SIX YEARS OF THE TCPA:
TWELVE RECENT ANTI-SLAPP CASES

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State Bar of Texas
29TH ANNUAL
ADVANCED GOVERNMENT LAW
July 27-28, 2017
Austin

CHAPTER 18

Justice Jane Bland was appointed to the First Court of Appeals in 2003 and was elected in 2004, 2006, and 2012. Before becoming an appellate judge, she served for six years as a civil trial judge, having been appointed by then Governor George W. Bush in 1997 and elected in 1998 and 2002.

Justice Bland is board certified in civil appellate law and civil trial law by the Texas Board of Legal Specialization. She is a member of the American Law Institute. Before serving on the bench, she practiced law with Baker Botts L.L.P., focusing on civil trial and appellate work. Before that, she clerked for Judge Thomas Gibbs Gee on the United States Court of Appeals for the Fifth Circuit.

She earned her law degree from the University of Texas School of Law with high honors, where she was Vice-Chancellor, an editor of the *Texas Law Review*, and a member of the Order of the Coif. She received her bachelor's degree in accounting and honors business from the University of Texas at Austin, with highest honors, where she was a UT Outstanding Student and served as president of the Orange Jackets.

Justice Bland serves on the Texas Supreme Court's Rules Advisory Committee and its Commission to Expand Civil Legal Services. She is the chair of the Oversight Committee on the Texas Pattern Jury Charges. She also serves on the Civil Appellate Law Advisory Commission for the Texas Board of Legal Specialization.

In March 2006, while sitting by special commission, Justice Bland delivered the majority opinion in *Hyundai v. Vasquez* for the Texas Supreme Court.

In November 2010, United States Supreme Court Chief Justice John Roberts presented Justice Bland with the William H. Rehnquist Award, given annually by the National Center for State Courts to the state court judge who exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics. The Texas Association of Civil Trial and Appellate Specialists named her Trial Judge of the Year in 2003 and Appellate Judge of the Year in 2007 and 2015. She also has received President's Awards four times for her work with the Houston Bar Association and the Houston Young Lawyers Association. She serves on the boards of Houston Volunteer Lawyers and the UT Law School Foundation, and she previously served on the boards of St. John's School and the UT Law Alumni Association Executive Committee.

Justice Bland is married to Douglas S. Bland. They have two children who attend college.



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Education and Clerkships

- J.D., University of Texas at Austin School of Law, 1991, *with honors*
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- Texas
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- United States Supreme Court
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Laura Lee Prather is a partner in the Litigation Practice Group in the Austin office of Haynes and Boone. Laura focuses her practice on First Amendment, Anti-SLAPP, intellectual property and media and entertainment litigation and appeals. She has significant government relations experience as an advocate at the Texas Legislature on First Amendment and open government concerns. Laura advises an extensive array of content providers including online and traditional newspapers, magazines, radio and broadcasters, cable television stations, production companies and music and sports entities. Laura co-authored a definitive law review article on the Texas Citizens Participation Act with First Court of Appeals Justice Jane Bland, “Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP In Texas,” 47 Tex. Tech L. Rev. 725 (Summer 2015).

Laura was instrumental in the passage of the three most significant pieces of First Amendment legislation in recent history in Texas - the reporters' privilege, the Texas Citizens Participation Act, and the Defamation Mitigation Act. Through her efforts, Laura both formed and led the coalitions in support of all three of these measures, making Texas the 37th state to pass a reporters’ privilege, the 28th state to adopt an Anti-SLAPP statute, and the 32nd state to enact a retraction statute. All three laws are designed to promote and protect free speech rights in Texas.

Laura has been named by *The American Lawyer* as one of the 45 best young women lawyers in the nation. She was recognized for her substantial career as a fierce advocate dedicated to preserving First Amendment rights, defending media companies in cases involving reporting on matters of public concern, and defending entertainment companies in theft of idea, trademark and copyright infringement litigation. In addition, Laura is the first woman to receive Texas Daily Newspaper Association's "Legacy Award," and has been named Texas Association of Broadcasters' "Associate of the Year" and as

- U.S. District Court for the Southern District of Texas
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one of Texas Lawyer's "Extraordinary Women in Texas Law." Her clients have recognized her as a BTI Client Service All-Star.

In addition to her private practice, Laura has served as the program attorney for the national television shows *Christina's Court* and *Judge Alex*, serves as an adjunct professor at the University of Texas School of Law in Media & Entertainment Law, and was the editor of the *E-Copyright Law Handbook* published by Aspen Law and Business.

Laura works on legislative initiatives and lobbying as a member of the Texas Association of Broadcasters' Legislative Task Force, the Public Participation Project's National Board of Directors, the General Counsel for the Legislative Advisory Committee of the Texas Press Association, and as a co-chair of the Freedom of Information Foundation of Texas' Legislative Committee. She also started and was the inaugural chair of the Media Law Resource Center's State Legislative Committee, bringing together lawyers from virtually every state that work on legislation impacting First Amendment rights and government transparency.

Professional Recognition

- Listed in *Chambers USA*, Chambers & Partners, for First Amendment Litigation (Nationwide), 2017
- Member, Fellows of the Texas Bar Foundation
- Fellow of the Society Award 2016, Society of Professional Journalists
- *Texas Super Lawyers*, Thomson Reuters, 2016
- Received the State Bar College Franklin Jones Best CLE Article Award for *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 TEX. TECH L. REV. 725 (Summer 2015).
- Board Certified in Civil Appellate Law, Texas Board of Legal Specialization
- *Martindale Hubbell® Law Directory* with a Peer Review Rating of AV® Preeminent™
- Finalist for 2014 Americas Women in Business Awards for Media Law, presented by Euromoney
- Named one of the top 45 women lawyers in the nation younger than age 45 by *The American Lawyer*, ALM Media Properties, LLC, 2011
- Named to the BTI Client Service All-Stars Team for Law

