



# Anti-Slapp in 2019

New Topics to Watch for the New Year

Judge Gena Slaughter | David Coale | Josh Sandler

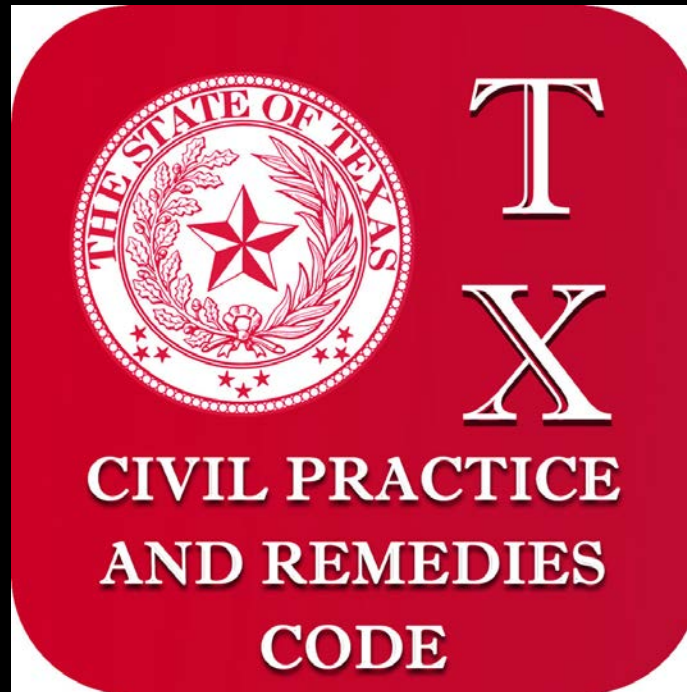
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# The Texas Citizens Participation Act (“TCPA”)

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# The Texas Citizens Participation Act (“TCPA”)

Sec. 27.002. PURPOSE. The purpose of this chapter 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.

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# The Texas Citizens Participation Act (“TCPA”)

Sec. 27.003. MOTION TO  
DISMISS. (a) If a 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, that party  
may file a motion to dismiss the  
legal action.

