

Update on the Texas Anti-SLAPP Statute: Proposed Legislation May Significantly Increase Litigation Costs

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Texas legislators are considering changes to the state's anti-SLAPP statute, known as the Texas Citizens Participation Act ("TCPA"), which could significantly increase litigation costs.

The TCPA provides a mechanism for litigants to seek dismissal of claims that impede their First Amendment rights. Currently, if a party's TCPA motion to dismiss is denied, the party has an immediate right to appeal. In turn, all discovery and proceedings in the trial court are automatically stayed. The newly proposed legislation would eliminate the automatic stay when the motion to dismiss is denied for three reasons:

1. it was not timely filed;
2. it is determined to be frivolous or solely intended to cause delay; or
3. the action is exempt under Texas Civ. Prac. & Rem. Code Section 27.010(a), such as when "a legal action [is] brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance

services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.”

While this change may seem insignificant, the potential ramifications could be drastic. Eliminating the automatic stay in certain instances would prevent parties from using the stay as a litigation tactic, but it could require parties to litigate the same case simultaneously in both the trial court and the appellate court.

As a result, litigation costs could multiply, as parties would be forced to engage in discovery in the trial court while also researching and drafting an appellate brief. These additional costs might turn out to be unnecessary if the appellate court ultimately denies the appeal.

Unsurprisingly, the proposed legislation has created a sharp divide between groups who support the proposed legislation (including certain business groups, such as the Texas Association of Business and Texans for Lawsuit Reform) and groups who oppose it (including Yelp, news media outlets, and a coalition of groups comprised of Institute for Free Speech, ACLU of Texas, Americans for Prosperity – Texas, Center for Biological Diversity, Competitive Enterprise Institute, and The Authors Guild, among others). Because the proposed legislation could affect and alter litigation decisions on both sides of an anti-SLAPP motion, it is important to remain aware of this proposed legislation.

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