PUBLICCITIZEN

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April 1, 2019

Members of the House Judiciary and Civil Jurisprudence Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 98768

Re: HB 2730 (Leach)
Amendments to the Texas Citizens Participation Act

Dear Committee Members:

On behalf of Public Citizen, a consumer advocacy organization with approximately 400,000 members and supporters nationwide, including 5500 in Texas, we write to express concerns about several aspects of HB 2730. Although some parts of the bill would likely have minimum impact on the rights of consumers and citizen activists, other parts of the bill would seriously undermine critical protections for the free speech of Texans and others who participate in public discussions about businesses and political issues in which they are interested, currently provided by the Texas Citizens Participation Act ("TCPA"), the Texas anti-SLAPP law.

Specifically, Public Citizen objects to the proposals that would

— eviscerate the TCPA's broad definition of matters of "public concern", and
— exempt specific causes of action and proceedings such as counterclaims and nondisparagement agreements from the law's protection

Below, we suggest alternate ways of addressing any legitimate concerns that may animate these proposals. In addition, Public Citizen suggests modifying the attorney fees provision to ensure that Texans who cannot afford to pay lawyers upfront for SLAPP defense can still get their attorney fees awarded.

Summary: Why We Care

A good anti-SLAPP law such as the TCPA provides important support for the right of Americans to participate in the process of self-government as well as to alert other consumers to problems encountered with businesses and others in the marketplace — it provides, that is, important protection for a vigorous marketplace of ideas. As consumer advocates, we have seen many cases in which consumers and citizen activists have been victimized by meritless litigation filed to challenge clearly protected speech by consumers criticizing powerful figures who object to the criticism.

Anti-SLAPP statutes are not intended as a general protection for all speech protected by the First Amendment. Rather, they are a response to a particularly abusive form of litigation — Strategic Litigation Against Public Participation — in which powerful local (or larger) interests seek to suppress public participation in debate about matters of public interest. In this sort of case, the plaintiff sues, not to obtain a remedy for truly wrongful speech, but to stop the criticism, and intimidate future critics, by imposing the costs of litigation on critical speakers. As the plaintiff knows, many consumers and citizens cannot afford lengthy litigation. Therefore, when such speakers are sued, or even **threatened** with suit, they lose just by having to hire a lawyer to evaluate the case and defend them. That is, the plaintiff achieves its goal by forcing the consumer to spend thousands of dollars on lawyers, as well as suffering the anxiety and risk that comes with being a defendant.

As a result, ordinary consumers and citizens are often easily cowed into silence. Generally, the plaintiffs in these cases tend to be wealthy and/or powerful, while the defendants tend to be individuals, non-profit groups, or publications that have less financial ability to sustain lengthy litigation than the plaintiff does. Ordinary people do not carry business insurance or specialized libel insurance.

Given the fact that SLAPP suits are intended to do their work by wearing down the critic, the result is too often that, rather than continue to engage in effective criticism, the critic agrees to withdraw or retract true statements or statements of opinion and to pay minor damages, rather than having to incur significant attorney fees. At the same time, the very fact that the critic has had to back down — or that winning the case cost the critic tens of thousands of dollars — sends a message to other potential critics that this is a company, or a political figure, that is just too expensive to criticize. So SLAPPs are an effective means of suppressing criticism both in the short run and in the long run; and they deprive the community of valuable commentary that elected officials and their appointed agencies can use to formulate public policy, and that members of the public can use effectively to help decide what candidates or policies to support, what businesses to patronize, and what goods or services to buy or avoid.

What the TCPA, like other good anti-SLAPP laws, does so effectively is to put the ability to withstand meritless lawsuits into the hands of ordinary people, by three main features. First, it gives the person subjected to a meritless lawsuit the chance to get the suit dismissed at an early stage, before the "wearing-down-the-defendant" strategy can take hold. Second, the law puts the burden on the plaintiff to show early in the litigation that it has a meritorious case. And third, the law creates a financing mechanism for ordinary people to be able to afford lawyers through the contingency of having attorney fees awarded **if** the case is found to be a SLAPP.