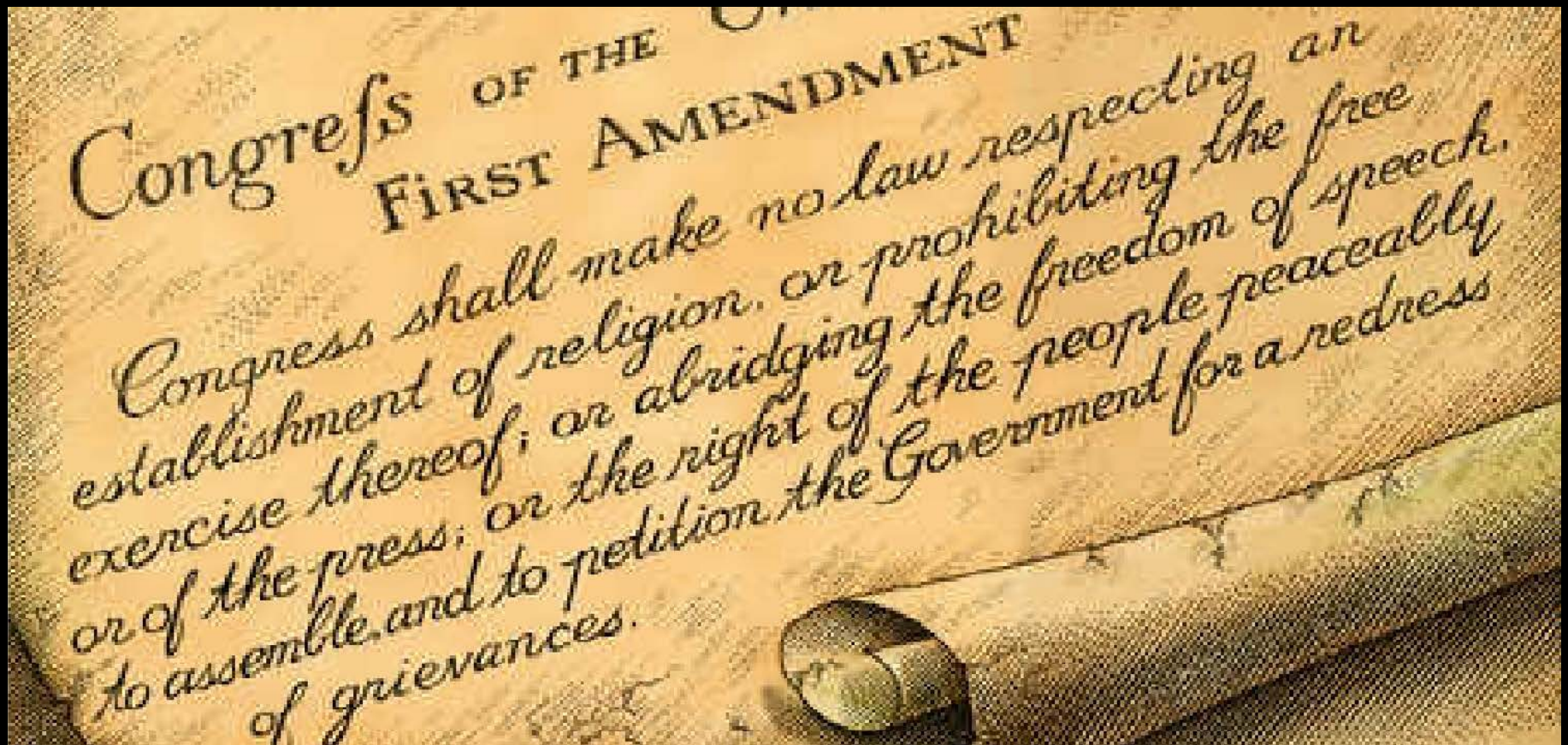
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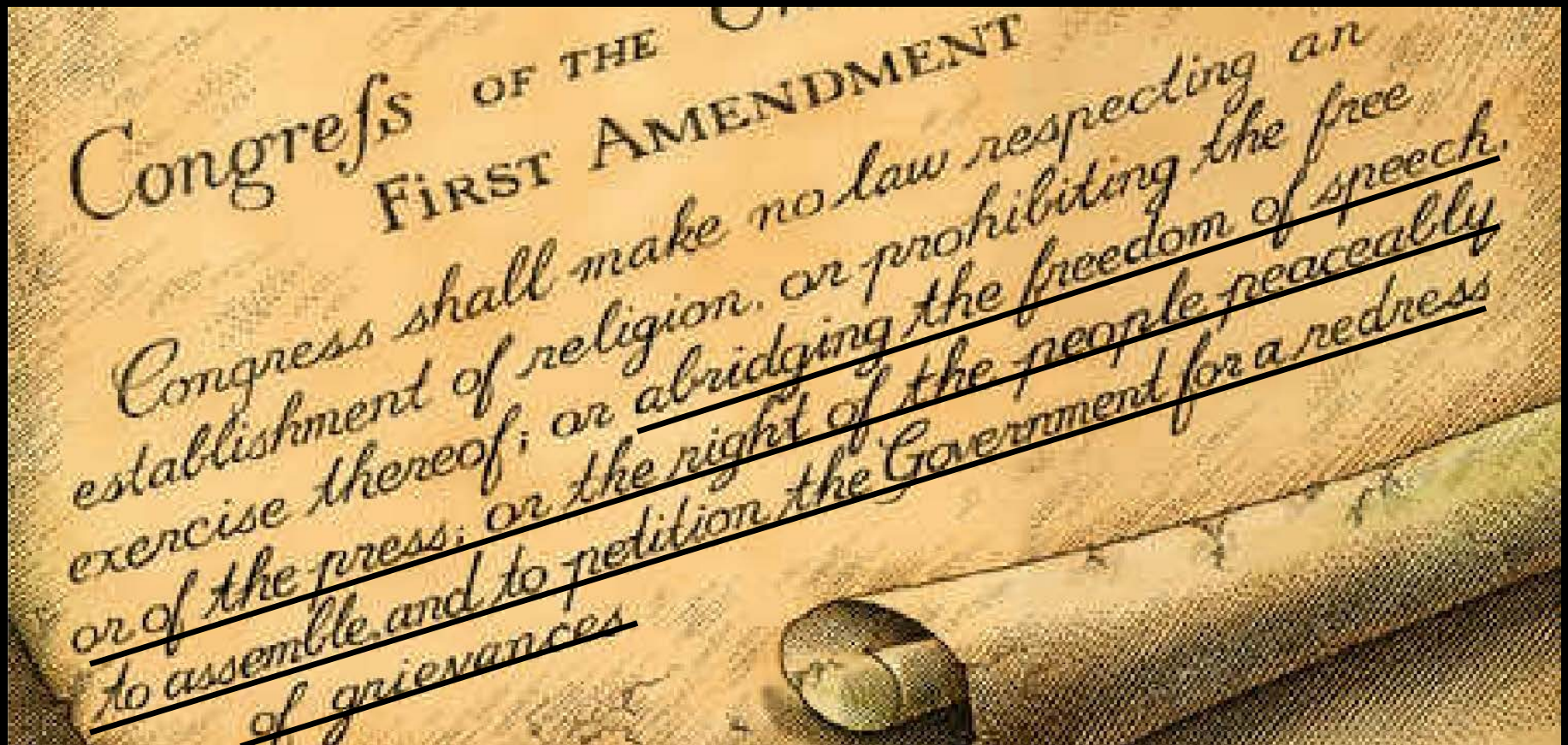
# The Texas Citizens Participation Act (“TCPA”)



