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LAW REVIEW

"THE TEXAS CITIZENS PARTICIPATION ACT ENTERS A NEW ERA"

John P. Atkins[*] *and Nicole Williams*[*]

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I. INTRODUCTION

The Texas legislature's enactment in 2011 of the Texas Citizens Participation Act (TCPA),[1] an anti-SLAPP (Strategic Lawsuit Against Public Participation) statute designed to protect citizens' rights to petition, freedom of speech, and freedom of association by providing procedures for early dismissal of frivolous lawsuits implicating those rights, had some unintended consequences. The original version of the statute was written broadly, and creative defense attorneys quickly found ways to use the law to stall or dismiss lawsuits that most

[*] John Atkins is business litigation counsel at Thompson Coburn LLP in Dallas and focuses his practice on litigation and counseling on matters involving complex business litigation, complex commercial disputes (including class actions), social justice litigation, health care litigation, and defamation matters. He has clients ranging from consumer product manufacturers to energy clients, from hospitals to social justice organizations.

[*] Nicole Williams is a business litigation partner at Thompson Coburn LLP in Dallas who focuses her practice on litigation and counseling on matters involving antitrust, advertising, and other complex business litigation, and complex commercial disputes, including class actions (as both plaintiff and defendant). She advises clients in industries such as food and beverage, retail, electronics, real estate, health care, and e-commerce.

[1] TEX. CIV. PRAC. & REM. CODE ANN. § 27.001.

people would agree did not involve the exercise of substantive constitutional rights.[2]

In response to concerns raised about its overbroad application,[3] Texas Governor Greg Abbott signed House Bill 2730 on June 2, 2019, which significantly amended the TCPA.[4] It has been two years since the enactment of these amendments, which became effective on September 1, 2019.[5] The authors intend this article to serve as an update for the previous edition that covered the initial days after the amendments and to provide some additional details regarding important questions at issue in TCPA jurisprudence today.[6]

II. THE TCPA BEFORE HOUSE BILL 2730

The basic purpose of the TCPA is to allow a defendant to seek early dismissal of frivolous legal actions that are based on, relate to, or are in response to the defendant's "exercise of the right of free speech, right to petition, or right of association . . . ."[7] Before the 2019 amendments, the TCPA broadly defined the terms "exercise of the right of free speech," "exercise of the right to petition," and "exercise of the right of association" to extend beyond constitutionally protected activities.[8] For instance, the Texas Supreme Court made clear that the definition of the "exercise of the right of free speech" could extend to private communications since the statute failed to indicate otherwise.[9] The court emphasized that those private communications

[2] For example, Texas courts applied the TCPA's dismissal procedures to cases involving breaches of non-compete and non-solicitation agreements, oil-and-gas lease disputes, and claims for misappropriation of trade secrets. Grant v. Pivot Tech. Sols., Ltd., 556 S.W.3d 865, 884 (Tex. App.—Austin 2018, pet. denied); Lona Hills Ranch, LLC v. Creative Oil & Gas Operating, LLC, 549 S.W.3d 839, 844 (Tex. App.—Austin 2018), *rev'd in part on other grounds,* 591 S.W.3d 127 (Tex. 2019); Morgan v. Clements Fluids S. Tex., Ltd., 589 S.W.3d 177, 183 (Tex. App.—Tyler 2018, no pet.); Gaskamp v. WSP USA, Inc., 596 S.W.3d 457, 467 (Tex. App.—Houston [1st Dist.] 2020, pet. dism'd) (en banc); Elite Auto Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 200–01 (Tex. App.—Austin 2017, pet. dism'd).

[3] *See* H. Comm. on Judiciary and Civ. Juris., Bill Analysis, Tex. C.S. H.B. 2730, 86th Leg., R.S. (2019) ("It has been suggested that certain statutory provisions relating to expedited dismissal procedures for lawsuits involving the exercise of free speech, the right of association, and the right to petition may lend themselves to unexpected applications because they are overly broad or unclear. C.S.H.B. 2730 seeks to remedy this issue by clarifying the scope and applicability of those provisions.").

[4] Tex. H.B. 2730, 86th Leg., R.S. (2019).

[5] Act of June 2, 2019, 86th Leg., R.S., ch. 378, § 1–12, 2019 Tex. Gen. Laws 378 (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011).

