an exercise of the right of free speech.** The Texas Supreme Court has held in a health law case that “*The plain language of the [TCPA] imposes no requirement that the form of the communication be public.*” Lippincott v. Whisenhunt, 462 S.W.3d 507, 509 (Tex. 2015).

- The name of the cause of action (i.e. defamation, fraud, breach of contract) does not determine whether the TCPA applies.
- The TCPA can apply to claims by or against health care providers relating to employment, contracts, peer review, anti-trust mergers or exclusion of providers.
- The TCPA does not apply to ***bodily*** injury or insurance claims. § 27.010
- There is a limited “commercial speech” exception. § 27.010(b) Miller Weisbrod, L.L.P. v. Llamas-Soforo, 08-12-00278-CV, 2014 WL 6679122, at *9 (Tex. App.—El Paso Nov. 25, 2014, no pet.).

Defamation by Medical Record

- Recent cases have suggested that the “bodily injury” exception to the TCPA is narrowly limited to claims for just “bodily injury” (as opposed to “personal injury”). Cavin v. Abbott, 545 S.W.3d 47, 67 (Tex. App.—Austin 2017, no pet.).
- Claims which fall under Chapter 74 which do not involve a physical injury could be subject to the TCPA. For instance, if a patient is claiming wrongful disclosure of confidential information or defamation by medical record, such a claim could likely be dismissed.
- With skillful timing, in some cases an attorney could potentially seek dismissal of cases both under the TCPA and under Chapter 74.

Takeaway

- Expanding world of TCPA
- A TCPA motion can be filed to dismiss any cause of action if it falls within the TCPA's broad definitions, which include a “communication” that is tangentially related to or implicates “health” or “safety.”

TPCA CLAIMS & Health Care

- YES

Peer Review

Antitrust

Service Contracts

Wrongful Terminations

NPDB Reporting

Disparagement

Defamation

Defamation by medical record

Tortious Interference

Conspiracy

?Divorce/custody (seriously!)

- NO

Bodily injury

Insurance

?Shareholder Dispute

?Debt

SIGNIFICANT SUPREME COURT CASES

In re Lipsky, 460 S.W.3d 579 (Tex. 2015)

Lippincott v. Whisenhunt, 462 S.W.3d 507 (Tex. 2015)

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

Lippincott v. Whisenhunt Case

- In the Lippincott case, the Texas Supreme Court addressed claims brought by a CRNA who was the sole provider of anesthesia at a surgery center as well as a part owner of the center. The claims were subject to dismissal under the TCPA because the claims were based in part on emails saying the plaintiff “*represented himself to be a doctor, endangered patients for his own financial gain, and sexually harassed employees.*” Lippincott v. Whisenhunt, 462 S.W.3d 507, 508–09 (Tex. 2015)

ExxonMobil v. Coleman Case

- Chemical plant employee at Exxon was fired and sued for slander claiming he was defamed when he was accused of not reading a chemical tank gauge and falsely claiming to have read the gauge.
- Dallas Court of Appeals affirmed trial court's denial of TCPA motion, explaining
 - *The fact that the potential consequences of Coleman's failure to gauge the tank included health, safety, environmental, and economic concerns is not enough to transform communications about a private employment matter into a public concern.*
ExxonMobil Pipeline Co. v. Coleman, 464 S.W.3d 841, 846 (Tex. App.—Dallas 2015)

- Texas Supreme Court reverses the Dallas Court of Appeals holding:

– *the court of appeals improperly narrowed the scope of the TCPA by ignoring the Act's plain language and inserting the requirement that communications involve more than a “tangential relationship” to matters of public concern. The TCPA does not require that the statements specifically “mention” health, safety, environmental, or economic concerns, nor does it require more than a “tangential relationship” to the same;*

ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895, 900 (Tex. 2017)

Memorial Hermann v. Khalil Case

- The case was brought by a physician asserting multiple causes of action against a hospital for wrongful actions taken in relation to peer review proceedings.
- The defendant, Memorial Hermann, filed a TCPA motion
- The plaintiff filed a counter-TCPA motion arguing that a TCPA motion is a “claim” which can be dismissed under the TCPA
- The Houston Court of Appeals ruled for Memorial Hermann, held that Plaintiff’s peer-review and employment related claims were subject to the TCPA, and held that one cannot TCPA dismiss a TCPA motion.
- Mem'l Hermann Health Sys. v. Khalil, 01-16-00512-CV, 2017 WL 3389645, at *3 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied)

Circuit Split on Whether One Can File a TCPA Motion against a TCPA Motion

- Hawxhurst v. Austin's Boat Tours, 550 S.W.3d 220, 228 (Tex. App.—Austin 2018, no pet.) held that a counter-claim for attorney's fees or a motion for sanctions seeking attorney's fees can be subject to a TCPA motion, and suggests that a TCPA motion can be filed against a TCPA motion.