The financial side is exceptionally important. Public Citizen has a small litigating staff, and we cannot take on every meritorious case. Often we have been in a position where, instead of being

able to handle a case ourselves, we needed to help good people with good cases find lawyers in their own communities. A key factor in our ability to help them find lawyers was whether there was a reliable statutory fee provision—when present, it is much easier to find pro bono counsel who can take the case on a contingent basis, contingent on getting fees awarded by a court. Good SLAPP laws like the TCPA make that possible for Texans who face meritless suits over their free speech.

In summary, SLAPP statutes are a specialized form of statutory provision that helps screen out meritless cases at an early stage of the lawsuit, while enabling the defendants to survive the litigation financially. The suits in question are ones that are often brought, not in the hope of winning and thus recovering substantial damages, but in the hope of disabling the defendants and discouraging both them, and others, from participating in public debate.

Examples of SLAPP Suits in Texas

Public Citizen's experience with three recent cases helps to elucidate the operation and value of the TCPA.

ADB Interests v. Lanum

Michelle Lanum is a Floridian who took part in a medical study, conducted in Florida, that was designed to produce data to support sales pitches for a medical device called "Fascia Blaster," supposedly to help women reduce their cellulite. The product was promoted by a former model named Ashley Black. At the time, Lanum was in a graduate program that exposed her to the rules for such studies, and to the ethical responsibility of scientists to speak out when they see wrongdoing. Lanum was dissatisfied about the serious side effects that accompanied her use of the device, and she concluded that the study was being conducted in a scientifically phony manner. Black had been urging participants in the study to come to promotional events and to participate in a Facebook group, talking about their experiences in the study and encouraging other women to use the product. But when Lanum was candid about her experiences and her evaluation, Black sued her, claiming defamation and that a clause in the study's participation agreement forbade users from talking about the study at all—that is, Black was claimed that the agreement contained a non-disclosure or non-disparagement provision. Black sued Lanum in Houston, where her LLC was located. Along with a Texas lawyer in private practice, Public Citizen informed Black's lawyer that Lanum would move to dismiss under the TCPA. Black then dropped the case against Lanum.

Baker v. DeShong

Plaintiff Clark Baker is an "HIV denialist"—disputing mainstream science, he argues that evidence of HIV's link to AIDS is fake, and that the various medical treatments aimed at ameliorating the effects of HIV and AIDS are a sham and a fraud. Under the rubric "HIV Innocence

Group," Baker made his living in two ways: by offering his services as a testifying expert, offering his views to criminal defendants charged with deliberately infecting their sex partners while lying about their HIV status, and by raising money from members of the public who share his pseudo-scientific views. He told donors that his objective was to find a way to take the depositions of the outstanding scientists who led the way in the fight against AIDS and HIV: Anthony Fauci, National Institutes of Health director, and Dr. Robert Gallo, the scientist credited with discovering HIV. He promised that these depositions would prove the existence of a conspiracy of pharmaceutical companies to fabricate a link between HIV and AIDS as a way of selling expensive medications. Our former client, Todd DeShong, created a web site called "HIV Innocence Truth" to dissect Baker's claims. Baker and the organization that he used to collect donations, the "Office of Scientific and Medical Justice," sued DeShong in federal court in Ft. Worth, objecting that the use of the phrase "HIV Innocence Truth" on DeShong's noncommercial criticism site violated the federal trademark laws, and also claiming defamation. Baker's admitted that the main reason for suing was to get discovery, especially depositions of Drs. Fauci and Gallo. Public Citizen teamed up with two Texas law firms. which took the case with the expectation of recovering fees under the TCPA. DeShong moved to dismiss the defamation claims under the TCPA (as well as to dismiss the trademark claims under the Lanham Act). After staying the discovery, the court agreed with us on the Lanham Act, and dismissed the libel claims because once the federal trademark claims were out of the case there was no reason for a federal court to keep the case.