[6] This article addresses only state court cases because the Fifth Circuit has held that the TCPA does not apply in federal court. *See* Klocke v. Watson, 936 F.3d 240, 249 (5th Cir. 2019). The Fifth Circuit concluded that the TCPA's dismissal procedures "impose[] additional requirements beyond those found in Rules 12 and 56 and answers the same question as those rules," so it "cannot apply in federal court." *Id.* at 245.

[7] TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a).

[8] Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(2)–(4), 2011 Tex. Gen Laws 961 (amended 2019) (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011); *see also*, *e.g.*, Youngkin v. Hines, 546 S.W.3d 675, 681 (Tex. 2018).

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

need only have a "tangential relationship" to a matter of public concern to fall under the TCPA.[10] It is this broad drawing of the relevant terms that led to many unusual applications of the TCPA.[11]

Perhaps the broadest definition in the pre-amendment TCPA was the phrase "matter of public concern," which the Texas Supreme Court defined as 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."[12] After reading these words, it is easy to see how zealous litigants might read into them applications the legislature did not consider. Indeed, the Texas Supreme Court interpreted that phrase to cover oral, written, and electronic communications between employees about a failure to record the number of petroleum products in storage tanks because it found the communications had a "tangential relationship" to a task performed to reduce environmental, health, safety, and economic risks.[13] The Texas Supreme Court also held that the TCPA applied to defamation claims arising from private emails between administrators at a surgery center alleging that a nurse anesthetist engaged in several medically and ethically improper practices because these emails were about "the provision of medical services" and thus related to a matter of public concern.[14] Commentators noted that, in this form, the Texas TCPA was the broadest Anti-SLAPP statute in the country.[15]

III. THE TCPA AMENDMENTS

The 2019 TCPA Amendments tightened the scope of the TCPA. Most significantly, whereas the pre-amendment TCPA applied to legal actions that are "based on, relate[] to, or [are] in response to [a] party's exercise of the right of free speech, right to petition, or right of association[,]"[16] the amendments removed the phrase "relates to" from section 27.003(a).[17] The present statute therefore requires the legal action to be "based on or . . . in response to a party's exercise . . . ." of the protected rights.[18]

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[10] ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895, 900 (Tex. 2017).
[11] Grant v. Pivot Tech. Sols., Ltd., 556 S.W.3d 865, 884 (Tex. App.—Austin 2018, pet. denied); Lona Hills Ranch, LLC v. Creative Oil & Gas Operating, LLC, 549 S.W.3d 839, 844 (Tex. App.—Austin 2018), *rev'd in part on other grounds,* 591 S.W.3d 127 (Tex. 2019); Morgan v. Clements Fluids S. Tex., Ltd., 589 S.W.3d 177, 183 (Tex. App.—Tyler 2018, no pet.); Gaskamp v. WSP USA, Inc., 596 S.W.3d 457, 467 (Tex. App.—Houston [1st Dist.] 2020, pet. dism'd) (en banc); Elite Auto Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 200–01 (Tex. App.—Austin 2017, pet. dism'd).
[12] ExxonMobil Pipeline Co., 512 S.W.3d at 900.
[13] *Coleman*, 512 S.W.3d at 901.
[14] *Lippincott*, 462 S.W.3d at 510.
[15] *See* April Farris & Matthew Zorn, *State Anti-SLAPP in Federal Court: An Update from Texas*, LAW360, (Nov. 1, 2018, 1:08 PM), https://www.law360.com/articles/1097627/state-anti-slapp-in-federal-court-an-update-from-texas ("The TCPA is the broadest anti-SLAPP statute in the nation.").
[16] Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.003(a), 2011 Tex. Gen Laws 961, 962 (amended 2019) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a)).
[17] *See* TEX. CIV. PRAC. & REM. CODE § 27.003(a).
[18] *See id.*

The amendments also narrowed the definition of the phrase "exercise of the right of association." The pre-amendment TCPA defined the "exercise of the right of association" as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." [19] The amendments narrowed the definition to cover only those who "join together to collectively express, promote, pursue, or defend common interests *relating to a governmental proceeding or a matter of public concern*."[20]

In addition, the amendments altered the previously broad definition of a "matter of public concern," which is incorporated into and integral to the understanding of the phrase "exercise of the right of free speech" (and, as amended, the phrase "exercise of the right of association").[21] Instead of covering all "issue[s] 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,"[22] the new definition only covers "a statement or activity regarding: a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity; a matter of political, social, or other interest to the community; or a subject of concern to the public."[23]