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# The Texas Citizens Participation Act (“TCPA”)



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# The Texas Citizens Participation Act (“TCPA”)

It does not follow from the fact that the TCPA professes to safeguard the exercise of certain First Amendment rights **that it should only apply to constitutionally guaranteed activities.**

*Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018).

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# The Texas Citizens Participation Act (“TCPA”)

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# The Texas Citizens Participation Act (“TCPA”)

“The Texas  
Communications  
Dismissal Act”

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# “The Texas Communications Dismissal Act”

Sec. 27.001. DEFINITIONS. In this chapter: ...

- (2) "Exercise of the right of association" means a **communication** between individuals who join together to collectively ...
- (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 ...
  - (A) a **communication** in or pertaining to ...

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# The TCPA is to be liberally construed



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# Communications can be public or private

“we must presume that the  
Legislature broadly included **both  
public and private communication.**”

*Lippincott v. Whisenhunt*, 462 S.W.3d  
507, 509 (Tex. 2015).



# Tangential relationship

The TCPA does not require that the statements specifically “mention” health, safety, environmental, or economic concerns, nor does it require more than a “**tangential relationship**” to the same ...

*ExxonMobil Pipeline Co. v. Coleman*,  
512 S.W.3d 895, 900–01 (Tex. 2017).

# In connection with

... rather, TCPA applicability requires only that the defendant's statements are “in connection with” “issue[s] related to” health, safety, environmental, economic, and other identified matters of public concern chosen by the Legislature.

*ExxonMobil Pipeline Co. v. Coleman*,  
512 S.W.3d 895, 900–01 (Tex. 2017).

# Could the TCPA apply to pre-suit demand letters?

Yes.

*Moricz v. Long*, 06-17-00011-CV,  
2017 WL 3081512, at \*4 (Tex. App.—  
Texarkana July 20, 2017, no pet.).



# Could the TCPA apply to pre-suit demand letters?

(4) "Exercise of the right to petition" means any of the following: ...

(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.

I have a trade secret case. Could this be  
subject to the TCPA?

Yes.

*Elite Auto Body LLC v. Autocraft  
Bodywerks, Inc.*, 520 S.W.3d 191  
(Tex. App.—Austin 2017).

# Prima Facie Case – Interference

## *Contract existence*

“Dickens presented clear and specific evidence of a **written contingent fee contract** with Quinn dated March 11, 2015.”

## *Intent / Causation*

“She also presented evidence that Webster **obtained a new contingent fee contract** on April 2, 2015 between Quinn and both Webster and Dickens, but without Dickens’s signature, that superseded prior agreements with respect to the subject matter.”

## *Knowledge / Interference*

“Dickens presented evidence that Webster’s associate later told Quinn that the **Dickens Contract was ‘no good,’** unconscionable, and did not comply with Texas ethical requirements. Dickens testified that Webster’s December 31, 2015 e-mail was forwarded to Quinn and there is evidence that Webster’s **‘scathing e-mail’** caused Quinn to believe that Dickens was not ‘600 percent behind’ her.”

## *Damage*

“Quinn later terminated Dickens and there is evidence **Dickens received no attorney’s fees** from the settlement of the wrongful death case”

*Dickens v. Webster*, No. 05-17-00423-CV, slip op. at 15  
(Tex. App.—Dallas Dec. 31, 2018, no pet. h.)