Firms, BTI Consulting Group, 2011

- Recipient of the Texas Daily Newspaper Association's Legacy Award, 2010
- Named Associate of the Year by Texas Association of Broadcasters, 2009
- Profiled in *Texas Lawyer*, ALM Media Properties, LLC, in "Extraordinary Women in Texas Law," as one of the state's top 30 leading women lawyers, 2008
- Recipient of the Texas Association of Broadcasters' Award of Honor for "Outstanding Efforts in the Continuing Battle to Pass the Texas Free Flow of Information Act" during the 80th Legislature, 2007 Regular Session
- Awarded the Special President's Award by the Texas Association of Broadcasters, 2005
- Selected as a Rising Star in the Legal Field, *Austin Business Journal*, American City Business Journals, 2004
- Received the "Austin Under 40 Legal Award," the Austin Young Men's Business League and Austin Young Women's Alliance, 2001
- Chosen as one of the top 10 "Up-and-Comers on the Texas Legal Scene" by *Texas Lawyer*, ALM Media Properties, LLC, 2000

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SIX YEARS OF THE TCPA: TWELVE RECENT ANTI-SLAPP CASES

I. INTRODUCTION

The Texas Citizens Participation Act (the "TCPA" or the "Act"),[1] Texas' Anti-SLAPP statute,[2] became effective on June 17, 2011. In the half-decade that it has been on the books, courts have grappled with a number of issues associated with the Act's scope and application. The results have been predictably mixed, but the dust is beginning to settle and some key trends are emerging. On the whole, courts have endeavored to remain consistent with the Legislature's intent to broadly apply the Act. The result is that Texas litigants must consider the TCPA and its implications in any case in which the claim relates to speech about a matter of public concern.

This article provides a high-level overview of the TCPA by focusing on some of the significant cases interpreting and applying this relatively new law. We begin with a short explanation of the TCPA, its purpose, and its application. Next, the article focuses on developments in Anti-SLAPP litigation by highlighting several high-impact TCPA decisions and discussing their potential implications for litigants and practitioners. The first group of cases involves the first prong of the two-part TCPA test, which requires defendants to demonstrate the applicability of the Act. The second involves the Act's *prima facie* case requirement, addressing the burden non-movants must meet to overcome a motion to dismiss under the TCPA. Finally, the article briefly highlights several cases addressing the mandatory attorney's fees and sanctions provision and the Act's applicability in federal court.

II. THE TCPA: WHAT IT IS AND WHAT IT DOES

The TCPA provides defendants with a special expedited motion to dismiss meritless lawsuits aimed at chilling their right of free speech, right of association, or right to petition in connection with a matter of public concern.[3] The purpose of the Act is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury."[4]

SLAPP suits chill speech by burdening speakers with the high cost of defending a lawsuit that is meritless on its face. In response to this problem, the TCPA allows movants to employ a special procedure for expedited dismissal of such suits upon a motion by the defendant. Furthermore, it imposes mandatory attorney's fees for SLAPP suits as a deterrent against such frivolous claims.

A motion to dismiss pursuant to the TCPA initiates a three-step process. First, the movant bears the burden of establishing by a preponderance of the evidence that the plaintiff's claim is in response to the defendant's exercise of First Amendment rights. Those rights are three-fold and specifically defined in the statute as follows:

> 2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.
> 3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.
> 4) "Exercise of the right to petition" means any of the following:
>
> (A) a communication in or pertaining to a judicial [or other similar official] proceeding;
> (B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;
> (C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;
> (D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and
> (E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.[5]

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[1] TEX. CIV. PRAC. & REM. CODE §§27.001-.011 (hereinafter "TCPA").

[2] SLAPP (Strategic Lawsuits Against Public Participation) suits are those that are intended to chill, or are in retaliation for, the exercise of constitutionally protected First Amendment rights. *See In re Lipsky*, 460 S.W.3d 579 (Tex. 2015).

[3] TCPA §§27.001-.011.

[4] TCPA §27.002.

[5] TCPA §27.001.

If the movant can satisfy this first step of the TCPA motion to dismiss by demonstrating that the plaintiff's claim implicates any one of those three rights, the burden shifts to the plaintiff to establish "by clear and specific evidence a *prima facie* case for each essential element of the claim in question."[6] This requirement "represents the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true."[7] In determining whether this factor is met, courts consider pleadings and any supporting and opposing affidavits.

A movant may also obtain dismissal by establishing an affirmative defense in the case by a preponderance of evidence. If, upon consideration of the evidence, plaintiff cannot meet its burden or if the movant has established an affirmative defense, the court must dismiss the case and award the moving party court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action "as justice and equity may require,"[8] as well as sanctions sufficient to deter the filing of similar lawsuits in the future.[9] If the court finds, however, that the TCPA Motion to Dismiss is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.[10]

Additionally, the TCPA provides a number of procedural safeguards designed to expedite consideration of the motion and avoid abuse of the legal process to chill speech. Specifically, the TCPA (1) stays discovery pending a ruling on the motion (but allows limited discovery to defend against the motion for good cause);[11] (2) provides that a hearing on the motion be set within 60-120 days;[12] and (3) requires courts to decide a TCPA motion to dismiss within 30 days from the hearing on the motion, otherwise, the motion is overruled by operation of law.[13] Further, if the trial court denies the Anti-SLAPP motion, movants have an immediate right of interlocutory appeal,[14] which creates an automatic stay of the underlying lawsuit while the Anti-SLAPP appeal is decided.[15]

III. TCPA STEP ONE: APPLICATION OF THE STATUTE

One of the most litigated issues regarding the TCPA has been the proper scope of the Act's reach. The first several cases in this article deal with that issue—specifically, the extent to which particular activities satisfy the TCPA's definitions of the rights of free speech, association, and petition. These rights are specifically defined in the statute, and during the TCPA's infancy, courts were tasked with parsing and interpreting these statutory definitions to determine precisely what types of activities would fall within the purview of the Act.

