THE CHANGING LANDSCAPE OF THE TEXAS CITIZENS PARTICIPATION ACT

Laura Lee Prather[†] *and Robert T. Sherwin*[‡]

---

† Partner, Haynes and Boone, L.L.P., Austin, Texas; B.B.A., University of Texas at Austin, 1988; J.D., University of Texas at Austin, 1991.

‡ Professor of Law and Director of Advocacy Programs, Texas Tech University School of Law.

** This Article will be published in Volume 52, Book 2 of the *Texas Tech Law Review* and has not gone through the full editing process. The fully edited version will appear in print in Winter 2019.

I. INTRODUCTION

Courts, scholars, and free speech advocates have dubbed meritless lawsuits targeting the legitimate exercise of the rights to engage in truthful speech, lawful petitioning, and legal association as "Strategic Lawsuits Against Public Participation" (SLAPP suits).[2] A SLAPP suit is the offensive use of a legal proceeding to prevent, or retaliate against, persons lawfully exercising First Amendment rights.[3]

SLAPP suits seek to prevent the named defendant from exercising a lawful right, such as testifying at a city council meeting,[4] complaining to a medical board about a doctor,[5] investigating fraud in our education system,[6] or participating in a political campaign.[7] They chill First Amendment activities by subjecting citizens who exercise constitutional rights to the intimidation and expense of defending a lawsuit that lacks merit.[8] While meritorious lawsuits are intended to right a legal wrong, the primary motivation behind a SLAPP suit is to stop lawful speech in a strategy to win a political or social battle.[9] In response to a rise in retaliatory litigation, at least thirty-three states, the District of Columbia, and the United States territory of Guam have passed some form of Anti-SLAPP legislation.[10] The Texas

---

2. *See* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 8–10 (Temple Univ. Press 1996). Professors Pring and Canan of the University of Denver are two of the primary scholars who analyzed this legal phenomenon and coined the term "SLAPP." *Id.* at 3.

3. *See* Chad Baruch, *"If I Had a Hammer": Defending SLAPP Suits in Texas*, 3 TEX. WESLEYAN L. REV. 55, 56–58, 62–63 (1996).

4. *See* Means v. ABCABCO, Inc., 315 S.W.3d 209, 214–15 (Tex. App.—Austin 2010, no pet.).

5. *See* Lewis v. Garraway, No. D-1-GN-06-001397 (201st Dist. Ct., Travis County, Tex. Apr. 21, 2006).

6. *See* Williams v. Cordillera Commc'ns, Inc., No. 2:13-CV-124, 2014 WL 2611746, at *3–4 (S.D. Tex. June 11, 2014).

7. *See* Farias v. Antuna, No. 2006-CI-16910 (408th Dist. Ct., Bexar County, Tex. Dec. 5, 2006).

8. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

9. Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 30 (1989).

10. *See* ARIZ. REV. STAT. ANN. §§ 12-751–12-752 (West, Westlaw through 2017 1st Reg. Sess.); ARK. CODE ANN. §§ 16-63-501–16-63-508 (West, Westlaw through 2017 Reg. Sess.); CAL CIV. PROC. CODE § 425.16–425.18 (1992) (West, Westlaw through Ch. 685 of 2017 Reg. Sess.); HB 19-1324 COLORADO'S ANTI-SLAPP STATUTE (Eff. July 1, 2019); 2017 CONN. LEGIS. SERV. P.A. 17-71 (SB 981) (enacted June 30, 2017); DEL. CODE ANN. tit. 10, § 8136 (West, Westlaw through 81 Laws 2017); D.C. CODE §§ 16-5501–5505 (West, Westlaw through Oct. 3, 2017); FLA. STAT. §§ 720.304(4), 768.295 (West, Westlaw through 2017 1st Reg. Sess. & Spec. "A" Sess.); GA. CODE ANN. §§ 9-11–11-1 (West, Westlaw through 2017 Sess.); HAW. REV. STAT. §§ 634F-1–634F-4 (West, Westlaw through 2017 1st Spec. Sess.); 735 ILL. COMP. STAT. 110/15 (West, Westlaw through P.A. 100-535); IND. CODE. 34-7-7-1–10 (West, Westlaw through 2017 1st Reg. Sess.); KAN. STAT. ANN. § 60-5320 (West, Westlaw through 2017 Reg. Sess.); LA. CODE CIV. PROC. ANN. art. 971 (West, Westlaw through 2017 Extraordinary Sess.); ME. REV. STAT. tit. 14, § 556 (West, Westlaw through Chapter 309 of the 2017 1st Reg. Sess.); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West, Westlaw through 2017 Reg. Sess.); MASS. GEN. LAWS CH. 231, § 59H (West, Westlaw through Chapter 74 of the 2017 1st Ann. Sess.); MINN. STAT. §§ 554.01–554.05 (2016) (subsequently held unconstitutional by Leiendecker v. Asian Women United of Minn., 895 N.W.2d 623 (Minn. May 24, 2017)); MO. REV. STAT. § 537.528 (West, Westlaw through 2017 1st Reg. & 1st and 2d Spec. Sess.); NEB. REV. STAT. §§ 25-21, 241–46 (West, Westlaw through 2017 1st Reg. Sess.); NEV. REV. STAT. §§ 41.635-670 (West through 2017 Legis. Sess.); N.M. STAT. § 38-2-9.1–2 (West, Westlaw through 2017 Legis. Sess.); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (West, Westlaw through L.2017, chpts. 1 to 331); N.Y. C.P.L.R. 3211(g) (West, Westlaw through L.2017, chapters 1 to 331); OKLA. STAT. ANN. TIT.

Legislature, like those in other states, noted this trend and, in 2011, it enacted the Texas Citizens Participation Act (TCPA or "Texas Anti-SLAPP Statute").[11]

After eight years of jurisprudence, powerful lobby groups sought changes to curtail its application in business settings.[12] All agreed the language needed to be tightened so that it could no longer be used improperly as a litigation tactic to thwart its purpose.[13] Including companion bills, five bills were introduced covering varying approaches to reform.[14] Ultimately, House Bill 2730 (H.B. 2730) was the measure that passed.[15] On Sunday, June 2, 2019, Governor Greg Abbott signed H.B. 2730 into law.[16] It goes into effect on September 1, 2019 and applies to actions filed on or after that date.[17] The changes to the law narrow the scope of applicability by narrowing its definitions, expanding its exemptions, and providing more direction for the courts and litigants about burdens and measures of proof.[18]

Under the original law, one could file an Anti-SLAPP motion if the "legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association . . . ."[19] "Exercise of the right of free speech" means a communication made in connection with a "matter of public concern."[20] H.B. 2730 made significant changes to these definitions, which will change the reach of the TCPA in future lawsuits.[21]

12, §§ 1430–40 (West, Westlaw through 2017 1st Reg. Sess.); OR. REV. STAT. § 31.150 et seq. (West, Westlaw through 2017 Reg. Sess.); 27 PA. CONS. STAT. §§ 7707, 8301-3 (West, Westlaw through 2017 Reg. Sess. Act 32); R.I. GEN. LAWS §§ 9-33-1–9-33-4 (West, Westlaw through Ch. 302, Jan. 2017 Sess.); Tenn. H. B. 777, 111th Leg. R.S. (2019); TEX. CIV. PRAC. & REM. CODE ANN. CH. 27 (West, Westlaw through 2017 Reg. and 1st Called Sess.); UTAH CODE ANN. §§ 78B-6-1401–78B-6-1405. (West, Westlaw through 2017 Gen. Sess.); 12 VSA § 1041 (West, Westlaw through 1st Sess. of the 2017-2018 Vt. Gen. Assembly); VA. CODE ANN. § 8.01-223.2 (amended by 2017 Virginia Laws Ch. 586 (HB 1941), 2017 VIRGINIA LAWS CH. 597 (SB 1413) (approved Mar. 16, 2017)); WASH. REV. CODE § RWC 4.24.500–525 (West, Westlaw through 2017 3d Spec. Sess.); 7 GUAM CODE ANN. § 17104 (West, Westlaw through P.L. 33–187 (Sept. 23, 2016)).

11. TEX. CIV. PRAC. & REM. CODE ANN. §§27.001–.010 (West 2017).

12. *See* Joe Mullin, *Why We Can't Support Modifications to Texas' Anti-SLAPP Law*, ELECTRONIC FRONTIER FOUND. (May 21, 2019), https://www.eff.org/deeplinks/2019/05/why-we-cant-support-modifications-texas-anti-slapp-law (discussing the amendments to House Bill 2730).

13. *See* Rick Blum, *New Legislation Would Imperil Texas Anti-SLAPP Law*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Mar. 11, 2019), https://www.rcfp.org/new-legislation-would-imperil-texas-anti-slapp-law/.

14. Tex. H.B. 2730, 86th Leg. R.S. (2019) (filed by Rep. Jeff Leach); Tex. S.B. 2162, 86th Leg. R.S. (2019) (filed by Sen. Angela Paxton); Tex. H.B. 3547, 86th Leg. R.S. (2019) (filed by Rep. Joe Moody); Tex. H.B. 4575, 86th Leg. R.S. (2019) (filed by Rep. Dustin Burrows); Tex. S.B. 1981, 86th Leg. R.S. (2019) (filed by Sen. Bryan Hughes); *see also Abbott Signs Favorable Anti-SLAPP Law Rewrite*, TEXAS ASS'N OF BROADCASTERS (June 3, 2019), https://www.tab.org/news-and-events/news/abbott-signs-favorable-anti-slapp-law-rewrite (detailing the unintended consequences of the original law and the current status of the law).

