

How Texas' Anti-SLAPP Law Applies To Medical Peer Review

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Recent court decisions, both in state and federal courts, have made it clear that the Texas Citizens Participation Act, or TCPA, Texas' anti-SLAPP statute, likely now applies to all causes of action arising out of facts related to the medical peer review process. This revelation will likely have a significant impact on the future of legal actions involving the medical peer review process in Texas.

Indeed, the inclusion of medical peer review claims within the purview of the TCPA's expansive remedies bears a striking resemblance to another statutory scheme that altered the landscape of health care related claims, The Texas Medical Liability Act, or TMLA, found in Chapter 74 of the Texas Civil Practices & Remedies Code. The TMLA, like the TCPA (which is found in Chapter 27 of the Texas Civil Practices & Remedies Code), imposes a significant hurdle to plaintiffs at the advent of their lawsuit — a hurdle which, if not properly addressed, carries case-ending consequences.

A comparison of these two statutes provides insight on the potential impact the TCPA may have on medical peer review cases in the future.

The Application of the TCPA and Its Consequences

The TCPA provides that a defendant may file a motion to dismiss a "legal action" when that legal action "is based on, relates to, or is in response to [that] party's exercise of" (1) free speech; (2) petition; or (3) association.[1] The first step of the TCPA process requires that the moving party show "by a preponderance of the evidence" that the nonmovant has asserted a "legal action" that is "based on, relates to, or is in response to" the movant's exercise of (1) free speech; (2) petition; or (3) association.[2]

If the movant can meet this burden, the burden shifts to the nonmovant to establish "by clear and specific evidence" a "prima facie case for each essential element of the claim in question." [3] However, even if the nonmovant meets this burden, dismissal may still be appropriate should the moving party establish "by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." [4]

The TCPA also imposes significant penalties on the nonmoving party in the event a TCPA motion to dismiss is successful. If the moving party is successful, "the court shall award to the moving party ... court costs, reasonable attorney's fees and other expenses ... and sanctions." [5] Thus, not only does a potential litigant face dismissal under the TCPA, but also mandatory payment of the opposing party's attorney's fees and costs and sanctions.



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The TCPA Likely Applies to All Medical Peer Review Cases, Regardless of the Cause of Action

Recent decisions coming from the Texas Supreme Court, Texas Courts of Appeals and The United States District Court for the Southern District of Texas make it clear that claims arising out of medical peer review are subject to dismissal under the TCPA — regardless of the plaintiff's asserted causes of action — because the process involves “free speech” as that term is defined in the TCPA.

The TCPA defines the “[e]xercise of the right of free speech” as a “communication made in connection with a matter of public concern.”^[6] A number of courts have analyzed this requirement in the medical professional context.

In *Lippincott v. Whisenhunt*, for example, the Texas Supreme Court addressed whether private communications between two surgical-center administrators regarding the adequacy of medical care provided by a nurse anesthetist related to a “public concern.”^[7] In holding that they did, the court explained “that the provision of medical services by a health care professional constitutes a matter of public concern.”^[8] Thus, while *Lippincott* did not directly address the peer review process, it did address communications regarding the competency of care provided by a medical professional.

The *Lippincott* holding was first applied specifically to the medical peer review process in *Memorial Hermann Health System v. Khalil*.^[9] In that case, the Houston First District Court of Appeals found that “[t]he communications” on which the plaintiff predicated her causes of action “list[ed] various peer-review and credentialing committee findings, including that Khalil failed to read patient records, communicate with surgeons, demonstrate ‘insight’ or ‘basic knowledge,’ recognize serious symptoms, and acknowledge incorrect dosing.”^[10] Thus, according to the Texas Supreme Court’s reasoning in *Lippincott*, “Memorial Hermann[s] communication regarding Khalil’s competence was a communication made in connection with an issue related to health or safety, and thus, a matter of public concern.”^[11] That was enough to apply the TCPA to all challenged causes of action.^[12]

Months after *Khalil*, the application of *Lippincott* to the medical peer review process was further solidified by the Corpus Christi Court of Appeals. In *Columbia Valley Healthcare Sys. LP v. Pisharodi*, the court echoed *Khalil* and held that “any statements made during the peer review process constitute protected free speech.”^[13]

Application of the TCPA to medical peer review cases is not contingent on the causes of action asserted by the plaintiff. The Southern District of Texas resolved this potential ambiguity in *Khalil v. Memorial Hermann Health System*, or “*Khalil II*,” a case predicated on the same facts as *Khalil*’s state court case.^[14] In *Khalil II*, Judge Lee Rosenthal noted that “[t]he fact that the claims here are [state-law employment] discrimination claims does not remove or reduce that court’s conclusions about the status of the communications ... [which] are related to health and safety, matters of public concern.”^[15] Thus, based on Judge Rosenthal’s reasoning, the cause of action alleged is immaterial. The proper analysis relates solely to whether the facts alleged involve communications made during the medical peer review process.

