TCPA: A SHIFTING TIDE IN 2020

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I. INTRODUCTION.

Texas civil litigators have a powerful tool available to seek prompt dismissal of adverse claims against their clients: A motion to dismiss under the Texas Citizens Participation Act (TCPA). This paper focuses on the TCPA, covering its history, 2019 legislative amendments, burden-shifting analysis (including a suggested revision to the familiar score), monetary awards, and fast-paced procedures. More broadly, I analyze the trends and statistics in TCPA jurisprudence, and discuss the shifting tide that has occurred over the last two years.

Although this paper provides updates about many opinions issued in 2019 and 2020, it is not a comprehensive research document and should not be relied upon as such. Especially considering that multiple TCPA opinions are issued nearly each week of the year, updated research should always be conducted in this area before proceeding.

II. TCPA BACKGROUND.

The TCPA was enacted in 2011 (H.B. 2973, 82nd R.S.) and codified under Chapter 27 of the Texas Civil Practice and Remedies Code (CPRC). It was amended in 2013, largely to address procedural issues (H.B. 2935, 83rd R.S.). As discussed below, many substantive amendments were made in 2019 (H.B. 2730, 86th R.S.). The TCPA has a broad scope that has significantly impacted Texas civil litigation.

A. Purpose.

The TCPA's dual purposes are (1) "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, (2) "protect the rights of a person to file meritorious lawsuits for demonstrable injury." CPRC § 27.002; *Langley v. Insgroup, Inc*., No. 14-19-00127-CV, 2020 WL 1679625, at *2 (Tex. App.—Houston [14th Dist.] Apr. 7, 2020, no pet.) (discussing purpose).

B. Not Limited to Protecting Constitutional Rights or Dismissing "SLAPP" Suits.

The TCPA is often referred to as an 'anti-SLAPP' statute, meaning that it is designed to dismiss Strategic Lawsuits Against Public Participation (*i.e*., lawsuits that threaten the exercise of First Amendment). *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (citing House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011)). However, neither the title "TCPA" nor the term "anti-SLAPP" appear anywhere in the statute. Moreover, nothing in the legislative history indicates that Texas was experiencing a flood of SLAPP litigation that needed control, and there is no apparent reason why our existing procedures for summary judgment dismissal and sanctions against frivolous lawsuits were not sufficient to guard against meritless litigation.

The statute is officially called, "Actions Involving the Exercise of Certain Constitutional Rights." Consistent with this, when enacted in 2011, many perceived the TCPA as simply a "media defense" statute to protect journalists from retaliatory defamation claims. The legislation was, in fact, promoted by media organizations as a means to defend against defamation and related claims.

The reality has been markedly different. In the nine years since its enactment, the TCPA has been broadly interpreted to apply to a variety of claims that were likely not intended at the time of the statute's enactment—i.e., claims that would not traditionally be considered "SLAPP" suits. *See, e.g., Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at *12 (Tex. App.—Austin Apr. 7, 2015, no pet.) (J. Field, concurring) (warning that under an overly-broad interpretation, "any skilled litigator could figure out a way to file a motion to dismiss under the TCPA in nearly every case"). For many years, it appears courts and practitioners focused disproportionately on the first statutory purpose (protection of the rights to speak, petition, and associate) without proper emphasis on the second statutory purpose (protection of the right to file a meritorious lawsuit).

The Texas Supreme Court has plainly held that the TCPA is not limited to protection of constitutional rights. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 134 (Tex. 2019) ("[T]he statute's scope is dictated by its text, not by our understanding of the constitution."); *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 892 (Tex. 2018) (The TCPA's definition of free speech is broader than and "not fully coextensive with the constitutional free-speech right protected by the First Amendment to the U.S. Constitution and article I, section 8 of the Texas Constitution."); *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018) (Just because "the TCPA professes to safeguard the exercise of certain First Amendment rights" does not mean "that it should only apply to constitutionally guaranteed activities."); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc*., 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. dism'd by agrmt) ("[The Texas Supreme Court's] analysis makes clear that this Court is to adhere to a plain-meaning, dictionary-definition analysis of the text within the TCPA's definitions of protected expression, not the broader resort to constitutional context that some of us have urged previously.") (rejecting non-movant's "attempts to limit TCPA 'communications' solely to those the First

Amendment protects"); *see also* CPRC § 27.011 (mandating a liberal construction).

In the 2019 legislative session, several bills were proposed that sought to narrow application of the TCPA so that it could only be used to dismiss claims infringing on constitutional rights. None of these proposals made it out of Committee. Instead, the enacted amendments make a variety of "line item" changes, which narrow the statute's scope in some ways but broaden it in others.

But in 2019-2010, several courts have pulled back on how broadly they are willing to interpret and apply the TCPA. As discussed in Section IV, the tide has undeniably shifted.

C. The TCPA Packs a Powerful Punch.

Dismissal under the TCPA has been a very powerful tool in civil litigation because it affords movants an swift mechanism to stop or vastly curtail discovery, potentially dismiss adverse claims with prejudice and obtain monetary relief, and stay all trial proceedings to pursue an interlocutory appeal if the motion is denied in whole or in part. This means that a defendant, who might otherwise have no right to recover its fees for successfully defeating a claim, now has the ability to not only avoid trial altogether but also to shift the fees and costs, and possibly recover sanctions against the plaintiff. *See Kawcak v. Antero Res. Corp.*, 528 S.W.3d 566, 569 (Tex. App.—Fort Worth 2019, pet. denied) ("No one can doubt the power of the TCPA to rock a claimant back on its heels. Once in the grip of the TCPA, a party may stairstep down increasingly dire consequences that most litigants do not face: [outlining consequences]."); *Serafine v. Blunt*, 466 S.W.3d 352, 365 (Tex. App.—Austin 2015, no pet.) (The TCPA is "less an 'anti-SLAPP' law than an across-the-board game-changer in Texas civil litigation.") (Pemberton, J., concurring).

III. LEGISTATIVE AMENDMENTS – 2019.

In response to the broad application, unintended consequences, and docket-clogging impact of the TCPA, many urged the Legislature to amend the statute in 2017. Those efforts failed. However, the effort was renewed and broadened in 2019. In this most recent legislative session, a wide variety of amendments to the TCPA were enacted under H.B. 2730 (86th R.S.).

By way of overview, the 2019 amendments relate to (1) the scope of "legal actions" both subject to and exempt from dismissal under the statute; (2) the definitions of protected rights; (3) procedures for the motion, response, hearing, ruling, and findings; (4) burdens of proof; and (5) monetary relief under the TCPA. Each amendment is discussed in more detail below, in connection with the relevant section of the paper.

The amendments are not retroactive. They apply "only to an *action* filed on or after the effective date" of September 1, 2019. H.B. 2730 §§ 11-12 (emphasis added). The statute does not define whether "action" means a "legal action," a "suit," a "claim" within a suit, or something else. I anticipate our appellate courts will be asked to interpret the meaning of "action" for this purpose but there has not yet been an opinion addressing it (as of mid-July 2020). For example, if a suit was originally filed in August 2019 alleging only a breach of contract claim, and then an amended petition was filed on September 2, 2019, adding a common law fraud claim, which version of the statute would apply to the amended petition? If the amended petition is considered an "action," then the 2019 amended version applies, which exempts "a legal action based on a common law fraud claim" from dismissal. CPRC 27.010(a)(12). But if "action" were defined to mean the lawsuit as a whole, then the prior version of the statute would apply, and the fraud exemption would be inapplicable.

IV. JURISPRUDENTIAL TRENDS & STATISTICS.

As of July 31, 2020, there have still not been any appellate opinions decided under the amended text of the 2019 statute. Nevertheless, there has been an undeniable and remarkable shift in TCPA jurisprudence between 2018 and 2020, as explained below.

A. Volume of Opinions.

As a starting place, it is important to understand the sheer volume of TCPA proceedings. No one can deny the prolific impact this statute has had on Texas practice and procedure, and on our courts' dockets. *See Interlocutory Appeals and Rule 91a Dismissals: Impact on Appellate Dockets and Other Consequences*, THE APPELLATE ADVOCATE (SBOT Summer 2017).

In the first full year of the TCPA's enactment (2012), only **2** TCPA opinions were issued by our appellate courts. The number has steadily increased each year. For benchmarks, the number of TCPA opinions rose to **25** in 2016, to **90** in 2018, and **140** in 2019. Half way through this year, there have already been 102 TCPA opinions issued, putting us on track for **200+** by the end of 2020.

This ever-increasing volume helps explain the shift in jurisprudence. Our courts appear to have recognized that extremely broad interpretations of the statute were leading to the unintended consequence of more litigation, not less. Essentially, there appears to have been a collective "enough is enough" mentality,

and the courts began to pull back on how broadly they would interpret and apply the statute.

B. Movant Win/Loss Statistics.

To properly advise clients about the risks and benefits of pursing or defending against a TCPA motion, it is critical to understand the win/loss statistics and how the jurisprudence has changed in recent years.

Back in 2018, you could not discuss the TCPA without noting the incredibly broad interpretation of the statute that seemed to sweep nearly every type of civil dispute into its scope. By then, the Texas Supreme Court had held that the TCPA protects both private and public communications (*Lippincott*, 2015), that "court of appeals [should not] improperly narrow[] the scope of the TCPA by ignoring the Act's plain language and inserting the requirement that communications involve more than a "tangential relationship" to matters of public concern" (*Coleman*, 2017), and that "[t]he TCPA casts a wide net" covering "[a]lmost every imaginable form of communication, in any medium" (*Adams*, Jan. 2018). Intermediate courts, of course, followed this lead. Consequently, in **2018**, the ultimate win/loss rates on appeal were that **movants prevailed in 61%** of the opinions and lost in 26% of the opinions. (The remaining 13% of 2018 opinions are "N/A" for win/loss because they were decided on a lack of jurisdiction or other grounds).

These statistics flipped by the end of 2019. Last year, movants prevailed in 25% of the opinions and lost in 57% of them, with 18% N/A. So far in **2020**, that trend continues with **movants prevailing in only 23%** and losing in 62% of the appellate opinions, with 15% N/A.

In advising clients and planning TCPA strategy, it is also helpful to understand the numbers on reasons why our appellate courts conclude that movants win or lose. For the first six months of 2020, the totals are:

Movant WON	
TCPA applies but PFC not satisfied	14
PFC satisfied but defense proven	4
Other	6
TOTAL	24

Movant LOST	
Not a "legal action"	5
Not a protected right	32
Exemption applies	9
PFC satisfied without a defense	9
Procedural error	8
TOTAL	63

C. Explanation of the Shifting Tide.

What is responsible for this dramatic shift in jurisprudence? In addition to the sheer volume of opinions discussed above, I see three other influential factors.

First, the 2018 elections resulted in 26 new Democratic intermediate appellate justices (19 of whom replaced Republican incumbents), primarily in Houston, Dallas, and Austin. Notably, these are the courts from which the highest volume of TCPA opinions are issued. While the resulting shift in jurisprudence may have some connection to the partisan change, I believe it is more closely connected to the "newness" of these judges. They campaigned on platforms of change and were presumably more open to new arguments and interpretations of the TCPA than their predecessors were, regardless of party affiliation.

Second, the 86th Legislative Session convened in January 2019, and it was obvious to anyone following this issue that the momentum had built for amendments to the TCPA. The drum beat was present in 2017 but it became undeniable in 2019. I believe that the anticipation of the forthcoming reform made already-open judges more willing to adopt narrower statutory interpretations, even under the pre-amendment text. Then, as of May, the 2019 amendments had been enacted, lighting the hallway for the future path of TCPA jurisprudence. Although the amendments were not made retroactive, some courts have already held that the clarifications made in 2019 are instructive about the legislature's true intent under the prior statute. And it cannot be lost on our intermediate courts that any opinions issued under the prior text are less likely to be reviewed by the supreme court if the relevant provision has now been changed. This further removes restraint from shifting interpretations.

Finally, the impact of *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 137 (Tex. Dec. 2019) cannot be overstated. In this opinion, the Court pivoted away from (without expressly overruling) its previously very broad interpretations of the TCPA, holding that "not every communication related somehow to one of the broad categories set out in section 27.001(7) always regards a matter of public concern. A private contract dispute affecting only the fortunes of the private parties involved is simply not a 'matter of public concern' under any tenable understanding of those words." As discussed below in Sections VI.E.2-3 (and as shown by the 32 losses based on the conclusion that the challenged claims did not implicate a protected right), intermediate courts across the State have cited Creative Oil in support of narrower interpretations of the pre-2019 version of the TCPA.

V. SHIFTING BURDENS: A NEW APPROACH.

The TCPA sets forth a three-part burden shifting analysis to determine whether dismissal should be granted. *See generally* CPRC § 27.005(a). Whether you are pursuing or defending against a TCPA motion, it is imperative to understand all steps in the analysis, including what has changed under the 2019 amendments.

Traditionally, the three steps have been described, in summary fashion, as: At Step (1), the movant must establish application of the statute. If he does, then the burden shifts to non-movant at Step (2) to establish a prima facie case in support of each challenged claim. Even if non-movant does so, the movant can still obtain dismissal at Step (3) by establishing a defense.

The problem with the foregoing analysis is that it overlooks several aspects of proving that the statute does or does not apply. For example, under which step should the Court consider an exclusion (added in 2019) to the TCPA's application, and which party should have the burden of proof on that issue? What about proof of a procedural defect (such as the untimeliness of a motion), or an exemption under section 27.010 (amended to increase categories in 2019)?

To account for these issues, I suggest it is more helpful to analyze dismissal under the TCPA in two parts: (1) application of the statute, and (2) merits of the claims. The parties' respective burdens should be addressed as subsets of these two parts, as addressed below.

VI. APPLICATION: DOES THE TCPA APPLY?

Determining whether the TCPA applies (or might apply) is a critical first step in pleading or defending against any civil claim or "legal action."

A. Movant's Burden.

Under the 2019 version of the statute, the movant carries the initial burden to "demonstrate" that non-movant filed a "legal action [] based on or in response to" the movant's exercise of a right protected by the TCPA. CPRC § 27.005(b).

This represents several amendments. As of July 31, 2020, no appellate opinion has addressed the meaning or impact of any of these amendments.

First, the quantity of proof changed from meeting this burden by a "preponderance of the evidence" to "demonstrating." Even under the old statute, "[w]hen it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more." *Hersh v. Tatum*, 526 S.W.3d 462, 466 (Tex. 2017) (non-movant's pleading is often "the best and all-sufficient evidence of the nature of the action" to show the TCPA applies); *but see Damonte v. Hallmark Fin. Servs., Inc.*, No. 05-18-00874-CV, 2019 WL 30598884, *6 (Tex. App.—Dallas July 12, 2019, no pet. h.) (Whitehill, J., concurring) (although pleadings alone may satisfy initial burden, movant can also rely on evidence to "connect the dots"); *Encore Enters., Inc. v. Shetty*, No. 05-18-00511-CV, 2019 WL 1894316, at *3 (Tex. App.—Dallas Apr. 29, 2019, pet. denied) (Movant who relied solely on pleadings without presenting anything more in support of Step 1 burden failed to demonstrate application of the TCPA).

Second, the definition of "legal action" was amended to expressly include specified filings that seek "declaratory" relief and to exclude three categories of actions, as addressed below in Sections VI.C(1)-(2). *See* CPRC § 27.001(6). Because the movant carries the initial burden of demonstrating that the TCPA applies, which includes showing that the non-movant filed a "legal action" as that term is defined by the TCPA, there is a good argument that it should be the movant's burden to establish that no exclusion to the definition of "legal action" applies—*i.e.*, to affirmatively disprove the exclusions. On the other hand, movants may argue that the new exclusions should be treated as the exemptions previously have been, placing the burden on the nonmovant. The statute is silent on this issue, and no opinion yet addresses it.

Third, the nexus requirement was amended to delete "relates to" and leave only "based on or in response to" as sufficient connections between the legal action and the protected right(s). This nexus is addressed further below in Section VI.D.

Fourth, the rights protected by the TCPA changed in several respects, as addressed below in Section VI.E. The definitions of "free speech" and "association" were amended (CPRC § 27.001(2), (3), (7)), and new categories of protected rights were added (*id*. §§ 27.005(b)(2), 27.010(b)).

B. Non-Movant's Rebuttal.

Appellate opinions setting forth the "three-part burden shifting" do not expressly discuss a non-movant's "rebuttal burden" at "Step 1." The practical reality, however, is that in most cases non-movants challenge applicability of the statute, arguing that the movant has failed to meet his initial burden for several reasons. The courts address these arguments and determine applicability of the statute before the burden ever "shifts" to the merits at "Step 2" for the non-movant to establish a prima facie case.

In rebuttal of the movant's initial burden, the non-movant can argue that the TCPA does not apply (and hence cannot be used as a tool for dismissal of the non-movant's claims) because (1) movant failed to follow the statutory procedures; (2) what non-

movant filed is not a "legal action," and/or an exclusion to the definition of "legal action" applies, if the burden of establishing an exclusion is held to fall on the non-movant; (3) movant has failed to demonstrate that the challenged claims implicate a protected right, as defined by the TCPA; or (4) one of the TCPA's exemptions apply. An attempt to establish the application of one of the TCPA's exemptions.

C. Interpretation of "Legal Action."

The filing of a "legal action" is the triggering event for application of the TCPA. CPRC § 27.003(a). Determining whether a filing is included in the meaning of "legal action" has spawned serious debate among practitioners and our courts, and was also the subject of several legislative amendments.

Under the 2019 version of the statute, "legal action" is defined as: "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief." CPRC § 27.001(6). As of 2019, three categories of exclusions were carved out of this definition, as discussed below. *Id*. § 27.006(A)-(C).

1. Declaratory Relief - Added in 2019.

The amendment adding "declaratory" relief to the definition of "legal action" codifies what most courts previously assumed to be the case: claims seeking a declaratory judgment are subject to dismissal under the TCPA, if such a claim implicates a protected right, as discussed in Section VI.E. *E.g.*, *Berry v. ETX Successor Tyler*, No. 12-18-00095-CV, 2019 WL 968528, at *1, *3 (Tex. App.—Tyler Feb. 28, 2019, no pet.); *Perez v. Quintanilla*, No. 13-17-00143-CV, 2018 WL 6219627, at *3 (Tex. App.—Corpus Christi Nov. 29, 2018, no pet.); *Holcomb v. Waller Cty*, 546 S.W.3d 833, 836, 839 (Tex. App.—Houston [1st Dist.] 2017 pet. denied); *see also Woodhull Ventures 2015, L.P. v. Megatel Homes III, LLC*, No. 03-18-00504-CV, 2019 WL 3310509, at *2 (Tex. App.—Austin July 24, 2019, no pet.) (decided post-amendment but based on prior law); but see Craig v. Tejas Promotions, LLC, 550 S.W.3d 287, 297-98 (Tex. App.—Austin 2018, pet. denied) (UDJA claim was not subject to dismissal under the TCPA).

Each of these prior cases involved claims for a declaratory judgment brought under the Uniform Declaratory Judgments Act, CPRC ch. 37. The most logical interpretation of the term "declaratory" relief under the TCPA is that is means a claim brought under the UDJA.

2. New Exclusions – Added in 2019.

Under the 2019 statute, the term "legal action" does **not** include: (A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief; (B) alternative dispute resolution proceedings; or (C) post-judgment enforcement actions. CPRC § 27.006(A)-(C).