Prestigious Pets v. Duchouquette

Robert and Michelle Duchouquette were sued in Justice Court for roughly $6000 in damages over a fairly mild review that Michelle posted on Yelp about some issues they had with a pet-sitting company named Prestigious Pets. The suit claimed breach of a nondisparagement clause in the consumer contract as well as defamation. Robert and Michelle hired a local law firm and moved to dismiss under the TCPA. The fees for this motion were about $10,000. After the case caused a major stir in the local media, the company doubled down, hired its own lawyer, and sued the Duchouquettes in District Court for up to a million dollars in damages and attorney fees. At this point, the Duchouquettes could no longer afford to pay for legal representation, but were able to find pro bono counsel by a local law firm, hopeful of receiving an award of fees under the TCPA, as well as Public Citizen. The trial judge granted a motion to dismiss under the TCPA, but refused to award attorney fees, on the basis that the decision of the Dallas Court of Appeals in *Cruz v. van Sickle*, 452 S.W.3d 503 (2014), barred the award of attorney fees where counsel were pro bono because, in such cases, fees had not been "incurred" by the defendants.

How HB 2730 Could Endanger an Effective TCPA

Several proposed changes in the TCPA would make it far less effective in protecting consumers who have spoken truthfully or expressed their opinions about powerful local interests

who can afford to sue them to punish their speech and intimidate them into silence.

Proposed change in the definition of "speech about matters of public concern"

The TCPA deliberately provides a broad definition of speech about a matter of public concern, specifying that the subjects covered include

(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.

The presence of these definitional subsections, and the extensive caselaw applying them, provide assurance to consumers in Texas that so long as they are expressing their honest opinions and telling the truth about businesses and political figures when they express themselves in public, they can expect to have their rights protected against baseless litigation aiming to silence them. But HB 2730 would strip these subjects out of the definition of the bill's coverage, replacing them with a different definition of the term "speech on matters of public concern."

The definition that has been offered in HB 2730 states:

"a statement or activity precipitating the underlying cause of action about

(A) 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;
(B) conduct that could directly affect a large number of people beyond the direct participants; or
(C) a topic of significant public interest

We are concerned that this definition does not plainly protect consumers who offer comments about their experiences with business on blogs, in letters to the editor, or such sites as the Better Business Bureau, Angie's List, or Yelp. Consequently, this new definition puts the free speech rights of consumers at significant risk.

The definition in the committee substitute is apparently taken from a California decision, *FilmOn.com v. DoubleVerify, Inc.*, 221 Cal. Rptr. 3d 539, 545 (Cal. App. 2017), *review granted*, 405 P.3d 237 (Cal. 2017), *citing Rivero v. AFSCME* , 105 Cal. App.4th 913, 919-924, (Cal. App. 2003), whose formulation appears in a number of decisions of California's intermediate appellate courts. Importantly, however, the California courts **also** consistently hold that consumer reviews, even if

they pertain only to a single instance of allegedly undesirable commercial or professional conduct, remain a matter of public interest within the meaning of California's anti-SLAPP law. *E.g., Sacks v. Haslet*, 2018 WL 4659509, at *8 (Cal. App. 4th Dist. Sept. 28, 2018); *Amato v. Bermudez,* 2018 WL 3689494, at *5–6 (Cal. App. 2d Dist. Aug. 3, 2018); *Hays v. Gagliardi*, 2017 WL 5591470, at *4–5 (Cal. App. 4th Dist. Nov. 21, 2017); *Kagewerks, Inc. v. Bessmon Kalasho*, 2014 WL 6066112, at *4–5 (Cal. App. 4th Dist. Nov. 14, 2014); *Korman v. Schott*, 2014 WL 4070487, at *3 (Cal. App. 1st Dist. Aug. 19, 2014). The cases note that, under the state's law, "the issue need not be 'significant' to be protected by the anti-SLAPP statute." *Id.* at *4, quoting *Nygard, Inc. v. Uusi–Kerttula*, 159 Cal. App.4th 1027, 1042 (Cal. App. 2008). The California courts are able to protect individual consumer reviews not only because the word "significant" does not modify "interest" in the statutory terms "topic of public interest," but also because the California legislature did not confine the statute's scope to a single formulation of what statements related to matters of public interest.

