

SUBJECT: Revising the Texas Citizens Participation Act

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 9 ayes — Leach, Farrar, Y. Davis, Julie Johnson, Krause, Meyer, Neave, Smith, White

0 nays

WITNESSES: For — David Tate, AT&T; Rick Briscoe, Open Carry Texas; Lee Parsley, Texans for Lawsuit Reform; George Christian, Texas Association of Defense Counsel; Lisa Kaufman, Texas Civil Justice League; Steve Bresnen, Texas Family Law Foundation; Will Adams and Matthew Kita, Texas Trial Lawyers Association; Jeffrey Goldfarb; Andrew Seger; (*Registered, but did not testify:* Jason Winborn, AT&T; Clifford Sparks, City of Dallas; Daniel Womack, Dow Chemical; Lee Loftis, Independent Insurance Agents of Texas; Bill Oswald, Koch Companies; Michael Garcia, Texas Association of Manufacturers; Sam Gammage, Texas Chemical Council; George Christian and John W. Fainter Jr., Texas Civil Justice League; Amy Bresnen, Texas Family Law Foundation; Dan Finch, Texas Medical Association; Jason Vaughn, Texas Young Republicans; Mike Meroney)

Against — Matt Simpson, ACLU of Texas; Erin Dufner, Better Business Bureau serving the Heart of Texas; Arif Panju, Institute for Justice; Alicia Calzada, National Press Photographers Association; JT Morris, Protect Free Speech Coalition; Stacy Allen, Texas Association of Broadcasters; Danny Reneau, Texas Press Association; Emily Cook, Texas Right to Life; Ken Martin, The Austin Bulldog; Anette Beebe, Xcentric Ventures, LLC; Angela Hooks, Yelp; and 10 individuals; (*Registered, but did not testify:* Amanda Gnaedinger, Common Cause Texas; Anthony Gutierrez, Common Cause Texas; Kelley Shannon, Freedom of Information Foundation of Texas; Cyrus Reed, Lone Star Chapter Sierra Club; Oscar Rodriguez, Texas Association of Broadcasters; Donnis Baggett, Texas Press Association; Mike Hodges and Bill Patterson, Texas Press Association; John Seago, Texas Right to Life; Leonard Woolsey, The

Daily News (Galveston County) and Texas Press Association; and 11 individuals)

On — Mary Ann Beckett, Corpus Christi Caller-Times; Tony McDonald, Empower Texans; Adrian Shelley, Public Citizen; Tim Archuleta, USA Today Network; Brad Ramsey, WFAA/TEGNA; and 9 individuals; (*Registered, but did not testify*: Samuel Sheetz, Americans for Prosperity; Samantha Omey, ExxonMobil; Shelby Sterling, Texas Public Policy Foundation)

BACKGROUND: Civil Practice and Remedies Code ch. 27, the Texas Citizens Participation Act (TCPA), requires dismissal of certain legal actions if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, petition, or association. A court may not grant the motion to dismiss if the plaintiff establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

The TCPA does not apply to:

- an enforcement action brought in the name of the state or a political subdivision by the attorney general, a district attorney, or a county attorney;
- a legal action 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, insurance products, or a commercial transaction in which the intended audience is an actual or potential customer;
- a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action; or
- a legal action brought under the Insurance Code or arising out of an insurance contract.

DIGEST: CSHB 2730 would add to the types of legal actions that were exempted from the Texas Citizens Participation Act (TCPA) and would revise provisions related to motions to dismiss legal actions under the statute.

The bill would revise various definitions as they relate to the TCPA, including a "matter of public concern." It also would specify that the TCPA applied in cases involving the free speech rights of persons involved in the media and artistic endeavors, consumer reviews of businesses, and for victims of certain criminal acts.

Exemptions. The bill would exempt the following legal actions from the TCPA's requirements:

- a legal action arising from an officer-director, employee-employer, or independent contractor relationship that sought recovery for misappropriation of trade secrets or corporate opportunities or that sought to enforce a non-disparagement agreement or a covenant not to compete;
- a legal action filed under Family Code provisions related to marriage, divorce, and child custody or an application for certain protective orders;
- a legal action brought under Business and Commerce Code ch. 17 provisions on deceptive trade practices, other than certain advertisements;
- a legal action in which a moving party raised a defense as a member of a medical committee;
- an eviction suit brought under Property Code ch. 24;
- a disciplinary action brought by the State Bar;
- a legal action brought under Government Code 554 protections for reporting violations of law; and
- a legal action based on a common law fraud claim.

Motion to dismiss. Under CSHB 2730, a party moving to dismiss a legal action under the TCPA would have to demonstrate, rather than show by a preponderance of the evidence, that the legal action was based on free speech grounds or specific activities listed in the bill.

The bill would remove the current requirement that a court dismiss a legal action if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the non-movant's claim. Under

the bill, the court instead would have to dismiss a legal action if the moving party established an affirmative defense or other grounds on which the party was entitled to judgment as a matter of law.

In determining whether a legal action was subject to the statute's dismissal requirements, a court would have to consider evidence a court could consider under a motion for summary judgment.