As of July 31, 2020, no appellate court has interpreted or applied any of these new exclusions. Categories (B) and (C) appear self-explanatory, and are written in language broad enough to exclude a variety of "actions" related to ADR and enforcement of a judgment. That makes sense because a motion to dismiss at either stage would not serve the TCPA's goal of dismissing meritless claims from the outset of litigation.

The precise meaning of category (A) will be debated among practitioners and courts. This author views the amendment as a legislative codification of prior holdings that ancillary motions such as a motion for sanctions, a motion to dismiss under the TCPA or Rule 91a, and discovery motions are not intended to be subject to dismissal under the TCPA. More specifically, the amended text removes such ancillary proceedings from the scope of the "catch-all" provision that some courts previously relied on to conclude that the TCPA applied in these contexts. *See below*, Sections VI.C.6-10. One of the TCPA's original authors, Laura Prather, has similarly interpreted the intent of these new exclusions. Laura Lee Prather, *Striking A Balance Changes to the Texas Citizens Participation Act*, 83 Tex. B.J. 238, 239 (2020) (Noting some litigants engaged in "gamesmanship" and used the pre-amendment TCPA "as a sword in litigation rather than for its intended purpose," including attempts to apply the TCPA to motions for sanctions. "[T]he Legislature attempted to narrowly target these exploitative uses by clarifying that the term 'legal action' does not include procedural actions.").

3. Governmental Party Claims - Excluded in 2019.

A separate 2019 amendment provides that, going forward, "a governmental entity, agency, or an official or employee acting in an official capacity" cannot use the TCPA to seek dismissal of legal actions brought against it/him/her. CPRC § 27.003(a). Because such governmental parties cannot be movants under the TCPA, claims pled against such parties cannot be considered "legal actions" under the amended statute. This amendment appears to negate the future impact of a 2018 opinion holding that, unlike the California anti-SLAPP statute, Texas's prior statute did not exempt public interest lawsuits nor prevent a public official from using the statute as a dismissal tool. *Roach v. Ingram*, 557 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

4. Must be a Judicial Filing in the Trial Court.

A handful of opinions clarify, under the plain text of the statute, that a "legal action" must be made in a judicial proceeding at the trial court level. *See In re Elliott*, 504 S.W.3d 455, 463, 476 (Tex. App.—Austin 2016) (orig. proceeding) (legal actions are filings made in a "judicial" proceeding).

Under this construction, filings made in an administrative proceeding are outside the scope of the TCPA (meaning that the TCPA cannot be used to discuss such filings at the administrative level). Similarly, the TCPA does not allow for dismissal of a de novo appeal filed in district court from an administrative agency's final order. *Sullivan v. Tex. Ethics Comm'n*, 551 S.W.3d 848, 855 (Tex. App.—Austin 2018, pet. denied) ("Application of the TCPA in this context would frustrate the legislature's specific and thorough schemes" allowing for a de novo appeal under Texas Government Code chs. 305 and 571); *but see Commission for Lawyer Discipline v. Rosales*, 577 S.W.3d 305 (Tex. App.—Austin 2019, pet. denied) (distinguishing *Sullivan* because Commission brought an original action in the district court seeking affirmative relief against Rosales).

Moreover, a legal action does not include appellate proceedings. *Amini v. Spicewood Springs Animal Hosp., LLC*, 550 S.W.3d 843 (Tex. App.—Austin 2018, no pet.). The appellees attempted an "aggressive" use of the TCPA as a pre-submission motion in the appellate court to dismiss the pending appeal. The Third Court characterized this motion as having "novelty beyond the norm," and swiftly rejected it because "the Legislature intended the TCPA's dismissal mechanisms to operate against 'legal actions' at the trial-court level and not against appeals." *Id*. at 844. This conclusion was based on procedural aspects of the TCPA, including its provision for "fact findings, discovery, and hearings that are characteristic of trial-level proceedings and foreign to appellate courts." *Id*. at 845. Moreover, the legislature specifically "prescribe[d] a role for courts of appeals under the TCPA" as the "traditional one" of being a reviewing body. *Id*. at 846. To conclude otherwise would "fundamental[ly] transform[] appellate courts' jurisdiction and procedure" in a manner contrary to the legislative intent. *Id*.

5. Not Amended Pleadings If Substance Unchanged.

Several courts have held that an amended pleading that does not add or alter the essential nature of the claims previously asserted and does not add new parties is not a "legal action" for purposes of re-starting the 60-day deadline to file a motion to dismiss. However, there has been much debate about how to apply this standard, resulting in inconsistent holdings from the intermediate appellate courts. Four cases on this issue are currently pending before the Texas Supreme Court. *See below*, Section IX.A.1.

6. Not TCPA and Rule 91a Motions.

Although the Texas Supreme Court has not expressly addressed the issue, it now appears clear from several intermediate holdings that motions to dismiss under the TCPA or Rule 91a are not themselves "legal actions" subject to dismissal under the TCPA. *See, e.g.*, *In re Fairley*, No. 04-19-00196-CV, 2020 WL 1159061, at *7 (Tex. App.—San Antonio Mar. 11, 2020, no pet.); *Deepwell Energy Servs., LLC v. Aveda Transp. & Energy Servs.*, 574 S.W.3d 925 (Tex. App.—Eastland 2019, pet. denied); *Roach v. Ingram*, 557 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *Paulsen v. Yarrell*, 537 S.W.3d 224, 233 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *Memorial Hermann Health Sys. v. Khalil*, No. 01-16-00512-CV, 2017 WL 3389645, *7 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied).

These holdings were reached under the prior statute. The conclusion appears even more clear under the exclusion added in 2019 to section 27.006(A), discussed above in sub-(2).

A cornerstone of these opinions derives from *In re Elliott*, 504 S.W.3d 455, 480-81 (Tex. App.—Austin 2016) (orig. proceeding) (Pemberton, J., concurring). Justice Pemberton cautioned that construing "legal action" in an overly-broad manner "encourages [] piecemeal or seriatim motions to dismiss attacking … individual filings within or related to a lawsuit, as opposed to the underlying lawsuit and substantive claims that are the Act's core focus. As such motions proliferate, application of the TCPA strays from—and, indeed, undermines through cost and delay—its manifest purpose to secure quick and inexpensive dismissal of meritless 'legal actions' that threaten expressive freedoms, [and] … would similarly invite tactical gamesmanship."

7. Most Likely Not a Motion for Sanctions.

The Fifth and Fourteenth Courts of Appeals have held that a motion for sanctions does not satisfy the definition of "legal action." *Patel v. Patel*, No. 14-18-00771-CV, 2020 WL 2120313, at *4-8 (Tex. App.—Houston [14th Dist.] May 5, 2020, no pet. h.) (Motions for sanctions do not vindicate "substantive causes of action or rights of relief" as contemplated by the definition of "legal action."); *Barnes v. Kinser*, -- S.W.3d --, No. 05-19-00481-CV, 2020 WL 1685589, at *1-4 (Tex. App.—Dallas Apr. 7, 2020, pet. filed) (Unlike a cause of action or a "legal claim," sanctions "serve the purpose of securing compliance with the rules of civil procedure, punishing violators, [] deterring similar misconduct by others, … [and] remedying the prejudice caused the innocent party."

Thus, a motion for sanctions cannot be equated with a legal action.); *Misko v. Johns*, 575 S.W.3d 872, 876-78 (Tex. App.—Dallas 2019, pet. denied) (motion for discovery sanctions is not a "legal action" because it is ancillary to any substantive claims).

These holdings were reached under the prior statute. The conclusion appears even more clear under the exclusion added in 2019 to section 27.006(A), discussed above in sub-(2).

Nevertheless, the Third Court issued a split opinion on this issue, in which the majority held that the TCPA applied to a motion/counterclaim for sanctions. *Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220 (Tex. App.—Austin Mar. 22, 2018, no pet.) (acknowledging its interpretation would presumably mean that "**any** answer filed in response to pleadings" would be subject to dismissal under the TCPA). Justice Pemberton, dissenting, took a narrower approach, concluding that the defendant's request for sanctions was not a "legal action" because, when that definition is "read carefully and in context," it refers to "a procedural vehicle for the vindication of some substantive cause of action or right of relief," as detailed in *Elliot* and *Paulsen*. *Id*. at 234. "And if there is any remaining doubt, Section 27.011 specifies that the TCPA 'does not abrogate or lessen any other … remedy …available under other … statutory, case, or … rule provisions.' Preexisting statutes and rules authorizing sanctions for litigation abuse—the same basic goal as the TCPA—would seem to survive under this provision." *Id*. at *27.

8. Split Regarding Rule 202 Petition.

The Texas Supreme Court declined the opportunity to answer whether a Rule 202 petition for pre-suit discovery constitutes a "legal action" under the TCPA. *Glassdoor, Inc. v. Andra Group, LP*, 575 S.W.3d 523, 530-31 (Tex. 2019) (holding the issue was moot and dismissing appeal).

Under the prior law, lower courts are split on this issue. *E.g., Houston Tennis Ass'n, Inc. v. Thibodeaux*, -- S.W.3d --, No. 14-19-00019-CV, 2020 WL 2832130, at *5 (Tex. App.—Houston [14th Dist.] May 28, 2020, no pet. h.) ("[A] Rule 202 petition does not assert a substantive claim or cause of action," and thus is **not** a "legal action"); *In re Krause Landscape Contractors, Inc*., 595 S.W.3d 831, 836 (Tex. App.—Amarillo 2020, no pet.) (Rule 202 petition **is** a "legal action" under the prior statute **but** 2019 amendment, adding the exclusion under section 27.006(A) "appears to exclude" Rule 202 petitions); *Hughes v. Giammanco*, No. 01-18-00771-CV, 2019 WL 2292990 (Tex. App.—Houston [1st Dist.] May 30, 2019, no pet.) (Rule 202 petition is **not** a legal action, primarily based on plain meaning of "petition"); *Breakaway Practice, LLC v. Lowthe*r, No. 05-18-00229-CV, 2018 WL 6695544 (Tex. App.—Dallas Dec. 20, 2018, pet. filed) (assuming without deciding that a Rule 202 petition was a legal action because the nonmovant dropped its contrary argument on appeal); *DeAngelis v. Protective Parents Coal*., 556 S.W.3d 836 (Tex. App.—Fort Worth Aug. 2, 2018, no pet.) (holding a Rule 202 petition **is** a legal action because the plain language of the definition includes the word "petition," and a "petition for presuit discovery," is not merely a procedural device but instead requests actual relief); *In re Elliott*, 504 S.W.3d 455, 464 (Tex. App.—Austin 2016) (orig. proceeding) (Rule 202 petition **is** a legal action subject to dismissal under the TCPA).

These holdings were reached under the prior statute. It remains to be determined whether the exclusion added in 2019 to section 27.006(A), discussed above in sub-(2), resolves the foregoing split of authority.

9. Not a Discovery Subpoena.

The Fourth and Fifth Courts have held that a discovery subpoena is not a "legal action." *Greiner v. Womack*, No. 04-19-00525-CV, 2019 WL 5405904, at *1 (Tex. App.—San Antonio Oct. 23, 2019, no pet.) (A subpoena for deposition on written questions is not a "legal action" because it "did not request legal or equitable relief or purport to assert a 'claim in question' upon which Womack would be required to present a prima facie case in response to the motion."); *Dow Jones & Co. v. Highland Capital Mgmt., L.P*., 564 S.W.3d 852 (Tex. App.—Dallas Nov. 2, 2018, pet. denied) (Unlike a Rule 202 petition, there is no "petition" required for a discovery subpoena, and a subpoena does not meet the plain definition of "relief," which "changes the relationship between parties," and is enforceable by a court. Reading the statute as a whole shows that it is intended to dismiss substantive claims on which liability is based, and a discovery subpoena falls outside of that intended meaning.).

These holdings were reached under the prior statute. The conclusion appears even more clear under the exclusion added in 2019 to section 27.006(A), discussed above in sub-(2).

10. Maybe Not a Request for Injunction.

In *Cavin v. Abbott*, -- S.W.3d -- No. 03-19-00168-CV, 2020 WL 3481149, at *2 (Tex. App.—Austin June 26, 2020, no pet. h.) ("*Cavin II*"), the majority held a request for injunction is not a "legal action" that can be separately dismissed under the TCPA. "The express language of the TCPA [defining "legal action"] contemplates that the relief sought is not a legal action but is merely a component of a legal action." *Id*. The underlying "legal action" was the claim for assault, upon which Abbott sought both monetary damages and an equitable injunction. "We

agree with our sister courts that the TCPA does not allow a request for injunctive relief to be separately challenged when it is linked to a cause of action." *Id.* (citing *Thang Bui v. Dangelas*, No. 01-18-01146-CV, 2019 WL 5151410 (Tex. App.—Houston [1st Dist.] Oct. 15, 2019, pet. filed) (stating that injunctive relief was a remedy tied to a defamation claim and "a remedy request is not separately challengeable apart from the cause of action to which it is linked"); *Van Der Linden v. Khan*, 535 S.W.3d 179, 203 (Tex. App.—Fort Worth 2017, pet. denied) (holding that "injunctive relief is a remedy, not a stand-alone cause of action" in suit for tortious interference with a contract, tortious interference with prospective business relations, and defamation)); *see also Nguyen v. Dangelas*, No. 01-19-00046-CV, 2019 WL 5996381, at *4 (Tex. App.—Houston [1st Dist.] Nov. 14, 2019, pet. denied) ("As we have already held in a related suit, when a party seeks injunctive relief as a remedy for tortious conduct, the pursuit of an injunction is not its own TCPA 'legal action' subject to discrete dismissal."); *but see id.* at *3-7 & n.3 (Goodwin, J., concurring) (concluding request for injunction is a "legal action" subject to dismissal but dismissal was not warranted here because Abbott established a prima facie case; and distinguishing cases cited by majority).

Just a month later, nearly the same panel of the Third Court allowed dismissal of a request for injunction under the TCPA without discussing whether that request was a "legal action." *RigUp, Inc. v. Sierra Hamilton, LLC*, -- S.W.3d --, No. 03-19-00399-CV, 2020 WL 4188028, at *9 (Tex. App.—Austin July 16, 2020, no pet. h.).[1] In *RigUp*, however, the underlying claim on which the injunction was based (tortious interference) was within the scope of the TCPA and was dismissed after non-movant failed to establish a prima facie case; hence, the ancillary request for injunctive relief was also dismissed. *Id.; see also Nguyen v. ABLe Communications, Inc.*, No. 02-19-00069-CV, 2020 WL 2071757, at *22 (Tex. App.—Fort Worth Apr. 30, 2020, no pet.) (request for injunctive relief must also be dismissed when underlying claims were subject to dismissal, without discussing "legal action"). In contrast, the underlying assault claim in *Cavin II* was exempt from dismissal, and the majority held the ancillary injunctive relief was not separately subject to dismissal.

The First Court addressed dismissal of an injunction claim in *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457 (Tex. App.—Houston [1st Dist.] 2020, pet. filed). The court noted that "[n]o one disputes that WSP's claims, seeking damages and injunctive relief, constitute a 'legal action.'" *Id.* at 471 n.8. However, the request for an injunction to prevent the disclosure of information was not subject to dismissal under the TCPA "[b]ecause it pertains to possible future conduct, rather than past conduct," and thus did not implicate an exercise of Gaskamp's right of free speech. *Id.* at 478.

D. Nexus Requirement.

"To meet step one, the movant for dismissal must establish a nexus between the legal action and the movant's exercise of the protected right.… [T]he 'legal action' must be 'factually predicated on the alleged conduct that falls within the scope of [the] TCPA's definition[s] of [the protected rights]." *Amend v. J.C. Penny Corp., Inc*. No. 05-19-00723-CV, 2020 WL 1528497, at *2 (Tex. App.—Dallas Mar. 31, 2020, no pet.).

Under the 2019 statute, "[i]f a legal action is **based on or is in response to**" one of the rights protected by the TCPA, then the party who's protected right is implicated may file a motion to dismiss the legal action." CPRC § 27.003(a).

This amendment removed the term "relates to" which was previously an option to satisfy the nexus requirement. It is not clear whether this amendment will have any tangible impact on the statute's application. However, one recent opinion shows the vast breadth of the term "relates to," meaning its removal from the statute likely has a narrowing impact. *Reeves v. Harbor Am. Cent., Inc*., -- S.W.3d --, No. 14-18-00594-CV, 2020 WL 2026527, at *7 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020, no pet.) (although conversion claim was not based on any protected communications, that claim "related to" allegations underlying other claims that implicated the right of association, so the conversion claim was also within the TCPA's scope).

Intermediate courts have differed in how broadly or narrowly they construe the nexus requirement. *Compare Riggs & Ray, P.C. v. State Fair of Tex.*, No. 05-17-00973-CV, 2019 WL 4200009 (Tex. App.—Dallas Sept. 5, 2019, pet. filed) (taking a narrow view to hold that nexus not satisfied despite evidence that legal action was filed in response to prior litigation pursued by movant; with a dissent by Whitehill, J.); *Beving v. Beadles*, 563 S.W.3d 399, 407 (Tex. App.—Fort Worth 2018, pet. denied) (taking a neutral view to hold that a sufficient "hook" was not established based on "speculative and conclusory" inferences drawn from circumstantial evidence); *Grant v. Pivot Tech. Solutions, Inc.*, 556 S.W.3d 865, 880 (Tex. App.—Austin Aug. 3, 2018, pet. denied) (holding under a liberal view that there is "no qualification as to [the] limits" of the required nexus; it is satisfied so

[1] *Cavin II* was authored by Justice Triana, joined by Justice Baker, with Justice Goodwin concurring. *RigUp* was authored by Justice Kelly, joined by Justices Goodwin and Baker.

long as the claim is factually predicated on communications protected by the statute, even if that relationship is tenuous).

Recently, the Third Court held that when a legal action "might at best be viewed as being based on a mix of protected and unprotected activity and [] the pleadings, evidence, and parties' argument provide no way to parse out which particular counterclaim is based on protected rather than unprotected conduct and to what degree," it is appropriate to deny the TCPA motion in full. *Weller v. MonoCoque Diversified Interests, LLC*, No. 03-19-00127-CV, 2020 WL 3582885, at *4 (Tex. App.—Austin July 1, 2020, no pet. h.). Because it is the movant's burden to establish the nexus between the legal action and the movant's protected right, movants should be careful in doing so when the underlying allegations arguably present a "mixed bag" of protected and unprotected rights.

E. Rights Protected.

Most appellate decisions about the TCPA include an issue about whether a protected right was implicated by the challenged legal action. Thus, this is a critical portion of the TCPA to understand, whether pleading or defending against claims.

Prior to 2019, the TCPA protected a party's exercise of the rights to: (1) speak freely, (2) associate, and (3) petition. CPRC § 27.001(2)-(4). Under the 2019 amendments, new categories of protected rights were added.

The court "cannot blindly accept attempts by the movant to characterize the claims as implicating protected expression." *Thomas v. BioTe Med. LLC*, No. 05-19-00163-CV, 2020 WL 948087, at *3 (Tex. App.—Dallas Feb. 26, 2020, no pet. h.) (internal quotations omitted). "To the contrary, [the court should] view the pleadings in the light most favorable to the nonmovant, favoring the conclusion that its claims are not predicated on protected expression." *Id*.; *see also Weller v. MonoCoque Diversified Interests, LLC,* No. 03-19-00127-CV, 2020 WL 3582885, at *3 (Tex. App.—Austin July 1, 2020, no pet. h.) (same); *Nobles v. U.S. Precious Metals, LLC*, No. 09-19-00335-CV, 2020 WL 1465980, at *5 n.7 (Tex. App.—Beaumont Mar. 26, 2020, pet. filed) (same).