At the very least, these proposed changes to the TCPA could reduce certainty for Texans who participate in public debate as courts struggle to construe the new language of the statute. And by narrowing the scope of the TCPA's protection, or at least making its scope uncertain, the change could lead to forum shopping, such that plaintiffs would tend to sue in Texas rather than, for example, Florida or California. In a number of high-profile cases around the country, wealthy plaintiffs have filed libel suits in states with no ant-SLAPP law or only a weak anti-SLAPP law, precisely so that their suits could wreak the maximum damage on critics by depriving them of the protection of anti-SLAPP laws.[1]

Public Citizen understands that the deletion of the subsections defining matters of public concern is proposed as a response to *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015), and its progeny, such as *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017), where the Texas Supreme Court broke the definitional subsections loose from their "public concern" moorings, holding that purely private communications between a few individuals in a commercial enterprise, about the mistakes made by a single employee in the course of deciding whether that worker's employment should continue, could be deemed a matter of public concern so long as the subject of the communications was "health" (in *Lippincott,* they were emails among supervisors about whether a certain employee had made treatment mistakes) or "safety" (in *ExxonMobil*, the statements within a workplace were about whether a particular employee had failed to perform a safety-critical maintenance task). In both cases, the Supreme Court claimed to be bound by the

[1] One notorious case involved Washington Redskins owner Dan Snyder, who responded to sustained criticism in D.C.'s alternative newspaper by suing it in New York, where its owner was located. *See* Levy, *Lessons from Dan Snyder's Libel Suit*, https://pubcit.typepad.com/clpblog/2011/03/lessons-from-dan-snyders-libel-suit.html. New York has a very narrow anti-SLAPP law.

statutory language, and thus refused to consider the plain intent of the legislature to have the TCPA protect **public** participation. Indeed, on the same theory, the TCPA would apply any time two retail employees say anything to each other about the goods and services that are sold in their workplace. Clearly, private statements within a company about whether to fire or discipline a single company staff member are not the sort of "citizens' participation" that animated the adoption of the TCPA.

However, considering the highly literal approach to statutory interpretation evidenced by the Court in *Lippincott*, replacing these provisions with unduly narrow alternate formulations would also be a mistake. Indeed, it will allow plaintiffs to argue that by deleting these definitional subsections, the Legislature was expressing its intent to exclude them from coverage under the TCPA. Rather than deleting the definitions, Public Citizen recommends adding language that makes clear that speech on matters of "health or safety" or about "a good, product, or service in the marketplace" is protected when it is directed at communicating to a broad audience, either directly or by communicating with a writer who will publishing to a broad audience (for example, a reporter).

Proposals to Exempt Categories of Cases from TCPA Coverage

A number of proposals have been put forward, many of them industry-specific, to exempt certain sorts of proceedings from TCPA coverage. In addition, the proposed bill excludes counterclaims, fraud claims, and contract claims (such as claims under non-disparagement or non-disclosure clauses) from TCPA coverage. These proposals should be rejected, for several reasons.

First, making coverage depend on the label placed on the plaintiff's claim encourages lawyers to plead claims brought against citizens engaged in public participation so as to avoid the TCPA. The approach suggested thus raises the danger that companies that are unhappy about being criticized will simply relabel defamation claims as fraud claims. *Cf. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), where the Supreme Court held that libel claims should not avoid **constitutional** scrutiny under *New York Times v. Sullivan* by changing the label on the claim