The legislature designed these amendments to narrow the TCPA's application; the bulk of this article will evaluate whether this effect was achieved. Unfortunately, the answer is "not as much as we would like."[24] In the last edition of this article, the authors speculated that given that most courts are inclined to "liberally" construe the language "to effectuate [the statute's] purpose and intent fully"[25] the post-amendment phrases "matter of political, social, or *other interest* to the community" and "a subject of concern to the public" have the potential for broad application.[26]

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[19] Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.003(a), 2011 Tex. Gen Laws 961, 962 (amended 2019) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(2)).
[20] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2) (emphasis added).
[21] *See id.* § 27.001(3), (7).
[22] *See* Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(7), 2011 Tex. Gen Laws 961, 962 (amended 2019) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 27.0011(7)).
[23] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7).
[24] The authors suggest that this creates strong grounds for a similar update next year when, hopefully, the picture will be clearer.
[25] *See id.* § 27.011(b).
[26] *See id.* § 27.001(7); *compare* Grant v. Pivot Tech. Sols., Ltd., 556 S.W.3d 865, 879 (Tex. App.—Austin 2018, pet. denied) (communication regarding company's involvement in Historically Underutilized Business program related to the government and economic wellbeing and therefore constituted communication about a "matter of public concern" covered by the TCPA), *and* Batra v. Covenant Health Sys., 562 S.W.3d 696, 708–09 (Tex. App.—Amarillo 2018, pet. denied) (private communications about healthcare provider's provision of medical services were about a "matter of public concern"), *with* Dyer v. Medoc Health Servs., LLC, 573 S.W.3d 418, 428 (Tex. App.—Dallas 2019, pet. denied) (TCPA did not apply to text messages between employees of a healthcare company regarding alleged misappropriation of trade secrets), *and* Pinghua Lei v. Nat. Polymer Int'l Corp., 578 S.W.3d 706, 715 (Tex. App.—Dallas 2019, no pet.) (employer's claims against former employees did not implicate a "matter of public concern," rendering TCPA inapplicable).

The amendments did at least remove certain cases from the TCPA's application categorically, regardless of the definitions discussed above. For instance, the statute makes exceptions for claims arising out of the employer-employee, officer-director, or independent contractor relationship for misappropriation of trade secrets or corporate opportunities or claims that seek to enforce a non-compete or non-disparagement agreement.[27] The statute also now exempts certain claims under the Texas Family Code, most Deceptive Trade Practices Act claims, eviction suits, disciplinary proceedings against lawyers, whistleblower claims brought by governmental employees, common-law fraud claims, procedural actions, motions that do not amend or add claims, alternative dispute resolution proceedings, or post-judgment enforcement actions. [28] Government defendants acting in their government capacity also cannot use the TCPA.[29]

Another significant change brought by the 2019 amendments is that an award of sanctions against the nonmovant is now discretionary rather than mandatory if the moving party prevails; however, the award of attorney's fees largely remains mandatory. [30] The only situation in which a court retains the discretion not to award attorney's fees to a prevailing movant is if the dismissed claim was a compulsory counterclaim. And, if the court dismisses a compulsory counterclaim that the court finds frivolous or solely intended for delay, the court may award fees to the movant.[31]

The pre-amendment TCPA defined the term "legal action" to include "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief."[32] At least one Texas court, therefore, concluded that the phrase "legal action" did not include claims for declaratory relief because those claims were merely "type[s] of remed[ies] that may be obtained with respect to a cause of action or other substantive right . . . ."[33] Following the amended definition of "legal action," the TCPA now expressly applies to actions for declaratory relief.[34] The amendments also identify a few specific types of claims that are subject to the TCPA, including complaints about, or reviews or ratings of a business; communications to the public, and acts in furtherance of those communications to the public regarding dramatic, literary, musical, political, journalistic, or artistic work; and legal actions against

[27] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a)(5).
[28] *See id.* § 27.010(a)(6)–(7), (8)–(11).
[29] *See id.* § 27.003(a).
[30] *Id.* § 27.009.
[31] *Id.* § 27.009(c).
[32] Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(6), 2011 Tex. Gen Laws 961, 962 (amended 2019) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6)).
[33] Craig v. Tejas Promotions, LLC, 550 S.W.3d 287, 303 (Tex. App.—Austin 2018, pet. denied) (emphasis omitted).
[34] TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6).

victims of family violence that are based on or in response to public or private communications.[35]