15. Heath Coffman, *Governor Abbott Signs Bills Amending the TCPA*, THE FORT WORTH BUS. & EMP. L. REP. (June 9, 2019), https://www.fwlawreporter.com/2019/06/governor-abbott-signs-bills-amending-the-tcpa/.

16. *Id.*

17. Laura Lee Prather, *Changes to Texas Anti-SLAPP Statute*, HAYNES AND BOONE, LLP (June 12, 2019), https://www.haynesboone.com/Alerts/changes-to-texas-anti-slapp-statute.

18. *Id.*

19. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West 2017).

20. *Id.* § 27.001(3) (West 2017).

21. *Id.* §§ 27.001(3), .003(a) (West 2017).

II. LEGISLATIVE CHANGES TO THE TCPA

The changes to the law are meant to be a constructive approach to reform while preserving the integrity and purpose of the law.[22] The changes emanate from three different directions: changes to when the TCPA can be used, how it can be used, and who can use it.

A. What Will the TCPA Cover?

1. New Definition of "Matter of Public Concern"

The TCPA continues to protect one from meritless claims brought against a party for exercising its right of free speech.[23] However, the breadth of that protection will change due to a modification of one of the underlying components of the definition of right of free speech.[24]

One of the chief complaints about the existing Anti-SLAPP law was the non-exclusive topical laundry list of what qualified as a "matter of public concern" that lead to the statute's application to trade secret and employment disputes and attorney disciplinary proceedings.[25] The original definition of "matter of public concern" derived from areas of discussion that courts had previously determined to be of public concern.[26] This non-exhaustive topical list, combined with the broad "relates to" language found in TCPA § 27.003(a), resulted in the statute's application in what many believed to be unconventional and inappropriate settings.[27]

The new definition, taken in part from the United States Supreme Court case *Snyder v. Phelps*,[28] provides a more generalized approach to determining whether something is a matter of public concern.[29] It expressly expands the definition of "matter of public concern" to include "activity" not just communications, and it protects statements or activities about public officials, public figures, or other persons who have drawn substantial public attention due to their official acts, fame, notoriety, or celebrity; matters of political, social, or other interest to the community; and subjects of concern to the public.[30]

2. New Definition of "Right of Association"

---

22. *See* Matthew Simmons, *Amendments Would Add Clarity to Texas Anti-SLAPP Law*, LITTLER MENDELSON P.C. (May 22, 2019), https://www.littler.com/publication-press/publication/amendments-would-add-clarity-texas-anti-slapp-law (explaining the possible effects of the new law).

23. CIV. PRAC. & REM. § 27.003 (eff. Sept. 1, 2019).

24. *See id.* § 27.001(7) (eff. Sept. 1, 2019).

25. *See* Prather, *supra* note 17.

26. *See* Means v. ABCABCO, Inc., 315 S.W.3d 209 (Tex. App.—Austin 2010, no pet.); *see also* Laura Lee Prather & Justice Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 TEX. TECH. L. REV. 633, 684–85 (2018).

27. Angela Morris, *Bill to Limit Attorneys' Ability to Win Anti-SLAPP Dismissals Just Passed Texas House*, TEX. LAWYER (Apr. 30, 2019, 1:50 PM), https://www.law.com/texaslawyer/2019/04/30/bill-to-limit-attorneys-ability-to-win-anti-slapp-dismissals-just-passed-texas-house/?slreturn=20190717175558.

28. Snyder v. Phelps, 562 U.S. 443 (2011) (citations omitted).

29. CIV. PRAC. & REM. CODE § 27.001(7) (eff. Sept. 1, 2019).

30. *Id.* § 27.001(7) (eff. Sept. 1, 2019).

The TCPA protects one from meritless claims brought against a party for exercising its right of association.[31] Under the original law, the "exercise of the right of association" is defined as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests."[32] This is similar to the definition found in the Connecticut,[33] Kansas,[34] and Oklahoma[35] Anti-SLAPP statutes.

The first appellate case to address the right of association was *Combined Law Enforcement Associations of Texas v. Sheffield*.[36] In *Sheffield*, a former employee of a police labor union sued the union and its executive director, alleging defamation based on five different alleged communications discussing Sheffield: an email from the executive director to the union's board and staff, two communications between the union and other police associations, statements made by the union's corporate counsel regarding a job the plaintiff received, and statements made by the same corporate counsel to the district attorney about Sheffield.[37] The union filed a motion to dismiss under the TCPA, alleging that the claims related to its exercise of its right of association, but the trial court denied the motion.[38] The Third Court of Appeals held that the first three statements related to the right of association.[39]

The new law, however, narrows the protection for exercising one's "right of association" by tying its protection to matters relating to a governmental proceeding or a matter of public concern.[40] The new definition reads:

> Exercise of 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*.[41]

Both "governmental proceeding"[42] and "matter of public concern"[43] are defined in the statute as well. Whether the court in *Sheffield* would deem the communications there as "relating to a governmental proceeding or a matter of public concern" is yet to be determined.

---

31. *Id.* § 27.003(a) (eff. Sept. 1, 2019).
32. *Id.* § 27.001(2) (West 2017).
33. CONN. GEN. STAT. ANN. § 52-196a (West 2019).
34. KAN. STAT. ANN § 60-5320 (West 2017).
35. OKLA. STAT. ANN. tit. 12, §§ 1430-40 (West 2017).
36. Combined Law Enf't Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (mem. op.).
37. *Id.* at *3.
38. *Id.* The appellate court noted that "[b]ecause they did not raise the free speech or petition rights as grounds for dismissal under the TCPA, the trial court did not reject them in denying the motions to dismiss, and arguments relating to those contentions are not properly within the limited scope of this interlocutory appeal." *Id.* at *4.
39. *Id.* at *5. The court did hold, however, that the movants failed to demonstrate that the two statements by corporate counsel were made "to an individual with whom he had joined together to collectively express, promote, pursue, or defend common interests." *Id.* Similarly, a 2016 decision from the Dallas Court of Appeals held that a lawyer's adversarial communication to a third party on behalf of his client does not meet the statutory definition of exercising the right of association. Levatino v. Apple Tree Café Touring, Inc., 486 S.W.3d 724, 728 (Tex. App.—Dallas, 2016, pet. denied).
40. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2) (West 2017).
41. *Id.* § 27.001(2) (emphasis added) (eff. Sept. 1, 2019).
42. *Id.* § 27.001(5) (West 2017).
43. *Id.* § 27.001(7) (West 2017).

3. Removal of "Relates to"

One of the early concerns with the TCPA was the breadth of its scope as delineated in § 27.003: "If a legal action is based on, *relates to*, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action."[44] One jurist opined that the broad language might "capture any 'legal actions' that have the subjective goal of chilling speech."[45] The biggest concern arose out of the qualifier "relates to" because its ordinary meaning merely "denotes some sort of connection, reference, or relationship."[46]

In answer to this call, the new law narrows the scope for when the TCPA applies by removing the "relates to" language. Section 27.003 will now provide that in order to file a motion to dismiss, the legal action must be "based on" or "in response" to a party's exercise of the right of free speech, right to petition, or right of association.[47]

B. When Can the TCPA Be Used and the New Definition of "Legal Action"?

It's been said that the fertile minds of a lawyer will attempt to stretch the parameters of any law.[48] In the case of the TCPA, many fertile minds decided to test novel interpretations of the statute in ways that lead to a significant abuse of the judicial process.[49] Litigants employed the TCPA in response to a litany of procedural motions unnecessarily tying cases up in the courts, overburdening the judicial system, and turning the purpose of the statute on its head.[50] As a result, the Legislature saw fit to modify the definition of "legal action" to expressly forbid this practice.[51]

1. Use of TCPA in Response to Pre-trial Motions

Under the original definition of "legal action," lawyers were using the law as a sword in litigation rather than for its intended purpose. They were filing Anti-SLAPP

---

44. *Id.* § 27.003(a) (emphasis added) (West 2017).

45. Serafine v. Blunt, 466 S.W.3d 352, 392 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring).

46. Cavin v. Abbott, 545 S.W.3d 47, 69, n.85 (Tex. App.—Austin 2017, no pet.) (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 148 (5th ed. 2011)); *see also* James v. Elkins, 553 S.W.3d 596, 606 (Tex. App.—San Antonio 2018, pet. denied) (interpreting "relates to" as the broadest of the qualifiers).

47. CIV. PRAC. & REM. § 27.003(a) (eff. Sept. 1, 2019).

48. *See, e.g.*, Hilco Elec. Co-op, Inc. v. Midlothian Butane Gas Co., 111 S.W.3d 75, 81 (Tex. 2003) (explaining how an attorney attempted to apply an expansive meaning of "any lawful purpose").

49. *See* Morris, *supra* note 27.

