Texas Citizens Participation Act:
Current and Future Boundaries of "Anti-SLAPP"

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Panelists: Justice Bob Pemberton, Third Court of Appeals

Ryan Botkin, Wittliff Cutter, PLLC

Pete Kennedy, Graves Dougherty Hearon & Moody

Moderator: Jennifer Hopgood, Office of the Attorney General

This paper has been prepared by Ryan Botkin, María Amelia Calaf, and Jennifer Hopgood.

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I. Introduction

A. Background to Texas's Anti-SLAPP Statute

The Petition Clause of the First Amendment protects the right of people to "petition the government for a redress of grievances." U.S. Const. amend. I. In the 1980's, legal scholars began to study and write about lawsuits for civil damages that, in their opinion, were being brought with increasing frequency against "political participants" by parties who perceived these participants as having political interests they opposed—specifically an "increasing incidence of the naming of environmental protection advocates and organizations as defendants in large civil damage cases." Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches* 22 Law & Soc'y. Rev. 385, 385-86, 387 (1988). Canan and Pring claim to have first termed these types of lawsuits—and the underlying concomitant "political-legal phenomenon"—as "strategic lawsuits against public participation" or SLAPPs. *Id.* 386.

Plaintiffs, scholars have posited, filed these SLAPP-type lawsuits "not with the intent of recovering from defendants, but rather to silence individuals and groups that ha[d] publicly opposed the plaintiff's actions or interests with the threat of costly, time-consuming, and potentially reputation-damaging litigation." Carson H. Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 Ohio State L.J. 845, 846 (2010) (citing *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003) (noting that SLAPPs "masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so")) (internal quotations and citations omitted).

In an effort to deter these lawsuits and to stop their "chilling effect" on public expression, states began to enact laws to allow for the early dismissal of meritless SLAPP lawsuits. By 2010, approximately twenty-seven states had passed some form of anti-SLAPP statute. *See* Canan & Pring at 386 (noting that this type of litigation effectively "chills" public participation and citing to *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 740-41 (1983) ("the chilling effect . . . upon a [defendant's] willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief")); Barylak at 847 (noting that state statutes' "common feature is the stated purpose of the anti-SLAPP measure" and that the purpose of California's anti-SLAPP statute is to "allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation"). Texas followed this trend and enacted its own "anti-SLAPP" statute in 2011.

B. The Texas Citizens Participation Act

The Texas Citizens Participation Act ("TCPA" or "Act") is designed to protect citizen participation and "actions involving the exercise of certain constitutional rights." Tex. Civ. Prac. & Rem. Code ch. 27. The TCPA's purpose 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." *Id.* § 27.002. As to the first part of the purpose, the TCPA "protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern." *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). The statute "shall be construed liberally to effectuate its purpose and intent fully." *Id.* § 27.0011(b). *But see id.* § 27.0011(a) (chapter does not abrogate, however, any "other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions").

1. Motion to Dismiss under the TCPA

The TCPA provides a "special procedure for the expedited dismissal of [a SLAPP] suit." *Lipsky*, 460 S.W.3d at 586. A party may file a motion to dismiss a legal action if the legal action 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." Tex. Civ. Prac. & Rem. Code § 27.003. "[A] court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

(1) the right of free speech;

(2) the right to petition; or

(3) the right of association.

Id. § 27.005(b).[1] A "legal action" is a "lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *Id.* § 27.001(6). The Act defines each of the three rights as predicated upon a "communication," which includes "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1).

The statute provides its own definition of "free speech." The exercise of the right of free speech means a "communication made in connection with a matter of public concern." *Id.* § 27.001(3). A matter of public concern includes an issue related to "health or safety"; "environmental, economic, or community well-being"; "the government"; "a public official or public figure"; or "a good, product, or service in the marketplace." § 27.001(7). The right of association is a communication "between individuals who join together to collectively express, promote, pursue, or defend common interests." *Id.* § 27.001(2).

Finally, and more extensively defined, the exercise of the right to petition may mean a communication in five delineated areas: in or pertaining to a proceeding—including judicial or non-judicial, legislative, or by a governing body—or meeting; in connection with an issue under review by a governmental body; one that is "reasonably likely" to either encourage consideration or review" by a governmental body or "enlist public participation in an effort to effect consideration of an issue" by a governmental body; or that "falls within the protection of the right to petition government" under the state or federal constitutions. *Id.* § 27.001(4). The Act further defines "governmental proceeding," "official proceeding," and "public servant." § 27.001(5), (7)-(9).

2. Procedural Burden Shifting

If a court finds that the moving party has met its burden of showing by a preponderance of the evidence that the legal action is based on, relates to, or is in response to one of the three enumerated and defined rights, the burden then shifts to the non-movant, i.e., the party that brought the underlying legal action, to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(b), (c). The burden may then shift back once more to the moving party, and a "court shall dismiss a legal action against the moving party if the

[1] This showing presumptively requires little more than an examination of the pleadings. *See Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017).

moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." *Id.* § 27.005(d).

3. Strict Timing for Filing and to Secure a Hearing

The timing of filing and disposition of a TCPA motion to dismiss occur early in a lawsuit — in keeping with the chapter's purpose to quickly dispose of a legal action. *See, e.g.*, *Lipsky*, 460 S.W.3d at 586. A motion to dismiss must be **filed** no later than the **sixtieth** (60th) day after date of service of the legal action. *Id.* § 27.003(b). A **hearing** must be **set** no later than the **sixtieth** (60th) day after date of service of the motion. *Id.* § 27.004(a). The statute does provide for some exceptions to the requirement that the hearing be set within 60 days from the filing of the motion. Specifically, a hearing may be set 90 days after service of the motion if docket conditions require an extension, a showing of good cause has been made, or the parties have agreed to the extra 30 days. *Id.* § 27.004(a)-(b). If the court allows for discovery, the hearing may not occur more than 120 days after the date of service of the motion. *Id.* § 27.004(c).[2]

4. Discovery and Evidence

The filing of a motion to dismiss suspends all discovery. *Id.* § 27.003(c). However, on motion by a party or by the court, and on showing of good cause, the court may allow "specified and limited discovery relevant to the motion." *Id.* § 27.006(b). Of note generally, in ruling on a motion to dismiss, a court "shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a).

