

**ANTI-SLAPP AND RULE 91A MOTIONS UPDATE:
ENDING THE LAWSUIT BEFORE IT BEGINS**

GEOFF A. GANNAWAY, *Houston*
Beck | Redden, LLP

ALEX B. ROBERTS, *Houston*
Beck | Redden, LLP

State Bar of Texas
33RD ANNUAL LITIGATION UPDATE
January 26-27, 2017
San Antonio

CHAPTER 19

TABLE OF CONTENTS

I. INTRODUCTION: EARLY DISMISSAL OF SUITS IN TEXAS STATE COURT 1

II. DOES THE TEXAS ANTI-SLAPP STATUTE APPLY TO YOUR LAWSUIT? YOU MIGHT BE SURPRISED. 1

 A. Introduction to the Texas Anti-SLAPP Statute 1

 B. Background of the TCPA 2

 C. Anti-SLAPP Is Heavily Slanted toward Defendants 2

 D. Application of the “clear and specific evidence” threshold – In re Lipsky: 4

 E. Determining the reach of TCPA rights – the right of free speech 5

 1. Right of free speech is broad and does not require a public communication 5

 2. Right of free speech not triggered by company’s statements on internal personnel matters 5

 3. Right of free speech not implicated by communications about a business dispute 6

 4. Right of free speech applied to article about sale of office building to be used as a community center 6

 5. Court narrowly reviews petition and finds no facts elevating business dispute to matter of public concern 6

 6. Right of free speech implicated by website calling attorney a liar 7

 7. No right of free speech implicated where defendant denies making statement 7

 F. Determining the reach of TCPA rights – the right of association 7

 1. Right of association is inapplicable if no element of public participation 7

 2. Right of association implicated by communications among HOA members 8

 3. Right of association implicated by communications among board members 8

 G. Determining the reach of TCPA rights – the right to petition 8

 1. Right of petition and right of association implicated by discussing patent suits with colleagues 9

 2. Right of petition implicated by filing a lawsuit and lis pendens 10

 3. Right of petition implicated by filing a TCPA motion 10

 H. The commercial-speech exemption 11

 1. No commercial-speech exemption where comments about an assisted living facility were not directed toward facility’s residents to sell them services 11

 2. Commercial-speech exemption applies where competitor criticized another in the same online thread in which he was reaching out to potential buyers 11

 3. Better Business Bureau business reviews do not fit within commercial-speech exemption 12

 4. Statements made to increase blog membership do not fit within commercial-speech exemption 12

 I. Miscellaneous procedural issues 12

 1. TCPA applies to Rule 202 petitions 12

 2. TCPA motion does not waive special appearance 12

 3. The TCPA probably applies in federal court, but whether that includes procedural rules is unclear.... 13

 4. In awarding attorneys’ fees, a court is not to consider justice and equity 13

 J. Conclusion – the scope of TCPA: How far is too far? 13

III. RULE 91A: THE FIRST-ROUND KNOCK OUT 14

 A. Introduction 14

 B. No Basis in Law or Fact 14

 1. No Basis in Law 14

 2. No Basis in Fact 14

 3. Impact on Pleading Standards 15

 4. Appellate Review 16

 C. Loser Pays 16

 D. Procedural Considerations 17

 1. Deadlines for filing, hearing, and deciding Rule 91a motions 17

 2. Required contents of Rule 91a motion 17

 3. Hearing on Motion to Dismiss 17

 4. Discovery during pendency of Rule 91a motion 18

 5. Impact on other motions 18