Additionally, the amendments provide that: (1) the parties may mutually agree to extend the deadline for a motion hearing, (2) require the movant provide notice of the hearing at least 21 days before the hearing date, and (3) require the responding party to respond (if at all) at least seven days before the hearing.[36] The amendments further specify that, in addition to pleadings and affidavits, courts can consider evidence that would be admissible under Texas Rule of Civil Procedure 166a (i.e., the summary-judgment rule) in determining whether a certain legal action is subject to the TCPA.[37]

Finally, the amendments changed the dismissal standard for defenses (previously referred to as "valid defense[s]" and described as "affirmative defense[s]" in the amendments) and now require a moving party relying on the affirmative defense to show it is entitled to judgment as a matter of law.[38] Prior applications raised arguments that the old standard, which only required proof of the affirmative defense "by a preponderance of the evidence," unconstitutionally infringed on the right to a trial by jury.[39]

IV. EFFECTS OF THE AMENDMENTS

The previous edition of this article speculated that the new language would have changed the results in certain cases. For example, we suggested that the result in *ExxonMobil Pipeline Company v. Coleman*,[40] in which a former ExxonMobil Pipeline Company employee sued the company and two supervisors for defamation based on communications about the former employee's alleged failure to record storage volumes of tanks containing petroleum products, might have been different.[41] The company and the supervisors moved to dismiss under the old TCPA, but the trial court and court of appeals denied the motion and concluded that the TCPA did not apply.[42] The Texas Supreme Court reversed and held that the communication was an exercise of the right of free speech under the TCPA because it involved a "matter of public concern" that related to health, safety, environmental, and economic issues.[43] However, the new definition does not include the words the court cited, although it still provides the possibility of dismissing lawsuits based on communications

[35] *See id.* § 27.010(b)–(c).
[36] *Id.* § 27.003.
[37] *Id.* § 27.006.
[38] *Id.* § 27.005.
[39] Marble Ridge Cap. LP v. Neiman Marcus Grp., Inc., 611 S.W.3d 113, 122 (Tex. App.—Dallas 2020, pet. abated) (posing the question); *compare* Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.005(d), 2011 Tex. Gen Laws 961, 963 (amended 2019), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d).
[40] 512 S.W.3d 897 (Tex. 2017).
[41] *Id.* at 897–98.
[42] *Id.* at 900.
[43] *Id.* at 900–01.

regarding issues of "concern to the public."[44] Moving forward, private communications between supervisors regarding whether an employee fulfilled an obligation to record storage volumes of tanks containing petroleum products may very well fall outside the definition of "matter of public concern."

The change in the definition of "exercise of the right of association" would likely have changed the outcome in *Grant v. Pivot Technology Solutions., Ltd.*.[45] In *Grant*, the Austin Court of Appeals held that the TCPA applies to communications between people who join together to pursue the common interest of obtaining employment with a new employer and ensure that their business could operate as a Historically Underutilized Business.[46] The amended TCPA changed the definition of "exercise of the right of association" to require the common interest to relate to "a governmental proceeding or a matter of public concern,"[47] which was not the case in *Grant*. Further, even if the definition of "exercise of the right of association" had not changed, the amended TCPA would likely have changed the outcome in *Grant* because the statute now provides that it does not apply to legal actions arising from an officer-director or employer-employee relationship that seek to enforce non-competition agreements.[48]

For this latter reason, the amended statute would likely also have reversed the decision in *Morgan v. Clements Fluids South Texas, Ltd.*,[49] in which the Tyler Court of Appeals held that the TCPA applied to claims for breach of contract, non-compete agreements, non-solicitation agreements, and misappropriation of trade secrets.[50] The amended TCPA specifically exempts those causes of action.[51]

Other changes in the TCPA, such as the change in the definition of the phrase "legal action" or the carve-out from the term "party," would also change case outcomes. The Austin Court of Appeals previously held, for example, that a claim for declaratory relief was not a "legal action,"[52] but the amended TCPA now explicitly includes claims for declaratory relief.[53] It does not appear that the Austin Court of Appeals has yet had an opportunity to rule on a TCPA motion involving a declaratory judgment claim filed post-amendment.