5. Appeal

A court must rule on a motion not later than the 30th day after the date of a hearing. *Id.* § 27.005(a). If a court does not rule by the 30th on a motion after the hearing, the motion is considered denied by operation of law. *Id.* § 27.008(a). Importantly, a movant may take an interlocutory appeal from a trial court's *denial* of a TCPA motion. *See id.* § 51.014(d)(12) (allowing for interlocutory appeal).[3] And such an appeal will be considered expedited by a court of appeals. *Id.* The proceedings below are stayed pending the appeal.

6. Attorney's Fees, Costs, and Sanctions

One unique aspect of the TCPA is related to attorney's fees and costs. If a motion to dismiss is granted, a court *shall* award to 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." *Id.* § 27.009(a)(1). Conversely, if a court finds that a motion to dismiss is "frivolous or solely intended to delay," a court *may* award court costs and reasonable attorney's fees to the responding party. *Id.* §

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[2] The lack of a deadline for a response can lead to uncertainty in getting a timely ruling.

[3] This provision, added in 2013, clarifies that the TCPA provides for an interlocutory appeal from any order denying a motion to dismiss brought under the TCPA. Several appellate courts have found that Section 51.014(d)(12) does not allow for an interlocutory appeal of a grant of a TCPA motion.

27.009(b). And a court may also impose sanctions to deter a party who brought a legal action from bringing similar actions. *Id.* § 27.009(b).

The Supreme Court has determined that the phrase "as justice and equity may require" only applies to "other expenses" and consequently, if a trial court grants a TCPA motion, it *must* award reasonable attorney's fees to the party who brought the motion to dismiss. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) (contrasting the mandatory fee provision of the TCPA with the permissive award under the Declaratory Judgments Act, which is subject to consideration of an award being "reasonable and necessary" and "equitable and just").[4] A reasonable attorney's fee is defined as "'one that is not excessive or extreme, but rather moderate or fair.'" *Id.* at 299 (quoting *Garcia v. Gomez*, 319 S.W.3d 638, 642 Tex. 2010)). Likewise, sanction awards should be designed to deter future filings of legal actions that would be dismissed under the statute.

7. Statutory Exceptions

A chapter 27 motion to dismiss does not apply in the follow four instances: an enforcement action brought in the name of the State or a political subdivision; a legal action involving commercial speech; personal injury or wrongful death actions; or actions brought under the insurance code or arising out of an insurance contract. *Id.* § 27.0010. The commercial speech exception is discussed more fully below.

II. Current State of Application

A. Texas Supreme Court Opinions

As of April 12, 2018, the Texas Supreme Court has handed down ten opinions on the TCPA. These opinions are discussed in greater detail below. While some of the earlier opinions offer very case-specific analysis of defamation, libel, and slander claims, there are three supreme court opinions that stand out for their precedential value in understanding the procedural and evidentiary burdens under the TCPA. For that reason, we address those opinions here first.

1. *Lipsky*: Circumstantial Evidence Allowed

The first case regarding the TCPA to reach the supreme court was *Lipsky*. 460 S.W.3d. 579. Landowner Lipsky sued drilling company Range for nuisance, alleging that Range's fracking operations near Lipsky's home were negligent, grossly negligent, and a nuisance, and that Range's drilling had contaminated Lipsky's water well. Range then filed a counterclaim against Lipsky and a third-party claim against his environmental consultant for defamation, business disparagement, and civil conspiracy. Lipsky in turn filed a TCPA motion against Range. The trial court denied Lipsky's motion and the court of appeals affirmed.

[4] For aficionados of grammar, the Supreme Court discussed the importance that a lack of a comma in the statute had in informing the text's meaning: "the insertion of a comma before 'as justice and equity may require,' would have indicated that the phrase was to modify the entire series." *Sullivan v. Abraham*, 488 S.W.3d 294, (Tex. 2016) (concluding that trial court applied erroneous standard when awarding "an equitable and just amount for attorney's fees rather than the required reasonable amount").

The issue before the supreme court was whether, in the second step of a court's analysis, circumstantial evidence could be considered by a court to determine if a plaintiff had met its burden of "'establish[ing] by clear and specific evidence a prima facie case for each essential element of the claim in question.'" *Id.* at 587 (quoting Tex. Civ. Prac. & Rem. Code § 27.005(c)). In answering this question, the supreme court noted that the statute does not define "clear and specific" and analyzed the nature of circumstantial evidence and whether it could be used to meet the prima facie burden. *Id.* at 588-89. Observing that circumstantial evidence "is simply indirect evidence that creates an inference to establish a central fact," the justices reasoned that the TCPA does not require direct evidence of each essential element of an underlying claim. *Id.* at 591. *See also Andrews Cty. v. Sierra Club*, 463 S.W.3d 867 (Tex. 867) (reversing and remanding in light of court's holding in *Lipsky* to intermediate court that had previously concluded TCPA did not permit use of circumstantial evidence or reasonable inferences to support a plaintiff's prima facie case).

Specific to Lipsky's TCPA motion, the court held that Range did not meet its burden as to its business disparagement claim. To prove its claim of special or economic damages, Range submitted an affidavit that only claimed that the company had suffered loss. *Id.* at 592-93 (noting that the affidavit was "devoid of any specific facts illustrating how Lipsky's alleged remarks about Range's business activities actually caused such losses"). The supreme court did, however, hold that Range had met its burden regarding its defamation per se claim. *Id.* at 596 (observing that Lipsky had "portrayed Range as incompetent, even reckless, as a gas producer, thereby injuring the company's reputation" and had accused Range of contaminating an aquifer).

2. *Lippincott* and *Coleman*: Communications of "Public Concern"

In another case involving defamation claims, the Texas Supreme Court clarified the type of communications covered by the TCPA. In *Lippincott v. Whisenhunt*, nurse-plaintiff Whisenhunt sued hospital administrators, at the hospital from which he had been dismissed from employment, for defamation, tortious interference with business relations, and conspiracy to interfere with business relations. 462 S.W.3d 507, 508 (Tex. 2015). The suit concerned emails the administrators wrote and sent to a third-party regarding nurse Whisenhunt—the emails alleged that Whisenhunt "represented himself to be a doctor, endangered patients for his own financial gain, and sexually harassed patients." *Id.* at 508-09. In response to the nurse's lawsuit, the administrators filed a TCPA motion to dismiss. *Id.* at 509. The supreme court, in holding that the TCPA applied to the administrators' emails, rejected the court of appeals' reasoning that the Act only protects public communication. *Id.* (noting that court of appeals relied on the phrase "otherwise participate in public" in the Act's purpose section, Tex. Civ. & Prac. Code § 27.001(1), to arrive at this interpretation). Instead, the court reasoned that the "plain language of the statute imposes no requirement that the form of the communication be public." *Id.* Internal communications, including oral communications, could come within the ambit of the TCPA.