Courts were also left to interpret the contours of the Act's commercial speech exemption, which states that it "does not apply to 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, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer."[16] In the years since its enactment, courts have provided some helpful guidance on the application of the Act in these areas.

A. The TCPA's "Matter of Public Concern" Requirement for Speech.

To demonstrate that a particular claim is based on or relates to the exercise of constitutionally protected right of free speech under the TCPA, a movant must show that the claim relates to a communication about a matter of public concern. The most-often litigated portion of the Act is whether a particular communication relates to a "matter of public concern." The statute defines a "matter of public concern" to include, among other things, issues related to the "environment, economic, or community well-being" and issues related to "a public official or public figure."[17]

Some cases easily satisfy this standard. For example, in *Entravision Communications Corp. v. Salinas*, the communications were found to relate to a matter of public concern when the father of the mayor of a Mexican city was detained by police with a large

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[6] *Id.* §27.005(c).

[7] *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (quoting *Rodriguez v. Printone Color Corp.*, 982 S.W.2d 69, 72 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

[8] TCPA §27.009(a).

[9] TCPA §27.009(b).

[10] *Id.*

[11] TCPA §27.003(c); §27.006(b).

[12] TCPA §27.004.

[13] TCPA §27.008.

[14] TEX. CIV. PRAC. & REM. CODE §51.014(a)(12).

[15] TEX. CIV. PRAC. & REM. CODE §51.014(b).

[16] TCPA §27.010(b).

[17] TCPA §27.001(7).

sum of money.[18] Similarly, the communications at issue in *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.* were clearly of public concern because they included reports made to government officials of elder abuse and substandard living conditions for residents of an assisted living facility.[19]

Other cases, however, do not directly involve a communication about government officials or reports to them, but rather are consumer-protection focused. For example, in *Better Business Bureau of Metropolitan Dallas, Inc. v. BH DFW, INC.*,[20] the communications at issue were online reviews of a swimming pool builder. Despite the fact that many of the statements involved complaints about a single pool-building company, the Dallas Court of Appeals held that the speech at issue "related to a good, product, or service in the marketplace and, therefore, under the statutory definition, related to a matter of public concern."[21] On the whole, courts have adopted a broad interpretation of what can qualify as a "matter of public concern."

1. *Forsterling v. A&E Television Networks, LLC.*[22]

The recent case of *Forsterling v. A&E Television Networks* applied the TCPA in an entertainment setting to a docu-drama show which focused on human trafficking. *Forsterling* dealt with the short-lived A&E docu-drama television show, *8 Minutes*. The program focused on a pastor who solicited prostitutes in an attempt to persuade them to "get out of the life" (change their occupations). Individuals appearing in the show sued A&E for fraudulent inducement and personal injury arising out of their appearance on the program.

The defendants moved to dismiss the suit under the TCPA. The plaintiffs responded in opposition that the lawsuit did not implicate defendants' First Amendment rights because the television program did not relate to a matter of public concern.

In concluding that the show involved a matter of public concern, the federal district court noted that the TCPA is "not limited to documentaries and newspapers."[23] Although the Court observed that the television show was "dramatized," the Court held that the dramatization or commercial nature of the television show was not dispositive of whether the issue confronted was one of public concern. The Court determined that the program's focus on "human trafficking, and prostitution, highlight[ed] the potential dangers of the trade."[24] Citing recent Texas legislation on human trafficking, the Court determined that the program's subject matter satisfied the first prong of the Anti-SLAPP statute and, therefore, in the absence of clear and specific evidence relevant to plaintiffs' legal theories, dismissal was proper.

B. Application to private communications.

Another interesting legal issue that the courts have been confronted with is the extent to which private communications can serve as the basis for an Anti-SLAPP suit under the TCPA. The Act broadly defines "the exercise of the right of free speech" as a "communication made in connection with a matter of public concern." The definition is silent on whether the Act requires that such a communication be made in public. With two recent cases addressing this question, the Texas Supreme Court has answered that it need not be public.

1. *Lippincott v. Whisenhunt.*[25]

Lippincott arose out of a dispute between two administrators of a surgery center and Warren Whisenhunt, a registered nurse anesthetist who contracted with the center to provide anesthesiology services for patients at the center. Whisenhunt sued Matthew Lippincott and Creg Parks, alleging defamation, tortious interference with existing and prospective business relations, and conspiracy to interfere in business relations. In support of his claim, Whisenhunt submitted copies of several emails sent to four recipients which intimated that Whisenhunt had falsely represented himself to be a doctor, endangered patients for his own financial gain, and sexually harassed employees.

The defendants moved to dismiss Whisenhut's claims pursuant to the TCPA. The trial court partially granted their motion, allowing the defamation claim to proceed but dismissing the other claims. The court of appeals reversed, holding that the TCPA does not apply to private communications and is therefore inapplicable.

The Supreme Court examined the plain language of the statute, noting the presumption that "the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted." The Court further noted the Legislature's direction that the

[18] *Entravision Communications Corp. v. Salinas*, 487 S.W.3d 276, 282 (Tex. App.—Corpus Christi 2016), reconsideration en banc denied (Mar. 8, 2016).

[19] 416 S.W.3d 71, 89 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

[20] 402 S.W.3d 299 (Tex. App.—Dallas 2013, pet. denied).

[21] *Id.* at 308.

[22] Civ. Action H-16-2941, 2017 WL 980347 (S.D. Tex. Mar. 9, 2017).

[23] *Id.* at *2.

[24] *Id.*

[25] 462 S.W.3d 507 (Tex. 2015).

courts construe the TCPA "liberally to effectuate its purpose and intent fully."[26]

With this in mind, the Court held that a "communication" is defined to include *any* form or medium, "regardless of whether the communication takes a public or private form."[27] Under the plain language, therefore, the Court determined that, in the absence of any such limiting language, the TCPA includes both public *and private* communications regarding matters of public concern.[28] The Court reversed the court of appeals' ruling and remanded for further proceedings consistent with its opinion.[29]

2. *ExxonMobil Pipeline Co. v. Coleman.*[30]

Like in *Lippincott*, the Supreme Court in *Exxon* was confronted with the question of whether private speech about an issue of public concern satisfied the TCPA's requirement that speech must be about a communication regarding a matter of public concern. And, as in *Lippincott*, the Supreme Court held that private communications about a public concern that form the basis for a lawsuit can trigger the TCPA.