The Fourteenth Court of Appeals in Houston concluded, under the prior statute, that the TCPA applies to claims against public employees acting in their

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[44] *Compare* Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(7), 2011 Tex. Gen Laws 961, 962 (amended 2019), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7).
[45] 556 S.W.3d 865 (Tex. App.—Austin 2018, pet. denied).
[46] *Id.* at 879.
[47] *Compare* Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(2), 2011 Tex. Gen Laws 961 (amended 2019), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2).
[48] TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a)(5).
[49] 589 S.W.3d 177 (Tex. App.—Tyler 2018, no pet.).
[50] *Id.* at 192.
[51] TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a)(5).
[52] Craig v. Tejas Promotions, LLC, 550 S.W.3d 287, 303 (Tex. App.—Austin 2018, pet. denied).
[53] TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6).

official capacities,[54] but the amended TCPA now expressly excludes application to government officials or employees in their official capacities.[55] Again, the Fourteenth Court of Appeals has yet to specifically recognize this change.

Another change in outcomes likely will result from the altered language regarding an award of sanctions to a prevailing movant. Numerous cases previously held that the pre-amendment TCPA required a mandatory sanctions award to the prevailing movant because that is how the previous language of the statute read.[56] By changing the word "must" to the word "may" and by requiring a finding regarding whether the party bringing the legal action did so to prevent the movant from exercising its constitutional rights for the court to award sanctions, the TCPA's amendments render sanctions discretionary and applicable in limited situations.[57]

Few of the predictions made in our previous edition have yet to be tested directly in the courts, but at least some effects from the amendments have started to occur. For instance, in *Straub v. Pesca Holding, LLC*,[58] the trial court applied the amended statute to deny a motion to dismiss, and the San Antonio Court of Appeals affirmed that denial, on the basis that the amended statute explicitly does not apply to common law fraud claims.[59] This case is procedurally interesting in that the case itself was filed *before* the amendment took effect, but the moving party was not added until *after* the amendment took effect.[60] The court reasoned that because the TCPA applies to specific, individual "legal actions," what mattered was the time of filing the specific "legal action" at issue rather than the whole case.[61] Therefore, the court held "that the 2019 amendments to the TCPA, which exempt common law fraud from the Act, apply to a newly added party's claims when the new party is added to a legal action on or after the effective date of the Act."[62] It will be interesting to see what the other appellate courts think of this result—not the result on common law fraud, which is dictated by the statutory text, but whether the proper locus for determining amendment applicability is the date the claim is made against the movant or the date the lawsuit is initiated. At the very least, *Straub* shows that the courts are ready to apply the newer, narrower TCPA when they have a "legal action" before them for which the amendments are effective.

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[54] Roach v. Ingram, 557 S.W.3d 203, 220 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).
[55] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a).
[56] *See, e.g.*, Serafine v. Blunt, No. 03-16-00131-CV, 2017 WL 2224528, at *7 (Tex. App.—Austin May 19, 2017, pet. denied) (mem. op.); Sullivan v. Abraham, 472 S.W.3d 677, 683 (Tex. App.—Amarillo 2014), *rev'd in part on other grounds*, 488 S.W.3d 294 (Tex. 2016).
[57] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.007(a), 27.009(a)(2).
[58] No. 04-20-00276-CV, 2021 WL 881277, at *4 (Tex. App.—San Antonio Mar. 10, 2021, no pet. h.).
[59] *Id.* at *4.
[60] *Id.*
[61] *Id.*
[62] *Id.*

V. APPLICABILITY OF THE AMENDMENTS

Straub is a good transition into the question of applicability; as House Bill 2730 made clear, it is effective for an "action" filed "on or after the effective date of this Act," which was September 1, 2019.[63] In the last edition of this article, we asked what would happen if, in a case initiated *before* the amendments took effect, a party added a claim against a new party *after* the amendment took effect. *Straub* seems to be the first case to directly answer that question.

Straub is not a surprising result because there are cases dealing with the applicability of the TCPA to claims added *after* the TCPA originally became effective on June 17, 2011.[64] That was the ruling in *James v. Calkins*,[65] in which the First Court of Appeals in Houston held that although the suit itself predated the TCPA's original effectiveness, the TCPA was available to defendants added by post-effective-date amendment.[66]

However, a separate question arises about the effect of pleading amendments that do not add parties but add or clarify *allegations*. A series of cases dealing with the proper application of the deadline to file TCPA motions to dismiss has repeatedly treated the question of whether the deadline is reset by an amendment as a question of whether the fundamental factual allegations and claims are the same pre and post amendment.[67] This debate may be affected by the related, but not identical, question addressed by the Texas Supreme Court in *Montelongo*, addressed in the next section, which addresses when the motion to dismiss deadline

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[63] Specifically, the session law provides:

> SECTION 11. Chapter 27, Civil Practice and Remedies Code, as amended by this Act, applies only to an action filed on or after the effective date of this Act. An action filed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.
> SECTION 12. This Act takes effect September 1, 2019.

Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. Ch. 378 (H.B. 2730) (West).

[64] Better Bus. Bureau of Metro. Dallas, Inc. v. Ward, 401 S.W.3d 440, 443 (Tex. App.—Dallas 2013, pet. denied).

[65] 446 S.W.3d 135, 145 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

[66] *Id.*

[67] San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Props., LP, 452 S.W.3d 343, 350 (Tex. App.—Corpus Christi 2013, pet. denied); *see also, e.g.*, Jordan v. Hall, 510 S.W.3d 194, 198–99 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (holding that the 60-day deadline to file a motion to dismiss under the TCPA is not reset by "amended petition that adds no new claims and relies upon the same factual allegations as an original petition"); Miller Weisbrod, L.L.P. v. Llamas-Soforo, 511 S.W.3d 181, 193–94 (Tex. App.—El Paso 2014, no pet.) (60-day deadline to file TCPA motion to dismiss not extended by second amended petition because the party against whom claims were made had been added in the first amended petition and 60-day deadline thus ran from the filing of the first amended petition).

is reset but does not explicitly address that question in the context of the amendments to the TCPA.[68]

One of the cases cited in the last edition of this article, *San Jacinto Title Services of Corpus Christi LLC v. Kingsley Properties LP*,[69] could be read as at variance from *Straub* and could suggest a possible split in results on the question of added parties. In that case—a case initiated before the TCPA became effective but was ongoing when the TCPA took effect—the TCPA was held *not* to apply to claims against a "new" defendant added after the TCPA took effect.[70] This holding *would* seem inconsistent with the reasoning in *Straub*, though the details may resolve the conflict. In *San Jacinto Title*, the movant had a theory that the original plaintiff had ceased to exist when it merged with the movant (even though it had answered), and that therefore the movant wasn't really sued until officially added as a party at the amendment.[71] The court did not find this argument persuasive, pointing out that, at the time the merged entity answered, it had already merged with the movant, meaning that the movant had been a party to the case, even if not properly named, since the "time of the appellee's Original Petition."[72] Thus, read carefully, *San Jacinto Title* supports, rather than undermines, the prediction that Texas courts will ultimately agree that parties added to cases post-amendment-effectiveness will operate under the amended TCPA.

Thus far, this authority, coupled with *Straub*, is the best guidance available on the question of whether new claims in a petition amended *after* September 1, 2019, in a case brought *before* September 1, 2019, will have the original or amended TCPA apply to them. But the authors have no certainty to offer here; thus far, this situation does not appear to have been addressed by a Texas appellate court.

VI. TALES FROM THE TCPA "MOLE-HOLE"

Because of the limited case law developed on the critical issues relating to the amendments since the previous edition, this article summarizes the following four TCPA cases, which will be relevant to practitioners generally even though these cases do not explicitly touch on what effect the 2019 amendments had.

First is the case that coined the term "mole-hole," from which this section gets its name. The Amarillo Court of Appeals—or at least one panel of it—appears to be getting a little tired of TCPA interlocutory appeals. Referring to the commonality of those appeals as a "game of 'whack-a-mole,'" the court in *Western Marketing, Inc. v. AEG Petroleum LLC*[73] complained that "each [appeal] leads us

[68] *See infra* Section VI.
[69] 452 S.W.3d 343 (Tex. App.—Corpus Christi 2013, pet. denied).
[70] *Id.* at 349–51.
[71] *Id.* at 351.
[72] *Id.*
[73] 616 S.W.3d 903 (Tex. App.—Amarillo 2021), opinion modified on reh'g, No. 07-20-00093-CV, 2021 WL 1152904 (Tex. App.—Amarillo Mar. 18, 2021, no pet. h.) (mem. op.).