Without offering a detailed discussion, the supreme court additionally determined that the emails in that case were "made in connection with a matter of public concern." *Id.* at 509-10 (noting that court had "previously acknowledged that the provision of medical services by a health care professional constitutes a matter of public concern" (citing *Neely v. Wilson*, 418 S.W.3d 52, 70 n.12 & 26 (Tex. 2013))). Thus, the court found the administrators met their burden of demonstrating that the TCPA applied to the emails at issue. *Id.* at 510.

The Texas Supreme Court expanded on its reasoning for its decision in *Lippincott* in a subsequent opinion, *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899-901 (Tex. 2017) (discussing *Lippincott* at length). There, Coleman, a terminal technician, sued his former employer ExxonMobil for defamation, after Coleman's supervisors alleged, in statements, inventory sheet, and a near loss report, that Coleman had failed to gauge a storage tank and such a failure could result in "noxious and flammable chemicals overfilling and spilling onto the ground." *Id.* at 897-98, 901 (noting that employees completed near loss reports "any time an incident occurs or [an] environmental or safety risk is observed") (internal quotations omitted). The company ultimately discharged Coleman from employment, and Coleman's defamation suit followed. *Id.* at 898. In holding that the statements "qualified as matters of public concern," the Supreme Court noted that the Act does not require that "communications involve more than a 'tangential relationship' to matters of public concern" nor does the Act require that communications "specifically 'mention' health, safety, environmental, or economic concerns." *Id.* at 900-01 (quoting and critiquing court of appeals opinion and that court's "improper narrowing" of the TCPA). A tangential relationship to a matter of public concern satisfied the statutory requirement of the TCPA.

As discussed in greater detail below, the supreme court's reasoning, and holdings, in *Lippincott* and *Coleman* have proved to "put to rest . . . [any] implicit limitations into the TCPA derived from broader statutory or jurisprudential contexts" including "First Amendment jurisprudence." *Cavin v. Abbott*, No. 03-16-00395-CV, --S.W.3d--, 2017 WL 3044583, at *10 (Tex. App.—Austin July 14, 2017, no pet.).

3. Minor Clarifications as to Elements of Defamation

Five other Texas Supreme Court opinions issued so far, while less significant in clarifying the scope of the TCPA, provide valuable guidance with respect to defamation claims and the burden non-movants must meet in order to defeat a motion to dismiss in those types of suits.

By way of example, in *Greer v. Abraham*, the supreme court held that when a public figure sues for defamation he must prove each element of the tort, including actual malice. 489 S.W.3d 440, 441 (Tex. 2016). School board trustee Abraham filed a defamation suit against an entity that ran a watchdog blog and had published a report that at a campaign rally, Abraham had heckled a candidate who was running against one Abraham's fellow school board members. *Id.* at 441-42. The blog had also reported that Abraham had to be forcibly removed from the event by then-governor Rick Perry's security detail. *Id.* at 442. Despite clarifying its blog post to delete the detail of Abraham having to be forcibly removed from the campaign event, Abraham sued the blog and Greer for defamation. *Id.* at 442-43. The defendants filed a TCPA motion to dismiss, and the trial court allowed Abraham to conduct discovery to ascertain Greer's state of mind. *Id.* at 443. The trial court ultimately granted the motion to dismiss, ruling that Abraham had not met his burden to present clear and specific evidence of actual malice. *Id.* The court of appeals reversed, reasoning that Abraham did not have to prove actual malice. In reversing the lower court's holding, the supreme court in providing a nuanced examination of actual malice, held that Abraham was a public figure, having been the longest serving member of the Canadian ISD school board, and he failed to meet his burden to establish a prima facie case for the element of actual malice. *Id.* at 446.

In *KBMT Operating Co., LLC v. Toledo*, 492 S.W.3d 710, 711-12 (Tex. 2016), a pediatrician filed a defamation suit against a television station after the station reported on a disciplinary proceeding against the pediatrician by the Texas Medical Board for having engaged in sexual contact with a patient.

The station reported the disciplinary action four times, but only in the last report did the station mention that the patient with whom Toledo had an inappropriate relationship was "an adult." *Id.* at 712. In addressing the station's TCPA motion to dismiss, the Texas Supreme Court held that the plaintiff pediatrician had failed to establish by clear and specific evidence that the station's report was false—an essential element of a defamation claim. *Id.* at 711 ("We hold that the truth of a media report of official proceedings of public concern must be measured against the proceedings themselves, not against information outside the proceedings."). In a lengthy dissent, Justice Boyd reasoned that Toledo had submitted prima facie proof that "an ordinary viewer could have understood the broadcasts to assert" that she had inappropriate relations with a minor and disagreed with the Court's conclusion regarding the broadcasts' "gist" was sufficient. *Id.* at 732-33 (Boyd, J., dissenting).

In the 2017 term, the supreme court addressed defamation allegations in three separate opinions. First, in *D Magazine Partners, L.P. v. Rosenthal*, a private citizen sued *D Magazine* for defamation after the magazine published an article about her, claiming that she had committed welfare fraud. 529 S.W.3d 429, 431 (Tex. 2017). The magazine in turn had filed a TCPA motion to dismiss. *Id.* In noting certain elements of the article, including the inclusion of a mug shot of Rosenthal from an unrelated arrest and captioning the article's title "The Park Cities Welfare Queen" under the heading "CRIME," the court held a "reasonable person could construe the article as a whole to accuse the plaintiff of fraudulently obtaining public benefits and that the plaintiff presented sufficient evidence in support of the defamation elements to survive the magazine's motion for early dismissal. *Id.* (holding that Rosenthal had presented prima facie case of defamation to defeat magazine's TCPA motion and acknowledging tension between rights of free press and speech and right of individuals to have "legal recourse when they are injured by false and defamatory speech"). *Id.*[5]