Pleading issues applicable to the TCPA

- Plaintiff's petition counts as evidence for the purpose of determining whether or not a plaintiff has shown a fact issue on each element of the plaintiff's claim against which a TCPA motion has been brought. § 27.006(a).
- Mere notice pleading is not sufficient. For the petition to count as "evidence," the petition must also be "clear and specific."
- A plaintiff expecting a TCPA motion should aim to show a prima facie case in the plaintiff's petition

- A plaintiff can get around issues like personal knowledge and hearsay by simply including information in the petition or attaching documents to the petition.
- The TRCP technically only allows instruments being sued on (i.e. promissory notes) to be included as a part of a petition. But exhibits attached to a petition will be considered unless they are first struck through special exceptions. Fawcett v. Grosu, 498 S.W.3d 650, 659 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

- If a plaintiff's pleadings are vague or omit key facts, the defendant bringing a TCPA motion can introduce evidence to fill in the factual gaps or omissions in a plaintiff's petition or to add context to show that the TCPA applies.
 - Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, INC., 402 S.W.3d 299, 308 (Tex. App.—Dallas 2013, pet. denied)
 - Shipp v. Malouf, 439 S.W.3d 432, 438 (Tex. App.—Dallas 2014, pet. denied), disapproved of on other grounds by In re Lipsky, 460 S.W.3d 579 (Tex. 2015)
- The Texas Supreme Court, reversing all of the Courts of Appeals which had considered the issue, held that a defendant can file a TCPA motion even if the defendant denies making a communication. Hersh v. Tatum, 526 S.W.3d 462, 465 (Tex. 2017), reh'g denied (Sept. 22, 2017).

Special Discovery Rules

- Because the TCPA stays all discovery except where the court grants leave for limited discovery, both sides benefit from front-loading discovery (i.e. serving requests for production, interrogatories, requests for admission) with an initial petition or answer.

Transactional Considerations

- In preparing a contract in the realm of health law, in appropriate cases, consider possibly including an express waiver of the TCPA.
- The TCPA will apply to claims brought based on or related to communications criticizing a health care provider's professionalism or patient care unless a TCPA exception applies.
- EXAMPLE CONTRACT CLAUSE: *“The Texas Citizens Participation Act shall not apply to any claim brought by employer related to this Agreement.”*

Ethical Considerations

Shift in the economics and viability of many non-bodily injury health law claims.

Upfront costs:

- Discovery, evidence
- Worse case – claims partially dismissed, no interlocutory appeal, and responsible for attorney’s fees and sanctions.

A plaintiff cannot avoid attorney’s fees or sanctions by nonsuiting after a TCPA motion is filed. James v. Calkins, 446 S.W.3d 135, 143 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

Manage Client expectations:

If it's SLAPPable:

- Must establish a prima facie case on each element of the plaintiff's claim (including damages) before suit is filed.
- Cannot expect to be able to prove the claim through discovery, fishing expedition.

- Will need to be able to overcome the defendant's defenses (i.e. peer review privilege) without much discovery
- Increased legal expenses
- Risk of attorney's fees and sanctions

How Lower Courts view TCPA

“Here, if we were to look only to the text of [section 27.001\(2\)](#), defining the right of association as a communication between individuals who join together to collectively express, promote, pursue, or defend common interests, it would result in giving constitutional right of association protection to virtually any private communication between two people about a shared interest. **That is an absurd result** that does not promote the purpose of the Act.”

ExxonMobil Pipeline Co. v. Coleman, 464 S.W.3d 841, 847 (Tex. App. – Dallas 2015) *rev'd* ExxonMobil Pipeline Co. v. Coleman, No. 15-0407, 2017 WL 727274 (Tex. Feb. 24, 2017)

Quite frankly, my personal interpretation of the applicability of the TCPA aligns with the lower case decision (Texarkana Court of Appeals) the basis of the Supreme Court's **Lippincott v. Whisenhunt** opinion. I am also ill-at-ease with the statute's evidentiary standard that even the Supreme Court declared in the **Lipsky** opinion "*is not a recognized evidentiary standard*" (at page 589). Nevertheless, my oath of office does not always allow me to agree with the law or like the outcome of my rulings and this case is a sobering, prime example of that reality.

Judge Paul White, Order 2/24/17

mEEK@cardwellchang.com

(713) 222-6025