Travis Coleman is a former employee of the ExxonMobile Pipeline Company ("ExxonMobil"). During his employment at ExxonMobil, one of his job duties was to perform a required inspection of the fluid volume of various petroleum products in a process known as "gauging the tanks." Coleman was terminated in 2012 for allegedly failing to gauge a particular tank.

Coleman sued ExxonMobil and several of his supervisors for defamation, civil conspiracy, tortious interference with an existing business relationship, and business disparagement. Coleman alleged that communications among ExxonMobil Pipeline Company employees that led to his termination, including a "near loss report" and inventory sheets were defamatory. The defendants moved to dismiss Coleman's claims under the TCPA, which the trial court denied. On appeal, the court of appeals affirmed the denial below, holding that the communications were related to Coleman's job performance, and that communications about his failure to properly gauge the tanks were not of public concern. The court of appeals determined that the potential health, safety, and environmental risks associated with Coleman's alleged failure "did not transform the challenged communication about a private employment matter into a public concern."[31]

The Texas Supreme Court reversed. The Court first held that the challenged statements "constitute[d] speech that the Legislature intended to safeguard through the TCPA."[32] Despite their non-public nature, the communications at issue "related to a 'matter of public concern'" because they concerned Coleman's alleged failure to gauge a particular tank, which was required, at least in part, to reduce the environmental, health, and safety impacts of the operations of the facility.[33] The Court reiterated that, as it stated in *Lippincott*, there was no requirement in the TCPA that the form of the communications be public.[34]

C. Commercial Speech and the TCPA.

Some speech is specifically exempted from the TCPA.[35] The most commonly asserted exemption is communications that relate to commercial transactions of the sale or lease of goods or services.[36] Texas state courts have interpreted the nuances of this exemption through key decisions discussed below.

1. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*[37]

Crazy Hotel, decided two years after enactment of the TCPA, became one of the first significant rulings on the Act. The suit began as a defamation lawsuit arising out of a series of articles published in the *Mineral Wells Index*. The newspaper, owned by the defendant, published several articles regarding the Crazy Water Retirement Hotel, a local assisted-living community. The articles focused on alleged misconduct by some of the officers and employees of the facility, as well as several regulatory compliance issues and official investigations into the facility. The articles also documented poor living conditions, such as lack of air conditioning, hot water, and gas, and recounted the Department of Aging and Disability Services' revocation of the facility's assisted living license and alleged incidents of abuse.[38] The Hotel and an employee brought suit, alleging defamation, business disparagement, and tortious interference.

Two groups of defendants separately moved to dismiss under the newly enacted TCPA. The trial court began the hearing, but plaintiffs' counsel moved to

[26] *Id.* at 509 (quoting TCPA §27.011).

[27] *Id.*

[28] *Id.*

[29] *Id.* at 510.

[30] 512 S.W.3d 895 (Tex. 2017).

[31] *Id.* at 900 (internal quotations omitted).

[32] *Id.* at 901.

[33] *Id.*

[34] *Id.*

[35] TCPA §27.010.

[36] *Id.* at §27.010(b).

[37] 416 S.W.3d 71, 88 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

[38] *Id.* at 76-77.

withdraw, and the court granted a continuance. The trial court resumed the hearing, but not within the 30 days required by the TCPA to rule on the motion. As a result, the Anti-SLAPP motion was overruled by operation of law.

On appeal, the First Court of Appeals held that the defendants met their burden of establishing that the TCPA applied. Specifically, the Court held that the articles that formed the basis of the lawsuit related to an issue of public concern—namely, the provision of health care and the substandard quality of the assisted living community.[39]

After concluding that the suit was based on speech that was directed to a matter of public concern, the Court addressed the issue of whether NHI's status as a for-profit corporation triggered the commercial speech exemption of the TCPA. TCPA Section 27.010(b) provides that the Act "does not apply to 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, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer."[40] Adopting the four-part test adopted by the Ninth Circuit and articulated in *Simpson Strong-Tie Co. v. Gore*,[41] the Court asked 1) whether the suit is against a party selling goods or services, 2) whether the suit arises from representations about the business or a competitor, 3) whether the statement was made to further a commercial transaction, or during delivery, and 4) whether the intended audience is a potential buyer. The Court also concluded that the burden rested on the plaintiff to demonstrate that the statute does not apply to its suit—a burden the Hotel did not meet.[42] This four-prong analysis has now become the standard in determining whether the TCPA's commercial speech exemption applies and the extent to which commercial defendants can avail themselves of the TCPA's motion to dismiss.

D. The pleadings as a basis for determining the applicability of the statute

The TCPA applies to a legal action if it "is based on, relates to or is in response to a party's exercise of the right of free speech, right to petition, or right of association."[43] For years some courts assumed that if a defendant denies making the statement that forms the basis of the complaint there was no exercise of the protected rights and the defendant could therefore not invoke the TCPA. But in *Hersh v. Tatum*, the Texas Supreme Court overturned that notion because of the requirement that courts consider the pleadings when determining whether the statute applies.

1. *Hersh v. Tatum*[44]

In *Hersh v. Tatum*, the plaintiffs were distraught parents of a teen who had committed suicide. The Tatums published their son's obituary in the *Dallas Morning News*, writing that he had died "as a result of injuries sustained in an automobile accident." In fact, he committed suicide hours after the accident. Less than two weeks after the suicide, Julie Hersh, an advocate for mental health and suicide prevention, published a blog post arguing that honesty about suicide in obituaries could help prevent suicide and raise awareness of mental health issues. The blog post did not mention or allude to Tatum. Hersh also interviewed with a reporter for the *Morning News* to promote her book which discussed suicide and depression, but again did not discuss the Tatum family. Meanwhile, the reporter for the *Morning News* learned from a colleague that the Tatum obituary was misleading and mentioned it in his column as an example of a suicide which was not disclosed in an obituary. The Tatums believed that Hersh had exposed the story of the false obituary to the newspaper and sued her for defamation, later non-suiting the defamation claim and replacing it with a claim for intentional infliction of emotional distress. Thus the basis of the petition was that Hersh disclosed the suicide to the reporter. Hersh filed a motion to dismiss under the TCPA, and denied ever discussing the Tatum suicide with the reporter.