Second, in *Bedford v. Spassoff*, Spassoff, individually and as sole owner of a youth baseball-instructional club, the Dallas Dodgers Baseball Club, sued Bedford for libel, business disparagement, tortious interference with contract, and intentional infliction of emotional distress after Bedford, whose son played on the youth baseball team, posted on Facebook that one of Spassoff's batting coaches had engaged in an "inappropriate relationship" with Bedford's wife. 520 S.W.3d 901, 903 (Tex. 2017). Bedford, in turn, filed a TCPA motion to dismiss all claims. *Id.* On appeal, only the libel claim was before the supreme court. In relying on its earlier reasoning in *Lipsky*, the Court noted that a plaintiff asserting a defamation claim "'must plead and prove damages, unless the defamatory statements are defamatory per se.'" *Id.* at 904. *See also* Tex. Civ. Prac. & Rem. Code § 73.001 ("A libel is a defamation expressed in written or other graphic form. . . ."). In its discussion of defamation per se, the court reasoned that Bedford's Facebook post concerning the batting coach's affair with Bedford's wife "did not accuse Spassoff or the Dodgers of lacking a peculiar or unique skill related to baseball or to running a baseball organization." *Id.* at 905. The Justices then concluded that because Bedford's Facebook post was not defamatory per se, the plaintiffs bore the burden to establish damages by clear and specific evidence. *Id.* (citing to *Lipsky*). Because the plaintiffs failed to sufficiently

[5] The court's holding turned on whether the article's gist was simply about whether the state's welfare agency had given benefits to "a person living in an expensive home in a wealthy school district despite a criminal history of theft,"—as the magazine contended—or was the article's gist that Rosenthal had "defrauded" the state to obtain benefits. *Id.* at 434. Justice Guzman, in turn, provided a cogent concurrence—and critique—regarding the intermediate court's overly narrow reliance on a single, crowd-sourcing source for the definition of "welfare queen." *Id.* at 442-47 (providing analysis of Wikipedia and the definition of "welfare queen" and noting that the site's open-edit model lacks "assurance that any particular definition actually represents the commonly understood meaning of a term that may be central to a legal inquiry").

plead and prove actual damages, the supreme court remanded the TCPA motion to the trial court for dismissal and for determination of attorney's fees for Bedford. *Id.* at 906.

In the third opinion for the 2017 term, the Texas Supreme Court held that a defendant may obtain dismissal under the TCPA even when the defendant denies making the statement at the center of a plaintiff's legal action. *Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017). In *Hersh*, the parents of a teenager had published an obituary in the *Dallas Morning News* and stated that their son had died of injuries "sustained in an automobile accident." *Id.* at 464. A staff writer for the *News* then wrote an article on suicide, and without naming the Tatums' son, described in sufficient detail the obituary and the details surrounding the car accident to identify their son, and then stated that the teenager had actually died of a self-inflicted gunshot wound "in a time of remorse afterward." *Id.* Prior to the publication of the article, the staff writer had met with Hersh, an author and advocate for removing stigma surrounding suicide, including when families neglect to mention suicide as the cause of death in obituaries. *Id.*

Relevant to the appeal to the supreme court, the Tatums sued Hersh for intentional infliction of emotional distress, alleging that Hersh's actions in "exploiting the tragedy of a grieving family for her personal gain by encouraging [the staff writer] to criticize [their obituary] constitute extreme and outrageous conduct." *Id.* at 465. And although Hersh admitted to meeting with the staff writer, she denied discussing the Tatums' son at the meeting. *Id.* The court held that when the pleadings in a legal action implicate an individual's exercise of free speech, the TCPA applies to such suits. *Id.* at 467-68 (noting also that "suicide prevention and awareness relate to health, safety, and community well-being, all included in the statutory definition of 'matters of public concern'" (quoting Tex. Civ. Prac. & Rem. Code § 27.001(7))). The court also held that the Tatums failed to meet their burden of showing that Hersh's conduct was "extreme and outrageous." *Id.* at 468 (reversing dismissal of Hersh's TCPA motion and remanding for consideration of attorney's fees). *See also id.* at 468-71 (Boyd, J., concurring) (relying on plain language of the statute, the majority ought to have not focused solely on "based on." but could have also found that Hersh established that her legal action also "relates to" and "is in response to" her exercise of free speech").

As explained in more detail below (*see infra* Practice Tips), these decisions suggest that practitioners asserting claims arising in connection with speech to any media outlets or web-based publications must build a strong factual record in order to survive a TCPA motion to dismiss.

B. Lower Court Opinions

1. "Vastly Expansive" Meaning and Scope of "Communication" Post-*Coleman*

For practitioners interested in TCPA-related jurisprudence, the recently handed-down opinions of *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.* and *Cavin v. Abbott* bear close reading. *See* 520 S.W.3d 191 (Tex. App.—Austin 2017, pet. dism'd by agr.); --S.W.3d---, 2017 WL 3044583 at *1. We turn first to the Third Court of Appeal's analysis of the meaning and scope of the "exercise of the right of free speech" as addressed in the *Cavin* opinion. The court, relying on the supreme court's reasoning and holdings in *Coleman* and *Lippincott*, and to a lesser extent *Hersh*, announced that it

> must apply a plain-meaning construction of the TCPA's definitions' literal language, without regard to the TCPA's broader purposes or background jurisprudence, even when this results in a *vastly expansive application of the 'exercise of the right of free speech' to*

> *reach a business's internal personnel matters having only an indirect relationship to the 'matter[s] of public concern' made the basis for the motion.*

Cavin, 2017 WL 3044583 at * 11 (emphasis added). The court further noted that the three rights in a TCPA motion—the rights of free speech, petition, and association—"extend considerably beyond—and largely without regard to—the parameters of expression *that would actually be protected by the First Amendment or the Texas Constitution*." *Id.* (emphasis added). Stated differently, this plain-meaning construction militates against reading into the statute a limited applicability as to when an expression is "constitutionally protected." *See id.* (noting that "[w]hether the expression is constitutionally protected . . . could come into play only in the second phase of the analysis, as a component of a claimant's clear and specific evidence of each essential element of each claim against the defendant" (citing to *Autocraft*)).