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# Prima Facie Case – Damages

“Elliott's pre-resignation letter and the affidavits of Vecchio and Cellio support, at minimum, rational inferences that (1) EMTS's **paramedic classes were profitable** before Elliott's disclosures of confidential information; (2) the disclosures **were a cause of ACI's terminating** the consortium agreement; and (3) termination of the consortium agreement **caused EMTS to lose the ability** to conduct the profitable paramedic training classes. Thus, EMTS provided prima facie evidence that Elliott's disclosures caused EMTS to lose profits. That evidence was sufficient to preclude dismissal of EMTS's suit.”

*S&S Emergency Training Solutions, Inc. v. Elliott*,  
No. 17-0628, slip op. at 8 (Tex. Dec. 21, 2018) (citations omitted).



# Prima Facie Case – Damages

4. “As a direct and proximate result and consequence of the false, disparaging, and defamatory statements made by Mr. Lipsky and Ms. Rich, Range has suffered direct pecuniary and economic losses and costs, lost profits, loss of its reputation, and loss of goodwill in the communities in which it operates. To date, the damages suffered by Range as a direct and proximate result and consequence of the conspiracy and false, disparaging, and defamatory public statements made by Lipsky and Rich are in excess of three million dollars (\$3,000,000.00).”

*In re: Lipsky*, 460 S.W.3d 59 (Tex. 2015)

# Prima Facie Case – Green Cheese?

"In contrast to 'clear and specific evidence,' a 'prima facie case' has a traditional legal meaning. It refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. It is the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'"

*Lipsky*, 460 S.W.3d at 590.



"[E]ven an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system . . . ."

*Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997).

# Prima Facie Case – Green Cheese?

“‘No evidence’ points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact.”

*City of Keller v. Wilson,*

168 S.W.3d 802, 810 (Tex. 2005) (citations omitted).



# Legal Action

Sec. 27.001. DEFINITIONS. In this chapter:

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.



# Legal Action: Can you assert a Motion to Dismiss under the TCPA at the appellate court level?

No.

*Amini v. Spicewood Springs Animal Hosp., LLC*, 550 S.W.3d 843 (Tex. App.—Austin 2018, no pet.).

# Legal Action: Can you assert a Motion to Dismiss under the TCPA by virtue of the filing of an amended pleading?

Not generally.

*In re Estate of Check*, 438 S.W.3d 829, 837 (Tex. App.—San Antonio 2014, no pet.).

# Legal Action: Can you assert a Motion to Dismiss under the TCPA if an amended answer contains a new affirmative defense?

If filed after the 60th day after the date of service of the legal action, not generally.

*Spencer v. Overpeck*, 04-16-00565-CV, 2017 WL 993093, at \*7 (Tex. App.—San Antonio Mar. 15, 2017, pet. denied).

Legal Action: Can you assert a Motion to Dismiss under the TCPA if your case was filed in federal court, then re-filed in state court, and all the parties and causes of action are the same?

Yes.

*Walker v. Hartman*, 516 S.W.3d 71, 78–79 (Tex. App.—Beaumont 2017, pet. denied).



Legal Action: Can you assert a Motion to Dismiss under the TCPA in response to a Motion for Sanctions filed in the case?

Yes.

*Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220, 226 (Tex. App.—Austin 2018, no pet.).

# Legal Action: Can you assert a Motion to Dismiss under the TCPA in response to a previously-filed Motion to Dismiss under the TCPA?

No.

*Paulsen v. Yarrell*, 537 S.W.3d 224, 233–34 (Tex. App.—Houston [1st Dist.] 2017, pet. denied), *reh'g denied* (Nov. 21, 2017).

Assumes yes.

*Hotchkin v. Bucy*, 02-13-00173-CV, 2014 WL 7204496, at \*5 (Tex. App.—Fort Worth Dec. 18, 2014, no pet.).

# Can I just get a quick summary judgment before the TCPA motion is ruled on?

"The supporters of the bill leading to the enactment of chapter 27 noted that the bill's purposes were to allow a prevailing movant of a motion to dismiss to achieve dismissal 'earlier than would otherwise be possible' and to avoid costly legal expenses, including discovery expenses, *even before the summary judgment stage* of litigation."