Notably, only the *movant's* exercise of rights/ communications are relevant to application of the TCPA. "[S]howing that the legal action is based on, related to, or in response to *another party's* exercise of those rights is insufficient." *Palladium Metal Recycling, LLC v. 5G Metals, Inc*., No. 05-19-00482-CV, 2020 WL 4333538, at *3 n.9 (Tex. App.—Dallas July 28, 2020, no pet. h.).

1. Communication.

To understand the protected rights, you must understand the definition of "communication" as a threshold matter. This is because the rights of free speech and petition are expressly defined as being forms of "communication," and the new categories of protected rights are defined, at least in part, as being triggered by a "communication." The right of "association" was defined as being a form of "communication" prior to 2019 but that word was removed from the definition in 2019. It remains to be seen what impact this may have on the analysis.

"Communication includes the making or submitting of a statement or a document in any form or medium, including oral, visual, written, audiovisual, or electronic." CPRC § 27.001(1). This definition is very broad. "The TCPA casts a wide net.… Almost every imaginable form of communication, in any medium, is covered." *Adams v. Starside Custom Builders, LLC*, No. 547 S.W.3d 890, 894 (Tex. 2018). The definition includes both private and public communications. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015).

The TCPA applies to alleged communications even when the movant denies making such communications. *Hersh v. Tatum*, 526 S.W.3d 462, 463 (Tex. 2017); *Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220, 228 (Tex. App.—Austin 2018, no pet.). However, if the movant expressly argues that nonmovant's petition fails to identify any communication made by movant, then the movant has no ground on which to pursue a dismissal under the TCPA. *Noble Anesthesia Partners, PLLC v. U.S. Anesthesia Partners, Inc*., No. 05-18-00768-CV, 2019 WL 3212137, at *3 (Tex. App.—Dallas July 9, 2019, pet. denied).

Courts are split on whether "conduct" is a form of "communication." Some say "yes." *See Lesley-McNiel v. CP Restoration Inc*., No. 01-18-00804-CV, 2019 WL 3783123, at *4 (Tex. App.—Houston [1st Dist.] Aug. 13, 2019, no pet.) (because each of the rights protected by the TCPA is described as an "exercise," which is "behavior," they all encompass "conduct"); *Montoya v. San Angelo Cmty. Med. Ctr*., No. 03-16-00510-CV, 2018 WL 2437508 (Tex. App.—Austin May 31, 2018, pet. denied) (although the communications were private and largely based on conduct, they fell within the scope of the TCPA).

Other courts say "no," conduct is not "communication." *E.g., Pacheco v. Rodriguez*, 600 S.W.3d 401, 410 (Tex. App.—El Paso 2020, no pet.) (pleadings that complained only about negligent conduct in failing to maintain a fence were not based on communications); *Smith v. Crestview Nuv, LLC*, 565 S.W.3d 793, 798 (Tex. App.—Fort Worth 2018, pet. denied) (TCPA did not apply where the nonmovant "specifically and narrowly alleged that

movant's actions … not his communications" formed the basis of liability. While "artful pleading cannot be a detour around the TCPA," the court refused to infer that the implicated conduct "necessarily involved communications.").

Most courts to have considered the issue have held claims based on silence or a failure to communicate are outside the scope of the TCPA. *E.g.*, *Pacheco*, 600 S.W.3d at 410 (claim for a negligent failure to warn was not based on communication); *Nguyen v. ABLe Communications, Inc*., No. 02-19-00069-CV, 2020 WL 2071757, at *20 (Tex. App.—Fort Worth Apr. 30, 2020, no pet.) (fraud by nondisclosure claim is not based on communication); *Krasnicki v. Tactical Entm't, LLC*, 583 S.W.3d 279, 283 (Tex. App.—Dallas 2019, pet. denied) (claims based on a "failure to communicate" or "silence" are not within the scope of the statute). But some courts hold otherwise. *E.g.*, *Mustafa v. Pennington*, No. 03-18-00081-CV, 2019 WL 1782993 (Tex. App.—Austin Apr. 24, 2019, no pet.) (breach of contract claim alleging attorney failed to engage in certain communications was within scope of the TCPA, and therefore subject to dismissal, because the claim was aimed at the manner in which the attorney communicated in the suit, implicating his right to petition); *see also Nguyen*, 2020 WL 2071757, at *20 & n.32 (distinguishing such cases).

The Dallas Court of Appeals recently held that various forms of electronic transfers of information to oneself were outside the scope of the statute. "The act of e-mailing a document to oneself or electronically saving a document to a drive or data-storage website which no one else views or has access is not a 'communication' as defined by section 27.001(1) because it does not 'make' or 'submit' the document." *Goldberg v. EMR Inc*., 594 S.W.3d 818, 829 (Tex. App.—Dallas 2020, pet. denied). "Electronically copying an existing document onto another drive, data-storage website, or the e-mailer's other inbox does not 'make' a document because the document was already made." *Id*. Likewise, taking physical devices that stored information and destroying data were not "communications." *Id*.

2. Free Speech.

The "'exercise of the right of free speech' means a communication made in connection with a matter of public concern." CPRC § 27.001(3). This language was not changed in the 2019 amendments.

The definition of a "matter of public concern" was amended in 2019 from a list of five examples of topics that did not necessarily have an apparent connection to "public" matters to, instead, a definitive list of three categories that have more emphasis on their "public" importance. A change was also made from referencing an "issue related to" one of the defined categories to, instead, "a statement or activity" regarding one of the categories. Now, "[a] matter of public concern means a statement or activity regarding: (A) 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; (B) a matter of political, social, or other interest to the community; or (C) a subject of concern to the public." *Id*. § 27.001(7).[2] While some view the amendment as an effort to narrow the scope of the TCPA, the new category (C) remains very broad. The impact of these amendments remains to be seen. As of July 31, 2020, no opinion has yet interpreted the amended language.

The term "in connection with," as used in the definition of free speech, is a phrase of "intentional breadth," which the Texas Supreme Court previously held requires nothing more than a "tangential relationship" to a matter of public concern. *ExxonMobil Pipeline Company v. Coleman*, 512 S.W.3d 895, 901 (Tex. 2017) (per curium) (statements in employee file, where that employee worked in oil and gas industry, had some connection to safety of performance, satisfying definition). Based on *Coleman*, many intermediate courts reached similarly broad applications of the "free speech" definition. *E.g., ETC Texas Pipeline, Ltd. v. Addison Expl. & Dev., LLC*, No. 11-18-00152-CV, 2019 WL 3956114, at *6 (Tex. App.—Eastland Aug. 22, 2019, pet. filed, BOM requested) (communications in a private business dispute regarding oil and gas leases and pipelines related to a "service in the marketplace" as a matter of public concern); *McDonald Oilfield Ops., LLC v. 3B Inspection, LLC*, 582 S.W.3d. 732, 746 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (statements alleged to be business disparagement about competitor related to matters of public concern being the qualification of employees to perform tasks that could impact environmental, health and safety concerns; and goods, products, or services in the marketplace).

In December 2019, however, the Texas Supreme Court modified its interpretation of the pre-amendment text, shifting to a narrower view of what satisfies a "matter of public concern" to clarify that communications about a private business dispute affecting only the parties' pecuniary interests will not satisfy the definition. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 137 (Tex.

[2] Pre-Amendment: "A matter of public concern includes an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (D) good, product, or service in the marketplace.

2019) (holding misrepresentations about payments due under a mineral lease were not protected by the TCPA as "free speech"). In *Creative Oil*, the Court did not overrule *Coleman* but instead distinguished it as "involv[ing] environmental, health, or safety concerns that had public relevance beyond the pecuniary interests of the private parties involved." *Id*. at 136.

Following *Creative Oil*, most intermediate courts have held private business communications impacting only the pecuniary interests of the parties involved are not "free speech" under the TCPA. *E.g*., *Crossroads Cattle Co., Ltd. v. AGEX Trading, LLC*, -- S.W.3d --, No. 03-19-00628-CV, 2020 WL 4462331, at *3 (Tex. App.—Austin July 24, 2020, no pet. h.); *Security Serv. Fed. Credit Union v. Rodriguez*, -- S.W.3d --, No. 08-19-00154-CV, 2020 WL 1969399, at *9 (Tex. App.—El Paso Apr. 24, 2020, no pet. h.); *Blue Gold Energy Barstow, LLC v. Precision Frac, LLC*, No. 11-19-00238-CV, 2020 WL 1809193, at *2, *7 (Tex. App.—Eastland Apr. 9, 2020, no pet.); *Anders v. Oates*, No. 02-19-00116-CV, 2020 WL 1809654, at *6 (Tex. App.—Fort Worth Apr. 9, 2020, no pet.); *Casey v. Stevens*, 601 S.W.3d 919 (Tex. App.—Amarillo 2020, no pet.); *Nobles v. U.S. Precious Metals, LLC*, No. 09-19-00335-CV, 2020 WL 1465980 (Tex. App.—Beaumont Mar. 26, 2020, pet. filed); *BusPatrol Am., LLC v. Am. Traffic Sols., Inc.*, No. 05-18-00920-CV, 2020 WL 1430357, at *5-7 (Tex. App.—Dallas Mar. 24, 2020, no pet. h.) (collecting similar cases); *Methodist Hosp. v. Harvey*, No. 14-18-00929-CV, 2020 WL 1060833, at *3 (Tex. App.—Houston [14th Dist.] March 5, 2020, no pet.); *Gaskamp v. WSP USA, Inc*., 596 S.W.3d 457, 477 (Tex. App.—Houston [1st Dist.] 2020, pet. filed).

The Austin Court recognized that, generally under *Creative Oil*, a dispute regarding enforceability of a covenant not to compete would be a private business matter, not a matter of public concern. *RigUp, Inc. v. Sierra Hamilton, LLC*, -- S.W.3d --, No. 03-19-00399-CV, 2020 WL 4188028, at *5 (Tex. App.—Austin July 16, 2020, no pet. h.). However, under the unique circumstances of that case, the dispute became "part of a broader public debate" because RigUp [movant] was spearheading a legislative effort to change the law on the exact subject of the dispute, CNCs for independent contractors in the oil and gas industry, through passage of HB 1552. RigUp's in-house counsel served as directors for a nonprofit, the "Coalition for Energy Jobs," to promote the bill. *Id*. at *4. Thus, the communications underlying the CNC dispute had "some relevance to a wider audience of potential buyers or sellers in the marketplace, … and therefore qualif[ied] as an 'exercise of the right of free speech' under the TCPA." *Id*. at *5.

In 2020, the El Paso Court of Appeals began analyzing claims as being "speech-based" or "non-speech-based," in a manner that blends the "communication" requirement with a First Amendment free speech analysis. Essentially, the court appears to reject prior broad applications of the TCPA that allowed for dismissal of claims, such as those in a business dispute, having no apparent relation to traditional rights of free speech. *See Ridge Petro., Inc. v. Energy Ops, LLC*, No. 08-19-00078-CV, 2020 WL 1969398, at *7 (Tex. App.—El Paso Apr. 24, 2020, no pet.); *see also Security Serv*., 2020 WL 1969399 at *5.

In *Ridge*, Energy Ops alleged that Ridge failed to properly calculate and make royalty payments and failed to provide the required documentation under a Disposal Agreement. The court rejected Ridge's argument that the underlying checks, statements, and division orders were "communications" related to a "matter of public concern, *i.e*., disposal services in the marketplace." The court reasoned that, unlike defamation, these were not "speech-based" claims "brought with the intent to chill Ridge's right to free speech." Instead, the claims were based merely on the contractual language, and related only to "mathematical calculations of royalties owed to a private party." "In the absence of a speech-based claim or any allegation or proof … that the non-speech claims were brought in an effort to chill Ridge's First Amendment rights, there is simply no basis on which we can find that the Act applies." *Ridge*, 2020 WL 1969398 at *7-9.

3. Association.

Under the prior statute, the definition of "exercise of the right of association" was "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." As of September 1, 2019, the "exercise of the right of association" means "*to join together* to collectively express, promote, pursue, or defend common interests *relating to a governmental proceeding or a matter of public concern*." CPRC § 27.001(2) (emphasis added); *see* also CPRC § 27.001(5) (defining "governmental proceeding"); § 27.001(7) (defining "matter of public concern"). By these changes, the express reference to a "communication" was deleted but the requirement of a "public" component of the expression was added. Also, the prior limitation on applying the right of association to only "individuals" was removed in 2019.

Our intermediate courts are split over whether the pre-2019 amendment definition of "right of association" requires a "public participation" element. *Compare, e.g., Gaskamp v. WSP USA, Inc*., 596 S.W.3d 457, 477 (Tex. App.—Houston [1st Dist.] 2020, pet. filed) ("[T]he proper definition of "common" in the phrase "common interests" is "of or

relating to a community at large: public," noting split among courts on this issue); *Erdner v. Highland Park Emergency Center, LLC*, 580 S.W.3d 269 2211091 (Tex. App.—Dallas May 22, 2019, pet. denied) (majority: communication "must involve public or citizen's participation" to satisfy definition of right of association; concurrence: court must reach this conclusion under its prior precedent but that precedent is wrong); *Kawcak v. Antero Res. Corp.*, 582 S.W.3d 566, 569 (Tex. App.—Fort Worth 2019, pet. denied) ("[W]e conclude that the common interests required in the TCPA's definition of 'the right of association' must be shared by the public or at least a group," noting disagreement with other courts); and *Segundo Navarro Drilling, Ltd. v. San Roman Ranch Mineral Partners, Ltd.*, No. 04-19-00484-CV, 2020 WL 3441434, at *2-5 (Tex. App.—San Antonio June 24, 2020, no pet. h.) (following *Kawcak* and distinguishing holdings from other courts; but dissent engaged in detailed statutory construction analysis to the contrary); *with, e.g., Reeves v. Harbor Am. Cent., Inc.*, -- S.W.3d --, No. 14-18-00594-CV, 2020 WL 2026527, at *5-6 and *8-10 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020, no pet.) (majority: breach of employment agreement by improper customer solicitation and misappropriation of trade secrets, satisfied definition; dissent: would follow *Kawcak*); *Rose v. Scientific Machine & Welding, Inc.*, No. 03-18-00721-CV, 2019 WL 2588512, *3 (Tex. App.—Austin June 25, 2019, no pet.) (claims based on wrongful disclosure of trade secrets satisfied definition of association because communications were made to pursue common business interests; no public interest was required); and *Morgan v. Clements Fluids S. Tex., LTD.*, 589 S.W.3d 177, 185 (Tex. App.—Tyler 2018, no pet.) (misappropriation of trade secrets claim implicated former employees' rights of association because it was based, at least in part, on their joint communications and sharing of information among themselves and with their new company, which had a common interest therein).

A recent opinion from the Third Court extends *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 137 (Tex. 2019) (regarding free speech) to the definition of "association," holding there must be a public component. *Crossroads Cattle Co., Ltd. v. AGEX Trading, LLC*, -- S.W.3d --, No. 03-19-00628-CV, 2020 WL 4462331, at *4 (Tex. App.—Austin July 24, 2020, no pet. h.). On this basis, the court concluded communications between a buyer and a seller did not constitute "association" because they "were on opposite sides of the transaction and, therefore, did not have a common interest as the applicable version of the TCPA contemplated." *Id.* at *3. "Their mere 'conducting business' together as buyer and seller in a particular transaction, without evidence of a specific common interest beyond that transaction, does not meet the statutory definition of exercising the right of association." *Id.* In reaching this holding, the court distinguished two of its prior opinions, which were decided in the era of *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017) (per curiam), under which an expansive construction of the TCPA was more in vogue. Crossroads, 2020 WL 4462331 at *3 (distinguishing *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865 (Tex. App.—Austin 2018, pet. denied); *Elite Auto Body, LLC v. AutoCraft Bodywerks, Inc.*, 520 S.W.3d 191 (Tex. App.—Austin 2017, pet. dism'd); *see above*, Section VI.E.2 (regarding *Creative Oil* and *Coleman*).

The 2019 amendments resolve this debate. For actions filed on or after September 1, 2019, it is clear that there must be something "public" about the associational right underlying the legal action for the TCPA to apply. *See Gaskamp*, 596 S.W.3d at 475-76 (reasoning that Legislature was aware of the split and adopted amendments to codify prior holdings that required a public component); *Segundo*, 2020 WL 3441434 at *5 (same; but dissent interprets legislative history oppositely). Moreover, the 2019 amendments expressly exempted certain "misappropriation of trade secrets" and "covenant not to compete" claims, which were frequently shoehorned into the "right of association," pre-amendment. *See Section* VI.F.5 (discussing new exemption).

Under the amended text, parties will continue to dispute the meaning of a "matter of public concern," as discussed above regarding "Free Speech."

4. Petition.

The "exercise of the right to petition" is defined in a long and detailed manner. CPRC § 27.001(4). *Vastly summarized*, the definition essentially means communications made in or pertaining to judicial, official, legislative, or governmental proceedings or that are likely to encourage public participation or review by such a governmental body. *See* CPRC § 27.001(5) (defining "governmental proceeding"), § 27.001(8) (defining "official proceeding"); § 27.001(9) (defining "public servant"). These definitions were not amended in 2019.

One clear application of "right to petition" is an attorney making a statement in the course of a legal proceeding, meaning that a subsequent claim filed against the attorney based on that statement will be subject to dismissal under the TCPA. *See Youngkin v. Hines*, 546 S.W.3d 675 (Tex. 2018) (claims against attorney based on his reading a Rule 11 agreement into the court record implicated his right to petition); *Smith Robertson, L.L.P. v. Hamlin*, No. 03-18-00754-CV, 2019 WL 3023304, at *2 (Tex. App.—Austin July 11, 2019, pet. denied) (attorney's submission of a foreign judgment to a Texas court clerk for purposes

of domesticating the judgment was an exercise of the right to petition; subsequent claim against attorney for filing an improper lien was dismissed); *Shopoff Advisors, LP v. Atrium Circle, GP*, 596 S.W.3d 894, 905 (Tex. App.—San Antonio 2019, no pet.) (The "email sent by Shopoff's attorney to the escrow agent at First American was a communication directly related to the pending litigation between Shopoff and Atrium," which satisfied definition); *but see Wendt v. Weinman & Assoc., P.C.*, 595 S.W.3d 926, 930 (Tex. App.—Austin 2020, no pet.) (claim by lawyer against former client for unpaid fees did not implicate client's right to petition because client failed to identity communications he made in litigation that formed basis of claim).

Our intermediate courts are split about whether "pre-suit" communications satisfy the right to petition. *Compare Moore v. Anson Fin., Inc.*, No. 02-19-00201-CV, 2020 WL 1293695, at *3 (Tex. App.—Fort Worth Mar. 19, 2020, no pet. h.) (definition includes pre-suit communications); *with Casey v. Stevens*, 601 S.W.3d 919 (Tex. App.—Amarillo 2020, no pet.) (definition does not include pre-suit communications).