50. *See id.*

51. *See* CIV. PRAC. & REM. § 27.001(6) (eff. Sept. 1, 2019).

motions in response to Anti-SLAPP motions,[52] motions for sanctions,[53] and various purely procedural matters.[54] In one case, a person who filed suit for judicial review of an Texas Ethics Commission order sought to employ the TCPA to dismiss the very same suit after realignment of the parties and the agency's subsequent filing of an amended pleading.[55] To prevent this gamesmanship, the new definition clarifies that the term "legal action" does not include procedural actions, alternative dispute resolution proceedings, or post-judgment enforcement actions.[56] The new definition also clarifies that the law does indeed apply to lawsuits seeking declaratory relief.[57] This clarification is consistent with the vast majority of appellate court opinions[58] and Texas Supreme Court *dicta*;[59] however, the Austin Court of Appeals previously held otherwise.[60]

2. Use of TCPA Motions On Appeal

52. *See, e.g.*, Deepwell Energy Servs., LLC v. Aveda Transp. & Energy Servs., 574 S.W.3d 925, 927 (Tex. App.—Eastland 2019, pet. denied) (questioning whether a TCPA motion to dismiss is able to be dismissed by a countermotion under the Act); Roach v. Ingram, 557 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (holding that a movant's counter Anti-SLAPP motion must establish by a preponderance of the evidence that the lawsuit concerned the right of free speech regularly a matter of public concern); Paulsen v. Yarrell, 537 S.W.3d 224, 234 (Tex. App.—Houston [1st Dist.] 2017, pet. denied), *reh'g denied*, (Nov. 21, 2017) (holding filing of TCPA motion in response to TCPA motion invalid use of the statute); *see also* Memorial Hermann Health Sys. v. Khalil, No. 01-16-00512-CV, 2017 WL 3389645, at *18 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied).

53. *Compare* Hawxhurst v. Austin's Boat Tours, 550 S.W.3d 220, 226–28 (Tex. App.—Austin 2018, no pet.) (holding request for sanctions was a "legal action" as defined by the TCPA), *with* Misko v. Johns, 575 S.W.3d 872, 878 (Tex. App.—Dallas 2019, pet. filed) (holding TCPA does not apply to motion for sanctions).

54. *See, e.g.*, Dow Jones & Co. v. Highland Capital Mgmt., L.P., 564 S.W.3d 852, 858 (Tex. App.—Dallas 2018, pet. denied) (holding the TCPA does not apply to third-party discovery subpoenas).

55. *See* Sullivan v. Texas Ethics Comm'n, 551 S.W.3d 848, 858 (Tex. App.—Austin 2018, pet. denied) (holding a TCPA motion to dismiss could not be used to dismiss the very same suit as plaintiff filed after realignment of parties).

56. CIV. PRAC. & REM. § 27.001(6) (eff. Sept. 1, 2019).

57. *Id.* (eff. Sept. 1, 2019).

58. *See, e.g.*, Sierra Club v. Andrews Cty., 418 S.W.3d 711, 716 (Tex. App.—El Paso 2013), *rev'd*, 463 S.W.3d 867 (Tex. 2015), and *disapproved on other grounds by In re* Lipsky, 460 S.W.3d 579 (Tex. 2015) (holding the movant association met its initial burden under the TCPA by showing nonmovant's declaratory-judgment suit complained in part of movant's threats of litigation); Landry's, Inc. v. Animal Legal Def. Fund, 566 S.W.3d 41, 74 (Tex. App.—Houston [14th Dist.] 2018, pet. filed); Holcomb v. Waller Cty., 546 S.W.3d 833, 840 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (reasoning the TCPA applied to the County's declaratory judgment action against the license holder); Perez v. Quintanilla, No. 13-17-00143-CV, 2018 WL 6219627, at *4 (Tex. App.—Corpus Christi Nov. 29, 2018, no pet.); Ghrist v. MBH Real Estate LLC, No. 02-17-00411-CV, 2018 WL 3060331, at *5 (Tex. App.—Fort Worth June 21, 2018, no pet.); Johnson-Todd v. Morgan, 480 S.W.3d 605, 612 (Tex. App.—Beaumont 2015, pet. denied).

59. *See* State ex rel. Best v. Harper, 562 S.W.3d 1, 9 (Tex. 2018) ("Despite the TCPA's broad definition, the state argues that a removal petition is not a legal action because it seeks 'constitutional' or 'political' relief in the form of an order removing an elected official from office rather than 'legal or equitable relief' such as damages, an injunction, or declaratory relief. We disagree. A court order requiring the defendant's removal or ouster from office is undoubtedly a 'remedy.'").

60. Craig v. Tejas Promotions, LLC, 550 S.W.3d 287, 302–03 (Tex. App.—2018, pet. filed) (considering broader statutory context in construing and applying TCPA's "legal action" definition to hold that declaratory-judgment claims were not independently a "legal action" or actions, despite arguable facial correspondence to definition, where claims' substance was subsumed within causes of action for damages and injunctive relief).

Perhaps the biggest abuse of the statute was in *Amini v. Spicewood Springs Animal Hospital*, where after filing a motion to dismiss in response to a motion to dismiss at the trial court level, the appellee filed a TCPA motion to dismiss the appeal.[61] Justice Pemberton, while also noting the litigant's prior aggressive tactics in filing a TCPA motion in response to a TCPA motion in the underlying case, wrote, "[t]his pre-submission motion has jurisprudential novelty beyond the norm*: it includes an appellate-level TCPA motion to dismiss Amini's appeal.* We conclude that the TCPA does not authorize that motion or relief."[62]

The new definition of "legal action" should prevent similar abuse in the future.[63]

C. Who Can Use the TCPA?

As the result of some troubling offensive uses of the TCPA by governmental entities, the new law expressly states that a governmental entity, agency, or an official or employee acting in an official capacity does not qualify as a party who can invoke the law's protections.[64] This statutory change will effectively overturn *Roach v. Ingram*, in which the court held that the TCPA's plain language does not preclude its application to government officials sued in their official capacity.[65]

D. New Exemptions

In addition to the four exemptions—enforcement actions, Insurance Code cases, bodily injury cases, and cases involving commercial speech—that the TCPA had already featured, at least eight new exemptions were added: trade secret misappropriation and enforcement of non-disparagement agreements or covenants not to compete in an employment or independent contractor relationships; family code cases and applications for protective orders; claims under the Texas Deceptive Trade Practices Act; medical peer review cases; eviction suits; attorney disciplinary proceedings; and common law fraud claims.[66]

E. Exemptions to the Exemptions

There are, however, some exemptions to some of these exemptions for the media and online business reviews and ratings.[67] Media defendants can invoke the TCPA any time the claim arises from the gathering, receiving or posting of information to the public in conjunction with the creation or dissemination of dramatic, literary, musical, political or journalistic works.[68] It expressly covers

---

61. Amni v. Spicewood Spring Animal Hosp., 550 S.W.3d 843, 843 n.2 (Tex. App.—Austin 2018, no pet. h.).

62. *Id.* at 843 (emphasis in original).

63. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6) (eff. Sept. 1, 2019).

64. *Id.* § 27.003(a) (eff. Sept. 1, 2019) ("A party under this section does not include a government entity, agency, or an official or employee acting in an official capacity.").

65. Roach v. Ingram, 557 S.W.3d 203, 220 (Tex. App.—Houston [14th Dist.] 2018, pet. denied.)

66. CIV. PRAC. & REM. § 27.010(a)(5)–(12) (eff. Sept. 1, 2019).

67. *Id.* § 27.010(b) (eff. Sept. 1, 2019).

68. *Id.* § 27.010(b)(1) (eff. Sept. 1, 2019).

motion pictures, television or radio programs, newspaper, website or magazine articles[69] and provides the same protection for claims against those who communicate or post-consumer opinions or commentary, evaluations of consumer complaints or reviews or ratings of businesses.[70] None of the claims arising out of these communications have to be related to matters of public concern.[71] For these same groups, the new law also exempts them from the commercial speech exemption and the new exemptions for DTPA and fraud claims.[72]

F. Procedures and Proof

From an evidentiary standpoint, the new law makes clear that courts may consider the type of evidence that would be admissible in a summary judgment proceeding.[73] It also provides a filing-framework timeline that is consistent with Texas and local rules regarding other dispositive motions, including a movant providing twenty-one days' notice for a hearing and a nonmovant's response being due no later than seven days before the hearing.[74] In addition to the more structured framework, the new law provides some much needed flexibility for litigants to be able to agree to file an Anti-SLAPP motion beyond the current sixty-day deadline.[75] In cases involving special appearances, motions to transfer or motions to recuse, this flexibility will be particularly helpful.[76]

When applying the law, all references to "preponderance of the evidence" have been removed.[77] The amended statute will now merely require a movant to demonstrate that the legal action in question is covered by the TCPA.[78] When a movant seeks to prevail on an affirmative defense, it requires a party show it is entitled to judgment as a matter of law.[79] The non-movant's standard remains the same and is governed by *In re Lipsky*.[80]

III. IMPACT ON PENDING ISSUES

The legislative changes to the TCPA will effectively moot at least four different issues that had been working their way through Texas courts of appeals. Specifically,

