

# **Anti-SLAPP and the Defamation Mitigation Act**

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# Texas Citizens Participation Act (TCPA)

- **SLAPP = strategic lawsuits against public participation**
- **KEY FEATURES:**
  - **LITERAL AND LIBERAL INTERPRETATION**
  - **MOTION TO DISMISS**
  - **DISCOVERY GENERALLY STAYED**
  - **FAST TRACK**
  - **IMMEDIATE APPEAL RIGHT**
  - **LOSER PAYS**
    - **Always** for losing non-movant (generally the plaintiff)
    - **Maybe sometimes** for losing movant (generally the defendant)

# TCPA PROCESS

- Party files "legal action" based on, relating to, or 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
- Discovery generally stops
- Quick hearing
- Quick ruling
- Immediate right of appeal

# BIG CASES:

- ***In re Lipsky*, 460 S.W.3d 579 (Tex.2015).**
  - Plaintiff landowner and defendant oil & gas company fight about plaintiff's contaminated water well.
  - Trial court must dismiss a suit that appears to stifle the defendant's communication on a matter of public concern unless "clear and specific evidence" establishes the plaintiff's prima facie case."
  - Circumstantial as well as direct evidence is relevant when considering a TCPA motion to dismiss.

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

- Independent contractor (nurse anesthetist) sues for defamation, tortious interference of contract, and civil conspiracy.
- Holding: **TCPA is not limited to just public communication.**
- Email statements questioning the quality of the independent contractor's medical care were of a matter of public concern.

# *ExxonMobil Pipeline Company v. Coleman*, 512 S.W.3d 895 (Tex. 2017).

- Terminated employee sues EMPCo for defamation.
- Statements about failing to properly “gauge the tanks.”
- TCPA motion to dismiss denied by trial court.
- Affirmed on appeal – statements about Coleman only **tangentially related** to matters of public concern (such as public safety).
- **HELD: Reversed. The TCPA does not require more than a tangential relationship to such concerns.**

# *D Magazine Partners, L.P. v. Rosenthal,* \_\_S.W.3d\_\_ (Tex. Mar. 17, 2017).

- Plaintiff sued D Magazine for defamation
- Plaintiff alleged D Magazine falsely accused her of welfare fraud
- **Held:**
  - DTPA – Deceptive Trade Practices Act & ITEPA – Identity Theft Enforcement and Protection Act Claims properly dismissed.
  - Affirmed ruling that defamation claim not dismissed
  - Each claim =‘s a “legal action” - reverses refusal to award attorney’s fees to D Magazine

*Hersh v. Tatum*, \_\_S.W.3d\_\_ (Tex. June 30, 2017).

- Suit for intentional infliction of emotional distress.
- Holding: TCPA applies despite the author's denial of making the alleged communications.
- In order to shift the burden to the plaintiff, the movant merely needs to show from the plaintiff's pleadings that the action is covered by the TCPA.
- Affirms trial court ruling that the alleged communication was not extreme and outrageous, as required by plaintiff's cause of action.

# IMPORTANT TO KNOW:

- **The TCPA has very limited exceptions**
  - Certain enforcement actions;
  - Certain legal actions against sellers of goods or services;
  - Personal injury or survival actions; and
  - Legal actions under the Insurance Code or arising from insurance contracts.
- **In the Fifth Circuit, the TCPA apparently applies in federal as well as state court: *Cuba v. Plyant*, 184 F.3d 701, 705 (5<sup>th</sup> Cir. 2016).**

# TDMA

## Texas Defamation Mitigation Act

- Overview:
  - DMA assists those who write or speak (using “protected” speech).
  - By providing partial or full escape routes to writers or speakers of allegedly defamatory speech.

# MOST IMPORTANT THING TO KNOW

- The TDMA creates, de facto, a **90 day Statute of Limitations** for defamation actions with big teeth. Here's how:
  - While a Plaintiff may still file suit within the 1 year SL, without a TIMELY AND SUFFICIENT ("T&S") request for correction, clarification or retraction ("CC or R") defamation suit cannot result in award of **exemplary damages**. Sec. 73.055 (c).

# IF WOULD-BE PLAINTIFF MAKES T&S REQUEST – **Option 1:**

- Would-be defendant **within 30 days of receipt of request** can request information. Sec. 73.058(c).
  - If would-be defendant makes this request, would-be plaintiff must provide requested information, or, if failing to do so without good cause: no exemplary damages permitted, unless publication is made with **actual malice**. Sec. 73.056(b)
- OR
- Within 60 days after citation is served, defendant can challenge T&S of request for CC or R with a **motion to declare** the request insufficient or untimely.

# IF WOULD-BE PLAINTIFF MAKES T&S REQUEST – **Option 2:**

- Would-be defamation defendant can make a **correction, clarification or retraction**. It must be:
  - **Timely** (within 30 days of request or receipt of information would-be defendant has requested)(see Sec. 73.057(a)); and
  - **Sufficient** (see laundry list in Sec. 73.057(b),(d) & (e)).
- If defamation defendant makes T&S CC or R and **intends to rely on it**, such defendant **must serve notice** on the plaintiff on the later of (1) 60<sup>th</sup> day after citation service or (2) 10<sup>th</sup> day after date of CC or R.

# How Plaintiff Can Defeat Correction, Clarification or Retraction:

- To defeat CC or R, plaintiff must state challenge to timeliness and/or sufficiency in a **motion to declare untimely or insufficient**.
- Must file **motion to declare** within 30 days after service of notice or within 30 days after date of CC or R, whichever is later. Sec. 73.058.

# Effect of Correction, Clarification or Retraction

- Regardless of whether person causing harm made a request –
- Plaintiff may not recover exemplary damages unless publication made with **actual malice**.

# IF PLAINTIFF FAILED TO MAKE T&S REQUEST

- Defendant may file **plea in abatement**.
- Not later than 30 days after filing defendant's original answer.
- Then suit is automatically abated, in its entirety, without court order,
- **On 11<sup>th</sup> day** after plea in abatement is filed,
  - if plea is verified and alleges defendant did not receive correction, clarification or retraction request and
  - if plea is not controverted with affidavit before the 11<sup>th</sup> day.
- Abatement continues until 60<sup>th</sup> day after plaintiff makes correction, clarification or retraction request or a later date agreed to by the parties.

# IMPACT OF TDMA

- **De facto 90 day statute of limitations** for defamation suit with full teeth potential – exemplary damages.
- **May be “a trap”** – (i.e. would-be plaintiff sends request and would-be defendant becomes plaintiff by filing suit for declaratory judgment).  
QUESTION – Is the request protected by TCPA?
- Back and forth potential before filing.
- Back and forth potential after filing.
- Abatement may occur.
- **Lightening may strike – would be defendant “undoes” defamation.**

**THE END**