Another frequent application of the right to petition arises when a legal action is filed in response to the movant's prior legal proceeding. *E.g.*, *Moore*, 2020 WL 1293695 at *3 (definition satisfied by nonmovant's claims that movants conspired to file prior litigation against nonmovant); *Lease Acceptance Corp. v. Hernandez*, No. 13-18-00598-CV, 2020 WL 1181248, at *3 (Tex. App.—Corpus Christi-Edinburg Mar. 12, 2020, no pet.) (claims complaining about conduct in prior lawsuit and collection efforts implicated right to petition); *Jetall Co., Inc. v. Van Dyke*, No. 14-19-00104-CV, 2019 WL 2097540, at *4 (Tex. App.—Houston [14th Dist.] May 14, 2019, no pet.) (claims for fraudulent lien filing implicated right to petition); *but see Blue Gold Energy Barstow, LLC v. Precision Frac, LLC*, No. 11-19-00238-CV, 2020 WL 1809193, at *4-5 (Tex. App.—Eastland Apr. 9, 2020, no pet.) (just because parties were involved in prior litigation does not mean every subsequent action between them will implicate the right to petition; later claims must be "premised on" the prior lawsuit to satisfy the definition).

Recently, some courts have followed the trend as seen with the rights of free speech and association, requiring a clearer connection to the "public" component and rejecting application of the TCPA to private business disputes. *E.g.*, *BusPatrol Am., LLC v. Am. Traffic Sols., Inc.*, No. 05-18-00920-CV, 2020 WL 1430357, at *8 (Tex. App.—Dallas Mar. 24, 2020, no pet. h.) (despite some communications being made to governmental actors about contracts for school bus safety, "petition" was not satisfied because "the communications involve no governmental or public proceedings" nor a public assembly to address a grievance; instead, communications involved merely private pecuniary interests); *Garrison Inv. Group LP v. Lloyd Jones Capital, LLC*, No. 02-19-00115-CV, 2019 WL 5996979, at *6 (Tex. App.—Fort Worth Nov. 14, 2019, no pet.) (Communications by a corporation to purchase HUD-insurance senior-living facility were not within meaning of "right to petition" simply because HUD-approval would be required. The claims for fraud and conspiracy related to misrepresentations made by the corporation and were not factually predicated on the submission of its HUD application.); *but see Beving v. Beadles*, 563 S.W.3d 399, 401 (Tex. App.—Fort Worth 2018, pet. denied) ("[D]espite the TCPA's express purpose to protect constitutional rights, the TCPA's definition of 'the right to petition' is far broader.").

5. New Categories of Protected Rights in 2019.

Under the 2019 amendments, the Legislature added that a movant may file a TCPA motion to dismiss legal actions that "arise[] from any act of [the movant] in furtherance of the [movant's] communication or conduct described by Section 27.010(b)." CPRC § 27.003(a). Correspondingly, the legislature amended the statute to provide that a court "shall dismiss a legal action against the moving party" that is "based on or is in response to … the act of a party described by Section 27.010(b)." *Id.* § 27.005(b).

As refenced in the amended text of Sections 27.003(a) and 27.005(b), the Legislature added Section 27.010(b), providing that the TCPA applies to:

> (1) a legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; and
>
> (2) a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer

> complaints, or reviews or ratings of businesses.

CPRC § 27.010(b)(1)-(2).

The Legislature stated that the TCPA applies to protect these two new categories of rights "[n]otwithstanding [the exemptions found in] Sections [27.010(a)] (2), (7), and (7). See below, Section VI.F (discussing exemptions). Based on this "notwithstanding" language, several commentators refer to the new categories of protected rights as "exclusions to the exemptions."

Although the expansive categories added by Section 27.010(b) have not yet been interpreted in any appellate opinion, their purpose appears to be robust protection of media defendants. Arguably, such parties were already afforded broad protection under the TCPA's "free speech" protection, so the necessity of these additions is unknown. However, Section 27.010(b) now provides "belt and suspenders" protection against claims based on the above-referenced rights.

The 2019 amendments to Section 27.010 also include an oddity. The Legislature added Section 27.010(c) regarding another category of legal actions subject to dismissal. Yet, it did not lead in with the same type of "notwithstanding the exemptions" language found in (b), nor did it include any reference to Section 27.010(c) under Sections 27.003(a) or 27.005(b) as it did with Section 27.010(b). Thus, the statute does not clearly provide movants a right to seek dismissal or courts the ability to grant dismissal on the basis of Section 27.010(c). Moreover, the placement of the final phrase in Section 27.010(c) adds confusion to its meaning and potential application: "This chapter applies to [*i.e.*, can be used to dismiss] a legal action against a victim or alleged victim of family violence or dating violence as defined in Chapter 71, Family Code, or an offense under Chapter 20, 20A, 21, or 22, Penal Code, based on or in response to a public or private communication."

F. Exemptions.

A non-movant "can avoid the TCPA's burden-shifting requirements by showing that one of the TCPA's several exemptions applies." *Diogu Law Firm PLLC v. Experience Infusion Centers LLC*, No. 01-19-00494-CV, 2020 WL 1681182, at *2 (Tex. App.—Houston [1st Dist.] Apr. 7, 2020, no pet.). When the same allegations underlie all claims, the nonmovant can establish application of an exemption and avoid dismissal globally without addressing the exemption on a claim-by-claim basis. *Langley v. Insgroup, Inc.*, No. 14-19-00127-CV, 2020 WL 1679625, at *3 (Tex. App.—Houston [14th Dist.] Apr. 7, 2020, no pet.).

To determine whether an exemption applies, the Court must "review th[e] evidence in the light most favorable to the nonmovant." *Hieber v. Percheron Holdings, LLC*, 591 S.W.3d 208, 211 (Tex. App.—Houston [14th Dist.] 2019, pet. denied). "[T]he factual allegations contained in the pleadings may alone be sufficient to demonstrate that the nature of the claims is such that the claims are statutorily exempt without need of additional proof." *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457 (Tex. App.—Houston [1st Dist.] 2020, pet. filed); *see also Lowfoot, Inc. v. McDavitt Group, LLC*, No. 01-18-01117-CV, 2020 WL 1679696, at *4 (Tex. App.—Houston [1st Dist.] Apr. 7, 2020, no pet.) (same). The Fort Worth court held that, where the petition alone establishes application of an exemption, the movant cannot overcome that with "contradictory evidence." *VetMoves v. Lone Star Veterinarian Mobile Surgical Specialists, PC*, No. 02-19-00340-CV, 2020 WL 1887770, at *3 (Tex. App.—Fort Worth Apr. 16, 2020, no pet.)

Before the 2019 amendments, the TCPA exempted four types of proceedings from its scope, as discussed below. The language of these four exemptions was not amended in 2019; they were merely re-numbered from CPRC § 27.010 subsections (a)-(d) to subsections (a)(1)-(4). Below, all references are to the current subsection numbers. In conducting research, remember to also look for cases decided under the prior numbers.

In the 2019 amendments, the Legislature added eight types of proceedings that are exempt from dismissal in actions filed on or after September 1, 2019. *Id* §§ 27.010(a)(5)-(12).

1. Governmental Enforcement Actions.

The TCPA "does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney." CPRC § 27.010(a)(1).

The Texas Supreme Court interpreted this exemption for the first time in *State ex rel. Best v. Harper*, 562 S.W.3d 1 (Tex. 2018). "[W]ithin the TCPA, the term 'enforcement action' refers to a governmental attempt to enforce a substantive legal prohibition against unlawful conduct.'" *Id*. at 12. "Under this definition, a removal petition is not an 'enforcement action' in the abstract. Instead it is a procedural device, and as such a party cannot initiate a removal action to enforce the removal statute itself." *Id*. "[W]hen a removal action has its basis in unlawful conduct, the 'enforcement action' exemption renders the TCPA inapplicable." *Id*. at 13. "A removal petition is not an 'enforcement action' unless it seeks to enforce a substantive legal prohibition against unlawful conduct."" *Id*. at 14. Best's and the State's allegations that Harper was incompetent did not

satisfy this definition and, thus, claims based on those allegations were not exempt from the TCPA. *Id*. at 14-15. However, the State's additional allegation that Harper violated the Open Meetings Act, which is a "specific statutory provision that contains a substantive prohibition against certain conduct" was "sufficient to form the basis of an enforcement action." *Id*. Hence, that claim was not subject to TCPA dismissal. *Id*.

In dissent, Justice Boyd (joined by Justices Johnson and Lehrmann) agreed with the definition of "enforcement action" but disagreed with its application. The dissenters would have concluded that "[w]hen the state pursues a Chapter 87 suit to remove a board member from office, it seeks to compel compliance with the officer's 'official duties,' regardless of whether it alleges incompetency or misconduct. Under either ground for removal, the suit is an enforcement action under the common, ordinary meaning of that phrase."

The Third Court addressed the enforcement action exemption in *Commission for Lawyer Discipline v. Rosales*, 577 S.W.3d 305 (Tex. App.—Austin 2019, pet. denied). The court held that a lawyer disciplinary proceeding was not an "enforcement action" because the Commission's internal counsel filed the suit on behalf of the Commission, and "neither the Commission nor the Chief Disciplinary Counsel is included among the four entities specifically listed in [section 27.010(a)(1)]. Rosales was legislatively overturned in 2019 by an amendment, which added an exemption for lawyer disciplinary proceedings. CPRC § 27.010(a)(10).

In *Hesse v. Howell*, No. 07-16-00453-CV, 2018 WL 2750005 (Tex. App.—Amarillo June 7, 2018, pet. denied, cert. denied), Hesse (an attorney) sued Howell (a DA prosecutor) individually and in his official capacity, based on actions Howell took against Hesse in a contempt proceeding arising from Hesse's prior misconduct in open court. The enforcement exemption was not applicable because the relevant legal action was the suit against Howell, not the underlying contempt proceeding. In arguing otherwise, "Hesse completely misreads section 27.010(a)." *Id*. at *4. In this legal action, there was no claim by the State to enforce compliance by the movant; the state official was the movant. *Id*.

2. Commercial Speech.

The TCPA does not apply to "a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer." CPRC § 27.010(a)(2). This is known as the "commercial speech" exemption. It has been, by far, the most frequently-litigated exemption.

The Texas Supreme Court clarified the four essential elements of this exemption in *Castleman v. Internet Money*, 546 S.W.3d 684, 688 (Tex. 2018), holding:

> [T]he TCPA's commercial-speech exemption … appl[ies] when (1) the defendant was primarily engaged in the business of selling or leasing goods [or services], (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."

Based on this test, the exemption did not apply to negative statements made about a business by a customer/consumer aimed at persons who were actual or potential customers of the business, not of the speaker.

Many opinions in 2020 have addressed the commercial speech exemption. A few are highlighted here, but this sampling is far from exhaustive.

In *VetMoves v. Lone Star Veterinarian Mobile Surgical Specialists, PC*, No. 02-19-00340-CV, 2020 WL 1887770, at *3 (Tex. App.—Fort Worth Apr. 16, 2020, no pet.), the commercial speech exemption was satisfied. Plaintiffs pled that defendants, as competing providers of mobile veterinary services, contacted plaintiff's customers and made improper statements about plaintiff in an effort to solicit business. The court rejected defendants' argument that the speech was not commercial in nature because it did not include an express "sales pitch." It was sufficient that the "communications involve business pursuits for oneself or a business stands to profit from the statements at issue." *Id*. at *4. The court also rejected defendants' argument that the statements were not made in defendants' capacity as a seller of services because the speaker was pretending to work for plaintiffs. Again, the intent of the communications was to garner business for defendants, which sufficed. *Id*. at *4-5.

In *Blaze Sales & Services, Inc. v. American Completion Tools, Inc*., No. 01-19-00497-CV, 2020 WL 1917842, at *6-8 (Tex. App.—Houston [1st Dist.] Apr. 21, 2020, no pet.), the commercial speech

exemption was satisfied. ACT (a manufacturer and seller of tools for the oil and gas industry) sued its competitors, Blaze Sales and Texas Tools, and a handful of ACT's former employees, alleging tortious interference and misappropriation, among other claims. In response to a TCPA motion, ACT argued the commercial speech exemption prevented dismissal. Regarding element 1, the former employee defendants sought to avoid the exemption by arguing that, as ACT's employees, they were not in the business of selling goods. The court rejected this argument, holding it was sufficient that the individuals were "primarily engaged in the business" of selling for the benefit of Blaze Sales and Texas Tools. For element 1 to be satisfied as to these individuals, they did not have to be the actual "sellers." *Id*. at *6

Other courts have reached similar conclusions on element 1. *E.g.*, *Lowfoot, Inc. v. McDavitt Group, LLC*, No. 01-18-01117-CV, 2020 WL 1679696, at *5 (Tex. App.—Houston [1st Dist.] Apr. 7, 2020, no pet.) (exemption applied to statements/conduct of company president, "even though [she] merely facilitated a product demonstration" for her company; regardless of whether the president directly proposed the commercial transaction, she was "engaged in the business" of selling); *Hawkins v. Fox Corp. Houston, LLC*, No. 01-19-00394-CV, 2020 WL 425121, at *4 (Tex. App.—Houston [1st Dist.] Jan. 28, 2020, no pet. h.) ("There is no requirement that Hawkins be 'the actual business itself' before Fox can claim the commercial-speech exemption…. [As an employee], Hawkins was primarily engaged in the business of selling or leasing goods or services."); *Rose v. Sci. Mach. & Welding, Inc*., No. 03-18-00721-CV, 2019 WL 2588512, at *5 (Tex. App.—Austin June 25, 2019, no pet.) (For purposes of the exemption, "[i]t is reasonable to conclude that a high-level executive of a company that primarily designs and sells manufactured items to customers is also 'primarily engaged' in that type of business.").

Returning to *Blaze Sales*, the defendants argued element 4 was not satisfied by their communications among themselves underlying the trade secrets claim. The court rejected this argument, holding the defendants cannot "isolate smaller communications within a larger scheme." 2020 WL 1917842 at *8. "[A]ny communications among [defendants] themselves were incidental to the larger scheme identified in ACT's pleadings." *Id*.

Similarly, in *East Texas Medical Center v. Hernandez*, No. 12-17-00333-CV (Tex. App.—Tyler May 31, 2018, pet. denied), the court held that the exemption applied to Hernandez's UDJA claim, which sought to declare ETMC's hospital lien invalid, because ETMC is in the business of selling health care services and it filed the lien in its capacity as a seller of that service based on a commercial transaction involving those services. Even if the lien (the communication) was aimed at some third-party non-customers, Hernandez (a customer) was also "included" in the intended audience, which satisfied this element of the exemption. *Id*. at *10-11.

In contrast to *Blaze Sales* and *Hernandez*, the commercial speech exemption was not satisfied based on element 4 in *Nguyen v. ABLe Communications, Inc*., No. 02-19-00069-CV, 2020 WL 2071757, at *20 (Tex. App.—Fort Worth Apr. 30, 2020, no pet.). ABLe sued its former employee (Nguyen), his new employer (Southwest), and E2, for which Southwest/Nguyen performed work as a subcontractor in competition with ABLe at DFW airport. In this scenario, DFW was the intended customer. The implicated communications, however, were made between Nguyen, Southwest, E2, and other former employees of ABLe who went to work for E2. "[S]ome of the alleged communications had some relation to [ABLe's] potential business with [DFW], but [DFW was not the intended audience.]" *Id*. at *6-7.

In *Martin v. Walker*, No. 10-19-00178-CV, 2020 WL 4360802, at *3-4 (Tex. App.—Waco July 29, 2020, no pet. h.), the commercial speech exemption was satisfied. Walker sued Martin, the seller of gambling services through operation of eight-liner machines, alleging he made false representations to induce her to gamble, despite knowing she was a gambling addict, which caused Walker to lose nearly $90,000. The court held, as alleged, Martin's statements were made in his capacity as a seller, satisfying elements 1 and 2. *Id*. at *3. Further, Martin's communications arose out of his commercial endeavors, and were directed at actual and potential customers, including Walker, satisfying elements 3 and 4. *Id*. at *4.

3. Bodily Injury, Death, and Survival.

The TCPA does not apply to "a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action." CPRC § 27.010(c) (on Sept. 1, 2019, this will be § 27.010(a)(3)). This exemption has been broadly interpreted.

The Third Court of Appeals relied on Black's Law Dictionary to define "bodily injury" as something that "commonly denotes '[p]hysical damage to a person's body.'" Thus, an assault claim seeking "medical expenses for physical damage and compensation for physical pain" falls under this exception. *Cavin v. Abbott*, No. 03-16-00395-CV, 2017 WL 3044583, at *7 (Tex. App.—Austin July 14, 2017, no pet.). More recently, in *Cavin II*, the court held that a request for injunction based on that assault claim was not separately subject to dismissal. *Cavin*

v. Abbott, -- S.W.3d -- No. 03-19-00168-CV, 2020 WL 3481149, at *2 (Tex. App.—Austin June 26, 2020, no pet. h.); *see above* Section VI.C.10.

The Third Court also addressed the bodily injury exemption in *Superior HealthPlan, Inc. v. Badawo*, No. 03-18-00691-CV, 2019 WL 3721327, at *4 (Tex. App.—Austin Aug. 8, 2019, no pet.). Reasoning that "the actual text of the exemption" does not limit its scope to "only a specific cause of action, and [the Court] 'may not judicially amend [the TCPA] by adding words that are not contained in the language of the statute,'" the court held that the exemption prevented dismissal of a claim under CPRC ch. 88 against a healthcare insurer for the negligent denial of benefits, which allegedly caused personal injuries to the insured. *Id*. (quoting *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017) (per curiam)). Unlike the insurance exemption, which applies to a legal action directly "brought under" the Insurance Code, the personal injury exemption more generally requires only that the claim "seek[] recovery for" bodily injury, wrongful death, or survival, regardless of the type of claim asserted. *Id*. (affirming *Cavin I's* definition).

In *Tyler v. Pridgeon*, 570 S.W.3d 392, 398, 402 (Tex. App.—Tyler 2019, no pet.), the court held that the exemption applied to prevent dismissal of a declaratory judgment claim seeking interpretation of a hospital lien, which sought to collect proceeds of a settlement in personal injury case.

Without elaboration, the Fifth Court of Appeals held that a negligence claim seeking damages suffered by the plaintiff in a shooting fell within the bodily injury exemption. *Kirkstall Rd. Enters. v. Jones*, 523 S.W.3d 251, 253 (Tex. App.—Dallas 2017, no pet.) (defendant TV producer aired a story in which plaintiff spoke about a murder investigation as a "witness" using a blurred image and altered voice; after airing, plaintiff received multiple threats and was then shot four times; plaintiff sued, arguing defendant was negligent in its portrayal of plaintiff).

4. Insurance Actions.

The TCPA does not apply to "a legal action brought under the Insurance Code or arising out of an insurance contract." CPRC § 27.010(a)(4). "[T]he plain language of [this] section [] exempts legal actions 'arising out of' an insurance contract, regardless of whether the legal action is 'seeking recovery for benefits under' an insurance contract and regardless of whether the nature of the claim sounds in tort or in contract." *Fairlawn Assets, LLC v. Booker*, No. 09-19-00306-CV, 2020 WL 2201690, at *4 (Tex. App.—Beaumont May 7, 2020, no pet.) (quoting *Robert B. James, DDS, Inc. v. Elkins*, 553 S.W.3d 596, 604 (Tex. App.—San Antonio 2018, pet. denied)). The legislature knew how to "use narrower qualifying phrases, and could have limited the insurance contract exemption to legal actions 'brought under' or 'based on' an insurance contract" if that had been its intent. *Id*.