In *Cavin*, a daughter and her husband—the Abbotts—sued her parents under several causes of action, including defamation and intentional infliction of emotional distress. *Id.* at *4. The daughter's parents, the Cavins, had undertaken an extensive and long-term effort to convince the daughter, and her friends and employer, that she had been, inter alia, brainwashed and subjected to an abusive relationship by her husband. *Id.* at *1-4. The parents in turn filed a TCPA action, arguing that their communications, which had been made the basis of the underlying legal action, fell within the TCPA's definition of "'communication[s] made in connection with . . . a matter of public concern.'" *Id.* at *12. The court agreed, holding that the subjects of mental illness and abuse "plainly fall within the ordinary meaning of 'health' and 'safety.'" *Id.*

The *Cavin* opinion also provides a cogent analysis of the court's earlier opinion in *Autocraft*. In *Autocraft*, the court held that "an auto-repair business's internal communications incident to alleged misappropriation of trade secrets from a rival sufficed as the 'exercise of the right of association' as the TCPA defines the term, *regardless of whether those communications were constitutionally protected expression*." *Id.* at *11 (citing to *Autocraft*). The Third Court of Appeals held in *Autocraft* that the TCPA "can potentially be invoked successfully to defend against claims seeking to remedy alleged misappropriation or misuse of a business's trade secrets or confidential information." 520 S.W.3d at 193. This broader application, post-*Coleman*, is so "principally because the 'communications' protected by the TCPA, and which in turn can serve as the predicate for a motion to dismiss a 'legal action' under that Act, are not confined solely to speech that enjoys constitutional protection." *Id.* at 193-94 (citing to *Coleman*, 512 S.W.3d 895). The basis of the underlying legal action involved former Autocraft employees who left the auto repair company to begin employment at a competitor's business—Elite Auto Body. *Id.* at 194. Autocraft sought injunctive relief against Elite and former employees and sought damages founded on theories of trade-secret misappropriate, unfair competition, and breach of fiduciary duty, among other claims. *Id.* Elite, in turn, filed a TCPA motion to dismiss. *Id.* The appellate court held that the TCPA applied because Elite had met its "initial burden to 'show[] by a preponderance of the evidence that Autocraft's 'legal action' or actions 'is based on, relates to, or is in response to' Elite's 'exercise of the right of association.'" *Id.* at 205.[6]

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[6] Recently, a sister court distinguished the holding in *Autocraft*, declining to hold that the TCPA applied in a suit involving a "bar fight" and the ensuing "brawl" at the appellate court. *See LFMC Enterprises, LLC v. Baker*, --S.W.3d--, 2018 WL 1474203, at *1 (Tex. App.—Houston [1st Dist.] Mar. 27, 2018, no pet.). A patron of a Houston nightclub filed a suit for, relevant here, statutory common- and public-nuisance after being beaten up by several of the club's bouncers. *Id.* The club's owners then filed a TCPA motion, urging that the legal action of nuisance interfered with their right of association. *Id.* at 2. In declining to hold that the owners' rights of association had been implicated, the court noted that the owners failed to show they exercised a right of

The *Cavin* court also addressed the possibility that any legal action could, arguably, be subject to a TCPA motion to dismiss:

> One might similarly observe that under the foregoing plain-meaning construction of the TCPA, it is hard to conceive of a 'legal action' that is *not* 'based in, relate[d] to, or . . . in response to' at least one of the TCPA's three defined categories of protected activity, so long as the complained-of conduct had some kernel of TCPA-defined 'communication' within it.

Cavin, 2017 WL 3044583, at *16. Footnote 88 is of particular importance in explaining concerns about the potentially unlimited application of the TCPA. *See id.* n.88 (citing to *Serafine v. Blunt*, 466 S.W.3d 352, 377-95 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring); *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at *12, 2015 Tex. App. LEXIS 3337 at *42 (Tex. App.—Austin Apr. 7, 2015, no pet.) (mem. op.) (Field, J., concurring) ("It seems that any skilled litigator could figure out a way to file a motion to dismiss under the TCPA in nearly every case, in the hope that the case will not only be dismissed, but that the movant will also be awarded attorneys' fees.")).[7]

2. Commercial Speech Exception

Although the Texas Supreme Court has yet to address the scope of the commercial speech exception, various appellate decisions suggest that this statutory exception may ultimately narrow the scope of the TCPA's applicability. Section 27.010(b) provides that the TCPA

> 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.

Tex. Civ. Prac. & Rem. Code § 27.010(b). The burden of proving the applicability of the exemption is on the party asserting it. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 89 (Tex. App.–Houston [1st Dist.] 2013, pet. denied) (op. on reh'g). Until recently, Texas state appellate courts, as well as the Fifth Circuit, have uniformly construed the commercial-speech exemption to require the following showing:

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association by ever going to the club or "engag[ing] in any communication with others about common interests there" or how an injunction would impinge on this right *Id.* at *3.

[7] Such concerns do seem to have merit. *See, e.g.*, *Collins v. Collins*, No. 01-17-00817-CV, 2018 WL 1320841, at *1-4 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018, no pet. h.) (mem. op.) (holding that, in probate proceeding, ex-wife's legal action for fraud, conversion, and partition "based on [now-deceased ex-husband]'s alleged misrepresentation or nondisclosure of assets during their divorce," TCPA applied because current wife showed that ex-wife's claims were "based on, related to, or in response to [ex-husband]'s exercise of the right to petition," where causes of action "rel[ied] on the same factual allegations to support her claim for a share" of marital assets and that former husband "was exercising his right to petition when he served the affidavit and inventory in the divorce").

(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services

(2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services;

(3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and

(4) the intended audience for the statement or conduct [is an actual or potential buyer or customer].

See, e.g., *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 753–55 (5th Cir. 2014); *Whisenhunt v. Lippincott,* 474 S.W.3d 30, 42–43 (Tex. App.–Texarkana 2015, no pet.); *Schimmel v. McGregor*, 438 S.W.3d 847, 856–58 (Tex. App.–Houston [1st Dist.] 2014, pet. denied); *Pena v. Perel,* 417 S.W.3d 552, 555 (Tex. App.–El Paso 2013, no pet.); *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Srvs., Inc.*, 441 S.W.3d 345, 354 (Tex. App.–Houston [1st Dist.] 2013, pet. denied); *Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 309 (Tex. App.–Dallas 2013, pet. denied); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d at 88–89.