---

69. *Id.* (eff. Sept. 1, 2019)
70. *Id.* § 27.010(b)(2) (eff. Sept. 1, 2019).
71. *See id.* § 27.010(b) (eff. Sept. 1, 2019).
72. *Id.* (eff. Sept. 1, 2019)
73. *See id.* § 27.006(a) (eff. Sept. 1, 2019).
74. *Id.* § 27.003(d), (e) (eff. Sept. 1, 2019).
75. *Id.* § 27.003(b) (eff. Sept. 1, 2019).
76. *See, e.g.*, Wakefield v. British Med. Journal Publ'g Grp., Ltd., 449 S.W.3d 172 (Tex. App.—Austin 2014, no pet.) (holding that special appearances were not waived when an anti-SLAPP motion to dismiss was reset).
77. CIV. PRAC. & REM. § 27.005(b), (d) (eff. Sept. 1, 2019).
78. *Id.* § 27.005(b) (eff. Sept. 1, 2019).
79. *Id.* § 27.005(d) (eff. Sept. 1, 2019). This codifies the way in which courts were interpreting § 27.005(d). *See* Batra v. Covenant Health Sys., 562 S.W.3d 696, 708 (Tex. App.—Amarillo 2018, pet. denied); Elite Auto Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 206 (Tex. App.—Austin 2017, pet. dism'd); Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71, 82 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).
80. *In re* Lipsky, 460 S.W.3d 579, 589 (Tex. 2015). *See also* Laura Lee Prather & Justice Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 TEX. TECH L. REV. 633, 659 (2018).

the new statute makes clear that a trial court need not award sanctions to a prevailing party, and that it does not apply in trade-secret litigation, non-compete employment disputes, and attorney disciplinary matters.[81]

A. Sanctions

The original TCPA provided:

> If the court orders dismissal of a legal action under this chapter, the court *shall* award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.[82]

Although this language made clear a prevailing moving party was entitled to sanctions, it naturally raised the question of whether those sanctions had to be more than some nominal amount, and more importantly, whether a failure to award them was harmless error.[83]

In *Rich v. Range Resources Corp.*, the Second Court of Appeals reviewed a trial court's denial of the successful movant's motion for sanctions.[84] It agreed with the movant that § 27.009(a) made an award of sanctions mandatory, and that by failing to award any sanctions, the trial court abused its discretion.[85] But it also said the amount of the sanction could be nominal—as low as $1.[86] Holding that the trial court's rejection of a sanction award amounted to an "implied finding that [the plaintiff] did not need deterring from filing similar actions in the future," the Fort Worth court relied on well-settled precedent that the failure to award nominal sanctions is harmless error.[87] In other words, it may be true that the trial court should have awarded *some* sanctions.[88] But given that it could have awarded as little as $1, and its no-sanction finding tells us it's likely that's what the court would have done, it would make no sense to remand to the trial court for a mere $1 award.[89]

In 2018, the Fifth Court of Appeals in *Tatum v. Hersh* "agree[d] with the *Rich* court's analysis," holding that a trial court's rejection of sanctions amounts to an

---

81. CIV. PRAC. & REM. § 27.010(a) (eff. Sept. 1, 2019).

82. *Id.* § 27.009(a) (West 2017) (emphasis added). To the extent the statute had a sanction-type provision that could be employed against movants who misused the statute, it existed—and still exists—at § 27.009(b): "If 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." *Id.* § 27.009(b) (West 2017).

83. *See id.* § 27.009(a) (West 2017).

84. Rich v. Range Res. Corp., 535 S.W.3d 610 (Tex. App.—Fort Worth 2017, pet. denied).

85. *Id.* at 612–13.

86. *Id.* at 613–14.

87. *Id.* at 614.

88. *Id.* at 612–13.

89. *Id.* at 613–14. The court also rejected the movant's argument that the amount of attorney's fees the court awarded—which was $470,012.41—should serve as a guideline for the amount of sanctions. *Id.* at 614–15 (distinguishing Kinney v. BCG Attorney Search, No. 03-12-00579-CV, 2014 WL 1432012, at *12 (Tex. App.—Austin Apr. 11, 2014, pet. denied)).

implicit finding that no sanctions were necessary to deter future conduct: "If this implicit finding was not an abuse of discretion, the trial court had discretion to award nominal sanctions and the failure to make that award is harmless error."[90]

The Fort Worth and Dallas court opinions stood in contrast to two earlier cases out of Amarillo and Austin.[91] In the 2016 decision of *Sullivan v. Abraham*, the Seventh Court of Appeals wrote, "though the quantum or extent of the sanction is regulated by what the trial court 'determines sufficient,' the obligation remains to levy a sanction appropriate under the circumstances of the case," and failing to make an award is reversible error.[92] Likewise, in 2017, the Third Court of Appeals in *Serafine v. Blunt* (Serafine II) remanded the case to the trial court after it failed to award any sanctions to a moving party who prevailed on its motion.[93]

Regardless of which approach is right, the new TCPA language makes *all* sanctions awards discretionary:

> [I]f the court orders dismissal of a legal action under this chapter, the court: . . . (2) *may* award to the moving party sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter."[94]

As a result, trial courts will no longer be forced to award nominal sanctions against parties it does not believe need to be deterred from filing future similar cases, and appellate courts will not need to wrestle with the question of whether failing to award any sanctions is reversible error.[95]

B. *Application to Trade Secret Cases*

Perhaps one of the most heavily debated topics in recent TCPA litigation has been whether, and if so to what extent, the statute applied to trade secret cases.[96] The Third Court of Appeals set the ball in motion in 2017 with its *Elite Auto Body, LLC v. Autocraft Bodywerks, Inc.* decision.[97] There, an automobile repair shop sued two former employees and the competing business they started for trade secret misappropriation.[98] The allegations essentially accused the former employees of giving their new employer confidential and proprietary information, including salary and other personnel data, financial documents, service bulletins, payment sheets, and

---

90. Tatum v. Hersh, 559 S.W.3d 581, 588 (Tex. App.—Dallas 2018, no pet.).

91. *See* Serafine v. Blunt, No. 03-16-00131-CV, 2017 WL 2224528 (Tex. App.—Austin May 19, 2017, pet. denied) [hereinafter *Serafine II*]; Sullivan v. Abraham, 472 S.W.3d 677 (Tex. App.—Amarillo 2014), *rev'd on other grounds*, 488 S.W.3d 294 (Tex. 2016).

92. *Sullivan*, 472 S.W.3d at 683.

93. *Serafine II*, 2017 WL 2224528, at *7.

94. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(2) (eff. Sept. 1, 2019) (emphasis added).

95. *See* Rich v. Range Res. Corp., 535 S.W.3d 610, 612–14 (Tex. App.—Fort Worth 2017, pet. denied).

96. Zach Wolfe, *It's Alive, It's ALIVE! How to Kill a TCPA Motion in a Trade Secrets Lawsuit*, FIVE MINUTE L. (Nov. 12, 2018), https://fiveminutelaw.com/2018/11/12/its-alive-its-alive-how-to-kill-a-tcpa-motion-in-a-trade-secrets-lawsuit/.

97. Elite Autobody LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191 (Tex. App.—Austin 2017, pet. dism'd).

98. *Id.* at 194.

vehicle check lists, which the competing shop then used in its business to compete with the plaintiff.[99]

The defendants all moved to dismiss under the TCPA, arguing the suit was based on, related to, or in response to their exercise of their right of association.[100] Specifically, they argued that the gravamen of the plaintiffs' allegations were that the defendants had made "communications"—sharing the alleged trade secret information with each other, and inducing employees of the plaintiff to come work with the defendants—as they "promote[d] and pursue[d] their common interests in developing and maintaining a competitive auto body repair business."[101]

The Austin court, for the most part, agreed.[102] Relying on the Texas Supreme Court's then-fresh decision in *ExxonMobil Pipeline Co. v. Coleman*,[103] the court rejected the plaintiff's argument that the statute protected the expression of association, free speech, and petition only in the constitutional sense.[104] Rather, it opined that "*Coleman*'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."[105] In short, it held that because some of the plaintiff's claims focused on communications made by the defendants as they pursued their common interests in operating a business, the defendants had met their burden of establishing that the claims were based on, related to, or in response to their TCPA statutory right of association.[106] In doing so, the court became the first to apply the statute to trade-secret-misappropriation claims.[107] At least three other courts of appeals have followed suit.[108]

Meanwhile, two other appellate courts rejected the premise that the TCPA's rights of association and free speech encompass trade-secret claims.[109] In *Kawcak v. Antero Resources Corp.*, the Second Court of Appeals plowed new ground when it

---

99. *Id.*

100. *Id.* The defendants also argued the claims implicated their free speech rights, but the court of appeals never reached that issue. *Id.* at 194, 205.

101. *Id.* at 197.

102. *Id.* at 204–05. The court did not dismiss *all* of the plaintiff's claims, holding that to the extent some of the claims were based on conduct that did not constitute "communications," those would not be subject to the statute. *Id.* at 206–07.

103. ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895 (Tex. 2017).

104. *Elite AutoBody*, 520 S.W.3d at 202–05.

105. *Id.* at 204.

106. *Id.* at 205.

107. *See id.* at 199–200. The Austin court has followed its own precedent three times since. Rose v. Sci. Mach. & Welding, Inc., No. 03-18-00721-CV, 2019 WL 2588512, at *3 (Tex. App.—Austin June 25, 2019, no pet.); Grant v. Pivot Tech. Sols., Ltd., 556 S.W.3d 865, 881 (Tex. App.—Austin 2018, pet. filed); Craig v. Tejas Promotions, LLC, 550 S.W.3d 287, 294–96 (Tex. App.—Austin 2018, pet. filed).

