

**THE TEXAS ANTI-SLAPP LAW AND
THE TEXAS DEFAMATION MITIGATION ACT:
A BLACK HOLE FOR CLAIMS WITH COMMUNICATIONS.**

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TABLE OF CONTENTS

	Page
Table of Authorities	v
I. Introduction	1
II. The Texas Citizens Participation	3
Act: What Is It?	3
A. Background and Enactment of the TCPA	3
1. What is a SLAPP lawsuit?	3
2. Alleged Purpose: Prevent Frivolous Suits.	4
3. All Statutory Construction Must Be in Service of the Legislature’s Stated Dual Purposes.	5
4. A Solution in Search of a Problem: Underlying Purpose is the Protection of Media Defendants.	6
5. The 2013 Amendments: Still Media-Driven.....	9
III. Application of the TCPA	11
A. What is a “legal action” under the TCPA, and can even a motion to dismiss be subject to a motion to dismiss?	11
B. Is there a nexus required between the “legal action” and the rights protected under the TCPA?.....	14
C. What speech rights are protected, and what does <i>in connection with</i> mean?	16
D. Public or Private? Does it matter where the speech is communicated?	19
E. What is a “matter of public concern?”	19
F. What are the rights of petition and association that are protected?	22
G. Exceptions to the TCPA.....	25
H. Procedure	27
1. A New Form of Threshold Dispositive Motion.....	27

2.	Deadline to File the Motion.....	27
3.	Deadline for Hearing and Decision: “Set,” “Rule,” and Continuances.....	28
4.	Discovery Stay – But Limited Discovery for “Good Cause.”.....	30
I.	Standards and Burdens of Proof/Actions by Court.....	31
1.	What type of evidence may be considered?.....	31
2.	Burden of Proof on the Movant – Preponderance of the Evidence.....	33
3.	Burden of Proof on the Respondent.....	33
i.	“Clear and specific evidence” – a measure of quality of proof.	33
ii.	What is a “prima facie case, and does it allow for inferences?” 35	
iii.	What about circumstantial evidence?	37
iv.	Does the TCPA violate the Open Courts provision of the Texas Constitution?	38
v.	What about non-communication or “mixed” claims joined in the same lawsuit?.....	40
4.	Affirmative Defenses May Now Be the Basis of Motions to Dismiss.....	41
5.	Ruling by the Court – Dismissal Mandatory.	42
6.	Request for Ch. 27 Sanctions Probably Survive Nonsuit or Amended Petition Dropping Some Claims.....	43
J.	Mandatory, Not Discretionary, Award of Fees and Sanctions for Movant Upon Dismissal of Legal Action.	44
K.	TCPA: Award of Fees, Not Sanctions, for Respondent/Plaintiff – Predicated on Frivolous Motion to Dismiss, Unless Based on Responsive Motion to Dismiss the Initial Motion to Dismiss.	46
L.	Appellate Review.....	46
1.	Interlocutory Appeal: What is Reviewable?	46

i.	Denial of motion to dismiss by operation of law: interlocutory appeal is clearly available.	47
ii.	Timely written denial of motion to dismiss – an interlocutory appeal is available for any order that “denies a motion to dismiss” filed under Section 27.003.	47
iii.	Mandamus.	50
2.	Motion to Dismiss Timely Granted -	51
i.	May be appealable noninterlocutory order.	51
ii.	May be appealable interlocutory order.	52
3.	Deadlines for Chapter 27 Appeal or Writ.	53
4.	Any Appeal or Writ From An Order On A Chapter 27 Motion to Dismiss Shall be Expedited.....	54
5.	Standard of Review of Interlocutory Appeal.	54
i.	<i>De novo</i> review – statutory construction.	54
ii.	<i>De Novo</i> Review of Sufficiency of Evidence to Meet Burdens of Proof.....	55
M.	Does the TCPA Apply in Federal Court?	56
N.	Does the Act Conflict with the Supreme Court’s Rule-Making Authority?	59
O.	Does the Statute Conflict With Texas’ Constitutional Protection of Rights to Sue for Reputational Torts?.....	60
IV.	Unintended Consequences.....	62
A.	Overbroad Application and Chilling Effect on Meritorious Business Tort Actions.	62
B.	Justice Delayed is Justice Denied.	64
C.	When The Texas Attorney General Must Be Invited to the Party.....	65
V.	The TCPA – Conclusions Drawn.....	65
VI.	The “Mulligan Bill”: The Texas Defamation Mitigation Act.	65

A.	Legislative History.....	66
B.	Application of the Defamation Mitigation Act: Prerequisites to Filing Defamation Suit, Request and Response, Abatement.....	68
C.	Limitations of Damages.....	69
D.	Harmonizing (or Conflicting) With Texas Citizens Participation Act.....	70