Recently, however, several appellate courts have called the applicability of this four-pronged test into question. Specifically, a few appellate courts have observed that the original analysis by the Fifth Circuit followed a California supreme court case interpreting that state's anti-SLAPP statute, which has a similar, but not identical commercial-speech exception. Those courts have found that under Texas law the second prong –the requirement that the cause of action arise out of the statement or representation made about another's business—is not necessary and is, in fact, inconsistent with the statutory mandate. *See, e.g.*, *Castleman v. Internet Money Ltd.*, 2017 WL 1449224, at *4 (Tex. App.—Amarillo April 19, 2017, pet. filed) (declining to apply second prong of *Crazy Hotel* test and concluding that because of the differences between California's exemption and the TCPA's, neither California's exemption nor the decisions of those Texas intermediate and federal appellate courts that incorporate aspects of California's exemption when interpreting the TCPA's exemption are controlling); *see also Redflex Traffic Sys., Inc. v. Watson*, No. 02-16-00432-CV, 2017 WL 4413156, at *10 (Tex. App.—Fort Worth Oct. 5, 2017 no pet.) (mem. op) (agreeing); *Global Tel*Link Corp. v. Securus Techs. Inc.*, No. 05–16–01224–CV, 2017 WL 3275921, at *3 (Tex. App.–Dallas July 31, 2017, pet. dism'd) ("We agree with the Amarillo Court of Appeals [that] the California statute does not control or even assist in the interpretation of [the TCPA's exemption]." (footnote omitted)). Eliminating the second prong of the commercial-speech test would arguably open up the exception to more types of cases.

3. What Constitutes a "Legal Action"?

Several intermediate courts of appeals have grappled with the meaning of "legal action" as defined by the TCPA. The Act defines a "legal action" as a "lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." Tex. Civ. Prac. & Rem. Code § 27.001(6).

Rule 202: In the context of a Rule 202 proceeding, one court of appeals has held that a trial court should have first ruled on a TCPA motion to dismiss prior to ordering a Rule 202 deposition to occur. *In re Elliot*, 504 S.W.3d 455, 457, 461, 464 (Tex. App.—Austin 2016, orig. proceeding) (noting that the definition of "legal action" is "defined very broadly in the TCPA" and that Rule 202 requires person seeking an order from trial court for pre-suit deposition to file a "petition" (citing to Tex. R. Civ. P. 202.1)). In a lengthy concurrence, Justice Pemberton argued that the court should have conditionally granted mandamus on a different ground—that the trial court had ordered the Rule 202 deposition to proceed without first requiring the party seeking the deposition to make a threshold showing "of any kind regarding the merits of [its] potential claims"). *Id.* at 470 (Pemberton, J., concurring) (noting that majority's reasoning would "imply that a vast range of court filings could be attacked through TCPA dismissal motions").[8]

Motion to Dismiss: More straightforward, but no less interesting, the First Court of Appeals recently held that a TCPA motion cannot be filed to defeat another TCPA motion. *See Paulsen v. Yarrell*, 537 S.W.3d 224, 234 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (reasoning that the "proposed interpretation of 'legal action'" by the party who had filed the second TCPA motion "could allow a plaintiff to defeat a motion to dismiss under the TCPA while avoiding the requirement to show that his claim has merit by establishing a prima facie case for each essential element of his claim"). The court further noted that "the TCPA's dismissal mechanism does not authorize a countermotion to dismiss as a substitute for a standard response in opposition." *Id.*

Motion for Sanctions: Most recently, the Third Court of Appeals held that a motion for sanctions, titled as a "counterclaim," constitutes a "legal action" subject to a TCPA motion to dismiss. *Hawxhurst v. Austin's Boat Tours*, --S.W.3d--, No. 03-17-00288-CV, 2018 WL 1415109, at *5 (Tex. App.—Austin Mar. 22, 2018, no pet. h.) (reasoning that a counterclaim or a motion for sanctions is a "legal action" under TCPA). The dissent asserted that "the TCPA's definition of 'legal action,' read carefully and in context, refers to a 'legal action' in the sense of a procedural vehicle for the vindication of some substantive cause of action or right of relief." *Id.* at *8 (Pemberton, J., dissenting) (noting that a sanctions request, "like the TCPA motion in *Paulsen*, does not 'request[] legal or equitable relief' in this more limited, technical sense, and is not a 'legal action'").

III. Future of TCPA

A. 2018 Supreme Court Term and Beyond

Of the several petitions currently pending at the Texas Supreme Court, there have been at least two oral arguments on cases regarding the TCPA.[9] In *Adams v. Starside Custom Builders, LLC* (16-

[8] Currently pending at the supreme court is an interesting appeal out of the Dallas court of appeals concerning a Rule 202 proceeding. *See Glassdoor, Inc. v. Andra Group, LP*, 17-0463, No. 05-16-00189-CV, 2017 WL 1149668, at *1 (Tex. App.—Dallas Mar. 24, 2017, pet. pending) (mem. op.) (whether trial court must rule on TCPA motion prior to granting a Rule 202 request for deposition).

[9] As of April 7, 2018, at least seven other petitions for review have been filed:

- *Walker v. Hartman*, 17-0508, 516 S.W.3d 71, 80 (Tex. App.—Beaumont 2017, pet. pending) (holding that TCPA motion survived nonsuit filed after motion to dismiss);
- *Castleman v. Internet Money Ltd.*, 17-0437, 2017 WL 1449224, at *4 (Tex. App.—Amarillo April 19, 2017, pet. pending) (declining to apply second prong of *Crazy Hotel* test and concluding that

0786, oral argument heard on January 9, 2018), home builder Starside sued homeowner Adams for business disparagement and later dropped that claim and added a claim for defamation. Adams filed a TCPA motion to dismiss but failed to amend the motion to state how his statements at issue fell within the TCPA. *See* 2016 WL 3548013, 05-15-01162-CV, at *1-3 (Tex. App.—Dallas, June 28, 2016, pet. granted) (mem. op.). Relying on its earlier decisions in *ExxonMobile v. Coleman* and *Tatum v. Hersh*, both of which were later reversed by the supreme court, the Dallas appeals court held that Adams had failed to meet his burden to show that the TCPA applied to Starside's defamation claim. *Id.* at *5.