down the tortuous winding TCPA mole-hole."[74] The court began by explaining that the case arose from allegedly disparaging remarks made about AEG and its products by the defendant, Western Marketing, in part in an affidavit.[75] On the first step of the TCPA analysis, Western Marketing asserted that the TCPA applied because (1) the statements in the affidavit implicated their right to petition, and (2) the statements generally implicated their right to free speech.[76] The court analyzed the former theory and noted that while some courts have held that affidavits fall within the right to petition, the affidavit did not contain all the statements at issue.[77] Further, because *Western Marketing* failed to segregate the claims to which its motion applied from the claims to which it did not apply, denial of the motion would normally be proper.[78] But the court found that it could not affirm the denial of the motion on that basis: "[o]h, were it that we could escape the mole-hole and end our journey by relying on that analysis" lamenting, "[s]adly we cannot for Western invoked another way to keep us underground."[79] Finding that all of the communications touched a matter of public concern (in this case, "a good, product, or service in the marketplace[,]" to wit, AEG's petroleum products), the court found itself forced to continue its TCPA review.[80] The court then undertook a typical TCPA analysis regarding each claim at issue in the case, ultimately reversing the trial court in part and rendering dismissal of several claims before announcing, with some relief, "we rise from this TCPA mole-hole."[81] Thus, the Courts of Appeals continue to do their jobs and carefully review interlocutory appeals of denials of TCPA motions, even if they are growing tired of it.

Second, a recent and interesting TCPA case involves the law of defamation—probably the cause of action most likely to draw a TCPA dismissal motion. In *Mogged v. Lindamood*,[82] the Court of Appeals for Fort Worth, *en banc*, ruled in pertinent part that the accusation that a political candidate was a "sexual predator" was "opinion" and therefore not capable of a defamatory meaning.[83] This is interesting because it is well-settled that "accusing someone of a crime" or of "engaging in serious sexual misconduct" constitutes defamation *per se*, if the claims satisfy all other elements of defamation.[84] There is an argument that the statement "sexual predator" could be an accusation both of serious sexual misconduct and criminal behavior. But the difference, as the court pointed out, between this and other cases, was that "sexual predator" is a statement without a clear, literal, factual meaning; instead, it is the kind of statement that is "in the eye

[74] *Id.* at 909.
[75] *Id.* at 910.
[76] *Id.* at 910–11.
[77] *Id.* at 911.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 911–13.
[81] *Id.* at 923.
[82] No. 02-18-00126-CV, 2020 WL 7074390 (Tex. App.—Fort Worth Dec. 3, 2020, pet. filed) (mem. op.).
[83] *Id.* at *16.
[84] In re Lipsky, 460 S.W.3d 579, 596 (Tex. 2015).

of the beholder" and thus, not capable of being true or false.[85] The result might have been different had the claim been more specific and literal, such as an accusation that the plaintiff committed a specific sexual act or crime. However, on these facts, the Fort Worth Court of Appeals—with only a single dissent on an unrelated issue—held that the mere accusation that a person is a sexual predator is not capable of a defamatory meaning. Practitioners should take note that, especially in a world governed by the TCPA, the question of whether the specific statement at issue in a defamation case is *factual* or a matter of *opinion* will be treated as a threshold inquiry.

The third TCPA case we present is particularly important for personal injury attorneys. In the recent case of *Buzbee v. Canales*,[86] the El Paso Court of Appeals ruled that a local newspaper advertisement seeking witnesses, and potentially clients, whose children were injured while in the care of a specific doctor fell within the TCPA's exception for commercial speech.[87] The underlying claim centered on the alleged defamatory and misleading character of the ads, but the court did not reach the merits of those arguments before the TCPA motion was filed.[88] This case somewhat broadens an earlier El Paso Court of Appeals holding regarding similar ads in *Miller Weisbrod, L.L.P. v. Llamas-Soforo*,[89] in which commercials for a similar purpose, again directed at alleged victims of malpractice by a specific doctor, were judged to be commercial speech under the TCPA.[90] The cases are undeniably similar, but the ads in *Buzbee* did not include specific language suggesting the solicitation of an attorney-client relationship.[91] The language did, for instance, include similar phrases that were at issue in *Miller Weisbrod*, such as "we can help you too" or "your child may be entitled to compensation."[92] The defendants in *Buzbee* grounded their argument in part on that distinction, but as the court pointed out, the ads were still only directed at those who had children that were allegedly injured by the plaintiff; that is, the ads demonstrated a desire only to speak to other people who had claims against the plaintiff.[93] The court found that the other commercial speech factors also weighed in favor of the TCPA exemption and therefore affirmed the trial court's denial of the plaintiff's TCPA motion.[94]