108. *See* TransDesign Int'l, LLC v. SAE Towers, Ltd., No. 09-18-00080-CV, 2019 WL 2647659, at *4–6 (Tex. App.—Beaumont June 27, 2019, pet. filed); Gaskamp v. WSP USA, Inc., No. D1-18-00079-CV, 2018 WL 6695810, at *12 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet.) Morgan v. Clements Fluids S. Tex., LTD., No. 12-18-00055-CV, 2018 WL 5796994, at *3 (Tex. App.—Tyler Nov. 5, 2018, no pet.); In *TransDesign*, the Beaumont court, while relying on *Elite Auto Body*, found the TCPA initially applicable on free speech (and not association) grounds. *TransDesign*, 2019 WL 2647659, at *4–6 It said the defendants' communications pertained to a good or service in the marketplace. *Id.* at 6. But it also held that the claims were subject to the statute's "commercial speech exemption," and therefore affirmed the trial court's denial of the motion. *Id.* at *7–9.

109. *See* Dyer v. Medoc Health Servs., 573 S.W.3d 418, 425–27 (Tex. App.—Dallas 2019, pet. denied); Kawcak v. Antero Res. Corp., No. 02-18-00301-CV, 2019 WL 761480, at *17 (Tex. App.—Fort Worth, Feb. 21, 2019, pet. denied);

zeroed in on the word "common" in the statute's definition of "exercise of the right of association":

> This focus may seem trivial, but it establishes a point where two roads of TCPA interpretation diverge. One road assigns a meaning to the word "common" that embraces a set of only two people and triggers the TCPA in almost any case of conspiracy. The other road reads "common" to embrace a larger set defined by the public or at least a group. In our view, a plain-meaning interpretation of the TCPA supports the second definition. Though it is not the result that drives our analysis, the choice of a definition tied to the public or a group does return the TCPA to the mission that most believed it had at its passage.[110]

In short, the Fort Worth court held that "the right of association" as defined by the TCPA "requires more than two tortfeasors conspiring to act tortiously for their own selfish benefit," thereby rejecting the statute's application to the plaintiff's theft-of-trade-secret claim.[111] It gave several examples of instances that would implicate the public or at-large component of "common interest," including homeowners associations, social-media groups, and civic or charitable organizations.[112] The Dallas Court of Appeals followed quickly behind with its decision in *Dyer v. Medoc Health Services, LLC*, holding that it would be "illogical" to say that an alleged conspiracy to steal trade secrets was the type of "citizens participation" the statute contemplated.[113]

But in the end, the appellate-court split on the question of the TCPA's applicability to trade-secret litigation has been rendered moot by the new statute. There are at least two reasons why. The first is clear; the law's newly expanded exemptions sections dictates that "[t]his chapter does not apply to . . . a legal action arising from an officer-director, employee-employer, or independent contractor relationship that [] seeks recovery for misappropriation of trade secrets or corporate opportunities."[114] The second reason goes directly to the statute's new definitions of "exercise of the right of association" and "matter of public concern."[115] As to "association," the statute now reads "to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern," thereby modifying the type of "common interest" that can serve as the qualifying event.[116] And as to "public concern," now gone are the "health or safety," "economic or community well-being," and "good product, or service in the marketplace" definitional components.[117] Instead, to show that their conduct or communication implicated free speech, movants will need to tie it to a

110. *Kawcack*, 2019 WL 761480, at *5.
111. *Id.* at *17.
112. *Id.* at *16 n.9.
113. *Dyer*, 573 S.W.3d at 426. The Dallas court also dispensed with the argument that the statute would apply to trade-secret claims on free-speech grounds. *Id.* at 427–29.
114. TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a)(5)(A) (eff. Sept. 1, 2019).
115. *Id.* § 27.001(2), (7) (eff. Sept. 1, 2019).
116. *Id.* § 27.001(2) (eff. Sept. 1, 2019).
117. *Id.* § 27.010(a)(5)(A) (West 2017).

public official or public figure, a matter of political, social, or other interest to the community, or a subject of concern to the public.[118]

C. Application to Attorney Discipline Cases

In 2019, the Third Court of Appeals held the TCPA could apply to attorney-disciplinary actions brought by the State Bar of Texas's Commission for Lawyer Discipline.[119] The Commission had argued that as part of the State Bar, which is a subdivision of the state, its action to enforce the Texas Disciplinary Rules of Professional Conduct was an enforcement proceeding, and therefore exempt under § 27.010.[120] The majority of the court's panel disagreed, writing:

> Although the Commission is charged with the important job of disciplining attorneys who violate the Texas Disciplinary Rules of Professional Conduct, neither the Commission nor the Chief Disciplinary Counsel is included among the four entities specifically listed in the TCPA's enforcement-action exemption—i.e., "the attorney general, a district attorney, a criminal district attorney, or a county attorney."[121]

Notably, one justice disagreed, opining that attorney disciplinary actions were indeed enforcement proceedings not subject to the TCPA.[122] She wrote that the case was not substantively different from *Sullivan v. Texas Ethics Commission*, in which the same court held that an action brought by the Texas Ethics Commission against an unregistered lobbyist was not subject to the statute.[123]

In any event, the amended TCPA expressly exempts "disciplinary action[s] or disciplinary proceeding[s] brought under Chapter 81, Government Code, or the Texas Rules of Disciplinary Procedure," thus ending any debate about whether lawyers can use the statute to seek early dismissal of State Bar disciplinary actions.[124]

D. Application to Employment Disputes

In the same way the new TCPA exempts trade-secret claims, it also makes clear it does not apply to claims brought by former employers to enforce non-disparagement agreements and covenants not to compete.[125] That will do away with cases like *Abatecola v. 2 Savages Concrete Pumping, LLC*, where the Fourteenth Court of Appeals applied the statute to tortious-interference-with-contract claims brought by one company against another for hiring an individual subject to a non-compete agreement.[126]

---

118. *Id.* § 27.001(7) (eff. Sept. 1, 2019).

119. Comm'n for Lawyer Discipline v. Rosales, 577 S.W.3d 305, 311 (Tex. App.—Austin 2019, no pet. h.) (citing CIV. PRAC. & REM. § 27.010(a) (West 2017)).

120. *Id.* at 311–13.

121. *Id.* at 311.

122. *Id.* at 319–22.

123. *Id.* at 320–22.

124. CIV. PRAC. & REM. § 27.010(a)(10) (eff. Sept. 1, 2019).

125. *Id.* § 27.010(5)(B) (eff. Sept. 1, 2019).

126. Abatecola v. 2 Savages Concrete Pumping, L.L.C., No. 14-17-00678-CV, 2018 WL 3118601, at *1, 8 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied).

What is less than clear is whether courts will construe the trade-secret and non-compete exemptions to also bar suits to enforce employee non-disclosure agreements.[127] Although not specifically enumerated as an exemption by the new statute, the argument will be made that the purpose of confidentiality covenants is to protect employers from losing trade-secret information when their former employees go to work for competitors.[128] In a way, a breach-of-contract/non-disclosure-agreement claim is a hybrid trade-secret/non-compete suit.[129] Whether courts construe it to be the type of action the Legislature intended to specifically exempt, or whether they see it as a claim that fell through the legislative cracks, will remain to be seen.[130]

IV. ISSUES NOT IMPACTED BY LEGISLATIVE CHANGES

There are a number of areas of TCPA jurisprudence not impacted by the legislative changes going into effect on September 1, 2019. Those include various procedural issues, pleading amendments, the nonmovant's burden of proof, and the commercial speech exemption.

A. Procedural Issues

1. Litigants Cannot Avoid TCPA Motions Through Nonsuit

It is well established that Texas law allows parties an absolute right to a nonsuit; but if a TCPA motion has already been filed, the nonsuit does not affect the TCPA movant's right to attorney's fees and sanctions.[131] This reasoning has been followed by courts in the TCPA context when a nonsuit is filed while the motion is pending.[132] If a motion to dismiss and request for fees or sanctions is pending when an order of dismissal is signed, then the order does not resolve the pending motion for fees and sanctions and is not a final judgment.[133] The trial court still has jurisdiction over the pending motion for fees and sanctions, and the movant can request a hearing and determination of these matters.[134] Because an order of nonsuit does not dispose of a

127. *See, e.g.*, Rose v. Sci. Mach. & Welding, Inc., No. 03-18-00721-CV, 2019 WL 2588512, at *2 (Tex. App.—Austin June 25, 2019, no pet.) (holding the TCPA applicable to claims that a former employee breached an agreement to keep confidential manufacturing drawings and blueprints).

128. *See* Jeremy H. Coffman, *Protecting Your Startup Client's Intellectual Property and Customer Relationships: The Intersection of Trade Secrets, Confidentiality Agreements, and Covenants Not to Compete*, 2017 TXCLE INTELL. PROP. L. 3 (2017).

129. *See id.*

130. *See* Simmons, *supra* note 22.

131. *See* TEX. R. CIV. P. 162 (outlining that any dismissal or nonsuit "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court");Villafani v. Trejo, 251 S.W.3d 466, 469 (Tex. 2008).

132. *See* James v. Calkins, 446 S.W.3d 135, 143–44 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); Rauhauser v. McGibney, 508 S.W.3d 377, 381 (Tex. App.—Fort Worth 2014, no pet.) *disapproved of on other grounds by* Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017) ("Although a plaintiff decides which of its own claims to pursue or to abandon, that decision does not control the fate of a nonmoving party's independent claims for affirmative relief."); Am. Heritage Capital, LP v. Gonzalez, 436 S.W.3d 865, 871 (Tex. App.—Dallas 2014, no pet.).