*In re: Lipsky*, 411 S.W.3d 530, 553 (Tex. App.—Fort Worth 2013, orig. proceeding [mand. denied])

Under current law, the victim of a SLAPP suit must rely on a motion for summary judgment. While summary judgment disposes of a controversy before a trial, both parties still must conduct expensive discovery. By allowing a motion to dismiss, CSHB 2973 would allow frivolous lawsuits to be dismissed at the outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system.

House Research Organization  
Bill Analysis,  
HB 2973 (May 2, 2011)

# 202 Petitions: Can you assert a Motion to Dismiss under the TCPA in response to a 202 Petition?

Yes.

*Glassdoor, Inc. v. Andra Group, LP*,  
560 S.W.3d 281, 293–94 (Tex. App.—  
Dallas 2017, pet. granted).

# Commercial-Speech Exemption

The TCPA's commercial-speech exemption applies when:

- (1) the defendant was **primarily engaged in the business** of selling or leasing goods;
- (2) the defendant made the statement or engaged in the conduct on which the claim is based in the defendant's capacity as a seller or lessor of those goods or services;
- (3) the statement or conduct at issue arose out of **a commercial transaction** involving the kind of goods or services the defendant provides; and
- (4) the intended audience of the statement or conduct were **actual or potential customers** of the defendant for the kind of goods or services the defendant provides.

*Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018).



# Procedural: When must you file a response to a TCPA Motion to Dismiss?

No deadline.

*MVS Int'l Corp. v. Int'l Advert. Sols., LLC*, 545 S.W.3d 180, 191 (Tex. App.—El Paso 2017, no pet.).

# Procedural: Can I present live testimony at the TCPA Motion to Dismiss hearing?

No.

*Pena v. Perel*, 417 S.W.3d 552, 556-57 (Tex. App.—El Paso 2013, no pet.).

Yes.

*Cruz v. Van Sickle*, 452 S.W.3d 503, 519 (Tex. App.—Dallas 2014, pet. denied); *Bacharach v. Garcia*, 13-14-00693-CV, 2015 WL 5136192, at \*3 (Tex. App.—Corpus Christi Aug. 31, 2015, no pet.); *Serafine v. Blunt*, 466 S.W.3d 352, 361 (Tex. App.—Austin 2015, no pet.).

# Procedural: What if I nonsuit my claims before the TCPA Motion to Dismiss hearing?

*Breitling Oil & Gas Corp. v. Petroleum  
Newspapers of Alaska, LLC*, 05-14-  
00299-CV, 2015 WL 1519667, at \*2  
(Tex. App.—Dallas Apr. 1, 2015, pet.  
denied).

Procedural: Can my TCPA Motion to Dismiss be based on communications in which I deny making but allege in the alternative?

Yes.

*Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017), *reh'g denied* (Sept. 22, 2017).

# Help, there's an emergency after an appeal's been taken!

## TRAP 29.3. Temporary Orders of Appellate Court

When an appeal from an interlocutory order is perfected, *the appellate court may make any temporary orders necessary to preserve the parties' rights* until disposition of the appeal and may require appropriate security. But the appellate court must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 24.

## TRAP 29.4. Enforcement of Temporary Orders

While an appeal from an interlocutory order is pending, only the appellate court in which the appeal is pending may enforce the order. But the appellate court may refer any enforcement proceeding to the trial court with instructions to:

- (a) hear evidence and grant appropriate relief; or
- (b) make findings and recommendations.

Attorney's fees: Must fees the court grant attorney's fees for *each* claim dismissed pursuant to a TCPA Motion to Dismiss?

Yes.

*D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 442 (Tex. 2017), *reh'g denied* (Sept. 29, 2017).

# TCPA – Federal Court?

“The applicability of state anti-SLAPP statutes in federal court is an important and **unresolved** issue in this circuit.”

*E.g., Block v. Tanenhaus,*  
867 F.3d 585, 589 (5th Cir. 2017)



# TCPA – Federal Court?



**Donald J. Trump** ✓

@realDonaldTrump

Follow



A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!

“Accordingly, the Court grants the Special Motion because **Mr. Trump's statement constituted ‘rhetorical hyperbole’** that is protected by the First Amendment.”

*Clifford v. Trump* , No. 2:18-cv-068393,  
Doc. 36 at 12 (C.D. Cal. Oct. 15, 2018)

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Thank you!

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