The term "arise out of" requires no more than "a causal connection or relation," and the term "insurance contract" "undoubtedly includes an insurance policy or agreement that governs the legal rights of and relationship between an insurer and insured regarding insurance benefits." *Id*. For the exemption to apply, it is only necessary that the facts underlying the action "arise out of" the insurance contract, even if the remedy requested does not arise out of an insurance contract. *Id*. "The *Elkins* court held that 'arising out of an insurance contract' required 'that the insurance contract be a but-for or motivating cause of the alleged facts entitling the plaintiff to relief, or that the alleged facts entitling the plaintiff to relief have a nexus to or originate in a contractual relationship between an insurer and an insured for insurance benefits." *Id*. (quoting 553 S.W.3d at 604) (cleaned up).

In *Fairlawn*, Fairlawn purchased M.H.'s right to receive payments from an annuity issued by Prudential Insurance as part of a structured settlement agreement. *Id*. at *2, *5. Later, M.H.'s guardian (Booker) sued Fairlawn for fraud and related claims, seeking to void its purchase agreement. *Id*. at *1-2. The court held that the exemption applied because Booker's claims "arose out of" the insured annuity contract underlying the dispute. *Id*. at *5. "The annuity contract issued by Prudential is one of the operative facts upon which Booker's requested relief is based." *Id*.

In *Elkins*, Dr. James alleged that Dr. Elkins (his associate in a dental practice) fraudulently misappropriated $350k from the practice. James reported it to the police and filed an insurance claim. Elkins sued, and James moved to dismiss. The majority held that claims based on the statements to the insurance company were exempt but claims based on statements made to the police were not. 553 S.W.3d at 607-09. The dissent would have held that the insurance exemption did not apply to any claim because they were not asserted "under" the Insurance Code nor did they seek recovery based on the insurance contract. *Id*. at 621-22 (Barnard, J., dissenting) (finding persuasive the reasoning of *Tervita v. Sutterfield*, 482 S.W.3d 280 (Tex. App.—Dallas 2015, pet. denied)).

In *Tervita*, the court held that a worker's compensation claim against a business was within the scope of the TCPA, and not subject to the insurance exemption, because the claim was "brought under the Texas Labor Code and the common law, not the Texas Insurance Code." 482 S.W.3d at 285-86. This conclusion was further supported by the fact that the

plaintiff did not seek benefits under an insurance contract, but, rather, under the Labor Code. *Id*.

5. New Exemptions in 2019.

For actions filed on or after September 1, 2019, the following are exempt from TCPA dismissal, under CPRC section 27.010(a):

> (5) a legal action arising from an officer-director, employee-employer, or independent contractor relationship that: (A) seeks recovery for misappropriation of trade secrets or corporate opportunities; or (B) seeks to enforce a non-disparagement agreement or a covenant not to compete;
> (6) a legal action filed under Title 1, 2, 4, or 5, Family Code, or an application for a protective order under Chapter 7A, Code of Criminal Procedure;
> (7) a legal action brought under Chapter 17, Business & Commerce Code [the DTPA], other than an action governed by Section 17.49(a) of that chapter;
> (8) a legal action in which a moving party raises a defense pursuant to Section 160.010, Occupations Code, Section 161.033, Health and Safety Code, or the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq.);
> (9) an eviction suit brought under Chapter 24, Property Code;
> (10) a disciplinary action or disciplinary proceeding brought under Chapter 81, Government Code [governing the State Bar of Texas], or the Texas Rules of Disciplinary Procedure;
> (11) a legal action brought under Chapter 554, Government Code [prohibiting retaliation for reporting violations of state law]; or
> (12) a legal action based on a common law fraud claim.

As of July 31, 2020, there have not yet been any appellate opinions addressing any one of these new exemptions.

G. The CNCA Does Not Preempt the TCPA.

In 2020, the Austin and Houston Fourteenth Courts held that the Covenants Not to Compete Act (Tex. Bus. & Comm. Code §§ 15.50-.52) does not preempt the TCPA. The CNCA provides the criteria, procedures, and remedies for enforcement of a CNC, and states it "preempt[s] any other criteria for enforceability of a [CNC] or procedures and remedies in an action to enforce a [CNC] under common law or otherwise." *Id*. at § 15.52. Nevertheless, the courts held that statutory differences between the stages of proceedings governed by the TCPA (allowing for summary dismissal before adjudication of claims) versus the CNCA (providing available remedies and procedures for adjudicating enforceability of a CNC) prevented any conflict for purposes of preemption. *RigUp, Inc. v. Sierra Hamilton, LLC*, -- S.W.3d --, No. 03-19-00399-CV, 2020 WL 4188028, at *5 (Tex. App.—Austin July 16, 2020, no pet. h.); *Reeves v. Harbor Am. Cent., Inc*., -- S.W.3d --, No. 14-18-00584-CV, 2020 WL 2026527, at *5-6 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020, no pet.).

Remember that, per the 2019 addition of CPRC § 27.010(a)(5)(B), the following is now exempted from dismissal under the TCPA: "a legal action arising from an officer-director, employee-employer, or independent contractor relationship that … seeks to enforce … a covenant not to compete." This amendment lessens the importance of the foregoing "lack of preemption" holdings because, for actions filed on or after September 1, 2019, most claims to enforce CNCs will be exempted. However, the dispute in *RigUp* was between business competitors, which falls outside the scope of the new exemption and would still be subject to dismissal under the amended TCPA.

H. Constitutional Challenges.

Many nonmovants have attempted to avoid dismissal by lodging constitutional challenges at the TCPA (pre-2019 amended version). Every attempt thus far has failed, and the supreme court has denied review of each opinion rejecting such arguments. *See, e.g., Landry's Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 67-68 (Tex. App.—Houston [14th Dist.] 2018, pet. denied, MFR pending) (rejecting challenge to violation of right to jury trial and Open Courts challenge); *Memorial Hermann Health Sys. v. Khalil*, No. 01-16-00512-CV, 2017 WL 3389645, at *40-44 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied) (rejecting facial and as-applied challenges based on right of expression, Open Courts, sanctions procedures, and limited discovery under TCPA); *Better Business Bureau of Metro. Houston, Inc. v. John Moore Servs*., 500 S.W.3d 26, 46 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (rejecting Open Courts challenge to evidentiary standard of the Act); *Abraham v. Greer*, 509 S.W.3d 609, 615-16 (Tex. App.—Amarillo 2016, pet. denied) (rejecting Open Courts challenge to discovery limits); *Combined Law Enforcement Ass'n of Tex. v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672, at *10 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (same).

Other opinions have held the nonmovant waived its constitutional challenge by failing to raise it or obtain a ruling on it in the trial court. *ProPublica, Inc. v. Frazier*, No. 01-19-00009-CV, 2020 WL 370563, at *10 (Tex. App.—Houston [1st Dist.] Jan. 23, 2020,

pet. filed); *ETC Texas Pipeline, Ltd. v. Addison Expl. & Dev., LLC*, No. 11-18-00152-CV, 2019 WL 3956114, at *11 (Tex. App.—Eastland Aug. 22, 2019, pet. filed, BOM requested).

However, the Dallas Court of Appeals recently indicated that it might be receptive to a constitutional challenge in a future case: "If a TCPA motion is granted at the third step, one might question whether section 27.005(d) operates as an unconstitutional deprivation of a claimant's right to trial by jury.… However, we are not presented with that question here." *Palladium Metal Recycling, LLC v. 5G Metals, Inc*., 05-19-00482-CV, 2020 WL 4333538, at *4 (Tex. App.—Dallas July 28, 2020, no pet. h.) (internal citations omitted).

I. The TCPA Does Not Apply in the Fifth Circuit.

Separate from the 2019 amendments, another big development in 2019 was the issuance of the Fifth Circuit's much anticipated decision in *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019), holding that the TCPA does not apply in federal court in a diversity case. The Court held that the TCPA is procedural and conflicts with FRCPs 12 and 56, which are valid. As a result of this ruling, plaintiffs with claims potentially subject to dismissal under the TCPA may be motivated to file in federal court (if able to satisfy diversity jurisdiction) rather than state court.

The First, Second, and Ninth Circuit Courts of Appeals have held that other states anti-SLAPP statutes do apply in federal court. However, the D.C., Seventh, Tenth, and Eleventh Circuits have held oppositely that state anti-SLAPP statutes impermissibly conflict with Federal Rules 12 and 56 and, therefore, do not apply in federal courts. In December 2018, the U.S. Supreme Court declined to resolve this conflict in *AmeriCulture Inc. v. Los Lobos Renewable Power, LLC*, 885 F.3d 659, 673 (10th Cir. 2018) (concluding New Mexico's anti-SLAPP statute is purely procedural and inapplicable in federal court), cert. denied No. 18-89, 2018 WL 3477416 (U.S. Dec. 3, 2018).

VII. MERITS: IS DISMISSAL WARRANTED?

If the court determines that the TCPA applies (after considering the movant's initial burden and any rebuttal by the non-movant), then the court should next consider the merits of the challenged claims to determine whether dismissal is warranted. *See above*, Section V. Here, the burden shifts to the non-movant to establish a prima facie case in support of its claims and, if the non-movant does so, the burden shifts back to the movant in attempt to establish a defense.

Although this portion of the analysis considers the merits of the claims based on the pleadings and evidence, it is important to remember that this is a preliminary review conducted promptly after the filing of a "legal action," often without the benefit of discovery. The TCPA "does not impose a heightened burden of proof or an elevated evidentiary standard." *Quintanilla v. West*, No. 04-16-00533-CV, 2020 WL 214757, at *3-4 (Tex. App.—San Antonio Jan. 15, 2020, no pet.).

A. Prima Facie Case.

"The court may not dismiss a legal action under [the TCPA] if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." CPRC § 27.005(c).

1. Legal Standards.

A prima facie case refers to evidence "sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted." *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015)). This "requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id*. The non-movant "is charged with providing enough detail to show the factual basis for its claim and to base opinions on demonstrable facts." *Quintanilla v. West*, No. 04-16-00533-CV, 2020 WL 214757, at *3-4 (Tex. App.—San Antonio Jan. 15, 2020, no pet.).

"Clear and specific" requires evidence that is "unambiguous, sure, or free from doubt" and is "explicit or elating to a particular named thing." *Lipsky*, 460 S.W.3d at 590-91. The evidence should establish the facts of when, where, and what occurred, the nature of the conduct, and any damages. *Id*. (regarding a defamation claim but holding may be viewed more generally to other claims).

To satisfy its prima facie burden, a nonmovant may rely on circumstantial evidence, which is "indirect evidence that creates an inference to establish a central fact." *K&L Gates LLP v. Quantum Materials Corp*., No. 03-19-00138-CV, 2020 WL 1313733, at *5 (Tex. App.—Austin Mar. 20, 2020, pet. filed). Pleadings are considered evidence for purposes of satisfying the TCPA burden. CPRC § 27.006(a); *Langley v. Insgroup, Inc*., No. 14-19-00127-CV, 2020 WL 1679625, at *4 (Tex. App.—Houston [14th Dist.] Apr. 7, 2020, no pet.); *see below*, Section IX.C. At least one court has held that expert testimony is not required to meet this burden, and concluding otherwise would require more than the Texas Supreme Court held in *Lipsky*. *Robins v. Clinkenbeard*, No. 01-19-00059-CV, 2020 WL 237943, at *10 (Tex. App.—Houston [1st Dist.] May 7, 2020, no pet. h.).

The evidence must be viewed in the light most favorable to nonmovant to determine if the record establishes a "rational inference" of the truth of its

allegations. *Quintanilla*, 2020 WL 214757 at *4; *see also D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 440 n.9 (Tex. 2017) (refusing to consider TCPA movant's rebuttal evidence in determining whether nonmovant established prima facie case).

However, establishing a prima facie case "requires more [than] mere notice pleading.… [G]eneral allegations that merely recite the elements of a cause of action [] will not suffice." *Lipsky*, 460 S.W.3d at 590-91; *see also Legacy Bank v. Harlan*, No. 05-18-00039-CV, 2018 WL 2926397, *3 (Tex. App.—Dallas June 7, 2018, no pet.) (rejecting nonmovant's argument that notice pleadings were sufficient to survive TCPA dismissal). "Bare, baseless opinions," "general averments," and "conclusory" statements do not satisfy this burden. *Lipsky*, 460 S.W.3d at 592-93. The nonmovant is required to link specific evidence in the record to each element of his claim. *Hawxhurst v. Austin's Boat Tours*, 550 S.W.3d 220 (Tex. App.—Austin Mar. 22, 2018, no pet.) (collecting cases).

2. Recent Examples.

The following provide examples but not an exhaustive review of 2020 opinions in which the prima facie case was and was not satisfied. In determining how to plead or defend against a claim potentially subject to dismissal under the TCPA, it is instructive to review examples of what was or was not held sufficient in other cases regarding similar claims.

Prima facie case **was** satisfied:

- *Robins v. Clinkenbeard*, No. 01-19-00059-CV, 2020 WL 237943, at *10 (Tex. App.—Houston [1st Dist.] May 7, 2020, no pet. h.) (legal malpractice).
- *eQuine Holdings, LLC v. Jacoby*, No. 05-19-00758-CV, 2020 WL 2079183, at *6-7 (Tex. App.—Dallas Apr. 30, 2020, pet. filed) (breach of contract/indemnity agreement).
- *HDG, Ltd. v. Blaschke*, No. 14-18-01017-CV, 2020 WL 1809140, at *6 (Tex. App.—Houston [14th Dist.] Apr. 9, 2020, no pet.) (defamation, breach of contract).
- *K&L Gates LLP v. Quantum Materials Corp.*, No. 03-19-00138-CV, 2020 WL 1313733, at *5 (Tex. App.—Austin Mar. 20, 2020, pet. filed) (breach of fiduciary duty and DTPA).
- *O'Gan v. Ogle*, No. 03-19-00234-CV, 2020 WL 217176, at *4 (Tex. App.—Austin Jan. 15, 2020, pet. filed) (Texas Theft Liability Act).
- *Robins v. Comm'n for Lawyer Discipline*, No. 01-19-00011-CV, 2020 WL 101921, at *9-14 (Tex. App.—Houston [1st Dist.] Jan. 9, 2020, no pet.) (professional misconduct).

Prima facie case **was not** satisfied:

- *Buckingham Senior Living Cmty., Inc. v. Washington*, -- S.W.3d --, No. 01-19-00374-CV, 2020 WL 2988368, at *4-8 (Tex. App.—Houston [1st Dist.] June 4, 2020, no pet. h.) (defamation and malicious prosecution).
- *Patel v. Patel*, No. 14-18-00771-CV, 2020 WL 2120313, at *9 (Tex. App.—Houston [14th Dist.] May 5, 2020, no pet. h.) (defamation).
- *Nguyen v. ABLe Communications, Inc.*, No. 02-19-00069-CV, 2020 WL 2071757, at *12-22 (Tex. App.—Fort Worth Apr. 30, 2020, no pet.) (breach of fiduciary duty, tortious interference, misappropriation of trade secrets, conspiracy to commit fraud, aiding and abetting, civil theft, injunctive relief).
- *Crossroads Hospice, Inc. v. FC Compassus, LLC*, No. 01-19-00008-CV, 2020 WL 1264188, at *6 (Tex. App.—Houston [1st Dist.] Mar. 17, 2020, no pet.) (judgment vacated but opinion maintained upon settlement, 2020 WL 3866902) (breach of fiduciary duty, tortious interference, conspiracy).
- *Lease Acceptance Corp. v. Hernandez*, No. 13-18-00598-CV, 2020 WL 1181248, at *4-6 (Tex. App.—Corpus Christi-Edinburg Mar. 12, 2020, no pet.) (Texas Debt Collection Act, intentional infliction of emotional distress, invasion of privacy)

3. Proof of Damages.

In 2018, the Texas Supreme Court clarified that, to establish a prima facie case on the damage element of a nonmovant's claim, the nonmovant is not required to quantify a specific amount of damages. *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843 (Tex. 2018). "Direct evidence of damages is not required, but the evidence must be sufficient to allow a rational inference that some damages naturally flowed from the defendant's conduct." *Id*. at 847.

Elliot has been applied by many intermediate courts. The various analyses are important to understand in attempting to properly plead and prove, or seek dismissal of, a claim for damages under the TCPA. *E.g., ADB Interest, LLC v. Wallace*, -- S.W.3d --, No. 01-18-00210-CV, 2020 WL 2787586, at *15 (Tex. App.—Houston [1st Dist.] May 28, 2020, MFET to file pet. granted) (nonmovant failed to present sufficient evidence of economic damages resulting from allegedly lost product sales); *Quintanilla v. West*, No. 04-16-00533-CV, 2020 WL 214757, at *3-4 (Tex. App.—San Antonio Jan. 15, 2020, no pet.) ("Because West produced evidence sufficient to support a rational inference that

Quintanilla's liens caused West to lose the sale of his overriding royalty interests, we conclude that West met his burden in establishing a prima facie case for the causation and special damages elements of his slander-of-title claim," even without specific proof of the lost market value); *Rogers v. Soleil Chartered Bank*, No. 02-19-00124-CV, 2019 WL 4686303, at *9-10 (Tex. App.—Fort Worth Sept. 26, 2019, no pet.) (other than a "conclusory" and "general averment" in nonmovant's pleading that it suffered damages, nonmovant did not make even a superficial effort to establish a PFC on this element; TCPA motion should have been granted on this basis); *Neurodiagnostic Consultants, LLC v. Nallia*, No. 03-18-00609-CV, 2019 WL 4231232 (Tex. App.—Austin Sept. 6, 2019, no pet.) (following *Elliot* to conclude nonmovant sufficiently demonstrated economic harm resulting from movant's misconduct).

B. Defenses.

If the nonmovant satisfies its burden of establishing a prima facie case, "the court shall dismiss a legal action against the moving party if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." CPRC § 27.005(d).

This provision reflects several amendments made in 2019. Under the pre-amendment version, the movant was required to prove "by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim."

It appears the shift from "preponderance" to "as a matter of law" requires a heightened burden by movant to obtain dismissal at "step 3." Proof "as a matter of law" is akin to a traditional summary judgment standard. Notably, in 2019, the Legislature made corresponding changes to the TCPA evidentiary and procedural rules that more closely track summary judgment practice. *See below*, Sections IX.A, C. However, as of July 31, 2020, no appellate opinion has yet interpreted these amendments.

To date, the most common defenses asserted in TCPA proceedings are various forms of privilege and immunity. *E.g.*, *Youngkin v. Hines*, 546 S.W.3d 675 (Tex. 2018) (attorney immunity applied as a defense shield a lawyer from liability to non-clients for conduct within the scope of representation to the clients); *K&L Gates LLP v. Quantum Materials Corp.*, No. 03-19-00138-CV, 2020 WL 1313733, at *6 (Tex. App.—Austin Mar. 20, 2020, pet. filed) (attorney immunity not established); *Moore v. Anson Fin., Inc.*, No. 02-19-00201-CV, 2020 WL 1293695, at *4 (Tex. App.—Fort Worth Mar. 19, 2020, no pet. h.) (attorney immunity established); *HDG, Ltd. v. Blaschke*, No. 14-18-01017-CV, 2020 WL 1809140, at *11 (Tex. App.—Houston [14th Dist.] Apr. 9, 2020, no pet.) (qualified privilege not established); *Caracio v. Doe*, No. 05-19-00150-CV, 2020 WL 38827, at *5-6 (Tex. App.—Dallas Jan. 3, 2020, no pet. h.) (qualified privilege established).