TABLE OF AUTHORITIES

Cases

<i>3M Co. v. Boulter</i> , 290 F.R.D. 5 (D. D.C. 2013) (<i>Boulter II</i>).....	57, 58
<i>3M Co. v. Boulter</i> , 842 F. Supp. 2d 85 (D. D.C. 2012)	56, 57
<i>Abbas v. Foreign Policy Grp., LLC</i> , 975 F. Supp. 2d 1 (D.D.C. Sept. 27, 2013)	58
<i>ACS Investors, Inc. v. McLaughlin</i> , 943 S.W.2d 426 (Tex. 1997)	37
<i>Adams v. Starside Custom Builders, LLC</i> , No. 05-15-01162-CV, 2016 Tex. App. LEXIS 6840, 2016 WL 3548013 (Tex. App.—Dallas June 28, 2016, pet. granted).....	15
<i>Addison v. Holly Hill Fruit Prods., Inc.</i> , 322 U.S. 607, 88 L.Ed. 1488, 64 S.Ct. 1215 (1944)....	55
<i>Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson</i> , 209 S.W.3d 644 (Tex. 2006)	55
<i>Alphonso v. Deshotel</i> , 417 S.W.3d 194 (Tex. App. – El Paso 2013, no pet.).....	45
<i>Am. Heritage Capital, LP v. Gonzalez</i> , 436 S.W.3d 865 (Tex. App. Dallas 2014, no pet.).....	51
<i>Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios</i> , 46 S.W.3d 873 (Tex. 2001).....	22
<i>Aquaplex, Inc. v. Rancho La Valencia, Inc.</i> , 297 S.W.3d 768 (Tex. 2009).....	36
<i>Ascend Health Corp. v. Wells</i> ,4:12-CV-00083-BR, 2013 U.S. Dist. LEXIS 35237 (E.D.N.C. March 14, 2013).....	58
<i>Avila and Univision v. Larrea</i> , 394 S.W.3d 646 (Tex. App. – Dallas 2012, pet. denied).....	passim
<i>Barbara Soules Young and Amy Ganci v. Krantz</i> , 434 S.W.3d 335 (Tex. App. – Dallas 2014, no pet.)	20
<i>Bedford v. Spasoff</i> , 485 S.W.3d 641 (Tex. App.—Fort Worth Feb. 11, 2016) pet. granted, <i>judgm’t reversed by</i> 520 S.W.3d 901 (Tex. June 09, 2017)	2, 62
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)	58
<i>Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.</i> , 402 S.W.3d 299 (Tex. App. – Dallas 2013, pet. denied).....	26, 50
<i>Better Bus. Bureau of Metro. Dallas, Inc. v. Ward.</i> , 401 S.W.3d 440 (Tex. App. – Dallas 2013, pet. denied).....	26
<i>Better Bus. Bureau of Metro. Houston, Inc.v. John Moore Services</i> , 441 S.W.3d 345 (Tex. App. – Houston [1st Dist.] 2013, pet. denied).....	passim

<i>Boley v. Atl. Monthly Grp.</i> , 950 F. Supp. 2d 249 (D.D.C. 2013).....	58
<i>Brady v. Fourteenth Court of Appeals</i> , 795 S.W.2d 712 (Tex. 1990).....	50, 52
<i>Brady v. Klentzman</i> , 515 S.W.3d 878 (Tex. 2017).....	20, 21, 22
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969).....	17
<i>Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC</i> , No. 05-14-00299-CV, 2015 Tex. App. LEXIS 3209 (Tex. App. – Dallas April 1, 2015, pet. denied).....	44
<i>Brugger v. Swinford</i> , No. 14-16-00069-CV, 2016 Tex. App. LEXIS 9155, 2016 WL 4444036 (Tex. App. – Houston [14th Dist.] Aug. 23, 2016, no pet.).....	56
<i>Camp v. Patterson</i> , No. 03-16-00733-CV, 2017 WL 3378904 (Tex. App. – Austin August 3, 2017, no pet. h.).....	16
<i>Campbell v. Clark</i> , 471 S.W.3d 615 (Tex. App.—Dallas 2015, no pet.).....	22
<i>Carr v. Brasher</i> , 776 S.W.2d 567 (Tex. 1989).....	36
<i>Casso v. Brand</i> , 776 S.W.2d 551 (Tex. 1989).....	61
<i>Castleman v. Internet Money Ltd.</i> , No. 07-16-00320-CV, 2017 Tex. App. LEXIS 3496, 2017 WL 1449224, (Tex. App. – Amarillo April 19, 2017, pet. filed (June 23, 2017)).....	26
<i>Cavin v. Abbott</i> , No. 03-16-00395, 2017 WL 3044583 (Tex. App. – Austin July 14, 2017, no pet. h.).....	16
<i>CBS Outdoor, Inc. v. Potter</i> , No. 01-11-00650-CV, 2013 Tex. App. LEXIS 645 (Tex. App. – Houston [1 st Dist.] Jan. 24, 2013, pet. denied)(mem. op.).....	56
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942).....	17
<i>Charalamboupoulos v. Grammer</i> , 2015 U.S. Dist. LEXIS 10507 (N.D. Tex. Jan. 29, 2015)....	23, 38, 59
<i>Cheniere Energy, Inc. v. Lotfi</i> , 449 S.W.3d 210 (Tex. App. - Houston [1st Dist.] 2014, no pet.).....	14, 24, 25, 56
<i>City of Austin v. Whittington</i> , 384 S.W.3d 766 (Tex. 2012).....	47
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005).....	56
<i>CMH Homes v. Perez</i> , 340 S.W.3d 444 (Tex. 2011).....	48, 50
<i>Coinmach Corp. v. Aspenwood Apartment Corp.</i> , 417 S.W. 3d 909 (Tex. 2013).....	37
<i>Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue</i> , 271 S.W.3d 238 (Tex. 2008).....	55