The trial court granted Hersh's motion to dismiss, and the Tatums appealed, arguing that Hersh could not simultaneously invoke the TCPA and deny making the statements that formed the basis of the lawsuit. The Dallas Court of Appeals agreed with the Tatums and, relying on its own precedent, held that a defendant who denies making the communication alleged cannot invoke the TCPA. On petition for review, the Supreme Court of Texas overturned, explaining that the language of the TCPA requires the court to consider the pleadings when determining whether a legal action should be dismissed. The Court explained that "[t]he basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations."[45] With that, the new standard has emerged that "[w]hen it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more."[46] With this important holding, a

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[39] *Id.* at 81.

[40] TCPA §27.010(b).

[41] 49 Cal. 4th 12 (2010).

[42] *Crazy Hotel*, 416 S.W.3d at 89.

[43] TCPA §27.003(a).

[44] 2017 WL 2839873 (Tex. June 30, 2017)

[45] 2017 WL 2839873, at *4.

[46] *Id.*

defendant in a lawsuit should only need to demonstrate that—based on the petition—the allegations are based on, relate to or are in response to the defendant's exercise of one of the three enumerated rights—the right of free speech, the right to petition, or the right of association.[47]

IV. TCPA STEP TWO: THE *PRIMA FACIE* CASE

Once an Anti-SLAPP movant establishes that the lawsuit in question arises out of, or relates to, a protected First Amendment right under the Act, the burden shifts. At that point, a non-movant plaintiff must then demonstrate a *prima facie* case for each essential element of a cause of action by "clear and specific evidence."[48]

"Clear and specific evidence" is not a defined evidentiary standard, so much of the litigation surrounding the TCPA has focused on this key issue: once the burden shifts to the non-movant, how much must a plaintiff prove to survive? The first major Texas Supreme Court decision on the issue, *In re Lipsky*, provided important clarification regarding the types of evidence that can establish a *prima facie* case in TCPA motions to dismiss. Others, such as *KBMT* and *Greer* focus on the application of the actual malice standard, actual malice, and accurate reporting of third-party statements, and their impact on step two under the TCPA. These cases serve as a valuable source of clarity to Anti-SLAPP litigants regarding the types of claims that can survive a TCPA motion to dismiss.

A. Defining the proper evidentiary standards: *In re Lipsky*.[49]

In a landmark 2015 decision, the Supreme Court of Texas clarified the requirements of the second prong of a TCPA Anti-SLAPP motion and set out the specific requirements that a plaintiff must meet in order to survive a TCPA motion to dismiss.

Lipsky involved a property owner that brought a lawsuit against a natural-gas drilling company. The property-owner plaintiff, Steven Lipsky, alleged that the drilling company contaminated his well, which caused several health and safety issues with the property. He and his wife brought claims of negligence, gross negligence, and nuisance against the company. The company asserted several counterclaims against the plaintiff and his environmental consultant for defamation, business disparagement, and civil conspiracy, and counter-defendants moved to dismiss under the TCPA.

On a petition for a writ of mandamus, the Supreme Court of Texas confronted the open question of the role of circumstantial evidence in responding to a TCPA clam. The Court initially noted that courts of appeals throughout the state disagreed on the role of circumstantial evidence in an Anti-SLAPP case. Some courts had held that only direct evidence could overcome a TCPA motion to dismiss, while others determined that relevant circumstantial evidence can be considered. The Court ultimately sided with the latter group, holding that it was proper to consider relevant circumstantial evidence in determining whether claims are subject to dismissal under the TCPA.

In so holding, the Court noted that "clear and specific" is not a recognized evidentiary standard and thus concluded that the Legislature intended it to be a different standard than "clear and convincing."[50] The Court rejected the proposition that "clear and specific" disallowed circumstantial evidence or reasonable inferences. "[A]ll evidentiary standards, including clear and convincing evidence, recognize the relevance of circumstantial evidence."[51] As the Court observed, cases may be won on the basis of circumstantial evidence, and the direct-evidence requirement would create the seemingly nonsensical result that the statute was "creat[ing] a greater obstacle for the plaintiff to get into the courthouse than to win its case."[52] The Court's ruling emphasized that, although circumstantial evidence could be considered, merely conclusory evidence would not be sufficient to establish a *prima facie* case and survive a TCPA motion.[53]

B. Reporting on Third-Party Statements: *KBMT Operating Co., LLC v. Toledo*.[54]

KBMT turned on the application of the TCPA on a theory of liability for third-party statements. *KBMT* involved a dispute between a physician and a television station that arose when the station broadcast a report that the physician had been disciplined for having engaged in sexual conduct with a patient.

The Texas Medical Board disciplined Plaintiff Minda Lao Toledo for engaging in sexual conduct with a patient. The Board issued a two-sentence press release about the decision and included information about the disciplinary action on its website.

KBMT, an ABC-affiliated television station in Beaumont discovered the press release and used it as the basis for a story about the plaintiff. The station aired a

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[47] *Id*. *See also* TCPA §27.003(a).

[48] TCPA §27.005.

[49] 460 S.W.3d 579 (Tex. 2015).

[50] *Lipsky*, 460 S.W.3d at 589.

[51] *Id*.

[52] *Id.*

[53] *Id.* at 593.

[54] 492 S.W.3d 710 (Tex. 2016).