The proposed exemption for compulsory counterclaims is especially inappropriate. Businesses sometimes respond to consumers who have sought judicial relief against misconduct by bringing defamation or similar counterclaims as an intimidation tactic, or as a bargaining chip in negotiating to pay consumers less than they deserve when, for example, properties are ruined by unsound construction techniques. The compulsory counterclaim exemption is presented as a matter of "fairness," on the theory that the defendant must either file its counterclaim or forfeit the right to pursue it. There is no reason why companies should get any more sympathy for filing SLAPP suits when they are filed as counterclaims than when they are filed as stand-alone lawsuits. Although it is true that, when a defamation claim is compulsory, it had to be filed or lost, the same quandary confronts a company when the statute of limitations is about to expire. Yet the "file now or lose" quandary is not a basis for exempting such plaintiffs from the TCPA.

Another proposed exemption is for claims brought under non-disparagement clauses signed in connection with employment or independent contractor relationships. Unlike nondisparagement clauses imposed on consumers, which were outlawed by the federal Consumer Review Fairness Act, 15 U.S.C. § 45b, courts tend to uphold nondisparagement clauses in the employment context. But although such contract provisions can be proper, courts endeavor to ensure that they were entered knowingly and willingly, and guard against an unknowing waiver of free speech rights. *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101, 110 (Tex. App.—Austin 2003). Moreover, the application of non-disparagement clauses may be unlawful in circumstances where the employee is blowing the whistle on certain forms of illegal activity, such as sexual harassment, discrimination, or violations of state or federal environmental or health and safety statutes. When such clauses are unlawful either in themselves or as applied, such claims should not be exempted from application of the TCPA. (If their application of such clauses is lawful, the TCPA does not prevent them from being enforced.). We urge that the exemptions not be added to the statute.

TCPA's Attorney Fees Provision

Given that the Legislature is considering changes in the TCPA, we propose an amendment to ensure that the law is useful in defending the free speech of Texans who cannot afford the money required to defend a TCPA case through determination of the motion to dismiss. Currently, the Courts of Appeals disagree about whether a prevailing SLAPP'ed defendant is entitled to an award of attorney fees when her counsel were pro bono lawyers, or were retained under an agreement making fees contingent on the TCPA award. *Compare Cruz v. Van Sickle*, 452 S.W.3d 503 (Tex.App.–Dallas 2014) and *MacFarland v. Le-Vel Brands* 2018 WL 2213913, at *7 (Tex. App.–Dallas May 15, 2018), *with McGibney v. Rauhauser*, 549 S.W.3d 816, 821 (Tex. App.–Fort Worth 2018).

The TCPA should be revised to make clear that fees are available in this circumstance. When companies or wealthy individuals are sued for speech, they will likely have the resources to pay lawyers in advance for TCPA representation. Indeed, a company will often have business insurance, including libel coverage, as media companies generally do. But the ordinary consumer or citizen critic is not likely to have such coverage, and, in many cases, will be able to retain counsel only pro bono, on the contingency of having fees awarded under the TCPA.

Consequently, if the TCPA is to fulfill its promise to the Texas consumers, the TCPA must permit awards of attorney fees for lawyers who are not paid upfront. Although we think the statute currently permits such awards, we suggest that, in light of the current disagreement among the courts of appeals, section 27.009(a)(1) be amended as follows: "court costs, reasonable attorney's fees, and other expenses **for** ~~incurred in~~ defending against the legal action, as justice and equity may require; and". (replacing the words "incurred in" with the word "for"). That way, lawyers who are willing to defend free speech on a pro bono basis, hoping to be awarded fees if they prevail, will be

rewarded, and Texans will be able to afford to defend themselves.

Conclusion

Public Citizen opposes the proposals to weaken the free speech provisions of the TCPA by eliminating language that protects consumers when they comment on the five categories now given express statutory recognition, and by adding unwarranted new exemptions to the statute. But it urges an amendment to enable all Texans to afford the legal representation needed tot defend against SLAPP suits.

Sincerely yours,

Adrian Shelley
Director, Public Citizen, Texas

Paul Alan Levy
Attorney, Public Citizen