<i>Combined Law Enforcement Associations of Texas. v. Sheffield</i> , No. 03-13-00105-CV, 2014 Tex. App. LEXIS 1098 (Tex. App. – Austin Jan. 31, 2014, pet. denied).....	passim
<i>Connick v. Myers</i> , 461 U.S. 138 (1983).....	21, 22
<i>Cook v. Tom Brown Ministries, et al.</i> , 385 S.W.3d 592 (Tex.App.—El Paso 2012, pet. denied). 1, 50	
<i>Coward v. Gateway Nat’l Bank</i> , 525 S.W.2d 857 (Tex. 1975)	35
<i>Cox Broad. Corp. v. Cohn</i> , 420 U.S. 469 (1975).....	22
<i>Crawford-El v. Britton</i> , 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998)	58
<i>Croucher v. Croucher</i> , 660 S.W.2d 55 (Tex. 1983)	56
<i>CTL/Thompson Texas, LLC v. Starwood Homeowner’s Ass’n</i> , 390 S.W.3d 299 (Tex. 2013).....	44
<i>Cuba v. Pylant</i> , 814 F.3d 701 (5 th Cir. 2016).....	59
<i>Culbertson v. Lykos</i> , 2013 U.S. Dist. LEXIS 129538 (S.D. Tex. Sept. 11, 2013)	58
<i>D Magazine Partners, L.P. v. Rosenthal</i> ,__ S.W.3d __, 2017 Tex. LEXIS 296 (Tex. March 17, 2017)	2, 17
<i>Direct Commercial Funding, Inc. v. Beacon Hill Estates</i> , No. 14-12-00896-CV, 2013 Tex. App. LEXIS 1898 (Tex. App. – Houston [14 th Dist.] January 24, 2013, no pet.)	5, 49, 52
<i>Dodson v. Bunton</i> , 81 Tex. 655, 17 S.W. 507 (Tex. 1891).....	55
<i>Duracraft Corp. v. Holmes Prods. Corp.</i> , 427 Mass. 156, 691 N.E.2d 935 (Mass. 1998).....	16
<i>Elite Auto Body LLC v. Autocraft Bodywerks, Inc.</i> , No. 03-15-00064-CV, 2017 Tex. App. LEXIS 4108 (Tex. App.—Austin May 5, 2017, pet. filed)	1, 18, 20, 33
<i>Elliott v. S&S Emergency Training Solutions</i> , No. 05-16-01373-CV, 2017 WL 2118787 (Tex. App.—Dallas May 16, 2017, pet. filed)	1
<i>Entergy Gulf States, Inc. v. Summers</i> , 282 S.W.3d 433 (Tex. 2009).....	54, 55
<i>Epperson v. Mueller</i> , No. 01-15-00231, 2016 Tex. App. LEXIS (Tex. App.—Houston [1 st Dist.] Aug. 11, 2016, no pet.)	56
<i>Epps v. Fowler</i> , 351 S.W.3d 862 (Tex. 2011)	43
<i>Ex parte Tucci</i> , 859 S.W.2d 1 (Tex. 1993)	61
<i>ExxonMobil Pipeline Co. v. Coleman</i> , 512 S.W.3d 895 (Tex. 2017).....	2, 17, 18

<i>Farah v. Esquire Magazine, Inc.</i> , 863 F. Supp. 2d 29 (D.D.C. 2012) (Collyer, J.) <i>aff'd sub nom. Farah v. Esquire Magazine</i> , 736 F.3d 528, 407 U.S. App. D.C. 208 (D.C. Cir. 2013)	58
<i>Fawcett v. Grosu</i> , 498 S.W.3d 650 (Tex. App. – Houston [14 th Dist.] 2016, pet. denied).....	56
<i>Fazio v Cypress/GR Houston I, L.P.</i> , 403 S.W.3d 390 (Tex. App. – Houston [1 st Dist.] 2013, pet. denied)	14
<i>Fitzgerald v. Advanced Spine Fixation Systems</i> , 996 S.W.2d 864 (Tex. 1999)	13, 55
<i>Fleming Foods of Tex. v. Rylander</i> , 6 S.W.3d 278 (Tex. 1999).....	54
<i>Forbes Inc. v. Granada Biosciences, Inc.</i> , 124 S.W.3d 167 (Tex. 2003).....	36, 38
<i>Ford Motor Co. v. Ridgway</i> , 135 S.W.3d 598 (Tex. 2004).	37, 38
<i>Ford v. Bland</i> , No. 14-15-00828-CV, 2016 Tex. App. LEXIS 13285, 2016 WL 7323309 (Tex. App. – Houston [14 th Dist.] Dec. 15, 2016, no pet.).....	24, 44
<i>Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors Inc.</i> , 960 S.W.2d 41 (Tex. 1998)	36
<i>Forras v. Rauf</i> 39 F. Supp. 3d 45 (D.D.C. 2014).....	58
<i>Fouts v. Little Cypress-Mauriceville I.S.D.</i> , 2004 Tex. App. LEXIS 9471 (Tex. App. – Beaumont, 2004, pet. denied)	21
<i>Godin v. Schencks</i> , 629 F.3d 79 (1 st Cir. 2010)	57
<i>Goodman v. Ill. Dep't of Fin. & Prof'l Reg.</i> , 430 F.3d 432 (7th Cir. 2005).....	17
<i>Hanssen v. Our Redeemer Lutheran Church</i> , 938 S.W.2d 85 (Tex. App.—Dallas 1996, writ denied)	24
<i>Hardy v. Commc'n Workers of Am.</i> , No. 05-16-00829-CV, 2017 WL 1192800 (Tex. App. – Dallas March 31, 2017, pet. filed)	66
<i>Harwood v. Gilroy</i> , No. 04-16-00652-CV, 2017 WL 2791321 (Tex. App.—San Antonio June 28, 2017, no pet. h.)	22
<i>Henson v. Denison</i> , 546 S.W.2d 898 (Tex. Civ. App. – Fort Worth 1977, no writ)	35
<i>Herrera v. Stahl</i> , 441 S.W.3d 739 (Tex. App. – San Antonio, 2014, no pet.).....	25
<i>Hersh v. Tatum</i> , ___ S.W.3d ___, 2017 WL 2839873 (Tex. June 30, 2017).....	2, 32
<i>Hinojosa v. Columbia/St. David's Healthcare System, L.P.</i> , 106 S.W.3d 380 (Tex. App.—Austin 2003, no pet.)	35