133. *Am. Heritage Capital, L.P.*, 436 S.W.3d at 871.

134. *See id.* at 871–72.

defendant's pending, affirmative claims for relief, the court does not lose plenary power.[135]

Consistent with this, courts have awarded fees and sanctions after voluntary nonsuits when there is a pending TCPA motion.[136] Indeed, if the movant has incurred expenses defending against the lawsuit, then awarding attorney's fees serves the purpose of the statute.[137]

Further, when there is a nonsuit following a TCPA motion and the court fails to rule on the TCPA motion, it is denied by operation of law and is subject to appeal.[138] In *Rauhauser v. McGibney*, the plaintiff nonsuited five hours after a TCPA motion was filed.[139] The court did not rule on the TCPA motion, leading to a denial by operation of law.[140] On appeal, the Second Court of Appeals held that the TCPA motion survived the nonsuit and that the trial court erred in permitting the TCPA motion to be denied by operation of law.[141]

2. Statutory Deadlines Remain Intact

Although there is more leeway for the parties to agree to extend the time for filing a TCPA motion, the deadlines for the hearing and ruling have not changed.[142] Furthermore, under the existing and continuing framework, one cannot extend the statutory deadlines by filing a motion for new trial or a motion for reconsideration.[143] Similarly, if a court rules on the TCPA motion more than thirty days after the hearing on the motion, the order is void.[144]

---

135. *Id.*; *see also James*, 446 S.W.3d at 143–44.

136. *See, e.g.*, *Am. Heritage Capital, L.P.*, 436 S.W.3d at 880–81 (affirming the trial court's award of $15,616 in fees and $15,000 in sanctions ordered after nonsuit); *see also* Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC, No. 05-14-00299-CV, 2015 WL 1519667, at *5 (Tex. App.—Dallas Apr. 1, 2015, pet. denied); Zimmerman v. Austin Investigative Reporting Project, No. D-1-GN-14-004290 (53rd Dist. Ct., Travis County., Tex. Jan. 7, 2015); Delgado v. Alvarado, No. 2014-10592 (234th Dist. Ct., Harris County., Tex. May 12, 2014); Algae Int'l Grp., Inc., v. Stegman, No. DC-13-03933 (44th Dist. Court, Dallas County., Tex. Sept. 13, 2013); Hest Techs., Inc. v. Bethel, No. 067-256909-11 (67th Dist. Ct., Tarrant County., Tex. Apr. 17, 2012).

137. *See* House Comm. on Judiciary & Civil Juris., Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011) at 2; *see also* Breitling Oil & Gas Corp., 2015 WL 1519667, at *5 (granting dismissal after a nonsuit was signed and awarding $80,000 fees, $2,444.58 expenses, as well as conditional fees in the event of an appeal); *Zimmerman*, No. D-1-GN-14-004290 (ruling that the court had jurisdiction to hear the motion to dismiss after the non-movant nonsuited prior to a hearing on the motion to dismiss); *Delgado*, No. 2014-10592 (awarding $11,395.50 in attorney's fees and expenses after a nonsuit); *Algae* Int'l Grp., Inc., No. DC-13-03933 (awarding $58,790.50 in attorney's fees and $29,395.25 in sanctions after nonsuit was filed); *Hest Techs., Inc.*, No. 067-256909-11 (awarding $7,500 in attorney's fees after a nonsuit was filed).

138. Rauhauser v. McGibney, 508 S.W.3d 377, 383 (Tex. App.—Fort Worth 2014, no pet.), *disapproved of on other grounds by* Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017).

139. *Id.*

140. *Id.*

141. *Id.* at 380.

142. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.004, .005 (West. 2017).

143. *See In re* Hartley, No. 05-19-00571-CV, 2019 WL 2266672, at *2 (Tex. App.—Dallas May 24, 2019, no pet.) (mem. op.) (holding the trial court does not have the statutory authority to grant a new trial on a TCPA motion more than thirty days after the hearing on the motion).

144. *See* Kim v. Manchac, No. 05-17-01472-CV, 2018 WL 564004, at *1 (Tex. App.—Dallas Jan. 26, 2018, no pet.) (mem. op.) (reversing dismissal order issued forty-two days after hearing on TCPA motion); Dall. Morning News, Inc. v. Mapp, No. 05-14-00848-CV, 2015 WL 3932868, at *3 (Tex. App.—Dallas June 26, 2015, no pet.) (mem. op.) (concluding trial court's written order signed forty-one days

3. Stay of Proceedings During Interlocutory Appeal

To prevent unnecessary use of limited judicial resources, trial court proceedings are stayed while an interlocutory ruling denying the motion is on appeal.[145] The Texas Supreme Court recently evaluated the contours of that stay and held that it was paramount but did not deprive litigants of protection under Texas Rule of Appellate Procedure 29.3.[146] In the case of *In re Geomet Recycling LLC*, the plaintiff/non-movant obtained from the appellate court a limited lifting of the statutory stay of proceedings under the TCPA so that the trial court could hold a temporary injunction hearing and consider a motion for contempt.[147] On mandamus, the Texas Supreme Court held that procedural rules cannot authorize courts to act contrary to a statute.[148] Thus, the stay provided in § 51.014(b) applied.[149] The court was quick to explain, though, that strict enforcement of the statutory stay does not deprive litigants of protection under Texas Rule of Appellate Procedure 29.3 which expressly authorizes the court of appeals, during an interlocutory appeal, to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal."[150] In this instance, however, the litigants had sought a limited lifting of the stay for the *trial court* to consider issues that had been pending at the time of the appeal rather than asking the *appellate court* to act.[151]

B. Amended Pleadings

Nothing in the statute prohibits claimants from amending their pleadings; however, amendment after a TCPA motion is filed would be contrary to the purpose of the statute,[152] and possibly a violation of the Texas Rules of Civil Procedure.[153] Further, any new claim is subject to a TCPA motion.[154] The same holds true for the addition of new parties—a newly added party may file a motion to dismiss within sixty days of being brought into the lawsuit.[155] Presumably, if an amended pleading

after the TCPA hearing came too late and was void); Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC, 407 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (rejecting argument that Tex. R. Civ. P. 329b empowered a trial court to grant a motion to dismiss after it had been overruled by operation of law).

145. *See* CIV. PRAC. & REM. § 51.014(a)(12), (b) (West 2017).

146. *In re* Geomet Recycling LLC, No. 18-0443, 2019 WL 2482125, at *5 (Tex. June 14, 2019).

147. *Id.* at *1–2.

148. *Id.* at *6.

149. *Id.*

150. *Id.* at *4 (citing TEX. R. APP. P. 29.3).

151. *Id* at *5. Because the parties had also agreed to have the temporary restraining order extended through the appeal, there was a question as to whether any order was necessary. *Id.* at *5 n.3.

152. *See, e.g.*, Lindsey v. Adler, No. 05-12-00010-CV, 2013 WL 1456633, at *3 (Tex. App.—Dallas Apr. 9, 2013, no pet.) (holding that a motion to dismiss under the Texas Medical Liability Act cannot be subverted by filing an amended petition); *see also* Salma v. Capon, 74 Cal. Rptr. 3d 873, 889 (2008) (holding that the trial court properly denied a request to file a proposed amended complaint while an anti-SLAPP motion was pending).

153. *See* TEX. R. CIV. P. 63.

154. *See In re* Estate of Check, 438 S.W.3d 829, 836–37 (Tex. App.—San Antonio 2014, no pet.) ("Extrapolating from *Ward*, in the absence of new parties or claims, the deadline for filing a motion to dismiss would run from the date of service of the original 'legal action.'"); *see also* Better Bus. Bureau of Metro. Dall., Inc. v. Ward, 401 S.W.3d 440, 443 (Tex. App.—Dallas 2013, pet. denied).

155. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003(b), 27.001(6) (eff. Sept. 1, 2019).

is filed *after* the new TCPA provisions go into effect, the new provisions will apply to the amended claims.

Courts have consistently restarted the clock for motions filed in connection with newly asserted claims. For instance, in *Williams v. Cordillera Communications, Inc*., a lawsuit against a television station based on the station's reports of a teacher's inappropriate behavior with female students, a TCPA motion to dismiss was filed after the filing of a second amended complaint.[156] The amended complaint contained new claims arising out of recent broadcasts not a part of earlier pleadings.[157] The court ruled that the term "legal action" in § 27.001(6) contemplates additional pleadings and additional causes of action that may arise during the progress of a case.[158] Because the claims in the second amended complaint related to separate broadcasts that did not occur until a year after the original complaint was filed, the court ruled that the motion—which was filed within sixty days of the operative pleading in which the new claims were added—was timely with respect to those new claims.[159] *Williams v. Cordillera* will remain good law with regard to amending pleadings and the application of TCPA to new claims pleaded.

Conversely, in *In re Estate of Check*, the Fourth Court of Appeals held that an amended pleading did not reset the sixty-day deadline to file a motion under the TCPA when no new parties or claims had been added.[160] Similarly, the First Court of Appeals in *Paulsen v. Yarrell*, when considering the appeal of a denial of a motion to dismiss, stated:

> An amended pleading that does not add new parties or claims does not restart the deadline for filing a motion to dismiss under the TCPA. Permitting the 60-day deadline to be reset each time a party amended a petition or counterclaim, regardless of whether new claims or parties have been introduced, would frustrate the expressed legislative purpose of the TCPA, "which is to allow a defendant *early in the lawsuit* to dismiss claims that seek to inhibit a defendant's constitutional rights to petition, speak freely, associate freely, and participate in government as permitted by law."[161]

None of the legislative amendments to the TCPA should impact this line of jurisprudence.