30-second report about the disciplinary action, stating that "A Port Arthur pediatrician has been punished by the Texas Medical Board after the Board found she engaged in sexual contact with a patient and became financially involved with a patient in an inappropriate manner." KBMT ran the report four times.[55]

Toledo sued KBMT, alleging that the inclusion of the fact that she was a pediatrician without clarifying that the patient with whom she had sexual contact was an adult falsely implied that she was having inappropriate sexual relations with a child. Defendants moved to dismissed under the TCPA, but the trial court denied the motion, ruling that Toledo had established a *prima facie* case of defamation because the "gist of the broadcast was that she had had sexual contact with a child."[56]

The Beaumont Court of Appeals affirmed. The Texas Supreme Court granted KBMT's petition for review and reversed. Toledo acknowledged that the suit implicated KBMT's First Amendment rights; therefore, the only issue on appeal was whether Toledo had established a *prima facie* case of defamation. Specifically, the Texas Supreme Court held that Toledo had failed to present evidence establishing that KBMT's report was false, which was a required element of the defamation claim.[57] The Court determined that the broadcast was to be compared to the facts contained in the Board proceedings, *not*, as Toledo argued, to the actual facts. If there was any possibility of confusion over the broadcast, the Court reasoned, that same confusion existed in the Board's report of its proceedings, including the disciplinary order to which plaintiff had agreed, and the broadcast cast the plaintiff in no worse light than the proceedings themselves.[58]

Justice Boyd filed a lengthy dissenting opinion, which Justices Johnson and Willett joined. In the opinion, Justice Boyd argued that Toledo had presented enough evidence that the broadcasts' "gist" was defamatory, and that "the broadcasts themselves constitute some *prima facie* evidence that an ordinary viewer could have concluded that the Board punished Toledo for engaging in sexual conduct with a pediatric patient."[59] Accordingly, the dissent argued that the majority opinion "usurp[ed] the jury's long-established role in defamation suits and deprive[d] Toledo of a trial when the TCPA does not."[60]

C. Actual Malice under the TCPA: *Greer v. Abraham*.[61]

Salem Abraham is a prominent member of the Canadian ISD board of trustees. In 2012, Abraham publicly supported fellow ISD board member Ken King's campaign for state representative. The political blog AgendaWise reported that, at a campaign event for King's opponent, Jim Landtroop, Abraham was forcibly removed for heckling the candidate. Abraham disputed that he was *forcibly* removed, and he also took issue with AgendaWise's characterization that his departure was in response to his heckling. Daniel Greer, an editor for the blog, posted two corrections and AgendaWise sent two separate letters of apology to Abraham over the error. Abraham nonetheless sued Greer and AgendaWise for defamation.

The trial court held that Abraham did not establish a *prima facie* case of actual malice, and it dismissed the claim under the TCPA. The court of appeals reversed, holding that actual malice was not an essential element of the claim, since the article did not identify Abraham's role as a school board member, directly relate to his status as a public figure, or call into question his fitness for office.

The Supreme Court reversed, holding that Abraham was a public figure and, therefore, that the actual malice standard applied under *New York Times Co. v. Sullivan*.[62] The Court first noted that statements about a public figure relate to their official conduct when the conduct relates to an official's fitness for office, which it did in this case. The Court also held that express reference to an individual's status as a public official is unnecessary because "the reference is implied for those public officials so well-known *in their communities* that the general public automatically associates them with their official positions."[63] The Court clarified that this association is between the public official and the community in which the official serves, not the audience of the publication. Applying this standard to Abraham, the Court determined that the reference to his status as a public figure was implied and that Abraham had not established a *prima facie* case of actual malice.

V. TCPA STEP THREE: AFFIRMATIVE DEFENSES

Finally, a movant may also obtain dismissal under the TCPA by establishing an affirmative defense by a

[55] *Id.* at 712.

[56] *Id.* at 713.

[57] *Id.* at 717.

[58] *Id.* at 716.

[59] *Id.* at 725.

[60] *Id.* at 727.

[61] 489 S.W.3d 440 (Tex. 2016).

[62] 376 U.S. 254, 279 (1964).

[63] *Greer*, 489 S.W.3d at 446.

preponderance of evidence.[64] A 2013 revision to the TCPA added a subsection to the Act expressly clarifying that a trial court "shall dismiss" a case "if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to a nonmovant's claim."[65] While this has been a less-frequently litigated requirement of the Act, *Kinney v. BCG Attorney Search, Inc.*, a Third Court of Appeals decision, provides some useful insight into how courts address this third step in practice.

A. *Kinney v. BCG Attorney Search, Inc.*[66]

In *Kinney*, plaintiff BCG Attorney Search, Inc.; its principal, Harrison Barnes; and other related BCG entities (collectively "BCG") brought an action in California against Robert Kinney, a competitor and former employee of BCG, based on Kinney's 2008 post to an internet website stating negative opinions about BCG and Barnes "based on [his] experience as a former employee." BCG sued Kinney, asserting claims for libel, unfair competition, and intentional interference with economic advantage. Kinney brought a special motion to strike under California's Anti-SLAPP statute and largely prevailed; the remaining claims were ultimately dismissed as well.

In 2012, BCG sued Kinney in Texas state court based on the same online comment. Kinney moved to dismiss under the TCPA. The trial court partially granted Kinney's Anti-SLAPP motion and awarded sanctions in the amount of $75,000. Both parties appealed.

On appeal, the Third Court of Appeals held that Kinney's "online statements related to services BCG provides to the public and that BCG's claims are based on those statements."[67] The court of appeals also held that BCG failed to meet its burden of demonstrating, as it had argued, that Kinney's statement fell under the commercial speech exemption to the TCPA. Thus, the TCPA applied.