<i>Hotchkin v. Bucy</i> , No. 02-13-00173-CV, 2014 Tex. App. LEXIS 13568 (Tex. App.—Fort Worth 2014, no pet.)	13
<i>Ilf v. Ilff</i> , 339 S.W.3d 74, (Tex. 2011).....	50
<i>In re D.C.</i> , No. 05-13-00944-CV, 2013 Tex. App. LEXIS 10006 (Tex. App. – Dallas Aug. 9, 2013)(mem. Op.), <u>appeal dism'd by D.C v. McClinton-Hunter</u> , 2015 Tex. App. LEXIS 5005 (Tex. App.—Dallas May 15, 2015)	30, 31
<i>In re Doe</i> , 19 S.W.3d 249 (Tex. 2000)	54
<i>In re E.I. DuPont de Nemours & Co.</i> , 136 S.W.3d 218 (Tex. 2004)(orig. proceeding).....	35
<i>In re Elliott</i> , 504 S.W.3d 455 (Tex. App. – Austin 2016, orig. proceeding)	14
<i>In re Estate of Check</i> , 438 S.W.3d 829 (Tex. App.— San Antonio 2014, no pet.).....	13, 27
<i>In re Hinterlong</i> , 109 S.W.3d 611 (Tex.App.—Fort Worth 2003)(orig. proceeding).....	39
<i>In re Lipsky</i> , 411 S.W.3d 530 (Tex. App. – Fort Worth 2013)(orig. proceeding).....	passim
<i>In re Lipsky</i> , 460 S.W.3d 579 (Tex. 2015).....	passim
<i>In re McAllen Med. Ctr., Inc.</i> , 275 S.W.3d 458 (Tex. 2008)(orig. proceeding).....	51
<i>In re Office of the Attorney Gen.</i> , 456 S.W.3d 153 (Tex. 2015).....	13
<i>In re Office of the Attorney General</i> , 422 S.W.3d 623 (Tex. 2013)	55
<i>In re Team Rocket, L.P.</i> , 256 S.W.3d 257 (Tex. 2008)(orig. proceeding).....	51
<i>In re Thuesen</i> , No. 14-13-00255-CV, 2013 Tex. App. LEXIS 4636 (Tex. App. – Houston [14 th Dist.] April 11, 2013)(orig. proceeding) (mem.op.)	passim
<i>In re United Scaffolding, Inc.</i> , 301 S.W.3d 661 (Tex. 2010)(orig. proceeding).....	50
<i>In the Interest of C.M.D.</i> , 287 S.W.3d 510 (Tex. App.—Houston [14th Dist.] 2009, no pet.)	62
<i>Int'l Ass'n of Drilling Contrs. v. Orion Drilling Co.</i> , 512 S.W.3d 483 (Tex. App. – Houston [1st Dist.] 2016, pet. filed).....	14
<i>Jain v. Cambridge Petroleum Group, Inc.</i> , 395 S.W.3d 394 (Tex. App. – Dallas 2013, no pet.) .	5, 53
<i>James v. Calkins</i> , 446 S.W.3d 135 (Tex. App.-Houston [1st Dist.], 2014 pet. denied)	passim
<i>Jardin v. Marklund, et al.</i> , 431 S.W.3d 765 (Tex. App. – Houston [14th Dist.], 2014, no pet.) .	25, 27

<i>Jaster v. Comet II Construction</i> , 438 S.W.3d 556 (Tex. 2014)	12, 13
<i>Jennings v. Wallbuilder Presentations, Inc.</i> , 378 S.W.3d 519 (Tex. App. – Fort Worth 2012, pet. denied)	passim
<i>KBMT Op. Co. v. Toledo</i> , 434 S.W.3d 276 (Tex. App. – Beaumont 2014, <i>rev'd sub nom. KBMT Operating Co., LLC v. Toledo</i> , 492 S.W.3d 710 (Tex. 2016))	8, 36
<i>Kennedy v. Tangipahoa Parish Library Bd. Of Control</i> , 224 F.3d 359 (5th Cir. 2000).....	21
<i>King Ranch, Inc. v. Chapman</i> , 118 S.W.3d 742 (Tex. 2003)	54
<i>Kinney v. BCG Attorney Search</i> , No. 03-12-00579-CV, 2013 Tex. App. LEXIS 10481 (Tex. App. – Austin August 21, 2013, , <i>opinion withdrawn by</i> No. 03-12-00579, 2014 Tex. App. LEXIS 3998, pet. denied)	30, 45, 47
<i>Kinney v. BCG Attorney Search</i> , No. 03-12-00579-CV, 2014 Tex. App. LEXIS 3998 (Tex. App. – Austin 2014, pet. denied).....	15, 42
<i>Kool Smiles v. Mauze & Bagby, P.L.L.C.</i> , 745 F.3d 742 (5th Cir. 2014).....	20, 26, 53, 58
<i>KTRK Television, Inc. v. Robinson</i> , 409 S.W.3d 682 (Tex. App. - Houston [1st Dist.] 2013, pet. denied)	34, 50
<i>Lamons Gasket Co. v. Flexitallic LP</i> , 9 F.Supp.3d 709 (S.D. Tex. 2014).....	37, 59
<i>LeCroy v. Hanlon</i> , 713 S.W.2d 335 (Tex. 1986).....	39
<i>Lippincott v. Whisenhunt</i> , 462 S.W.3d 507 (Tex. 2015).....	13, 19, 54
<i>Lipsky v. Range Production Co., et al.</i> , No. 02-12-00098-CV, 2012 Tex. App. LEXIS 7059 (Tex. App.—Fort Worth Aug. 23, 2012, pet. denied)(mem. op.)	48, 50
<i>Long Canyon Phase II & III HOA v. Cashion</i> , 517 S.W.3d 212 (Tex. App. – Austin , 2017, no pet.)	24
<i>Low v. Henry</i> , 221 S.W.3d 609 (Tex. 2007)	45
<i>Martinez v. Humble Sand & Gravel, Inc.</i> , 875 S.W.2d 311 (Tex. 1994)	51
<i>McDonald v. Clemens</i> , 464 S.W.2d 450 (Tex. Civ. App.—Tyler 1971, no writ)	34
<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1990).....	36, 60, 61
<i>Miller Weisbrod LLC v. Llamas-Soforo</i> , 511 S.W.3d 181 (Tex. App. – El Paso , 2014, no pet.)	26
<i>Morris v. Crow</i> , 142 F.3d 1379 (11th Cir. 1998).....	21