Texas intermediate courts are split about the ability to establish "substantial truth" as a defense to a defamation claim for purposes of obtaining dismissal under the TCPA after the non-movant established falsity as part of its prima facie case. In *ProPublica, Inc. v. Frazier*, No. 01-19-00009-CV, 2020 WL 370563, at *6-8 (Tex. App.—Houston [1st Dist.] Jan. 23, 2020, pet. filed), the court held it was reversible error to refuse to consider the defense. The court noted disagreement with *Van Der Linden v. Khan*, 535 S.W.3d 179, 200 (Tex. App.—Fort Worth 2017, pet. denied), which held the defendant/movant is prohibited from attempting to establish this defense. The First and Second Courts engaged in different interpretations of the holding in *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 441 (Tex. 2017), resulting in split outcomes. It remains to be seen whether the supreme court will grant the petition in ProPublica to resolve the split.

C. Defamation Mitigation Act.

The Defamation Mitigation Act (CPRC ch. 73) provides "carrots and sticks" to encourage plaintiffs and defendants to correct or mitigate against damage resulting from defamatory publications prior to litigation. In *Warner Bros. Entm't, Inc. v. Jones*, -- S.W.3d --, No. 18-0068, 2020 WL 2315280, at *5 n.15 & *11 (Tex. May 8, 2020) (motion for rehearing pending), the issues related to the TCPA included whether the nonmovant is required to prove compliance with the DMA as part of his prima facie case or the movant is required to prove a failure to comply as a defense; and whether a failure to comply with the DMA constitutes a defense on which dismissal under the TCPA was warranted or, instead, results merely in abatement of the case and a loss of the ability to recover exemplary damages. The Court, however, did not decide those issues. Instead, the Court concluded the DMA was satisfied based on the facts presented, affirmed the denial of TCPA motion, and remanded.

Parties litigating defamation claims must be aware of the DMA and endeavor to comply with its statutory requirement. However, such parties must wait for further clarification from our courts about the impact of complying or failing to comply within the context of the TCPA.

VIII. MONETARY RELIEF.

For most successful movants, the TCPA provides for mandatory monetary awards. For some successful nonmovants, the TCPA provides for discretionary awards of fees and costs. Important changes were made to these provisions in 2019.

A. Awards to Successful Movants.

Prior to the 2019 amendments, the TCPA provided that movants who successfully obtained dismissal of a legal action under the TCPA shall be awarded attorneys' fees, court costs, other expenses, and sanctions "sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." *See Sullivan v. Abraham*, 488 S.W.3d 294, 295 (Tex. 2016) (explaining meaning of prior text).

Following the 2019 amendments, successful movants are entitled to mandatory awards of only attorneys' fees and court costs. CPRC § 27.009(a)(1). And there is an exception: Movants who succeed in dismissing a compulsory counterclaim are entitled to attorneys' fees only "if the court finds that the counterclaim is frivolous and solely intended to delay." *Id*. § 27.009(c). This amendment reflects a policy judgment: If a party is forced to assert a compulsory counterclaim in response to an affirmative claim brought against it, then that party should not face the risk of a potentially-large monetary award for having pled the responsive claim, as required, unless the claim is frivolous or solely intended to delay. That is the same standard that has always governed awards to nonmovants under the TCPA, so the case law addressing that issue will now be instructive to movants. *See below*, Section VIII.B.

Also following the 2019 amendments, an award of sanctions "sufficient to deter" the nonmovant is now discretionary. *Id*. § 27.009(a)(2).

If sanctions are awarded under the amended statute, then it appears the trial court must make findings "regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purposes, including to harass or to cause unnecessary delay or to increase the cost of litigation." CPRC § 27.007(a) (as amended in 2019). However, this provision references an award made under section 27.009(b) (to nonmovants) rather than 27.009(a)(2) (to movants).

I view this as a legislative typo—which should be corrected to refer to section 27.009(a)(2)—for several reasons. First, the prior version of Section 27.007(a) allowed for these findings "[a]t the request of" a movant, not a nonmovant. There is no obvious reason why the Legislature would have reversed its original intent. Second, section 27.007(c) states "[i]f the court awards sanctions under Section 27.009(b)…" (Emphasis added). Section 27.009(b) does not provide for any sanctions, only fees and costs to a nonmovant. Third, it would be an absurd result to require findings that the nonmovant brought the legal action for an *improper* purpose in support of a monetary award *in favor of* a nonmovant under section 27.009(b). On the other hand, it would be logical to make such findings in support of an award of sanctions to the movant under section 27.009(a)(2).

Monetary relief to a movant is mandatory (subject to the 2019 exception) even if the TCPA motion is granted only in part. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 442 (Tex. 2017). As discussed below, the movant should segregate the relevant fees accordingly.

The trial court can bifurcate disposition of (1) dismissal under the TCPA and (2) proof of the monetary amounts to be awarded. E.*g.*, *Mazaheri v. Tola*, No. 05-18-01367-CV, 2019 WL 3451188, at *6 (Tex. App.—Dallas July 31, 2019, pet. denied); *Day v. Fed'n of State Med. Boards of the United States, Inc.*, 579 S.W.3d 810, 824-25 (Tex. App.—San Antonio 2019, pet. denied); *see below*, Section IX.D.1. Moreover, a party is entitled to have a jury determine the amount of fees to be awarded. *Pisharodi v. Columbia Valley Healthcare Sys., L.P.*, No. 13-18-00364-CV, 2020 WL 2213951, at *7-10 (Tex. App.—Corpus Christi May 7, 2020, no pet. h.) (engaging in detailed analysis of the issue).

1. Amount of Attorneys' Fees.

A party seeking recovery of its attorney's fees under the TCPA must prove up those amounts just as it would in any other setting, using affidavits, invoices, and possibly live testimony. The most recent, comprehensive analysis of these standards is found in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 483 (Tex. 2019).

Although the TCPA uses only the term "reasonable" rather than "reasonable and necessary," the "claimant wish[ing] to obtain attorney's fees from the opposing party, … must prove that the requested fees are both reasonable and necessary." *Id*. at 489. "Both elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a prevailing party can shift to the non-prevailing party." *Id*. Under the TCPA, "[r]easonable" means "not excessive or extreme, but rather moderate or fair." *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).

The TCPA's use of the term "incurred" to describe the fees awardable "acts to limit the amount of fees the court may award, and a fee is incurred when one becomes liable for it." *Rohrmoos*, 578 S.W.3d at 489 (internal quotation omitted) (favorably citing *Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 299-300 (Tex. 2011) for the holding that it was appropriate to deny a pro se attorney's fees under an "incurred" statute because he "did not incur attorney's fees as that term is used in its ordinary meaning because he did not at any time become liable for attorney's fees"); *see also Cruz v. Van Sickle*, 452 S.W.3d 503, 524-25 (Tex. App.—Dallas 2014, pet. denied) (movant represented by pro bono counsel is

not entitled to fee recovery under TCPA because fees were not "incurred").

In *Rohrmoos*, the Court confirmed its intent for "the lodestar analysis to apply to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed." 578 S.W.3d at 498. "This base lodestar figure should approximate the reasonable value of legal services provided in prosecuting or defending the prevailing party's claim through the litigation process." *Id*. In "step two" of the analysis, the base amount can be adjusted up or down based on consideration of the relevant *Arthur Anderson* factors, to the extent such factors were not already considered for purposes of the "step one" or base calculation. *Id*. at 500 (citing *Arthur Andersen & Co. v. Perry Equip. Corp*., 945 S.W.2d 812 (Tex. 1997)).

"General, conclusory testimony devoid of any real substance will not support a fee award. Thus, a claimant seeking an award of attorney's fees must prove the attorney's reasonable hours worked and reasonable rate by presenting sufficient evidence to support the fee award sought." *Id*. at 501-02. "[B]illing records are strongly encouraged to prove the reasonableness and necessity of requested fees when those elements are contested." *Id*. at 502; *see also ADB Interest, LLC v. Wallace*, -- S.W.3d --, No. 01-18-00210-CV, 2020 WL 2787586, at *19-20 (Tex. App.—Houston [1st Dist.] May 28, 2020, MFET to file pet. granted) (engaging in detailed analysis of evidence presented by both sides on fees; affirming $125,000 award).

Practitioners seeking to establish fees with an affidavit under CPRC ch. 18 should also be mindful of amendments made to that statute, effective September 1, 2019, per H.B. 1693 (86th R.S.) (clarifying that an affidavit concerning cost and necessity of services is not evidence of, and does not support a finding of, the causation element of a civil action; revising the deadlines by which the party offering the affidavit or a counter affidavit must serve the document; and requiring written notice of that service to the clerk). *See Day v. Fed'n of State Med. Boards of the United States, Inc.*, 579 S.W.3d 810, 824-25 (Tex. App.—San Antonio 2019, pet. denied) (discussing use of chapter 18 affidavit in TCPA case).

"[A] claimant must segregate legal fees accrued for those claims for which attorneys' fees are recoverable from those that are not." *Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017). Recovery of attorney's fees under the TCPA must be segregated between fees incurred related to the claims that were successfully dismissed versus fees incurred related to claims that were not dismissed under the TCPA. *See Morales v. Barnes*, No. 05-18-00767-CV, 2020 WL 597346, at *2 (Tex. App.—Dallas Feb. 7, 2020, pet. filed) ("A party is not entitled to attorney's fees for claims that are not dismissed." Hence, "fee claimants must segregate between claims for which fees are recoverable and the claims for which fees are not, unless the claims are inextricably intertwined."); *Urguhart v. Calkins*, No. 01-17-00256-CV, 2018 WL 3352919 (Tex. App.—Houston [1st Dist.] July 10, 2018, no pet.) (trial court had discretion to reduce amount requested to eliminate fees incurred in non-TCPA proceedings).

When a movant prevails under the TCPA, the movant is entitled to recover a conditional award of appellate fees in addition to trial fees, assuming the movant presents sufficient proof of the requested fee amounts. *Joselevitz v. Roane*, No. 14-18-00172-CV, 2020 WL 1528020, at *7 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020, no pet.); *Johnson-Todd v. Morgan*, No. 17-09-00168 and 17-09-00194-CV, 2018 WL 6684562, at *7 (Tex. App.—Beaumont Dec. 20, 2018, pet. denied); *McIntyre v. Castro*, No. 13-17-00565-CV, 2018 WL 6175858, *20 (Tex. App.—Corpus Christi-Edinburg Sep. 6, 2018, pet. for writ of mandamus denied).

2. Amount of Sanctions.

The TCPA "gives the trial court broad discretion to determine what amount is sufficient to deter the party from bringing similar actions in the future." *Kinney v. BCG Attorney Search, Inc*., No. 03-12-00579-CV, 2014 WL 1432012, at *11 (Tex. App.—Austin Apr. 11, 2014, pet. denied). Not surprisingly, the amounts of sanctions awarded to successful movants under the TCPA have varied widely.

Even under the pre-amendment version of the statute, in which a sanctions award is mandatory, trial courts have discretion to award only a nominal amount of sanctions, such as $1.00, "[i]f the trial court determines [the nonmovant] is not likely to file a similar action." *Morales v. Barnes*, No. 05-18-00767-CV, 2020 WL 597346, at *4 (Tex. App.—Dallas Feb. 7, 2020, pet. filed); *see also Rich v. Range Res. Corp*., 535 S.W.3d 610, 613 (Tex. App.—Fort Worth 2017, pet. denied); *Weber v. Fernandez*, No. 02-18-00275-CV, 2019 WL 1395796, at *3 (Tex. App.—Fort Worth Mar. 28, 2019, no pet.). If the trial court denied sanctions altogether, it may support "an implied finding the plaintiff did not need to be deterred." *Morales*, 2020 WL 597346 at *4. As long as the implied finding is not an abuse of discretion, then the denial of sanctions is "non-reversible harmless error." *Id.*; *see also Joselevitz v. Roane*, No. 14-18-00172-CV, 2020 WL 1528020, at *7 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020, no pet.) (court did not abuse discretion in awarding $2.00 in sanctions; nonmovant did not need to use "three pages in his brief" to complain about the imposition of this nominal award);

Although some courts have considered the nonmovant's income as a factor in determining the proper amount of sanctions, nothing in the plain text of the statute requires that evidence of net worth or similar facts be considered. *See Pisharodi v. Columbia Valley Healthcare Sys., L.P.*, No. 13-18-00364-CV, 2020 WL 2213951, at *10 (Tex. App.—Corpus Christi May 7, 2020, no pet. h.) (collecting cases); *see also ADB Interest, LLC v. Wallace*, -- S.W.3d --, No. 01-18-00210-CV, 2020 WL 2787586, at *21-22 (Tex. App.—Houston [1st Dist.] May 28, 2020, MFET to file pet. granted) (affirming $125,488 sanctions award following detailed analysis that considered: "(1) the plaintiff's annual net profits; (2) the amount of attorney's fees incurred; (3) the plaintiff's history of filing similar suits; and (4) any aggravating misconduct, among other factors").

Other opinions show the parameters of the sanctions amounts awarded and the relevant factors considered. *See Landry's Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 60 (Tex. App.—Houston [14th Dist.] 2018, pet. denied, MFR pending) (in awarding TCPA sanctions, court should consider *Low* factors as guideposts; award of $450,000 was arbitrary but $175,000—an amount equal to the fee award—would be reasonable); *id*. at *79-82 (Jewell, J., concurring and dissenting) (expressing disagreement that the chapter 10 factors should apply but, even if they did, concluding that nothing more than nominal sanctions should be awarded on the record presented); *Batra v. Covenant Health Sys*., 562 S.W.3d 696 (Tex. App.—Amarillo Oct. 9, 2018, pet. denied) (trial court need not find that nonmovant was abusing the legal process before awarding sanctions); *Urguhart v. Calkins*, No. 01-17-00256-CV, 2018 WL 3352919 (Tex. App.—Houston [1st Dist.] July 10, 2018, no pet.) (sanctions award of $2,000—where $235,000 was requested—was not an abuse of discretion based on conflicting evidence); *McGibney v. Rauhauser*, 549 S.W.3d 816, 836 (Tex. App.—Fort Worth 2018, pet. denied) (reversing $150,000 award "based on the meager evidence before" the court to support it; rejecting appellee's argument that amount of award was supported by application of the *Gore* Guideposts governing excessiveness of punitive damage awards).

B. Awards to Successful Non-Movants.

The TCPA provides the trial court discretion to award fees and costs to a nonmovant in certain circumstances. Per CPRC § 27.009(b), "[i]f the court finds that a motion to dismiss filed under this chapter is frivolous **or** solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party." This provision was not amended in 2019.

If seeking fees/costs under this section, best practices are to prepare evidence and make a specific argument in support of the amounts requested; obtain a ruling on your request, and have that ruling (and the required findings, if successful) included in the same order denying the TCPA motion. The evidence required to support an award of fees under this provision is the same as that required for movants. *See above*, Section VIII.A.1.

To preserve error on the denial of an award under Section 27.009(b), a nonmovant must obtain an adverse ruling from the trial court on its request for fees/costs against the movant. Although an implied ruling may suffice, it cannot be inferred from an order denying the TCPA motion. *In re Estate of Calkins*, 580 S.W.3d 287, 300 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

If a nonmovant is denied fees/costs under section 27.009(b) and that denial is contained within the TCPA order, then the nonmovant should perfect a cross-appeal of that issue and argue interlocutory jurisdiction under CPRC section 51.014(a)(12) extends to this portion of the order. *See Weller v. MonoCoque Diversified Interests, LLC*, No. 03-19-00127-CV, 2020 WL 3582885, at *4 (Tex. App.—Austin July 1, 2020, no pet. h.) (exercising jurisdiction on this basis); *Perlman v. EKLS Firestopping & Constr., LLC*, No. 05-18-00971-CV, 2019 WL 2710752, at *5 (Tex. App.—Dallas June 28, 2019, no pet.) (by failing to perfect cross-appeal, nonmovant waived request for fees). The decision to award fees/costs under this section is reviewed for an abuse of discretion. *Weller*, 2020 WL 3582885 at *5.

Trial courts are required to make an express finding of "frivolous" and/or "solely intended to delay" to support an award under section 27.009(b). *Id*. ("Given the fact that the trial court did not make and MDI did not seek the required findings that could support attorney's fees under section 27.009(b), we decline to hold as a matter of law that appellants' TCPA motion utterly lacked a legal or factual basis or was filed solely with an intent to delay the proceedings."); *see also Wong v. Ream*, No. 11-19-00302-CV, 2020 WL 1887695, at *5-6 (Tex. App.—Eastland Apr. 16, 2020, no pet.) (findings that TCPA motion was untimely and "not well taken," and that movant's request for extension of time was frivolous, would not support award under section 27.009(b) in the absence of statutorily-required findings about the TCPA motion itself; court rendered a take-nothing judgment to nonmovants); but see *eQuine Holdings, LLC v. Jacoby*, No. 05-19-00758-CV, 2020 WL 2079183, at *6-7 (Tex. App.—Dallas Apr. 30, 2020, pet. filed) (where trial court awarded fees/costs to nonmovant but failed to make required findings,

appellate court reversed and remanded for further proceedings to do so).[3]

Establishing that a TCPA motion was "frivolous or solely intended to delay has been a difficult standard to satisfy. *E.g.*, *Sullivan v. Texas Ethics Commission*, 551 S.W.3d 848, 857-58 (Tex. App.—Austin 2018, pet. denied) (Trial court found the motion was frivolous and solely intended to delay. The Third Court reversed, holding the motion was not frivolous because the court "[could] not say, as a matter of law, that [it] had no basis in law or fact"; and that, "while [several] circumstances might support a finding that delay was a factor in Sullivan's decision to file the motion, they do not support a reasonable finding that delay was the only factor."); *see also Mulcahy v. Cielo Prop. Group, LLC*, No. 03-19-00117-CV, 2019 WL 4383960, at *4 (Tex. App.—Austin Sept. 13, 2019, pet. denied) (although court affirmed denial of TCPA motion, it could not say the motion had "no basis in law or fact, and the district court therefore did not abuse its discretion in declining to award Cielo the fees and costs incurred in defending against the motion"); *Breakaway Practice, LLC v. Lowther*, No. 05-18-00229-CV, 2018 WL 6695544, *4 (Tex. App.—Dallas Dec. 20, 2018, pet. denied) (motion was not frivolous just because movant argued for an improper standard of proof related to the prima facie case).

The first opinion affirming an award under section 27.009(b) on its merits was not issued until mid-2019. In *Lei v. Natural Polymer Internat'l*, No. 05-18-01041-CV, 2019 WL 2559756 (Tex. App.—Dallas June 21, 2019, no pet.), the defendants moved for dismissal of all claims under the TCPA after the parties had engaged in discovery and the trial court had granted a temporary injunction, determining plaintiffs had proven a probable right to relief on those claims. Consequently, defendants knew before filing the TCPA motions that plaintiffs could establish a prima facie case. *Id*. at *8. On this basis, the trial court had discretion to conclude the motion was frivolous and award fees to the plaintiff/nonmovant. *Id*.