C. *Quantum of Proof Required by Nonmovant*

156. Williams v. Cordillera Commc'ns, Inc., No. 2:13-CV-124, 2014 WL 2611746, at *3 (S.D. Tex. June 11, 2014).

157. *Id.* at *2.

158. *Id.*

159. *Id.*

160. *In re* Estate of Check, 438 S.W.3d 829, 836–37 (Tex. App.—San Antonio 2014, no pet.); *see also* Miller Weisbrod, L.L.P. v. Llamas-Soforo, 511 S.W.3d 181, 182 (Tex. App.—El Paso 2014, no pet.) (holding that a TCPA motion was untimely because the new claims were originally brought in a first amended petition, and the motion was filed more than sixty days after the first amended petition was filed.).

161. Paulsen v. Yarrell, 455 S.W.3d 192, 198 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citations omitted) (quoting *Check*, 438 S.W.3d at 836).

Additionally, nothing about the statutory revisions will have an impact on the quantum of proof required by the non-movant; TCPA § 27.005(c) was not changed.[162] Thus, after the moving party establishes that the suit implicates the right to free speech, right to petition or the right of association, the burden then shifts from the moving party (usually the defendant), to the party bringing the action (usually the plaintiff) to adduce a *prima facie* case with clear and specific evidence of each essential element of the claim in question.[163] If the plaintiff does not meet its burden, then the court must dismiss the claim.[164]

The Texas Supreme Court opined about the clear-and-specific- evidence standard in *In re Lipsky* and recognized that it does not categorically exclude relevant circumstantial evidence.[165] The Court explained the TCPA's clear and specific standard requires more than fair notice of a claim as required by the Texas Rules of Civil Procedure.[166] According to the Court:

> Fair notice of a claim under our procedural rules thus may require something less than 'clear and specific evidence' of each essential element of the claim. Because the [TCPA] requires more, mere notice pleadings—that is, general allegations that merely recite the elements of a cause of action—will not suffice. Instead, a plaintiff must provide enough detail to show the factual basis for its claim.[167]

In a defamation case that implicates the TCPA, the plaintiff must establish through pleadings and evidence the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff.[168]

The Court continued to explain that conclusory affidavits do not suffice to meet the clear and specific evidentiary burden.[169] In *Lipsky*, the Court held both the affidavit of a company executive with global conclusions about damages was not sufficient clear and specific evidence for the business disparagement claim, nor was the general accusations of bias by a third-party consultant sufficient clear and specific evidence to support the conspiracy claim.[170]

Moving forward, *In re Lipsky* will remain good law with regard to its interpretation of the "clear and specific" standard.

1. Proof That Can Be Considered in TCPA Proceedings

The TCPA expressly provides that the court may look to pleadings and affidavits as proof in the Anti-SLAPP context.[171] Often, a movant will rely on the

---

162. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West 2017).

163. *Id.*; *In re* Lipsky, 411 S.W.3d 530 (Tex. App.—Fort Worth 2013, orig. proceeding) *mand. denied*, 460 S.W.3d 579 (Tex. 2015, orig. proceeding).

164. CIV. PRAC. & REM. § 27.005 (West 2017).

165. *In re* Lipsky, 460 S.W.3d 579, 591 (Tex. 2015, orig. proceeding).

166. *Id.* at 590–91.

167. *Id.*

168. CIV. PRAC. & REM. § 27.006(a) (West 2017).

169. *Lipsky*, 460 S.W.3d at 590–91.

170. *Id.*

171. CIV. PRAC. & REM. § 27.006(a) (eff. Sept. 1, 2019). H.B. 2730 changed the title of this section to "Proof" rather than "Evidence" to more accurately describe the use of pleadings. *Id.* (eff. Sept. 1, 2019).

pleadings to establish that the claims brought against it are based on, related to, or made in response to the exercise of the right of free speech, right to petition, or right of association—the TCPA's required showing to obtain dismissal.[172] In *Hersh v. Tatum*, the Texas Supreme Court made it clear that the facts asserted in the initial pleading may demonstrate that the statute applies even if the defendant denies making the statements, holding that "[w]hen it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more."[173] This ruling will stand under the new statutory provisions.

Importantly though, the facts asserted in those pleadings must be specific enough to determine the applicability of the statute if relying solely on them to demonstrate that the TCPA is applicable.[174] If the facts are not clear, an affidavit may be required to demonstrate applicability of the statute.[175] For example, in *Cheniere Energy, Inc. v. Lotfi*, a case in which both parties relied only on the pleadings, the First Court of Appeals held:

> Because we are to view the pleadings and evidence in the light most favorable to the non-movant, we conclude that the limited assertions in [Plaintiff's] pleading fail to meet the movants' burden of establishing that they had a communication, they acted in furtherance of a common interest, and that [Plaintiff's] claim against them is related to their exercise of the right of association. Absent affidavit evidence supporting their contentions, [Movants] have failed to meet their burden to obtain dismissal.[176]

In addition to pleadings and affidavits, H.B. 2730 made clear that courts shall also consider any evidence a court could consider in a summary judgment proceeding.[177]

2. Proof That Cannot Be Considered in TCPA Proceedings

The TCPA (old and new) does not contemplate live testimony at a hearing on a motion to dismiss.[178] More than one court has denied live testimony, because "[b]y statute, the trial court's decision on a motion to dismiss under Section 27.003 is not

---

172. *Id.* (eff. Sept. 1, 2019).

173. Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017) (applying the TCPA despite author's denial of making the alleged communication). *See also* Rio Grande H2O Guardian v. Rober Muller Family P'ship, Ltd., No. 04-13-00441-CV, 2014 WL 309776, at *3 (Tex. App—San Antonio, Jan. 29, 2014, no pet.) (*disapproved on other grounds by Lipsky*, 460 S.W.3d 579 (Tex. 2015, orig. proceeding)) ("Because we may consider the pleadings as evidence in this case, Rio Grande H2O Guardian's petition established that the appellants were exercising their right to petition in filing the lawsuit"); Schimmel v. McGregor, 438 S.W.3d at 847, 859 (Tex. App—Houston [1st Dist.] 2014, no pet.) ("We first note that, in making a determination on a motion to dismiss, the trial court is not limited to considering only supporting and opposing affidavits, but the court 'shall consider the pleadings' as well.").

174. *See* Cheniere Energy, Inc. v. Lotfi, 449 S.W.3d 210, 214–15 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

175. *See id.*

176. *Id.*

177. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (eff. Sept. 1, 2019) (adding the phrase "evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure.").

178. *See id.*

based on live testimony."[179] This too is consistent with summary judgment jurisprudence.

D. Discovery

Nothing has changed in the statute *vis a vis* the discovery provisions. The TCPA provides for an automatic stay of discovery in the case while a motion to dismiss is pending.[180] The purpose of the discovery stay is to prevent costs associated with defending against a meritless claim.

For good cause, however, the trial court can, on its own motion or at the request of the parties, authorize limited discovery relevant to the motion.[181] Good cause is a necessary requirement and has been defined as: "the discovery necessary to further [a] cause of action."[182] The plaintiff must show the trial court that the requested discovery would provide evidence of essential elements of the claim necessary to refute the motion to dismiss.[183] If discovery is permitted, the court may extend the hearing date to no longer than 120 days after the date the motion to dismiss was served.[184]

A trial court's ruling that permits or denies specific and limited discovery is reviewed under an abuse-of-discretion standard.[185] To establish an abuse of

---

179. Pena v. Perel, 417 S.W.3d 552, 556 (Tex. App.—El Paso 2013, no pet.). *See* Elite Auto Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 195 (Tex. App.—Austin 2017, pet. dism'd) (upholding a TCPA ruling excluding live testimony citing TEX. CIV. PRAC. & REM. CODE § 27.006(a)). *See also In re* Estate of Calkins, No. 01-18-00160-CV, 2019 WL 2292985, at *9 (Tex. App.—Houston [1st Dist.] May 30, 2019, no pet.); Perez v. Quintanilla, No. 13-17-00143-CV, 2018 WL 6219627, at *2 (Tex. App.—Corpus Christi Nov. 29, 2018, no pet.); Gaskamp v. WSP USA, Inc., No. 01-18-00079-CV, 2018 WL 6695810, at *7 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet.); *In re* Elliott, 504 S.W.3d 455, 462 (Tex. App.—Austin 2016, orig. proceeding).

180. *See* CIV. PRAC. & REM. § 27.003(c) (West 2017); *see also* San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Props., LP, 452 S.W.3d 343, 349–51 (Tex. App.—Corpus Christi 2013, pet. denied); Avila v. Larrea, 394 S.W.3d 646, 653 (Tex. App.—Dallas 2012, pet. denied).