<i>Murphy USA, Inc. v. Rose</i> , No. 12-15-00197-CV, 2016 Tex. App. LEXIS 10829, 2016 WL 5800263 (Tex. App. - Tyler Oct. 5, 2016, no pet.)(mem. op.)	23, 24
<i>N.Y. Underwriters Ins. Co. v. Sanchez</i> , 799 S.W.2d 677 (Tex. 1990).....	48
<i>National Surety Corp. v. Ladd</i> , 131 Tex. 295, 115 S.W.2d 600 (Tex. 1938).....	54
<i>Neely v. Wilson</i> , 418 S.W.3d 52 (Tex. 2013).....	60, 61, 66
<i>Nero v. Hospital Auth.</i> , 86 F. Supp. 2d 1214 (S.D. Ga. 1998).....	21, 22
<i>Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.</i> , 416 S.W.3d 71 (Tex. App. – Houston [1 st Dist.] 2013, pet. denied).....	passim
<i>Osborne v. Ohio</i> , 495 U.S. 103 (1990)	17
<i>Ostrovitz & Gwinn, LLC v. First Specialty Ins. Co.</i> , 393 S.W.3d 379 (Tex. App. – Dallas 2012, no pet.)	37
<i>P&G v. Amway Corp.</i> , 242 F.3d 539 (5th Cir. 2001)	17
<i>Parker v. Walton</i> , 233 S.W.3d 535 (Tex. App.—Houston [14 th Dist.] 2007, no pet.)	4
<i>Paulsen v. Yarrell</i> , 455 S.W.3d 192 (Tex. App.—Houston [1st Dist.] 2014, no pet.)	13
<i>Paulsen v. Yarrell</i> , No. 01-16-00061-CV, 2017 WL 2289129 (Tex. App. – Houston [1 st Dist.] May 25, 2017, no pet. h.).....	14
<i>Pena v. Perel</i> , 417 S.W.3d 552 (Tex. App.—El Paso 2013, no pet.)	26
<i>Pickens v. Cordia</i> , 433 S.W.3d 179 (Tex. App. – Dallas 2014, no pet.).....	19, 20
<i>Public Utility Comm’n of Texas v. Cofer</i> , 754 S.W.2d 121 (Tex. 1988).....	54
<i>Quick v. City of Austin</i> , 7 S.W.3d 109 (Tex. 1998)	54
<i>Quintanilla v. West</i> , No. 04-16-00533-CV, 2017 WL 1684832 (Tex. App.—San Antonio April 26, 2017, pet. filed).....	1
<i>Railroad Comm’n of Tex. v. Tex. Citizens for a Safe Future and Clean Water</i> , 336 S.W.3d 619 (Tex. 2011).....	54
<i>Ramsey v. Lynch</i> , No. 10-12-00198-CV, 2013 Tex. App. LEXIS 5554 (Tex. App. – Waco May 2, 2013, no pet.)(mem. op.).....	passim
<i>Rehak Creative Servs. v. Witt</i> , 404 S.W.3d 716 (Tex. App. – Houston [14th Dist.] 2013, pet. denied)	34

<i>Richardson-Eagle, Inc. v. Mercer, Inc.</i> , 213 S.W.3d 469 (Tex. App. – Houston [1 st Dist.] 2006, pet. denied).....	37
<i>Rio Grande H2O Guardian v. Robert Muller Family P'ship</i> , No. 04-13-00441-CV, 2014 Tex. App. LEXIS 915 (Tex. App. - San Antonio, Jan. 29, 2014, no pet.).....	23, 34
<i>Rivers v. Johnson Custodial Home, Inc.</i> , No. A-14-CA-484-SS, 2014 U.S. Dist. LEXIS 117759 (W.D. Tex. Aug. 22, 2014).....	19, 20, 59
<i>Robinson v. KTRK Television, Inc.</i> , No. 01-14-0880-CV, 2016 Tex. App. LEXIS 3345 (Tex. App. – Houston [1 st Dist.] March 31, 2016, pet. for cert. filed)	40
<i>Roth v. United States</i> , 354 U.S. 476 (1957).....	17
<i>Russell v. Russell</i> , 865 S.W.2d 929 (Tex. 1993).....	37
<i>Salge v. Edna I.S.D.</i> , 411 F.3d 178 (5th Cir. 2005).....	21
<i>San Jacinto Title Services v. Kingsley Properties, LP</i> , 452 S.W.3d 343 (Tex. App. – Corpus Christi – Edinburg 2013, pet. denied).....	5, 48, 49, 50
<i>Sandholm v. Kuecker</i> , 202 IL 111443, 962 N.E.2d 418 (Ill. 2012).....	14
<i>Sax v. Votteler</i> , 648 S.W.2d 661 (Tex. 1983).....	39
<i>Schimmel v. McGregor</i> , 438 S.W.3d 847 (Tex. App. - Houston [1st Dist.] 2014, pet. denied)	passim
<i>Schlumberger Ltd. v. Rutherford</i> , 472 S.W.3d 881 (Tex. App.—Houston [1st Dist.] 2015, no pet.).....	37
<i>Serafine v. Blunt</i> , 466 S.W.3d 352 (Tex. App.—Austin 2015, no pet.)	passim
<i>Service Corp. v. Guerra</i> , 348 S.W.3d 221 (Tex. 2011).....	56
<i>Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.</i> , 559 U.S. 393, 130 S.Ct. 1431, 176 L.Ed.2d 311(2010).....	57
<i>Shipp v. Malouf</i> , 439 S.W.3d 432 (Tex. App. – Dallas [5th Dist.], 2014, pet. denied).....	8, 22
<i>Sisto v. Am. Condo. Ass'n, Inc.</i> , 68 A.3d 603 (R.I. 2013)	16
<i>Smith v. Smith</i> , 126 S.W.3d 660 (Tex.App.—Houston [14 th Dist.] 2004, no pet.).....	39
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011).....	20
<i>Sorokolit v. Rhodes</i> , 889 S.W.2d 239 (Tex. 1994)	55