After determining that the TCPA applied, the Court turned its attention to Kinney's issue on appeal: that the California court's order on the Anti-SLAPP motion barred the Texas lawsuit under the doctrine of *res judicata*. The Court rejected BCG's argument that the TCPA does not require it to overcome Kinney's affirmative defenses. Although the 2013 amendment to the TCPA clarifies that a nonmovant must overcome a movant's affirmative defenses, the Court looked at the language of the pre-amendment statute and determined that it did not need to determine whether the pre- or post-amendment version of the statute applied, because both versions required the nonmovant to overcome affirmative defenses.[68]

Turning to the merits of Kinney's affirmative defense, the Court ultimately held that the required elements for *res judicata* were satisfied, and that the California action effectively barred BCG from bringing suit in Texas. It also held that the trial court did not abuse its discretion by ordering sanctions in the amount of $75,000.

VI. ATTORNEY'S FEES

One of the most important aspects of the TCPA is the mandatory fee shifting provision, which serves as a deterrent against the filing of meritless claims. Under the Act, a plaintiff who files a frivolous lawsuit that chills a defendant's protected First Amendment rights is responsible for reasonable attorney's fees incurred in defending against the meritless claim. A successful TCPA movant is entitled to "court costs, reasonable attorneys' fees, and other expenses incurred in defending against the legal action as justice and equity may require."[69] This award of fees minimizes the chilling impact of meritless litigation brought to deter speech, compensates SLAPP defendants for fees expended in defending against the frivolous claims, and creates a strong deterrent against the initiation of SLAPP suits in the first place.

A. *Sullivan v. Abraham*.[70]

Greer's companion case, which also arose out of litigation involving Salem Abraham, provided an opportunity for the Supreme Court to interpret the mandatory attorney's fees provision. In *Sullivan*, Salem Abraham sued Michael Quinn Sullivan, a conservative blogger, for defamation. Sullivan brought a motion to dismiss the suit under the TCPA, which was successful at the trial court level.[71] Sullivan then sought attorney's fees under the fee-shifting provision of the TCPA for $67,290 in attorney's fees, $4,381.01 in costs and expenses, and sanctions. The trial court granted dismissal of the claim and stated that "justice and equity

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[64] TCPA §27.005(d).

[65] *Id.*

[66] *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012 (Tex. App.—Austin Apr. 11, 2014, pet. denied).

[67] *Id.* at *5.

[68] "However, even prior to the addition of section 27.005(d), the plain language of section 27.006 required the court to consider 'the pleadings and supporting and opposing affidavits stating the facts on which the liability *or defense* is based.'" *Id.* at *8 (emphasis in original).

[69] TCPA §27.009. The statute also requires a mandatory award of sanctions. *Id.*; *see also Serafine v. Blunt*, No. 2017 WL 2224528, *7 (Tex. App.—Austin May 19, 2017).

[70] 488 S.W.3d 294 (Tex. 2016).

[71] *Id.* at 295.

necessitate Defendant's recovery of reasonable attorney's fees in the amount of $6,500 and costs in the amount of $1,500."[72]

Although Sullivan's motion was granted, he appealed on the issue of the amount of his fees. The appellate court affirmed the award, noting that, although the TCPA made an award of sanctions mandatory, the amount would be limited to the amount "the trial court determines sufficient to deter similar actions."[73] The court of appeals' analysis relied on *Bocquet v. Herring,*[74] a case that involved attorney's fees under the Declaratory Judgments Act.[75]

The Supreme Court reversed, holding that the TCPA's attorney's fees provision requires that courts undergo a different analysis than under the Declaratory Judgment Act. The Declaratory Judgment Act is permissive of an award of attorney's fees and subject to express limitations, including that awards be "reasonable and necessary" and "equitable and just."[76] The TCPA on the other hand, has no such limiting language. Relying on the last-antecedent canon to determine that the statutory requirement that awards by limited by "justice and equity" was limited only to "other expenses,"[77] the Supreme Court of Texas ultimately held that the trial court erred by including these consideration in its attorney's fees award, and the appellate court erred in recognizing them as part of its standard of review.[78]

B. *D Magazine Partners, L.P. v. Rosenthal.*[79]

In *D Magazine*, a Dallas-area citizen brought an action against the magazine after it published an allegedly defamatory article in referring to her as a "welfare queen." The article suggested that she was receiving welfare benefits from the state while living a luxurious lifestyle that suggested that she did not truly need the welfare benefits.

Rosenthal sued *D Magazine* for defamation, alleging that the article suggested that she was engaging in welfare fraud against the State of Texas. The trial court dismissed two causes of action—violations of the Texas Deceptive Trade Practices – Consumer Protection Act (DTPA) and Identity Theft Enforcement and Protection Act (ITEPA)—but denied the TCPA motion as to plaintiff's defamation claim. The Court of Appeals affirmed, and *D Magazine* sought Supreme Court review.

The Supreme Court ultimately affirmed much of the lower court's ruling, noting that Rosenthal had established a *prima facie* case of the magazine's negligence in publishing the article. However, *D Magazine* successfully argued that it was entitled to attorney's fees for the partial dismissal under the TCPA after the trial court dismissed the DTPA and ITEPA claims.

D Magazine argued that, even if the trial court properly denied its motion with respect to its defamation claims, it was still entitled to attorney's fees for the dismissed causes of action. The Supreme Court agreed, holding that the trial court erred in denying the fee request for the DTPA and ITEPA causes of action that were dismissed. It reasoned that each of the causes of action that were dismissed "constituted a 'legal action' under the TCPA's broad definition of the term . . . [and] *D Magazine* was therefore entitled to an award of reasonable attorney's fees."[80] The Court declined to express an opinion on how the continuation of a defamation claim would affect the proper fee amount, leaving that question for the trial court on remand.[81]

VII. FEDERAL COURT APPLICATION

One additional question that comes up frequently is the extent to which the Act is applicable in federal court proceedings. Regarding federal claims, it is well settled that the TCPA does not apply because of the Supremacy Clause of the United States Constitution.[82] The Supremacy Clause "invalidates state laws that interfere with or are contrary to federal law."[83] State laws cannot create obstacles to the accomplishment and execution of the full purposes and objectives of federal statutes and regulations.[84] In the context of a federal cause of action, a state's Anti-SLAPP statute would create such an obstacle or interference such that federal courts are precluded from applying state statutes like the TCPA.