More recently, such an award was affirmed in *Borderline Mgmt, LLC v. Ruff*, No. 11-19-00152-CV, 2020 WL 1061485, at *9 (Tex. App.—Eastland Mar. 5, 2020, pet. denied). The court held the trial court did not abuse its discretion in finding that Borderline filed the TCPA motion solely for purposes of delay based on evidence that its principal had been found by other courts to be "engaged in a pattern of delay and obstruction," and Borderline had engaged in several other procedures that caused delay of the case. However, the record lacked sufficient evidence to support the amount of fees awarded because nonmovant provided only a summary affidavit from counsel "[w]ithout details about the work done and how much time was spent on each task," without supporting billing records, and without proper segregation of fees. *Id*. at *10 (remanding for further proceedings on fee award) (citing *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 483 (Tex. 2019).

IX. PROCEDURE: KNOW THE RULES; AVOID THE LANDMINES.

The importance of understanding how the TCPA's swift deadlines and unique procedures cannot be overstated. As counsel for a party asserting a claim, failure to do so can result in the loss of your client's ability to pursue relief, potentially with an adverse award of attorney's fees, costs, and sanctions. As counsel for a party defending a claim, failure to understand the rules can result in a missed opportunity to obtain an early dismissal and monetary relief in favor of your client.

A. Deadlines.

The TCPA sets forth specific deadlines (with caveats) for filing the motion, setting a hearing, and obtaining a ruling. In 2019, deadlines were added for serving notice of the hearing and filing the response.

"If a party fails to satisfy these requirements, then it forfeits the statute's protections." *Wightman-Cervantes v. Hernandez*, No. 02-17-00155-CV, 2018 WL 798163, *4 (Tex. App.—Fort Worth Feb. 9, 2018, pet. denied); *see also Braun v. Gordon*, No. 05-17-00176-CV, 2017 WL 4250235, *1 (Tex. App.—Dallas Sept. 26, 2017, no pet.).

1. Motion.

A TCPA motion must be filed "on or before 60 days from the date of service of the legal action." CPRC § 27.003(b). This deadline may be extended upon a showing of good cause by the movant. *Id*. Also, under the 2019 amendments, "parties, upon mutual agreement, may extend the time to file a motion under this section." CPRC § 27.003(b).

Many courts have that the 60-day deadline does not re-start upon the filing of an amended pleading that does not alter the essential nature of the claims asserted. *E.g.*, *Maldonado v. Franklin*, No. 04-18-00819-CV, 2019 WL 4739438, at *3-6 (Tex. App.—San Antonio Sept. 30, 2019, no pet.) (engaging in

[3] Under the 2019 amendments, if the trial court makes an award under this provision, it might also be required to issue findings under section 27.007(a). But as discussed in Section VIII.A above, the reference in section 27.007(a) to "sanctions under Section 27.009(b)" appears to be a legislative typo, which should have referenced section 27.009(a)(2) instead.

detailed comparison of original and amended pleadings to determine which claims were newly-asserted such that portion of TCPA motion was timely).

However, there has been much debate over what constitutes a "new" cause of action for purposes of restarting the TCPA motion-filing deadline. This issue is currently pending before the Texas Supreme Court in four matters: (1) No. 19-1112, merits briefs requested, from *Montelongo v. Abrea*, No. 04-19-00301-CV, 2019 WL 5927742 (Tex. App.—San Antonio Nov. 13, 2019, pet. filed); (2) No. 19-1122, briefs on the merits filed, from *Kinder Morgan SACROC, LP v. Scurry County*, No. 11-19-00097-CV, 2019 WL 5800308, at *8 (Tex. App.—Eastland Nov. 7, 2019, pet. filed); (3) No. 19-0992, briefs on the merits filed, from *ETC Texas Pipeline, Ltd. v. Addison Expl. & Dev., LLC*, 582 S.W.3d 823 (Tex. App.—Eastland 2019, pet. filed); and (4) No. 20-0047 & -48, from *Chandni, Inc. v. Patel*, No. 08-18-00107-CV, 2019 WL 6799747 & 2019 WL 6799759 (Tex. App.—El Paso Dec. 13, 2019, pet. denied, MFR pending). The petition for review in *Montelongo* collects many opinions decided on this issue between 2014-2020 in a chart attached as Appx. D thereto.

In an interesting variation of this issue, the Eastland Court recently held that the granting of a special exception, which caused plaintiff to clarify she was *not* asserting certain claims against defendant, did not toll the deadline to file a motion until the amended pleading was filed. Hence, the motion was untimely. *Borderline Mgmt, LLC v. Ruff*, No. 11-19-00152-CV, 2020 WL 1061485, at *5 (Tex. App.—Eastland Mar. 5, 2020, pet. denied).

Waiving or accepting service under TRCP 119, or making a general appearance under TRCP 120, has the same effect as being served with citation and, hence, may trigger the 60-day motion deadline even in the absence of actual service. *Skidmore v. Gremillion & Co. Fine Art*, Inc., No. 01-18-00829-CV, 2019 WL 1119401, at *4-5 (Tex. App.—Houston [1st Dist.] Mar. 12, 2019, pet. denied) (TRCP 120); *Grant v. Pivot Tech. Sols., Inc*., 556 S.W.3d 865, 885-86 (Tex. App.—Austin 2018, pet. denied) (TRCP 119).

For purposes of extending the motion deadline, the Third Court relied on the meaning of "good cause" used "in other contexts": a failure caused by "accident or mistake, not intentional [conduct] or the result of conscious indifference." Under this meaning, movant failed to show good cause to extend his motion-filing deadline where he provided no explanation for why he could not have sought dismissal sooner. *Campone v. Kline*, No. 03-16-00854-CV, 2018 WL 3652231, at *6 (Tex. App.—Austin Aug. 2, 2018, no pet.); *see also Torres v. Pursuit of Excellence, Inc*., No. 05-18-00676-CV, 2019 WL 2863866 (Tex. App.—Dallas July 2, 2019, pet. denied) (date on certificate of service is prima facie proof of when the deadline began running, and a movant claiming that a "technical difficulty" prevented timely filing must put on evidence to overcome the presumed deadline shown by that certificate).

The First Court of Appeals held that, where the motion was one day late and the trial court expressly noted in the order that the motion was timely filed, it constituted an implied finding of good cause. *Schimmel v. McGregor*, 438 S.W.3d 847, 856 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). On the other hand, the Ninth Court held that, where the motion was one day late and the movant did not request an extension or make any effort to demonstrate good cause for his delay, the trial court properly denied his TCPA motion on the basis of untimeliness. *Shiflet v. Port Arthur Patrolmen's Hunting Club*, No. 09-19-00012-CV, 2019 WL 4064573, at *1 (Tex. App.—Beaumont Aug. 29, 2019, no pet.). But in a more recent opinion related to that matter, the Ninth Court held that there was good cause for additional defendants to "join" a timely-filed TCPA motion based on the same arguments. *Castille v. Port Arthur Patrolmen's Hunting Club*, No. 09-18-00395-CV, 2020 WL 1879475, at *4 (Tex. App.—Beaumont Apr. 16, 2020, no pet. h.).

A movant who fails to (1) expressly request a continuance of the motion deadline based on good cause and/or (2) does not obtain a ruling on its request, waives the argument. *See Maldonado v. Franklin*, No. 04-18-00819-CV, 2019 WL 4739438, *6 (Tex. App.—San Antonio Sept. 30, 2019, no pet.) (denying movant's request that the appellate court grant an extension based on her original request in that forum on the basis of good cause; the reference to "court" in Section 27.003(b) is limited to the trial court, and movant waived request for an extension there); *Miller Weisbrod, L.L.P. v. Llamas-Soforo*, 511 S.W.3d 181, 194 (Tex. App.—El Paso 2014, no pet) (failing to ask explicitly for an extension results in a waiver of the ability to file a motion to dismiss beyond the 60-day deadline).

2. Notice of Hearing.

The prior version of the statute did not include a "notice of hearing" requirement. However, the 3-day default under TRCP 21 and any local rule remain applicable. Parties should demonstrate professional courtesy in coordinating the hearing date and providing fair notice.

Effective September 1, 2019, the statute was amended to add a notice of hearing requirement: "The moving party shall provide written notice of the date and time of the hearing under Section 27.004 not later than 21 days before the date of the hearing unless

otherwise provided by agreement of the parties or an order of the court." CPRC § 27.003(d).

Although there are not yet any appellate opinions interpreting this new language, you can anticipate that summary-judgment jurisprudence will be instructive because the requirement under the TCPA is now similar to TRCP 166a(c) ("Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing."). *See, e.g.*, *Vertex Servs., LLC v. Oceanwide Houston, Inc.*, No. 01-18-00125-CV, 2019 WL 3783115, at *7 (Tex. App.—Houston [1st Dist.] Aug. 13, 2019, no pet.) (granting summary judgment on grounds added in reply would deprive nonmovant of hearing and mandatory 21–day notice of hearing required by Rule 166a(c), which serves the purpose of providing nonmovant adequate notice of all claims that may be summarily disposed of and the specific grounds on which the movant relies).

3. Response.

The prior version statute did not contain a deadline by which the nonmovant's response must be filed. Hence, for actions filed before September 1, 2019, the nonmovant may file its response any time prior to the hearing, including on the day of the hearing. *Brown Sims, P.C. v. L.W. Matteson, Inc.*, 594 S.W.3d 573, 588 (Tex. App.—San Antonio 2019, no pet.) (nonmovants were entitled to file their response with new evidence attached the day before the hearing); *MVS Int'l Corp. v. Int'l Advert. Sols., LLC*, 545 S.W.3d 180 (Tex. App.—El Paso 2017, no pet.) (because legislature did not create a response deadline, court declined to do so by judicial fiat). However, local rules may require an earlier deadline, and trial courts maintain broad discretion to control their dockets, which may include requiring parties to file a TCPA response by an earlier deadline. *See Mission Wrecker Serv., S.A. v. Assured Towing, Inc.*, No. 04-17-00006-CV, 2017 WL 3270358, *3 (Tex. App.—San Antonio Aug. 2, 2017, pet. denied) (trial court did not abuse discretion in sustaining objection that response filed 15 minutes prior to hearing was untimely because the absence of a deadline cannot be used as a tool to ambush opposing counsel).

Effective September 1, 2019, the statute was amended to add a response deadline: "A party responding to the motion to dismiss shall file the response, if any, not later than seven days before the date of the hearing on the motion to dismiss unless otherwise provided by an agreement of the parties or an order of the court." CPRC § 27.003(e).

Although there are not yet any appellate opinions interpreting this new language, you can anticipate that summary-judgment jurisprudence will be instructive because the requirement under the TCPA is now similar to TRCP 166a(c) ("Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response.").

4. Reply.

The TCPA does not include any requirement that the movant file a reply in support of its motion nor does it set a deadline for doing so. Because the statute previously allowed the response to be filed on the day of the hearing, it was not feasible to file a reply in most cases. Now that the response must be filed 7-days before the hearing, reply briefing will become more common. The trial court maintains discretion to set a reply deadline by individual case and/or by local rule.

5. Hearing.

The TCPA hearing must originally be "set" on or before 60 days from the date of service of the motion. CPRC § 27.004(a). The original setting may be continued for the hearing "to occur" up to 90 days later if: (a) docket conditions of the court require a later hearing; (b) good cause is shown; or (c) the parties agree. *Id.* § 27.004(a)-(b). Additionally, the hearing may be extended "to occur" up to 120 days later if the court grants a request to conduct discovery limited to the TCPA motion. *Id.* §§ 27.004(c); 27.006(b).

These provisions were not amended in 2019. However, an amendment was made to the court's deadline to rule on the motion to now calculate the deadline from the date the hearing "concludes." *Id.* § 27.005(a). This indicates the hearing may be recessed and reconvened at a later date. If so, the movant should ensure the record is clear about the applicable hearing date(s) and ruling deadline. *See also below*, Sections IX.D.1-2 (discussing the ruling deadline).

"A TCPA movant forfeits the motion if it fails to request and obtain a timely hearing.… [I]f the movant makes reasonable efforts to obtain a timely hearing" but the trial court refuses to conduct a hearing, then "[m]andamus will issue to correct a trial court's refusal." *In re Zidan*, No. 05-20-00595-CV, 2020 WL 4001134, at *6 (Tex. App.—Dallas July 15, 2020, orig. proceeding). Additionally, if the trial court erroneously abates a case in a manner that prevents a movant from having a timely hearing on its TCPA motion, then the Dallas Court of Appeals will grant mandamus relief, ordering the trial court to vacate its abatement order, consider the erroneous order as "good cause" for extending the hearing date, and reinstate the TCPA proceeding. *Id.*; *but see id.* at *8 (Bridges, J., dissenting) (would deny mandamus based on conclusion that abatement was proper).

The Dallas Court of Appeals recently addressed several additional issues related to the timeliness of a hearing, concluding in two split opinions (by the same

panel) that the hearings were untimely and, thus, the TCPA motions were forfeited. *Walker v. Pegasus Eventing, LLC*, No. 05-19-00252-CV, 2020 WL 3248476 (Tex. App.—Dallas June 16, 2020, no pet. h.) (revised opinion issued after panel *sua sponte* vacated prior opinion); *Woods Capital Enterprises, LLC v. DXC Tech. Services LLC*, No. 05-19-00380-CV, 2020 WL 4344912 (Tex. App.—Dallas July 29, 2020, no pet. h.) (concurrence at 2020 WL 4345723). In both matters, Justices Pedersen and Reichek were in the majority, with Justice Carlyle concurring/dissenting.

First, the *Walker* majority held that even if an amended pleading could have restarted the deadline for a TCPA motion, no new motion was filed, so the hearing deadline ran from the original motion service date. 2020 WL 3248476 at *7. Second, the majority held the service date should be calculated from the date the motion is served on the nonmovant, even if service is not effectuated on all parties to the case at that time. *Id*. Third, the majority held that where nonmovant's counsel did not oppose the rescheduled/extended hearing date, the "invited error" doctrine did not prevent nonmovant from later complaining about the untimeliness of the hearing. *Id*. Fourth, the majority held the parties' Rule 11 agreement to conduct additional discovery did not extend the hearing deadline in the absence of a court order allowing for a continuance to conduct discovery under section 27.004(c). *Id*. at *8.

Concurring and dissenting in *Walker*, Justice Carlyle criticized the majority for taking too narrow a view of the statute and ignoring distinctions from prior cases. *Id*. at *9. He would have concluded that nothing in the plain text of sections 27.004(c) and 27.006(b), under which the trial court may continue the hearing to "allow" discovery, requires a specific order for that purpose. *Id*. at *9-10. Justice Carlyle cautioned that, "[w]e should be loath to dispose of our cases on procedural grounds when a creditable interpretation exists to get to the merits, though it continues to happen," and noted that the majority's holding "produces cheap victories for parties willing to engage in "gotcha" litigation, while furthering none of the legislative purposes underpinning that prior case law." *Id*. at *11-12.

Just over a month later, in *Woods*, the majority again concluded that the parties' agreement to conduct discovery did not suffice to extend the hearing deadline, and that the invited error doctrine did not bar nonmovant's argument about the hearing's untimeliness. 2020 WL 4344912 at *4. The majority also noted that movant's counsel expressly passed the hearing, when it was originally set within the statutory deadline. *Id*.[4]

In a separate concurrence, Justice Carlyle noted that the "record here provides an even stronger basis [than in *Walker*] to conclude the court allowed discovery because the court said the parties would have additional time to complete discovery, and at the subsequent hearing expressed its belief that it had granted a continuance for this purpose. 2020 WL 4345723 at *1. "By any meaning of the word, the trial court *allowed* discovery." *Id*. "At heart, we should not read our laws in ways that encourage parties to game the system, most especially when there is a sensible reading that prohibits the gamesmanship." *Id*. at *2.

The clear lesson for movants under *Walker* and *Woods* is to get a written order confirming any extension on the hearing deadline, whether it be to allow for discovery under section 27.004(c), or for one of the grounds set forth in sections 27.004(a) and (b). These opinions also provide language relevant to statutory construction issues under the TCPA in a broad variety of contexts.

When the hearing deadline falls on a weekend, conducting the hearing on the following Monday is timely under the Code Construction Act, Tex. Gov't Code § 311.014(b), and TRCP 4. *Forget About It, Inc. v. BioTE Med., LLC*, No. 05-18-01290-CV, 2019 WL 3798180, at *4 (Tex. App.—Dallas Aug. 13, 2019, pet. denied).

Although the trial court has discretion to conduct a hearing by *submission*, the statute requires that movant timely set its TCPA motion for an *oral* hearing, at least according to the Fort Worth Court of Appeals. *Wightman-Cervantes v. Hernandez*, No. 02-17-00155-CV, 2018 WL 798163, at *3 (Tex. App.—Fort Worth Feb. 9, 2018, pet. denied). Hence, in the absence of an agreement between the parties or permission expressly granted by the trial court to conduct the hearing by written submission, the movant failed to comply with the statutory hearing deadline by not setting an oral hearing within 60-days of filing his motion. *Id*.; *but see Weber v. Fernandez*, No. 02-18-00275-CV, 2019 WL 1395796, *3 (Tex. App.—Fort Worth Mar. 28, 2019, no pet.) (noting

[4] The majority also held its conclusion was not impacted by a recent decision, *In re Panchakarla*, -- S.W.3d --, No. 19-0585, 2020 WL 2312204 (Tex. May 8, 2020) (orig. proceeding) (per curiam) (holding trial court can reconsider ruling so long as plenary power exists, as discussed further below in Section IX.D.2). The majority construed *Pancharkarla's* holding as applying to only an order granting a TCPA motion but the opinion states, "the TCPA is silent about a trial court's authority to reconsider *either* a timely issued ruling granting a TCPA motion to dismiss or a *timely order denying such a motion* when no interlocutory appeal is pending. … [W]e hold that the TCPA does not impose a 30-day restriction on a trial court's authority to vacate a ruling on a TCPA motion to dismiss."

without analysis that the TCPA hearing was conducted by submission).

Trial courts cannot *sua sponte* rule on a TCPA motion in the absence of a hearing, even if the trial court believes based on its initial review that the motion is "frivolous or solely intended to delay." *Reeves v. Harbor Am. Cent.*, Inc., 552 S.W.3d 389, 394-95 (Tex. App.—Houston [14th Dist.] June 7, 2018, no pet.) (trial court cannot take "a short-cut around the rest of the statute"). There, the trial court denied the TCPA motion before the nonmovant even filed a response, stating that no briefing or argument was necessary because the court perceived the motion as being used to avoid discovery, which had previously been agreed to per Rule 11 and ordered by the court. The Fourteenth Court reversed and remanded for consideration of the TCPA motion on its merits because trial courts must consider the evidence presented and analyze all three steps of the burden-shifting framework before ruling. *Id*.

Although a trial court cannot refuse to conduct a hearing, the burden is on the movant to timely request that the hearing be conducted. Where a movant made reasonable requests for the hearing to be conducted and the trial court refused to comply, mandamus relief was granted. *In re Herbert*, No. 05-19-01126-CV, 2019 WL 4509222 (Tex. App.—Dallas Sept. 19, 2019, orig. proceeding). On the other hand, where nothing in the record showed that the trial court actually denied a setting or that the movant took action to object to the lack of a hearing, the movant waived any right to pursue dismissal under the TCPA. *Vodicka v. Tobolowsky*, No. 05-17-00727-CV, 2019 WL 1986625, at *5 (Tex. App.—Dallas May 6, 2019, no pet.); *see also RPM Servs. v. Santana*, No. 06-19-00035-CV, 2019 WL 4064576 (Tex. App.—Texarkana Aug. 29, 2019, no pet. h.) (movant forfeited rights under TCPA by failing to timely set a hearing; without a hearing, motion was not overruled by operation of law, and appellate court had nothing to review on interlocutory appeal); *Wightman-Cervantes v. Hernandez*, No. 02-17-00155-CV, 2018 WL 798163, at *4 (Tex. App.—Fort Worth Feb. 9, 2018, pet. denied) (where movant failed to seek continuance of the hearing under any ground allowed by the statute and instead asked court to cancel the previously-set hearing, movant forfeited rights under TCPA).