The supreme court in the 2018 term also has heard oral argument in *Youngkin v. Hines*, 16-0935, on December 6, 2016. Attorney Youngkin had represented landowners in a property dispute in which Hines was a defendant. 524 S.W.3d 278, 281 (Tex. App.—Waco 2016, pet. granted). After a proposed settlement agreement fell apart, Hines sued Youngkin for fraud and conspiracy; Youngkin in turn filed a TCPA motion to dismiss. *Id.* at 283-85. The appellate court affirmed the trial court's dismissal of the motion, holding that Youngkin failed to establish a litigation-privilege defense. *Id.* at 291-92 (noting that Youngkin only provided "bare assertion that he was acting as the property owners' attorney). On appeal to the supreme court, the Texas Trial Lawyers Association has filed an amicus brief, urging the court to grant Youngkin's motion because an attorney ought to be afforded "immunity from civil liability to third parties for actions taken while representing a client in litigation." Amicus Brief at ii.[10]

B. Federal: Procedural or Substantive?

The Fifth Circuit has not yet decided on the applicability of state anti-SLAPP statutes in federal court. *See, e.g.*, *Rudkin v. Roger Beasley Imports, Inc.*, No. A–17–CV–849–LY, 2017 WL 6622561, at *2 (W.D. Tex. Dec. 28, 2017) (noting that "[t]he applicability of state anti-SLAPP statutes in federal court

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because of differences between California's exemption and TCPA's, decisions of Texas courts incorporating aspects of California's exemption are not controlling);

- *Quintanilla v. West*, 17-0454, 534 S.W.3d 34 (Tex. App.—San Antonio 2017, pet. pending) (whether parol evidence precludes consideration of certain evidence in deciding whether plaintiff met burden in response to TCPA motion);
- *Glassdoor, Inc. v. Andra Group, LP*, 17-0463, 2017 WL 1149668, at *1 (whether trial court must rule on TCPA motion prior to granting a Rule 202 motion);
- *Dallas Morning News, Inc. v. Hall*, 17-0637, 524 S.W.3d 369 (Tex. App.—Fort Worth 2017, pet. pending) (trial court may not act as factfinder or resolve conflicting reasonable inferences in determining whether a plaintiff satisfies its prima facie proof requirement);
- *Van Der Linden v. Khan*, 17-1034, 535 S.W.3d 179 (Tex. App.—Fort Worth, 2017, pet. filed) (whether movant who had posted Facebook messages alleging plaintiff-doctor had given money to Taliban were "made in connection with a matter of public concern"); and
- *Warner Bros. Entertainment v. Jones*, 18-0068, – S.W.3d -- , No. 03-16-00009-CV, 2017 WL 6757187 (Tex. App.—Austin, Dec. 21, 2017, pet. filed) (holding that former NFL player had established prima facie case of libel against all but one defendant after news site published unverified allegation that football player had hired hitman to kill his agent).

[10] Available at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=99c1645d-dfb5-4380-895c-cd64d8ae94e9&coa=cossup&DT=BRIEFS&MediaID=5c027211-6ef5-4c0b-b376-a18e2c84af9f.

is an important and unresolved issue in this circuit" (quoting *Block v. Tanenhaus*, 867 F.3d 585, 589 (5th Cir. 2017))). The *Rudkin* opinion is interesting, and of potential importance, because the court held that the TCPA is procedural and consequently not applicable in federal court. *Id.* at *3 (citing to *Cuba v. Pylant*, 814 F.3d 701, 719 (5th Cir. 2016) (Graves, J., dissenting). Judge Austin further noted that even if the TCPA "is viewed to be somehow substantive, it still cannot be applied in federal court, as its provision conflict with [federal] Rules 12 and 56." *Id.*

Roger Beasley has filed a notice of appeal (cause no. on appeal to Fifth Cir. is 18-50157). It will be interesting to see if this case is the one via which the Fifth Circuit decides whether the TCPA is procedural or substantive.

C. Legislative Fix to Provide Some Limits on Scope and Applicability?

As noted above, the supreme court's reasoning, and holdings, in *Lippincott* and *Coleman* have "put to rest . . . [any] implicit limitations into the TCPA derived from broader statutory or jurisprudential contexts" including "First Amendment jurisprudence." *Cavin v. Abbott*, No. 03-16-00395-CV, --S.W.3d--, 2017 WL 3044583, at *10 (Tex. App.—Austin July 14, 2017, no pet.). Given the now-seemingly boundless application of the TCPA to legal actions, an observation from a 2015 concurrence regarding the TCPA now seem even more prescient, and necessary, in 2018:

> The TCPA presents difficult issues of statutory construction that broadly impact not only the sound operation of our civil justice system, but the sometimes-competing rights of Texans that the statute was expressly intended to balance and reconcile. As my expressed concerns have failed to sway this Court thus far, I can only hope that some justice of the Texas Supreme Court might be listening and find this writing of some assistance in this or another of the TCPA cases that are beginning to crowd its docket. Even better, I would hope that the Texas Legislature might be listening, because it could provide, by amending the TCPA, the clearest and most direct expression of any legislative intent that has been eluding the Judicial Branch.

Serafine, 466 S.W.3d at 394-95 (Pemberton, J., concurring). As courts are bound to apply statutes as they are written and find them, it seems that any reining in of the applicability of the TCPA will need to come from the Texas Legislature.

IV. Practice Tips

The following list of practice tips, by no means exhaustive, are suggestions to consider when either thinking about filing a lawsuit or when named as a defendant.

A. Plaintiff: Possibility of Defendant Filing a TCPA Motion

1. Pre-Suit: Educate Your Client

If counsel for a potential plaintiff, you must consider the possibility of a potential defendant filing a TCPA motion to dismiss. Likewise, you should take care to educate your client about this possibility *prior to filing a legal action*. Some important considerations, both for you as the attorney and for your client are listed below, in no particular order of importance.

Also, think twice about seeking a Rule 202 petition, as such a request could expose your client to a TCPA motion. *See In re Elliot*, 504 S.W.3d 455 (discussed *supra* p. 11).

2. Marshall Your Evidence Early or Pre-Suit

You need to marshal your evidence—either prior to filing suit or very early in a suit—with an expectation that you may only be able to conduct limited discovery as allowed by the trial court after a defendant has filed a TCPA motion. Although the TCPA does not require *direct* evidence of each essential element of a claim, the Act does require something more than mere notice pleading—a plaintiff "must provide enough detail to show the factual basis for its claim"—which in a defamation suit the pleadings and evidence must establish "the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff." *Lipsky*, 460 S.W.3d. at 590-91 (noting that prima facie case refers to "evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted"). Likewise, in a trade secret case, the plaintiff will need to be able to articulate why the information at issue is secret and how it has been used by a competitor. This need to present a prima facie case supported by clear and specific evidence early on requires that plaintiff-side practitioners prepare their case before filing a petition.