In our final case discussion, the Texas Supreme Court decided a significant TCPA case just before this issue went to press. In *Montelongo v. Abrea*,[95] the Texas Supreme Court addressed a question that frequently arises in TCPA cases—how does the sixty-day window for filing a TCPA dismissal motion interact with an

[85] *Mogged*, 2020 WL 7074390, at *16.
[86] No. 08-20-00138-CV, 2021 WL 865448 (Tex. App.—El Paso Mar. 9, 2021, no pet. h.).
[87] *Id.* at *3–7.
[88] *Id.* at *2.
[89] 511 S.W.3d 181 (Tex. App.—El Paso 2014, no pet.).
[90] *Id.* at 191.
[91] *Buzbee*, 2021 WL 865448, at *4.
[92] *Compare Buzbee*, 2021 WL 865448, at *1, *with Miller Weisbrod*, 511 S.W.3d 181.
[93] *Buzbee*, 2021 WL 865448, at *7.
[94] *Id.*
[95] No. 19-1112, 2021 WL 1705210, at *1 (Tex. Apr. 30, 2021).

amended petition?[96] In this case, the plaintiffs in a deceptive trade practices action amended their complaint in response to a Rule 91(a) motion to dismiss, not a TCPA motion, and added new claims for fraud, conspiracy, fraudulent concealment, and breach of contract.[97] After the court denied the 91(a) motion, and within sixty days of the amendment (but not within sixty days of the original petition), defendants filed a TCPA motion seeking dismissal of the entire action.[98] These facts posed a question with three possible answers: (1) the TCPA motion was timely as to *all* claims because the amended petition was a new "legal action" that asserted both old and new claims; (2) the TCPA motion was timely *only* as to the new claims because the only thing new about the legal action was those claims; or (3) the TCPA motion was untimely as to all claims because no new facts had been alleged, even if new legal theories had been asserted.[99] The Court of Appeals took the third approach and held that the TCPA motion was untimely as to all claims.[100]

That appellate decision was consistent with the other Texas Courts of Appeals. There has been unanimity among Texas Courts of Appeals on several related issues. First, the courts have held that where an amended petition adds new parties, the new parties have sixty days to file their TCPA motions after the amendment.[101] Similarly, the Texas Courts of Appeals have been near-unanimous in holding that where a party adds a new claim by an amendment and bases that claim on new essential facts not pleaded in the original complaint, the defendant receives a new sixty-day window to move to dismiss the new legal claim based on the new facts.[102] However, the court would not permit the defendant to dismiss any legal claims that were in the original complaint.[103] The Texas Supreme Court agreed with these holdings.[104]

The Texas Courts of Appeals have also held that an amendment that adds new claims but no new facts is not considered a new "legal action" that triggers a new sixty-day dismissal window.[105] With that, the Texas Supreme Court disagreed.[106] Noting that the TCPA defines "legal action" to include "causes of action," the court explained that facts alone do not make a legal action—the legal consequences and theories the pleading invokes based on those facts are equally important.[107] Therefore, the Texas Supreme Court reversed the Court of Appeals and the trial court, sending the case back down for proper consideration of the TCPA motion.[108]

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[96] *See id.*
[97] *Id.* at *2.
[98] *Id.*
[99] *See generally id.*
[100] *Id.* at *3.
[101] *Id.* at *4–5 (summarizing the Texas Court of Appeals holdings).
[102] *Id.* at *5.
[103] *Id.*
[104] *Id.*
[105] *Id.* at *6.
[106] *Id.*
[107] *Id.* at *6–7.
[108] *Id.* at *8.

The Texas Supreme Court's holding effectively overrules at least the five court of appeals cases cited in footnote eleven and overturns a legal proposition that the Texas Courts of Appeals had, to this point, unanimously adopted.[109] Thus, Texas lawyers must keep in mind that the days where it was possible to amend a complaint or counterclaim to add new claims and legal theories without giving the opposing side another bite at a potential TCPA motion are gone.

VII. CONCLUSION

The TCPA's 2019 amendments made several changes that require appellate review to fully define. Even two years after the amendments became effective, the impact of the amendments on the application of the TCPA remains largely unclear. It may still be some time before the contours of this new version of the law are satisfactorily mapped. In the meantime, as TCPA case law develops, we will aim to keep you informed.

And with that, we rise from the TCPA mole-hole, at least until the next edition of our TCPA update.

[109] *Id.* at *6 n. 12.