B. Discovery.

Once a TCPA motion is filed, all discovery is automatically suspended unless the court allows "specified and limited discovery relevant to the motion" based on a showing of good cause. CPRC §§ 27.003(c), .006(b); *see In re Spex Grp. US LLC*, No. 05-18-00208-CV, 2018 WL 1312407 (Tex. App.—Dallas Mar. 14, 2018, orig. proceeding) (filing a TCPA motion automatically stays discovery only, not other trial court proceedings; the trial court may grant a TRO while the TCPA motion is pending). These provisions were not amended in 2019.

"If the court allows discovery under Section 27.006(b), then the court **may** extend the hearing date to allow discovery under that section, but in no event may the hearing occur more than 120 days after the service of the motion." CPRC § 27.004(c). This provision was not amended in 2019. However, you should be aware of two recent Dallas Court of Appeals opinions interpreting this provision, as discussed above in Section IX.A.5.

It is not sufficient for the nonmovant to make a "contingent" request for discovery filed contemporaneous with its TCPA response to be heard at the same time as the TCPA motion. The TCPA "does not authorize the trial court to permit discovery after concluding that the plaintiff's evidence falls short." *Landry's Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 69 (Tex. App.—Houston [14th Dist.] 2018, pet. denied, MFR pending). Hence, the trial court "did not abuse its discretion in denying the conditional motion for discovery." *Id*.

The majority in *Mustafa v. Pennington*, No. 03-18-00081-CV, 2019 WL 1782993 (Tex. App.—Austin Apr. 24, 2019, no pet.) held that the trial court did not err in denying discovery because the nonmovant could not establish a prima facie case on his claim. *Id*. at *4. Finding this somewhat circular (because the purpose of discovery is to enable a nonmovant to meet that burden), the concurring opinion clarified that discovery was properly denied because nonmovant could not assert a viable claim as a matter of law in any event. *Id*. (J. Goodwin, concurring).

The scope of discovery is not defined in the statute, and has not been well-defined by the courts. *In re Spex*, 2018 WL 1312407 at *4-5. "Discovery is relevant to the motion to dismiss if it seeks information related to the allegations asserted in the motion. Some merits-based discovery may also be relevant, however, to the extent it seeks information to assist the non-movant to meet its burden to present a prima facie case for each element of the non-movant's claims to defeat the motion to dismiss." *Id*. Although requests for production and deposition testimony (limited to certain topics and a reduced duration) have been permitted, "[a] party would [] not need multiple or lengthy depositions or voluminous written discovery in order to meet the low threshold to establish a prima facie case." *Id*. (holding trial court allowed overly-broad discovery; remanding with instructions to conduct another hearing and narrow the scope of the permitted discovery for TCPA purposes).

Several opinions have considered the scope of discovery allowed under section 27.006(b), reaching

mixed results. *See Norwich v. Jack N. Mousa, Ltd*., No. 11-19-00339-CV, 2020 WL 2836789, at *6 (Tex. App.—Eastland May 29, 2020, pet. filed) (affirming order that denied discovery from several non-parties, denied the deposition of movant, and limited the scope of written discovery from movant); *ADB Interest, LLC v. Wallace*, -- S.W.3d --, No. 01-18-00210-CV, 2020 WL 2787586, at *17-18 (Tex. App.—Houston [1st Dist.] May 28, 2020, MFET to file pet. granted) (affirming order that permitted movant's deposition but denied written discovery including 62 RFAs, 24 multi-part interrogatories, and 39 RFPs covering topics beyond the scope of the claim at issue in the TCPA motion); *Brown Sims, P.C. v. L.W. Matteson, Inc*., 594 S.W.3d 573 (Tex. App.—San Antonio 2019, no pet.) (trial court did not abuse its discretion in allowing three depositions, limited in scope, and tailored to topics relevant to the motion); *Lane v. Phares*, 544 S.W.3d 881, 889 n.1 (Tex. App.—Fort Worth 2018, no pet.) (three hour deposition of the defendant/movant was permitted); *In re IntelliCentrics, Inc*., No. 02-18-00280-CV, 2018 WL 5289379, *3-7 (Tex. App.—Fort Worth, Oct. 25, 2018, orig. proceeding) (scope of discovery is shaped by the scope of the pleadings; because movant opted to broadly characterize plaintiff's claims as being based on defendant's protected activities under the TCPA, the defendant could not simultaneously attempt to narrow the scope of the claims for purposes of limiting discovery); *In re SSCP Mgmt., Inc*., 2019 WL 1758502 (Tex. App.—Fort Worth Apr. 22, 2019, orig. proceeding) (trial court abused its discretion in permitting overly-broad discovery, despite fact that the TCPA motion challenged every single element of every single claim pled).

Also related to appellate review, in *Baumgart v. Archer*, 581 S.W.3d 819, 829-30 (Tex. App.—Houston [1st Dist.] 2019, pet. denied), the court held that it was not reversible error for the trial court to deny nonmovant's request for discovery in a defamation case where the alleged statement underlying nonmovant's claim "on its face" was not capable of a defamatory meaning. Hence, the denial of discovery "probably did not cause the rendition of an improper judgment." *Id*.

In a similar opinion showing a subtle but important distinction, the majority in *Mustafa v. Pennington*, No. 03-18-00081-CV, 2019 WL 1782993 (Tex. App.—Austin Apr. 24, 2019, no pet.) held that the trial court did not err in denying discovery because the nonmovant could not establish a prima facie case on his claim. *Id*. at *4. Finding this somewhat circular (because the purpose of discovery is to enable a nonmovant to meet that burden), the concurring opinion clarified that discovery was properly denied because nonmovant could not assert a viable claim as a matter of law in any event. *Id*. (J. Goodwin, concurring).

PRACTICE TIPS for the nonmovant:

- Gather as much supportive evidence as possible prior to filing a "legal action" to ensure you can establish a prima facie case ("PFC") if necessary.
- If a TCPA motion is filed against your client, immediately consider whether you need discovery to support your PFC. If so, file a motion to conduct discovery on an expedited schedule and possibly with court supervision to prevent delay of objections, etc. Set it for a hearing as soon as possible. Do not wait to request discovery as part of your TCPA response.
- To preserve any error arising from the court's denial of your request for discovery, demonstrate in your motion exactly what discovery you need, and provide argument about why the discovery is necessary and how you will be harmed if your request is denied. Unless you can demonstrate harm on appeal, any resulting error will not be a basis for reversal.
- If the movant improperly stonewalls your discovery efforts, consider whether movant's conduct supports a request under CPRC § 27.009(b) for costs and fees based on the TCPA motion being frivolous or intended to delay.

C. Evidentiary Issues.

The prior version of the statute instructed trial courts regarding "Evidence," that, "[i]n determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." CPRC § 27.006(a) (former version).

Several amendments were made effective September 1, 2019: (1) the title changed to "Proof"; (2) language was added to clarify that such proof should be considered in determining both Step 1 (*i.e*., whether the legal action "is subject to" dismissal) and Steps 2 and 3 (*i.e.,* whether dismissal should be granted); and (3) language was added to clarify that a court may also consider evidence akin to that in summary-judgment practice.

In full, Section 27.006(a) now reads: "Proof: In determining whether a legal action is subject to or should be dismissed under this chapter, the court shall consider the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based."

Despite the prior version's limited reference to "pleadings" and "affidavits," courts have routinely

considered documentary evidence and the products of any permitted discovery (such as deposition transcripts, written discovery responses, etc.) that are attached to and specifically incorporated in the TCPA motion/response. *E.g.*, *Norwich v. Jack N. Mousa, Ltd.*, No. 11-19-00339-CV, 2020 WL 2836789, at *6 (Tex. App.—Eastland May 29, 2020, pet. filed) (considering pleadings, declarations, and affidavits, and all attachments to each); *Security Serv. Fed. Credit Union v. Rodriguez*, -- S.W.3d. --, No. 08-19-00154-CV, 2020 WL 1969399, at *5-6 (Tex. App.—El Paso Apr. 24, 2020, no pet. h.) (considering affidavits and attached deposition transcripts). The best practice is to prove up the attached evidence via affidavits. *But see Maldonado v. Franklin*, No. 04-18-00819-CV, 2019 WL 4739438, *9 n.4 (Tex. App.—San Antonio Sept. 30, 2019, no pet.) (allowing use of unsworn declaration instead of sworn affidavit because CPRC § 132.001 does not exclude TCPA motions from permissible uses).

The Thirteenth Court of Appeals noted a split in authority about whether live testimony is permitted at a TCPA hearing but, without deciding the issue, assumed the testimony was impermissible and did not consider it on appeal. *Pisharodi v. Columbia Valley Healthcare Sys., L.P.*, No. 13-18-00364-CV, 2020 WL 2213951, at *6 n.9 (Tex. App.—Corpus Christi May 7, 2020, no pet. h.)

Relatedly, trial courts are authorized in TCPA proceedings to review and rule on evidentiary objections just as in any other proceeding. And following the 2019 amendments incorporating summary-judgment standards, practitioners should be diligent in making and preserving evidentiary objections. *See Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370 (Tex. 2019) (applying Texas Rules of Evidence 602, 801, and 802 to affidavit, concluding it contained inadmissible hearsay); *West v. Quintanilla*, 573 S.W.3d 237, 249 (Tex. 2019) (parol evidence rule did not preclude proof of a collateral agreement in satisfaction of prima facie case that liens were false); *Palladium Metal Recycling, LLC v. 5G Metals, Inc.*, No. 05-19-00482-CV, 2020 WL 4333538, at *6 & n.12 (Tex. App.—Dallas July 28, 2020, no pet. h.) (party waived evidentiary objections by failing to obtain a ruling, noting distinction between form and substance objections); *Maldonado*, 2019 WL 4739438 at *9 n.4 (evidentiary objections to hearsay and speculation were waived by failing to obtain a ruling); *Mazaheri v. Tola*, No. 05-18-01367-CV, 2019 WL 3451188, at *5-6 (Tex. App.—Dallas July 31, 2019, pet. denied) (trial court did not abuse discretion in striking affidavits for lack of relevancy, personal knowledge, and expert qualifications); *Pierce v. Brock*, No. 01-18-00954-CV, 2019 WL 3418511 (Tex. App.—Houston [1st Dist.] July 30, 2019, no pet.) (evidence barred by mediation privilege or that was inadmissible hearsay could not support movant's burden at Step 1); *Darnell v. Rogers*, No. 08-17-00067-CV, 2019 WL 2897489, at *4 (Tex. App.—El Paso July 5, 2019, no pet.) (evidence that is speculative has no probative value for TCPA purposes).

The Dallas Court held that evidence cannot be presented after the TCPA hearing. *Bass v. United Dev. Funding, L.P.*, No. 05-18-00752-CV, 2019 WL 3940976, at *26-27 (Tex. App.—Dallas Aug. 21, 2019, pet. denied) (trial court did not err in striking supplemental evidence submitted after the TCPA hearing; allowance of continued filings would interfere with court's statutory deadline to rule on the motion).

D. Ruling in Trial Court.

1. Deadline to Rule.

"The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion concludes." CPRC § 27.005(a). The word "concludes" was added in 2019. Under the prior statute, the deadline to rule ran from the hearing date, implying the hearing must be concluded on a single date. For actions filed on or after September 1, 2019, the deadline runs from the date the hearing "concludes," implying that trial courts may conduct subsequent proceedings, if necessary, without being hamstrung by the deadline to rule. Under this new language, it will be important to make the record clear about the date on which the hearing "concludes," and to ensure that the conclusion of the hearing occurs within the hearing deadlines discussed above.

"If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal." CPRC § 27.008(a). "The legislature gave the trial court no discretion to extend this deadline," meaning any attempted ruling after the 30-day deadline is void. *In re Tabletop Media, LLC*, No. 05-20-00454-CV, 2020 WL 2847272, at *2 (Tex. App.—Dallas June 2, 2020, orig. proceeding) (granting mandamus relief); *In re Neely*, No. 14-19-01018-CV, 2020 WL 1434569, at *2-4 (Tex. App.—Houston [14th Dist.] Mar. 24, 2020, orig. proceeding) (granting mandamus relief).

In *Wightman-Cervantes*, 2018 WL798163 at *1, the Second Court agreed with previous opinions by the Fifth Court and the Fifth Circuit that, when no hearing is conducted, the 30-day deadline to rule is not triggered, meaning the motion cannot be overruled by operation of law.

Recently, the Second Court addressed another iteration of this scenario, holding that when the trial court began the TCPA hearing, heard some evidence,

but then expressly recessed and stated its intent to reconvene the hearing, the proceeding did not constitute the "date of the hearing" to trigger the court's deadline to rule. *Stewart v. Douglas*, No. 02-19-00292-CV, 2020 WL 4360560, at *3-5 (Tex. App.—Fort Worth July 30, 2020, no pet. h.). Although this case was decided under the pre-amendment text, the Court's analysis turns on its determination that the hearing had not "concluded," so the motion could not be deemed "overruled by operation of law" thirty days later. By failing to reschedule the remainder of the TCPA hearing within the statutory deadline, movant forfeited its motion. Without an express or implied ruling on the TCPA motion, the Second Court held it lacked interlocutory jurisdiction and dismissed the appeal. *Id*.

Several opinions hold that the trial court need only rule on the dismissal portion of the motion within 30 days. It can bifurcate the issue of monetary relief and make that ruling subsequently. *E.g., Farhat v. Wilson Scott, LLC*, No. 02-19-00438-CV, 2020 WL 1949624, at *7 (Tex. App.—Fort Worth Apr. 23, 2020, no pet.) ("[T]he TCPA does not require the trial court to rule on the question of attorney's fees within[thirty days]." Rather, the trial court may "resolve the issue of attorney's fees in a separate, later order."); *Day v. v. Fed'n of State Med. Boards of the United States, Inc.*, 579 S.W.3d 810 (Tex. App.—San Antonio 2019, pet. denied) (evidence in support of fees is not required to be presented at the dismissal hearing; it can be presented later to support fee award in connection with final judgment); *Leniek v. Evolution Well Servs., LLC*, No. 14-18-00954-CV, 2019 WL 438825 (Tex. App.—Houston [14th Dist.] Feb. 5, 2019, no pet.) (per curiam) ("Nothing within the TCPA expressly prohibits the trial court from timely ruling on the request for dismissal and later resolving issues relating to statutorily required attorney's fees and sanctions."); *DeAngelis v. Protective Parents Coal*., 556 S.W.3d 836 (Tex. App.—Fort Worth Aug. 2, 2018, no pet.) (trial court's plenary power extended after it granted the TCPA motion in February to allow for a subsequent grant of monetary relief made as part of the final judgment in June; the statute does not require the court "to completely resolve all matters related to the motions to dismiss" by the 30-day deadline).

2. Motions to Reconsider, Etc.

In 2020, the Texas Supreme Court held that, regardless of the TCPA's 30-day ruling deadline, a trial court has plenary power to vacate its prior interlocutory order granting dismissal or denying the TCPA motion (if no interlocutory appeal is pending) at any time before final judgment or denying. *In re Panchakarla*, -- S.W.3d --, No. 19-0585, 2020 WL 2312204, at * 3 (Tex. May 8, 2020) (per curiam) (reversing *In re Hatley*, No. 05-19-00571-CV, 2019 WL 2266672 (Tex. App.—Dallas May 24, 2019, orig. proceeding).

In *Panchakarla*, the trial court timely granted the TCPA motion within 30 days of the hearing, dismissing plaintiff's claims. Based on the issuance of new and controlling authority, Plaintiff timely filed a motion for reconsideration and motion for new trial within 30 days of that order, per Tex. R. Civ. P. 329b. The trial court granted that motion and vacated its prior TCPA dismissal within its plenary power. The defendants then pursued both an interlocutory appeal and petition for writ of mandamus from the new order.

The supreme court reasoned that nothing in the TCPA expressly prohibits a trial court from reconsidering its prior order while it maintains plenary power. *Id*. at *3. To deprive trial courts of this power would "judicially amend" the TCPA "by adding words that are not contained in the language of the statute." *Id*. This scenario is different than cases in which the trial court failed to make a timely ruling on the TCPA motion in the first place. *Id.*

The Court clarified that, "once the trial court vacated its [prior TCPA] order, … no ruling on the dismissal motion was in place. Accordingly, the motion was either overruled by operation of law for want of a timely ruling … or denied by the trial court in a new trial. *Id*. The Court did not decide "whether the trial court's granting a new trial restarted the trial clock and permitted a new hearing and ruling on the [TCPA] motion, because even if it did, the same result ensues…. [T]he defendants can seek relief by interlocutory appeal." *Id*.

3. Disposition.

Dismissal is mandatory if the movant establishes that the disputed claims are within the scope of the TCPA, and (1) the nonmovant fails (a) to rebut that with proof of an exemption, exclusion, or procedural defect; or (b) to satisfy its burden of establishing a prima facie case on each essential element of its claim(s), or (2) the nonmovant establishes a prima facie case but the movant establishes a valid defense or other ground on which it is entitled to judgment as a matter of law. CPRC § 27.005(b), (d).

Dismissal under the TCPA is with prejudice. *See Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs*., 500 S.W.3d 26, 40 (Tex. App.—Houston [1st Dist.] 2016, pet denied) ("A dismissal with prejudice under the TCPA constitutes a final determination on the merits for res judicata purposes."); *see also Holcomb v. Waller Cty*., 546 S.W.3d 833, 841 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (Jennings, J., dissenting) ("A motion to dismiss under the TCPA tests the potential merits of claims implicating free-expression rights at the outset of a suit. Thus, an order of dismissal under

the TCPA is made with prejudice and is a judgment on the merits.").

Nothing in the statute prevents the trial court from issuing a "split" ruling that partially grants and partially denies a TCPA motion. *E.g., Connor v. McCormick*, No. 03-18-00813-CV, 2020 WL 102034, at *5 (Tex. App.—Austin Jan. 9, 2020, pet. denied) (rejecting Connor's argument that trial court was required to make a single ruling; holding trial court did not err by "consider[ing] each allegedly defamatory statement separately in deciding whether dismissal of a claim based on that statement was proper under the TCPA"); *see also Woods Capital Enterprises, LLC v. DXC Tech. Services LLC*, No. 05-19-00380-CV, 2020 WL 4344912 (Tex. App.—Dallas July 29, 2020, no pet. h.), as discussed above in Section IX.A.5.

4. Effect of Ruling – New in 2019.

In 2019, the Legislature added a new provision to the TCPA titled "Effect of Ruling," CPRC § 27.0075: "Neither the court's ruling on the motion nor the fact that it made such a ruling shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by the ruling."

Although no appellate opinions have yet interpreted this language, parties should be mindful of it and consider adding language to orders on motions in limine that no mention will be made to the fact-finder(s) about a prior TCPA ruling.