<i>Southwest Energy Prod. Co. v. Berry Helfand</i> , 411 S.W.3d 581 (Tex. App. – Tyler 2013, <i>rev’d sub nom. Southwestern Energy Prod. Co. v. Berry-Helfand</i> , 491 S.W.3d 699 (Tex., June 10, 2016).....	37
<i>Sтары v. DeBord</i> , 967 S.W.2d 352 (Tex. 1998).....	48
<i>Stockton v. Offenbach</i> , 336 S.W.3d 610 (Tex. 2011)	55
<i>Sullivan v. Abraham</i> , 488 S.W.3d 294 (Tex. 2016).....	40, 45, 46
<i>Summersett v. Jaiyeola</i> , 438 S.W.3d 84 (Tex. App. – Corpus Christi 2013, <i>pet. denied</i>).....	47
<i>Terrell v. Univ. of Texas Sys. Police</i> , 792 F.2d 1360 (5th Cir. 1986).....	21
<i>Tex. Tech Univ. Health Science Ctr. v. Apodaca</i> , 876 S.W.2d 402 (Tex. App. – El Paso 1994, <i>writ denied</i>).....	35
<i>Tex. Workers' Comp. Comm’n v. Garcia</i> , 893 S.W.2d 504 (Tex. 1995).....	62
<i>Texas Mun. Power Agency v. Public Util. Comm’n</i> , 253 S.W.3d 184 (Tex. 1997).....	54
<i>Town of Madawaska v. Cayer</i> , 2014 ME 121, 103 A.3d 547.....	16
<i>Trinity River Auth. v. URS Consultants, Inc.</i> , 889 S.W.2d 259 (Tex. 1994).....	39
<i>Turner v. KTRK Television, Inc.</i> , 38 S.W.3d 103 (Tex. 2000)	36, 61
<i>United States v. Lockheed Missiles & Space Co.</i> , 190 F.3d 963 (9th Cir. 1999).	57
<i>UTMB v. Estate of Blackmon</i> , 195 S.W.3d 98 (Tex. 2006).....	43
<i>Villafani v. Trejo</i> , 251 S.W.3d 466 (Tex. 2008)	44
<i>Vincenty v. Bloomberg</i> , 476 F.3d 74 (2nd Cir. 2007).....	17
<i>Walker v. Packer</i> , 827 S.W.2d 833 (Tex. 1991).	50
<i>WFAA-TV Inc. v. McLemore</i> , 978 S.W.2d 568 (Tex. 1998).....	36
<i>Wholesale TV and Radio Advertising, LLC v. Better Bus. Bureau of Metro. Dallas, Inc.</i> , No. 05-11-01337-CV, 2013 Tex. App. LEXIS 7348 (Tex. App. – Dallas June 14, 2013, <i>no pet.</i>) 26, 36	
<i>Williams v. Cordillera Communications, Inc.</i> , 2014 U.S. Dist. LEXIS 79584 (S.D. Tex. June 11, 2014).....	58
Rules and Statutes	
12 TEX. B. J. 531 (1949).....	60

735 ILCS 110/15 (West 2014).....	14
CA. CIV. PROC. CODE § 425.16(B)(1)	14
D.C. CODE §§ 16-5501-5505	56
FED. R. CIV. P. 1	57
FED. R. CIV. P. 12	56
FED. R. CIV. P. 12(b)	29
FED. R. CIV. P. 56	56
FED. R. CIV. P. 6(b)	29
HAW. REV. STAT. § 634F-1 (2011)	3
Local Rule CV-7(d)	29
TEX. BUS. & COM. CODE § 17.01 <i>et seq.</i>	69
TEX. CIV. PRAC. & REM. CODE § 10.001 <i>et seq.</i>	4, 5
TEX. CIV. PRAC. & REM. CODE § 10.002(a,b)	5
TEX. CIV. PRAC. & REM. CODE § 10.004	5
TEX. CIV. PRAC. & REM. CODE § 10.005	45
TEX. CIV. PRAC. & REM. CODE § 10.006	5
TEX. CIV. PRAC. & REM. CODE § 27.001 <i>et seq.</i>	1
TEX. CIV. PRAC. & REM. CODE § 27.001(1).....	16
TEX. CIV. PRAC. & REM. CODE § 27.001(2).....	24
TEX. CIV. PRAC. & REM. CODE § 27.001(3)	16
TEX. CIV. PRAC. & REM. CODE § 27.001(4).....	23
TEX. CIV. PRAC. & REM. CODE § 27.001(4)(a)(ii)	12
TEX. CIV. PRAC. & REM. CODE § 27.001(6).....	12, 13, 41
TEX. CIV. PRAC. & REM. CODE § 27.001(7).....	20, 22
TEX. CIV. PRAC. & REM. CODE § 27.002.....	6, 62

TEX. CIV. PRAC. & REM. CODE § 27.003	2
TEX. CIV. PRAC. & REM. CODE § 27.003(a)	11, 27
TEX. CIV. PRAC. & REM. CODE § 27.003(b)	27
TEX. CIV. PRAC. & REM. CODE § 27.003(c)	30, 41
TEX. CIV. PRAC. & REM. CODE § 27.004	30
TEX. CIV. PRAC. & REM. CODE § 27.004(a)	28
TEX. CIV. PRAC. & REM. CODE § 27.004(b)	28
TEX. CIV. PRAC. & REM. CODE § 27.004(b,c)	11
TEX. CIV. PRAC. & REM. CODE § 27.004(c)	28
TEX. CIV. PRAC. & REM. CODE § 27.005	2
TEX. CIV. PRAC. & REM. CODE § 27.005(a)	29
TEX. CIV. PRAC. & REM. CODE § 27.005(b)(c)	36, 41
TEX. CIV. PRAC. & REM. CODE § 27.005(b)	33
TEX. CIV. PRAC. & REM. CODE § 27.005(c)	33
TEX. CIV. PRAC. & REM. CODE § 27.005(c)	42
TEX. CIV. PRAC. & REM. CODE § 27.005(d)	11, 42
TEX. CIV. PRAC. & REM. CODE § 27.006(a)	31
TEX. CIV. PRAC. & REM. CODE § 27.006(b)	30
TEX. CIV. PRAC. & REM. CODE § 27.007(a)	16
TEX. CIV. PRAC. & REM. CODE § 27.007(a,b)	43
TEX. CIV. PRAC. & REM. CODE § 27.008	2, 46
TEX. CIV. PRAC. & REM. CODE § 27.008(a)	16, 47, 49, 53
TEX. CIV. PRAC. & REM. CODE § 27.008(b)	50, 54
TEX. CIV. PRAC. & REM. CODE § 27.008(c)	53
TEX. CIV. PRAC. & REM. CODE § 27.009(a)	44

TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1).....	32
TEX. CIV. PRAC. & REM. CODE § 27.009(b).....	46
TEX. CIV. PRAC. & REM. CODE § 27.010(a).....	25
TEX. CIV. PRAC. & REM. CODE § 27.010(b).....	25
TEX. CIV. PRAC. & REM. CODE § 27.010(c).....	25
TEX. CIV. PRAC. & REM. CODE § 27.010(d).....	25
TEX. CIV. PRAC. & REM. CODE § 27.011(b).....	6, 50, 52
TEX. CIV. PRAC. & REM. CODE § 37.006.....	65
TEX. CIV. PRAC. & REM. CODE § 41.001(2).....	34
TEX. CIV. PRAC. & REM. CODE § 41.003.....	46
TEX. CIV. PRAC. & REM. CODE § 51.014(6).....	9
TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12).....	10, 16, 48
TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6).....	47
TEX. CIV. PRAC. & REM. CODE § 51.014(b).....	47
TEX. CIV. PRAC. & REM. CODE § 73.001 <i>et seq.</i>	9
TEX. CIV. PRAC. & REM. CODE § 73.052.....	66
TEX. CIV. PRAC. & REM. CODE § 73.053.....	68
TEX. CIV. PRAC. & REM. CODE § 73.055(a).....	68
TEX. CIV. PRAC. & REM. CODE § 73.055(b).....	68
TEX. CIV. PRAC. & REM. CODE § 73.055(c).....	69
TEX. CIV. PRAC. & REM. CODE § 73.055(d).....	68
TEX. CIV. PRAC. & REM. CODE § 73.056(a).....	68
TEX. CIV. PRAC. & REM. CODE § 73.056(b).....	69
TEX. CIV. PRAC. & REM. CODE § 73.057(a).....	68
TEX. CIV. PRAC. & REM. CODE § 73.057(b).....	69

TEX. CIV. PRAC. & REM. CODE § 73.057(c)	69
TEX. CIV. PRAC. & REM. CODE § 73.057(d)	69
TEX. CIV. PRAC. & REM. CODE § 73.057(e)	69
TEX. CIV. PRAC. & REM. CODE § 73.058(a)	69
TEX. CIV. PRAC. & REM. CODE § 73.058(b)	69
TEX. CIV. PRAC. & REM. CODE § 73.058(d)	69
TEX. CIV. PRAC. & REM. CODE § 73.059	69
TEX. CIV. PRAC. & REM. CODE § 73.061(a,b)	69
TEX. CIV. PRAC. & REM. CODE § 73.062(a)	69
TEX. CIV. PRAC. & REM. CODE § 73.062(b)	69
TEX. CIV. PRAC. & REM. CODE § 73.062(c)	69
TEX. CIV. PRAC. & REM. CODE § 73.062(d)	69
TEX. CIV. PRAC. & REM. CODE § 9.001, <i>et seq.</i>	4, 5
TEX. CIV. PRAC. & REM. CODE § 9.002(a)(2)	5
TEX. CIV. PRAC. & REM. CODE § 9.003	59
TEX. CONST. art. I, § 13	39, 61
TEX. CONST. art. I, § 8	61
TEX. CONST. art. V, § 31(b)	59
TEX. CONST. art. V, § 31(c)	59
TEX. CONST. art. V, § 6	48
TEX. ELEC. CODE § 253.131(a)	63
TEX. ELEC. CODE § 273.081	63
TEX. GOV'T CODE § 22.001(a)(2)	50
TEX. GOV'T CODE § 22.002	53
TEX. GOV'T CODE § 22.004(c)	59

TEX. GOV'T CODE § 22.221.....	53
TEX. GOV'T CODE § 311.016.....	45
TEX. GOV'T CODE § 311.022	47
TEX. GOV'T CODE § 402.010	65
Tex. Gov't Code §311.005(13).....	20
TEX. R. APP. P. 25.1	53
TEX. R. APP. P. 26.1	53
TEX. R. APP. P. 52	53
TEX. R. CIV. P. 13.....	4, 45
TEX. R. CIV. P. 166-a.....	60
TEX. R. CIV. P. 166a(c).....	29
TEX. R. CIV. P. 166a(i)	38
TEX. R. CIV. P. 174(a)	41
TEX. R. CIV. P. 174(b).....	41
TEX. R. CIV. P. 192.3(a)	31
TEX. R. CIV. P. 21	29
TEX. R. CIV. P. 41	41
TEX. R. CIV. P. 48.....	31
TEX. R. CIV. P. 51.....	41
TEX. R. CIV. P. 97.....	41
Other Authorities	
BLACK'S LAW DICTIONARY (8TH ED).....	34
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BLACK'S LAW DICTIONARY 180 (10 TH ED. 2014).....	15
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<i>Hearing on Tex. H.B. 1759 Before the Sen. Comm. on State Affairs</i> at 00:10:50, 2013 Leg., 83d Sess. (Tex. 2013)	68
<i>Hearing on Tex. H.B. 2935 Before the H. Comm. on Judiciary & Civ. Jurisprudence</i> , 2013 Leg., 83d Sess. (Tex. 2013)	10
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http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/HB02935H.pdf#navpanes=0	11
http://www.capitol.state.tx.us/tlodocs/83R/senateamendana/pdf/HB01759A.pdf#navpanes=0 ..	68
http://www.foift.org/	7
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WILLIAM SHAKESPEARE, OTHELLO, act 3 sc. 3	61

I. INTRODUCTION.

On June 17, 2011, Texas Governor Rick Perry affixed his neat signature to the new Texas anti-SLAPP¹ law, entitled the Texas Citizens Participation Act (the “TCPA”), and in so doing Texas joined 27 states and the District of Columbia in enacting various forms of legislation purportedly aimed at preventing frivolous lawsuits from stifling free speech activities and the rights of petition and association.² As currently interpreted and applied, the TCPA is arguably the broadest anti-SLAPP law in the country. There have been no other states that have enacted anti-SLAPP legislation since Texas.