The closer question is regarding the Act's application to state claims before a federal court sitting in diversity. In general, federal courts sitting in diversity apply state substantive law and federal procedural law

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[72] *Id.* at 295-96.

[73] *Id.* at 296.

[74] 972 S.W.2d 19 (Tex. 1998).

[75] *Sullivan*, 488 S.W.3d at 296.

[76] *Id.*

[77] *Id.* at 298.

[78] *Id. at* 299.

[79] No. 15-0790, 2017 WL 1041234 (Tex. Mar. 17, 2017).

[80] *Id.* at *10.

[81] *Id.*

[82] U.S. Const., Art. VI, cl. 2.

[83] *Hillsborough Cnty., Fla. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (internal quotations omitted).

[84] *Id.* at 713.

under the *Erie* doctrine.[85] At the TCPA's outset, an open question remained whether the TCPA was a substantive law that was applicable in federal court, or strictly procedural. While the Fifth Circuit has yet to specifically address this issue, the weight of current authority suggests that the TCPA applies to state law claims brought in diversity cases in federal court.

A. *Williams v. Cordillera Communications, Inc.*[86]

Christopher Williams sued media defendants Cordillera Communications Inc., KVOA Communications, Inc. d/b/a KRIS Communications (collectively "KRIS") for defamation arising out of several broadcasts and social media posts. The statements at issue included that Williams, a school teacher, engaged in inappropriate sexual conduct with his students, sexual harassment and was arrested for indecent exposure.[87]

The action was removed to the District Court in the Southern District of Texas on the basis of diversity jurisdiction.[88] KRIS moved to dismiss under the TCPA; Williams objected, arguing that the TCPA is procedural and does not apply in federal court.

The district court disagreed, holding that the Act is enforceable in federal court. While noting that the TCPA is "procedural in that it has specific time constraints, places a stay on discovery, and requires an expedited decision with an accelerated appellate process," it ultimately determined that the "procedural features are designed to prevent substantive consequences—the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law regarding defamation."[89] The district court looked to several other federal courts applying state Anti-SLAPP laws and observed that the Fifth Circuit has concluded that the accelerated appeal provision of the Louisiana Anti-SLAPP statute applies in federal court.[90]

Since *Cordillera*, several other federal courts sitting in diversity have applied the TCPA.[91] For example, in *Walker v. Beaumont Independent School District*,[92] the Eastern District of Texas, sitting in diversity, applied the TCPA to dismiss claims against a school district and several related entities for the publication of allegedly defamatory publications about the plaintiff. Similarly, in *Cuba v. Pylant*,[93] the Fifth Circuit recently vacated a district court's decision denying a motion to dismiss under the TCPA, assuming—without deciding—that the TCPA applied in federal court as state substantive law.[94]

Notably, Judge Graves dissented, arguing that the TCPA is a procedural law and "must be ignored."[95] Judge Graves noted that, in his view, the TCPA conflicted with Rules 12 and 56 of the Federal Rules of Civil Procedure, and as a result, that the Act may not be applied as long as Rules 12 and 56 are validly promulgated rules under the Rules Enabling Act.[96]

Most recently, however, the District Court for the Southern District of Texas expressly disagreed with Judge Graves' line of reasoning, holding that the TCPA does not conflict with the federal rules. The district court in *Banik v. Tamez* ultimately noted that, while there appears to be a split of authority on whether state Anti-SLAPP laws conflict with the federal rules, the TCPA could be reconciled with the federal rules. The Court applied the TCPA and invited plaintiff to "make his argument to the Fifth Circuit so that it may establish precedent."[97]

Thus, while the question remains open after *Cuba v. Pylant*, the current weight of the case law suggests that the TCPA is a substantive law and, under *Erie*, is applicable in diversity cases. Nonetheless, practitioners should be aware that this issue remains somewhat unsettled.

VIII. CONCLUSION

When it was enacted in 2011, the Legislature tasked courts to interpret the TCPA "broadly" to properly effectuate the Act's core purpose.[98] Plaintiffs who assert such claims should be prepared to promptly adduce evidence to support their claims or risk early dismissal and liability for the defendant's attorney's

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[85] *Williams v. Cordillera Communications, Inc.*, 2:13-CV-124, 2014 WL 2611746, at *1 (S.D. Tex. June 11, 2014).

[86] 2:13-CV-124, 2014 WL 2611746, at *1 (S.D. Tex. June 11, 2014).

[87] *Williams v. Cordillera Communications, Inc.*, 26 F. Supp. 3d 624, 627 (S.D. Tex. 2014).

[88] 2014 WL 2611746 at *1.

[89] *Id.*

[90] *Id.* at *2 (citing *Henry v. Lake Charles American Press, LLC*, 566 F.3d 164 (5th Cir.2009)); *Brown v. Wimberly*, 477 Fed. Appx. 214, 216 (5th Cir. 2012) ("This court has adopted the use of the statute in federal court under *Erie*.").

[91] *See, e.g., Forsterling v. A&E Television Networks, LLC*, Civ. Action H-16-2941, 2017 WL 980347 (S.D. Tex. March 9, 2017).

[92] 1:15-CV-379, 2016 WL 1156852, at *1 (E.D. Tex. Mar. 24, 2016).

[93] 814 F.3d 701 (5th Cir. 2016).

[94] *Id.* at 706.

[95] *Id.* at 719 (Graves, J., dissenting).

[96] *Id.* at 720.

[97] *Banik v. Tamez*, No. 7:16-CV-462, 2017 WL 1228498 (S.D. Tex. Apr. 4, 2017).

[98] TCPA §27.011(b).

fees. Defendants should move to dismiss claims that lack merit. Courts have, on the whole, endeavored to apply the Act consistent with the Legislature's intent. As a result, litigants should consider the TCPA and its implications in any case where the substantive claim relates to speech about a matter of public concern.