This consideration is made all the more urgent given the mandatory filing and hearing deadlines for a TCPA motion (sixty days after service of petition and no more than 120 days after service of TCPA motion if discovery is allowed, respectively).

3. Argue Your Prima Facie Case in Responding to a TCPA Motion

In your response to a TCPA motion to dismiss, be sure to argue not only that the TCPA does not apply—if that is true. You also should brief the trial court on the second burden-shifting phase – establishing by clear and specific evidence a prima facie case for each essential element of your claim in question.

Many opinions have noted a plaintiff failing to address the second phase—in responding to a TCPA motion—that he meets the burden regarding the merits of his underlying legal action. And in each instance, although a court had found that the TCPA applied, the plaintiff had waived his opportunity to have the case remanded for a trial on the merits. *See, e.g.*, *Autocraft*, 520 S.W.3d at 206 (Autocraft "presented no evidence in opposition to appellants' motion and never attempted to establish or address each essential element of its claims"); *Cavin v. Abbott*, at *18 (plaintiffs only cited "en masse" to a voluminous record, failing to explain why the evidence satisfied each element of their claims); *see also Collins v. Collins*, 2017 WL 1320841, at *4-5 (plaintiff's response in trial court only addressed whether TCPA applied to her legal action and failed to also address the second step of whether she could "'establish by clear and specific evidence a prima facie case for each essential element of the claim[s] in question'" (quoting Tex. Civ. Prac. & Rem. Code § 27.005(c)).

4. Mandatory Attorney's Fees to Defendant If Motion Granted

Reasonable attorney's fees are mandatory if a defendant's TCPA motion is granted. *See Sullivan v. Abraham*, 488 S.W.3d at 300. It is important to remember that a fee award must be granted for each claim dismissed pursuant to a TCPA motion, even if one or more claims survive. *See D Magazine*, 529 S.W.3d at 442 (holding that trial court erred in denying fee award for dismissal of some claims, because

"each of those claims constituted a 'legal action' under the TCPA's broad definition of the term.").[11] Additionally, a court may award sanctions to deter a party who brought a legal action from bringing similar actions.

5. Nonsuit Does Not Dispose of a TCPA Motion

Courts have construed a TCPA motion as a claim for affirmative relief, and as such a TCPA motion survives a motion to nonsuit the underlying legal action. *See Walker v. Hartman*, 516 S.W.3d 71, 80 (Tex. App.—Beaumont 2017, pet. filed) (holding that TCPA motion survived nonsuit filed after motion to dismiss); *see also Rauhauser v. McGibney*, 508 S.W.3d 377, 380 (Tex. App.–Fort Worth 2014, no pet.) (noting that a TCPA motion to dismiss is a claim for affirmative relief), *overruled on other grounds by Hersh v. Tatum*, 2017 WL 2839873, at *6 (Tex. 2017)); *Duchouquette v. Prestigious Pets, LLC*, No. 05-16-01163-CV, 2017 WL 5109341, at *3 (Tex. App.—Dallas Nov. 6, 2017, no pet.) (mem. op.) (same). Consequently, if a defendant files a TCPA motion, a nonsuit will not dispose of the TCPA motion. I.e., you will still have to pay attorney's fees if a court grants a defendant's TCPA motion.

B. Defendant: Filing a TCPA Motion

1. Can You File a Non-Frivolous TCPA Motion?

If named as a defendant in a legal action, consider whether you can file a non-frivolous TCPA motion to dismiss that is not "solely intended to delay." Tex. Prac. & Rem Code § 27.009(b). Considering whether to file a TCPA motion is an especially good exercise, especially post-*Coleman*, where there now is a broader applicability of a TCPA motion.

2. Timely Secure a Hearing on Your TCPA Motion to Dismiss

If you are the movant, be sure to secure a hearing, because if you fail to secure a hearing on your motion to dismiss, an appellate court will lack jurisdiction to review your motion. Recently, a court of appeals held that a trial court had properly dismissed a defendant's TCPA motion after the defendant had failed to secure a timely hearing on his motion to dismiss within ninety days after the date the motion was served. *Grubbs v. ATW Investments, Inc.*, --S.W.3d--, No. 04-17-00555-CV, 2017 WL 6502428, at *1 (Tex. App.—San Antonio, Dec. 20, 2017, no pet.) ("Absent a trial court's extension of the hearing date to allow discovery, the plain language of section 27.004 requires a hearing on a motion to dismiss to occur within ninety days." (citing to Tex. Civ. Prac. & Rem. Code § 27.004(a))).[12]

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[11] Also of note is the currently pending appeal in the Dallas Court of Appeals, *Shillinglaw v. Baylor Univ.*, 05-17-00498-CV, oral argument March 27, 2018. At issue is the trial court's awarding to multiple defendants almost $400,000 in attorney's fees pursuant to a TCPA motion.

[12] *See, e.g.*, *Braun v. Gordon*, No. 05–17–00176–CV, 2017 WL 4250235, at *2 (Tex. App.–Dallas Sept. 26, 2017, no pet.) (mem. op.) (holding that because Braun had failed to secure hearing and trial court did not, therefore, ever issue order on motion, court of appeals lacked jurisdiction because there was no order subject to interlocutory appeal); *Wightman-Cervantes v. Hernandez*, No. 02-17-00155-CV, 2018 WL 798163, at *3 (Tex. App.—Fort Worth Feb. 9, 2018, rehearing granted on Mar. 27, 2018) (mem. op.) (same, relying on *Braun*). *See also Cuba v. Pylant*, 814 F.3d 701, 709 (5th Cir. 2016) ("[T]he clock for denial of a TCPA motion by operation of law runs from the date of the hearing.").

V. Conclusion

Although the TCPA provides defendants with an expedited motion to dismiss unmeritorious legal actions, the Texas Supreme Court in *ExxonMobile v. Coleman* has held that the statute applies in legal actions regardless of whether a communication at issue is a constitutionally protected expression. Such a broad applicability of the TCPA bears close study for civil litigators.