It is also important to note that even if medical peer review actions were not subject to the TCPA by virtue of the right of free speech, the medical peer review process may also be deemed to implicate the TCPA's protected "right of association." The TCPA defines the "exercise of the right of association" as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." [16]

A medical peer review committee is an association that a defendant hospital or committee member has a right to be a part of and, by joining, collectively expresses and pursues a common interest. Moreover, in instances where a defendant engages in communications that are made "in further of the [defendant's] business enterprise," such communications may be subsumed by the defendant's right of association. [17] Thus, the protection of the right of association likely further brings medical peer review communications into the purview of the TCPA.

HCQIA Immunity Increases the Effectiveness of the TCPA

Given the foregoing rulings, a potential plaintiff in a case predicated on the medical peer review process must be prepared to present "by clear and specific evidence" a "prima facie case for each essential element of the claim in question." [18] However, it may prove futile for the plaintiff to meet this burden if the defendant can show at this early stage "by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." [19] This second provision is a powerful tool in medical peer review cases.

The Healthcare Quality Improvement Act, or HCQIA, and the state analogue, Texas Occupations Code § 160.010, both provide participants in professional peer review actions a valid defense in the form of immunity from civil money damages. [20] Accordingly, even if a potential litigant in the medical peer review context clears the prima facie hurdle in response to a TCPA motion to dismiss, the moving defendant may still be entitled to dismissal of a plaintiff's claims — and recovery of costs and attorney's fees — if the moving defendant demonstrates by a preponderance of the evidence that the complained of acts were in fact engaged in as a part of the peer review process, at which point the plaintiff once again has the burden of showing the peer review was either unreasonable [21] or conducted with malice. [22]

In *Khalil I*, the Texas court of appeals collapsed this burden into part of the plaintiff's initial showing, requiring that the plaintiff "establish by clear and specific evidence a prima facie case for each essential element of her defamation cause of action, including 'the requisite degree of fault.'" [23] Based on the language of section 160.010(c) of the Texas Occupations Code, which states that a "health care entity that, without malice, participates in medical peer review ... is immune from any civil liability," the court found that *Khalil* had "the burden to establish malice for the statements" made during the peer review process to survive dismissal. [24]

The TMLA, Like the TCPA, Imposed Significant Burdens at the Advent of the Lawsuit

The significant burdens now imposed on medical peer review cases by the TCPA are similar in many ways to those imposed by Chapter 74 — the TMLA. Indeed, a comparison of the material provisions of the TCPA and the TMLA, which is provided in the chart below,

emphasizes the sizeable burden both impose on unprepared plaintiffs:

COMPARISON BETWEEN TEXAS CIVIL PRACTICES AND REMEDIES CODE CHAPTER 27 (TEXAS CITIZEN'S PARTICIPATION ACT) AND CHAPTER 74 (TEXAS MEDICAL LIABILITY ACT)	
Texas Civil Practice & Remedies Code Chapter 27	Texas Civil Practice & Remedies Code Chapter 74
<p>Filing Deadline</p> <p>§ 27.003(b) A motion to dismiss must be filed no later than 60 days after the date of service, but the court may extend the time to file a motion on a showing of good cause.</p> <p>§ 27.003(c) All discovery in the legal action is suspended until the court has ruled on the motion to dismiss [expedited discovery permitted on good cause shown - see §27.006(b)].</p>	<p>Filing Deadline</p> <p>§ 74.351(a) A claimant must serve expert reports on defendant no later than 120 days after each defendant's original answer has been filed with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted.</p> <p>Each defendant physician or health care provider must file and serve any objection no later than 21 days either after the expert report is served or after the defendant's answer is filed, whichever date is later. Failing to do so will waive all objections.</p>
<p>Attorney's Fees</p> <p>§ 27.009(a)(1) If the court dismisses a legal action, it must award the moving party court costs, reasonable attorney's fees and other expenses incurred in defending against the action.</p> <p>§ 27.009(b) The court may award reasonable attorney's fees to the respondent if it finds that a motion to dismiss is frivolous or solely intended to delay. A successful TCPA motion also requires the nonmovant to pay mandatory sanctions. See§27.009(a)(2).</p>	<p>Attorney's Fees</p> <p>§ 74.351(b) If an expert report has not been served within the period specified by Subsection § 74.351(a), the court shall award the affected physician or health care provider reasonable attorney's fees and dismiss the claim.</p>
<p>Extensions</p> <p>§ 27.004(b) If the court allows discovery under §27.006(b), it may extend the hearing date up to 120 days after serving motion for discovery.</p>	<p>Extensions</p> <p>§ 74.351(c) If an expert report has not been served within the period specified by § 74.351(a) because the report is deficient, the court may grant one 30-day extension to fix the deficiency. If the claimant receives notification of the extension after the 120-day</p>