Over the last six years the TCPA has launched a new and very expensive motions practice, clogging the dockets of trial and appellate courts with expensive, complicated, and time-consuming litigation, that often result in fee awards in the hundreds of thousands of dollars.³ The

TCPA introduces what one judge called a “draconian” motion to dismiss that places a heavy burden on the aggrieved plaintiff to prove that his suit is not frivolous at the inception of the litigation without the benefit of any meaningful discovery.⁴

The Act does not attempt to define the shape or scope of a true SLAPP suit or distinguish between causes of action subject to or protected from the anti-SLAPP statute. Instead, the TCPA has been applied to a very broad array of claims that do not resemble a SLAPP case, including UCC-1 financing statements,⁵ theft of trade secrets,⁶ breaches of nondisclosure agreements,⁷ and

er-fined-trade-secrets-suit-against-ex-atty-gutted; \$124,000 in fees awarded, to be increased. See John C. Council, *Video: Winning Attorney Fees Under Texas’ Anti-Slapp Statute (and then some?)*, Texas Lawyer (Feb. 4, 2015), available at <http://www.texaslawyer.com/id=1202717046749/Video-Winning-Attorney-Fees-Under-Texas-AntiSLAPP-Statute-and-then-some>.

¹ “Strategic Lawsuits Against Public Participation.”

² See TEX. CIV. PRAC. & REM. CODE § 27.001 *et seq.* The 27 other states, in addition to the District of Columbia, are Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, and Washington. Colorado recognizes similar protection through common law.

³ \$624,000 in fees and costs awarded in February, 2017, and \$60,000 in fees and sanctions in July, 2017. See John C. Council, *Litigator of the Week: The King of Texas’ Animal Anti-Slapp Kingdom*, Texas Lawyer (Aug. 3, 2017), available at <http://www.texaslawyer.com/id=1202794690875/Litigator-of-the-Week-The-King-of-Texas-Animal-Anti-SLAPP-Kingdom>; \$350,000 in fees and \$250,000 in sanctions against Schlumberger, August 2014. See Jeremy Heallen, *Schlumberger Fined, Trade Secrets Suit Against Ex-Atty Gutted*, Law360 (Aug. 27, 2014), available at <https://www.law360.com/articles/571752/schlumberger>

⁴ In a campaign finance law case, the Mayor of El Paso filed suit to enjoin violations of the Texas Elections Code by several corporations and a group of individuals. The defendants filed a motion to dismiss under the lawsuit under the new anti-SLAPP statute, arguing that the corporate contributions at issue in the case were a form of “protected speech.” In denying the motion to dismiss, Judge Javier Alvarez stated that the new procedure for dismissal of a lawsuit without discovery and with the burden on the plaintiff was too draconian. The author of this paper was counsel for the plaintiff in that case, and received a rude introduction to the TCPA in one of its first applications. See *Cook v. Tom Brown Ministries, et al.*, 385 S.W.3d 592 (Tex.App.—El Paso 2012, pet. denied) (related interlocutory appeal of temporary injunction).

⁵ See *Quintanilla v. West*, No. 04-16-00533-CV, 2017 WL 1684832 (Tex. App.—San Antonio April 26, 2017, pet. filed).

⁶ See *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, No. 03-15-00064-CV, 2017 Tex. App. LEXIS 4108 (Tex. App.—Austin May 5, 2017, pet. filed).

⁷ See *Elliott v. S&S Emergency Training Solutions*, No. 05-16-01373-CV, 2017 WL 2118787 (Tex. App.—Dallas May 16, 2017, pet. filed).

a host of other business, commercial and personal disputes. In fact, very few of the cases currently making their way through the appellate courts could properly be characterized as a SLAPP case. So long as a defendant in a suit that involves a communication can characterize the suit as even tangentially “based on,” “relating to,” or “in response to” the exercise of free speech, petition or association, the motion to dismiss can be filed, and unless the plaintiff presents prima facie evidence of each element of his claim, the motion to dismiss must be granted, with mandatory fees and sanctions assessed.⁸

Our research also shows that, when confronted with a TCPA motion to dismiss, plaintiffs are almost certain to lose all or part of their cases to dismissal. Although there are no reported statistics on the number of TCPA motions to dismiss granted at the trial level, we do have a record of results on appeal. Since only the movant whose motion to dismiss is denied is entitled to an interlocutory appeal,⁹ a review of results on appeal shows that more than 70% of appealed cases conclude with the motion to dismiss being granted in whole or in part.¹⁰

⁸TEX. CIV. PRAC. & REM. CODE § 27.003 & 27.005.

⁹TEX. CIV. PRAC. & REM. CODE § 27.008.

¹⁰ Mario Franke, in our office, reviewed the cases appealed since the inception of the statute, and counted a case once in instances of more than one opinion.

SUMMARY OF FINDINGS:

2017

For 2017, there are a total of 37 reported cases on WestLaw.

Of these, 27 of the reported cases granted the TCPA motion to dismiss at issue (either whole or in part). This constitutes a 72.97% percentage success rate for TCPA motions in reported cases for 2017.

Notably, to date, there have been already four (4) Supreme Court cases (*Hersh v. Tatum*; *Bedford v. Spasoff*; *D Magazine Partners, L.P. v. Rosenthal*; and

ExxonMobil Pipeline Co. v. Coleman) addressing TCPA motions.

2016

For 2016, there are a total of 40 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).

Of these, 22 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 55.00% percentage success rate for TCPA motions in reported cases for 2016.

2015

For 2015, there are a total of 37 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).

Of these, 26 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 70.27% percentage success rate for TCPA motions in reported cases for 2015.

2014

For 2014, there are a total of 21 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).

Of these, 14 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 66.66% percentage success rate for TCPA motions in reported cases for 2014.

2013

For 2013, there are a total of 13 reported cases on WestLaw addressing TCPA motions to dismiss (excluding opinions that were subsequently addressed by Supreme Court, or substituted on rehearing, or on remand).

Of these, 10 of the reported cases granted the TCPA motion to dismiss (either whole or in part). This constitutes a 76.92% percentage success rate for TCPA motions in reported cases for 2013.

Notably, the vast majority of denials for TCPA motions are procedural nature (i.e., tardy appeals; movants not fulfilling the first prong the TCPA and therefore the Court of Appeals failing to have jurisdiction to address the merits of the claims).

However, once the reviewing courts do address the claims set forth by the non-movant in a particular

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