The bill would permit, rather than require, a court to award to the moving party sanctions against the party who brought the legal action in an amount the court determined sufficient to deter the party from bringing similar actions.

The bill would exclude a government entity, agency, or an official or employee acting in an official capacity as a party that could file a motion to dismiss a legal action on free speech grounds.

Parties to a legal action could, upon mutual agreement, extend from 60 days the time to file a motion to dismiss. The party moving for dismissal would have to provide written notice of the date and time of the hearing on the motion not later than 21 days before the date of the hearing unless otherwise provided by agreement of the parties or court order. A responding party would have to file any response not later than seven days before the date of the hearing unless otherwise provided by agreement of the parties or court order.

Attorney's fees. If a court ordered dismissal of a compulsory counterclaim, it could award to the moving party reasonable attorney's fees incurred in defending against the counterclaim if the court found that the counterclaim was frivolous or solely intended for delay.

Definitions. The bill would revise the definition of a "matter of public concern" by removing specific references to "health or safety, environmental, economic, or community well-being, the government, a public official or public figure, or a good, product, or service in the marketplace." A matter of public concern instead would be defined as a

statement or activity regarding:

- a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;
- a matter of political, social, or other interest to the community; or
- a subject of concern to the public.

The bill would revise the definition of "exercise of the right of association" to mean joining together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern. It would remove language describe it in part as a "communication between individuals."

The bill would expressly exclude from the definition of a "legal action" procedural actions taken or motions made in an action that did not amend or add a claim for legal, equitable, or declaratory relief; alternative dispute resolution proceedings; and post-judgment enforcement actions.

Covered actions. CSHB 2730 would specify that the provisions governing the dismissal of civil actions involving the exercise of certain constitutional rights applied to:

- a legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information was actually communicated to the public, for the creation, dissemination, exhibition, advertisement, or other similar promotion of a dramatic, literary, musical, political, journalist, or otherwise artistic work, including audio-visual work, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution;
- a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or

- ratings of businesses;
- a legal action against a victim or alleged victim of family violence or dating violence, unlawful restraint, smuggling of persons, trafficking of persons, and certain sexual and assaultive offenses, based on or in response to a public or private communication.

Severability. If any provision of CSHB 2730 was held invalid, the invalidity would not affect other provisions or applications of the bill that could be given effect without the invalid provision or application.

The bill would take effect September 1, 2019, and would apply to an action filed on or after that date.

**SUPPORTERS
SAY:**

CSHB 2730 would provide needed reforms to the Texas Citizens Participation Act (TCPA) to curtail abuses and ensure the law is used as intended to protect Texans in the exercise of their constitutionally protected speech, petition, and association rights. The law allows judges to assess whether a lawsuit is being pursued largely to silence critics and to quickly dismiss the types of cases commonly referred to as a Strategic Lawsuit Against Public Participation, or SLAPP.

Since its enactment in 2011, the broadly worded Texas anti-SLAPP law has been used to put an early end to lawsuits in which core constitutional rights have not been invaded, including cases involving trade secrets, employment non-compete agreements, and lawyer disciplinary actions. The law also has impacted the workload of certain Texas appellate courts with numerous appeals. CSHB 2730 would address these issues by exempting certain types of lawsuits that are unlikely to involve free speech rights. While some have criticized these exemptions, other legal remedies exist for persons who believe they have suffered a wrong in these areas.

CSHB 2730 is a carefully negotiated bill that would resolve criticisms that earlier versions of the bill went too far in narrowing the definition of a "matter of public concern" as the standard for bringing an anti-SLAPP action. The bill would use a widely accepted standard from the U.S.

Supreme Court to appropriately define when a communication was protected speech. Similarly, criticisms that earlier versions of the bill would have a "chilling" effect on news gathering have been addressed with clear statements that communications involving news reporting and artistic endeavors remain legitimate activity deserving of protection. Websites that provide important consumer information by rating businesses would likewise be specifically protected. The bill also would include important protections for communications by victims of domestic violence and sexual assault.

OPPONENTS
SAY:

CSHB 2730 would make unnecessary changes to a law that has been effective in protecting average Texans' free speech rights from being silenced by powerful and wealthy interests. The exemption of numerous categories of lawsuits from the TCPA could weaken the ability of persons to raise a free speech defense in certain types of civil litigation. For instance, a person who was evicted after complaining about a housing situation might not be able to have a court determine whether the eviction was connected to the person's exercise of free speech rights.

Criticism that the TCPA has burdened Texas appellate courts is overblown, as such appeals make up a tiny fraction of all appeals filed.

OTHER
OPPONENTS
SAY:

CSHB 2730 would not go far enough in reining in the excessive use of the anti-SLAPP law to dismiss valid legal claims. Earlier versions of the bill would have included key language about the nature of the rights to be protected and a narrower definition of what constituted a matter of public concern. The use of a new evidentiary standard that would require a party moving to dismiss a legal action to "demonstrate" that the legal action was based on free speech grounds is undefined and could be confusing to courts.