	deadline, then the 30-day extension shall run from the date of receipt.
<p>Exemptions</p> <p>§ 27.010 Chapter 27 does not apply to:</p> <ol style="list-style-type: none"> 1. enforcement actions brought in the name of this state by the attorney general, a district attorney, a criminal district attorney or a county attorney; 2. legal actions against a person primarily engaged in 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 where the intended audience is an actual or potential buyer or customer; 3. a legal action seeking recovery for bodily injury, wrongful death or survival or to statements made regarding that legal action. 4.a legal action brought under the Insurance Code or arising out of an insurance contract. 	<p>Exception from Certain Laws</p> <p>§ 74.004(a) Sections 17.41 through 17.63 of the Business & Commerce Code do not apply to physicians or health care providers regarding claims for damages for personal injury or death from negligence.</p>
<p>Interlocutory Appeals</p> <p>§ 27.008(b) An appellate court shall expedite an interlocutory appeal from a trial court order on a motion to dismiss from a failure to rule.</p>	<p>Interlocutory Appeals</p> <p>§ 51.014(a)(9) Grants an immediate appeal from an interlocutory order that denies all or part of the relief sought by a motion.</p> <p>§ 51.014(a)(10) Allows an appeal of an interlocutory order that grants relief sought by a motion under § 74.351(l).</p>

The TCPA Also Has the Potential to Alter the Legal Landscape

The TMLA altered the legal landscape for health care liability claims, drastically reducing the potential claimants in the court systems. The burden imposed by the TMLA, and the attendant punitive measures if a plaintiff fails to meet that burden, dissuades many potential plaintiffs from entering the legal fray. Indeed, the TMLA reduces the potential monetary value of weaker claims.

Before the Texas Legislature enacted TMLA, a potential plaintiff with a weak claim could have carried that claim through to summary judgment, or even trial, allowing for the possibility of a favorable settlement during the course of litigation. The TMLA barred that possibility by imposing its expert requirement, and made the prospect of filing a weak claim daunting and less desirable.

The burdens imposed by the TCPA are likely to have a similar, if not more significant, impact on medical peer review cases as the TMLA did on health care liability claims. The TCPA saddles a potential plaintiff with an immediate burden that requires the plaintiff to demonstrate a prima facie case of each claim asserted, which serves a substantial hurdle at the onset of a case. Moreover, even if the plaintiff is able to successfully negotiate this first obstacle, the plaintiff is also likely required to demonstrate why the HCQIA and Texas Occupations Code § 160.010 are not otherwise valid defenses to each claim. These hurdles are high indeed, and may act as did the TMLA did in its sphere of influence and dramatically reduce medical peer review litigation in Texas.

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[1] Tex. Civ. Prac & Rem. Code § 27.003(a).

[2] Id. § 27.005(b).

[3] Id. § 27.005(c).

[4] Id. § 27.005(d).

[5] Id. § 27.009(a).

[6] Id. § 27.001(3).

[7] 462 S.W.3d 507, 509 (Tex. 2015).

[8] Id. at 510 (internal citations omitted).

[9] [Memorial Hermann Health System v. Khalil](#), 01-16-00512-CV, 2017 WL 3389645, at *6 (Tex. App. — Houston [1st Dist.] Aug. 8, 2017, pet. denied).

[10] Id.

[11] Id.

[12] Id.

[13] [Columbia Valley Healthcare Sys. LP v. Pisharodi](#), 13-16-00613-CV, 2017 WL 4416334, at *2 (Tex. App. — Corpus Christi Oct. 5, 2017, no pet.).

[14] [Khalil v. Memorial Hermann Health System](#), CV H-17-1954, 2017 WL 5068157, at *5 (S.D. Tex. Oct. 30, 2017).

[15] Id.

[16] Tex. Civ. Prac & Rem. Code § 27.001(2).

[17] [Elite Auto Body LLC v. Autocraft Bodywerks Inc.](#), 520 S.W.3d 191, 197 (Tex. App. — Austin 2017, pet. dismiss'd).

[18] Tex. Civ. Prac & Rem. Code § 27.005(c).

[19] Id. § 27.005(d).

[20] 42 U.S.C. §§ 11111(a)(1) (a)(2) and 11134; see also [Ching v. Methodist Children's Hosp.](#), 134 S.W.3d 235, 241 (Tex. App. — Amarillo 2003) (explaining that “in conducting periodic peer reviews of its medical staff, a hospital is entitled to statutory immunities from civil liability under HCQIA, 42 U.S.C. § 11111(a) and section 160.010 of the Occupation Code”).

[21] See 42 U.S.C. § 11111(a).

[22] Texas Occupations Code 160.010(a), (b), (c) and (e).

[23] [Khalil](#), 2017 WL 3389645, at *9 (citing Tex. Civ. Prac. & Rem. Code § 27.005(c); [In re Lipsky](#), 460 S.W.3d 579, 592 (Tex. 2015)).

[24] Id.