181. CIV. PRAC. & REM. § 27.006(b) (eff. Sept. 1, 2019); *see also Elliott*, 504 S.W.3d at 465 (holding that discovery must be directed at resolving the motion to dismiss); Hand v. Hughey, No. 02-15-00239-CV, 2016 WL 1470188, at *3 (Tex. App.—Fort Worth Apr. 14, 2016, no pet.) (allowing limited depositions); Am. Heritage Capital, L.P. v. Gonzalez, 436 S.W.3d 865, 865–69 (Tex. App.—Dallas 2014, no pet.) (allowing limited depositions); Pickens v. Cordia, 433 S.W.3d 179, 179–83 (Tex. App.—Dallas 2014, no. pet.) (allowing limited discovery); Clark v. Hammond, No. 14-12-01167-CV, 2014 WL 1330275, at *1 (Tex. App.—Houston [14th Dist.] Apr. 3, 2014, no pet.) (mem. op.) (per curium) (allowing limited discovery). It is not an abuse of discretion for judges to allow limited *means* of discovery. *See, e.g.*, Mansik & Young Plaza LLC v. K-Town Mgmt., LLC, No. 05-15-00353-CV, 2016 WL 4306900, at *9 (Tex. App.—Dallas Aug. 15, 2016) (allowing two witnesses to aver what they heard in a meeting while disallowing the deposition of the speaker at the meeting).

182. *See* Walker v. Schion, 420 S.W.3d 454, 458–59 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (finding no abuse of discretion where trial court disallowed discovery); *In re* D.C., No. 05-13-00944-CV, 2013 WL 4041507, at *1 (Tex. App.—Dallas Aug. 9, 2013, no pet.) (mem. op.) (granting writ of mandamus after trial court granted expedited discovery); Ramsey v. Lynch, No. 10-12-00198-CV, 2013 WL 1846886, at *1 (Tex. App.—Waco May 2, 2013, no pet.) (mem. op.) (trial court concluded there was no good cause for discovery).

183. *See Walker*, 420 S.W.3d at 458.

184. CIV. PRAC. & REM. § 27.004(c) (eff. Sept. 1, 2019).

185. *Walker*, 420 S.W.3d at 458. "Although we have found no other cases specifically addressing the standard of review applicable to the denial of a motion for discovery under the Citizens Participation Act, we agree with Schion that the abuse-of-discretion standard applies. This approach is consistent not only with the permissive language of the statute, but also with the longstanding general rule that a trial court's denial of discovery is reviewed for abuse of discretion." *Id.*; *see, e.g.*, Ford Motor Co. v. Castillo,

discretion, a plaintiff must show that the inability to obtain the discovery prevented the plaintiff from prevailing.[186] The Fifth Court of Appeals granted mandamus relief requiring a trial court to vacate an order granting discovery in a TCPA case when there was "no good cause for the discovery."[187] In that case, the non-movant had stated that he needed depositions "in order to defend the motion to dismiss;" the appeals court held that a general need was insufficient to demonstrate "good cause for the discovery."[188] The Sixth Court of Appeals also clarified it is not sufficient to ask for limited discovery the day of the hearing on the motion without also requesting a continuance.[189] When a trial court orders discovery, courts have continued to apply standard discovery rules within the TCPA's deadlines.[190]

Multiple litigants have raised constitutional challenges to the provision restricting discovery during the pendency of a TCPA motion on the basis that it violates a plaintiff's rights under the open-courts doctrine in the Texas constitution, but those challenges have been unsuccessful.[191] Specifically, in both *Greer* and *Sheffield*, the courts of appeals noted that the restrictions on discovery were tempered by the ability for a litigant to obtain discovery upon a showing of good cause.[192]

E. Commercial Speech Exemption

The text of the commercial speech exemption was unchanged by the Legislature, thus leaving intact the April 2018 Texas Supreme Court decision interpreting that exemption in *Castleman v. Internet Money Ltd.*[193] Prior to that opinion, there was a growing split in appellate authority.[194] In *Castleman*, Timothy Castleman and Internet Money Limited entered into an agreement in which Internet Money would perform certain order-fulfillment services for Castleman.[195] When Internet Money did not perform to Castleman's satisfaction, Castleman demanded that Internet Money cover his lost profits.[196] Internet Money refused, and in response, Castleman posted several statements critical of Internet Money in a blog and YouTube video describing the dispute between the two parties.[197]

---

279 S.W.3d 656, 661 (Tex. 2009) ("We review a trial court's actions denying discovery for an abuse of discretion."); *see also In re* CSX Corp., 124 S.W.3d 149, 152 (Tex. 2003) (per curiam) ("Generally, the scope of discovery is within the trial court's discretion.").

186. *Walker*, 420 S.W.3d at 458–59.

187. *In re* D.C., No. 05-13-00944-CV, 2013 WL 4041507, at *1 (Tex. App.—Dallas Aug. 9, 2013, no pet.).

188. *Id.*

189. Whisenhunt v. Lippincott, 474 S.W.3d 30, 41 (Tex. App.—Texarkana 2015), *reh'g overruled* (Sept. 1, 2015).

190. *See, e.g.*, Abraham v. Greer, 509 S.W.3d 609, 617 (Tex. App.—Amarillo 2016, pet. denied) (upholding journalist's privilege in limited discovery context).

191. Mem'l Hermann Health Sys. v. Khalil, No. 01-16-00512-CV, 2017 WL 3389645, at *16 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied); *Abraham*, 509 S.W.3d at 615; Combined Law Enf't Ass'n of Texas v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672, at *10 (Tex. App.—Austin Jan. 31, 2014, pet. denied).

192. *Khalil*, 2017 WL 3389645, at *16; *Greer*, 509 S.W.3d at 616–17; *Sheffield*, 2014 WL 411672, at *10.

193. Castleman v. Internet Money Ltd., 546 S.W.3d 684 (Tex. 2018).

194. *See id.* at 686.

195. *Id.* at 685.

196. *Id.*

197. *Id.* at 685–86.

Internet Money sued for defamation based on these posts, and Castleman moved to dismiss under the TCPA. The trial court denied Castleman's motion, holding that the commercial speech exemption to the TCPA applied. The Amarillo Court of Appeals affirmed, agreeing with the trial court that the commercial speech exemption prevented application of the TCPA in this instance.[198]

Upon review, the Texas Supreme Court reversed.[199] When "read within its statutory context," the Texas Supreme Court concluded that the exemption "requires that the defendant engaged in the conduct on which the claim is based in his capacity as 'a person primarily engaged in the business of selling or leasing goods or services.'"[200] The Court further held "that 'the intended audience' of the statement or conduct must be actual or potential customers of the defendant," as opposed to the plaintiff's actual or prospective customers or to the public at large.[201] As a result, the Court held that application of the commercial speech exemption was inappropriate because the communications at issue were not made in Castleman's capacity as a person engaged in the business of selling or leasing goods and, additionally, because they were made to Internet Money's potential consumers and the public at large, not to Castleman's potential customers.[202]

Under the new TCPA provisions, *Castleman's* interpretation of the commercial speech exemption remains good law.

V. REMAINING OPEN QUESTIONS

Although it's clear the amendments to the TCPA both resolved several issues courts had been grappling with, and left alone other areas that have been clearly established, other questions remain that the Texas Supreme Court will ultimately need to resolve. Specifically, does the statute apply to Rule 202 Petitions for pre-suit discovery?[203] And does it apply to pre-suit correspondence, like demand or cease-and-desist letters?

A. Applicability of Rule 202

As discussed above, the statute altered the definition of "legal action," not only to add "declaratory relief," but also to exclude procedural actions and motions (like appeals and anti-SLAPP motions themselves), ADR proceedings, and post-judgment enforcement actions.[204] The new statute does *not* address whether pre-suit requests for discovery, which are governed by Texas Rule of Civil Procedure 202, are "legal actions."[205] The Austin and Fort Worth Courts of Appeals have held they are,[206] the Fourteenth Court of Appeals in Houston and the Dallas Court of Appeals have

198. Castleman v. Internet Money Ltd., 545 S.W.3d 682 (Tex. App.—Amarillo 2017) *rev'd*, 546 S.W.3d 684 (Tex. 2018).

199. Castleman v. Internet Money Ltd., 546 S.W.3d 684 (Tex. 2018).

200. *Id.* at 689.

201. *Id.*

202. *Id.* at 690–91.

203. *See* TEX. R. CIV. P. 202.

204. *See supra* Section II.B.

205. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6) (eff. Sept. 1, 2019).

206. DeAngelis v. Protective Parents Coal., 556 S.W.3d 836, 847–49 (Tex. App.—Fort Worth 2018, no pet.); *In re* Elliott, 504 S.W.3d 455, 463–66 (Tex. App.—Austin 2016, no pet.).

presumed they are,[207] and the First Court of Appeals in Houston has said they are not.[208]

In 2016's *In re Elliott*, the Third Court of Appeals became the first Texas appellate court to decide whether pre-suit discovery requests are "legal actions" under the TCPA.[209] There, a company sought to depose—without having filed a lawsuit—a particular named individual it suspected of publishing an online article critical of the company.[210] An anonymous "John Doe 1," identifying himself as "an author, publisher, and/or distributor" who utilized the website on which the article had been published, filed a TCPA motion to dismiss.[211] Doe claimed the Rule 202 petition was "based on, related to, or in response to [Doe's] exercise of his right of free speech and the rights of free speech of other potential defendants and adverse parties."[212]

In holding that the deposition request was subject to the dismissal mechanisms of the TCPA, the Austin court wrote, "[o]n its face, the Rule 202 petition fits the description of covered filings under the TCPA—*i.e.*, it is a petition or other judicial pleading or filing that seeks legal or equitable relief . . . —a presuit deposition."[213] Disagreeing with the Rule 202 petitioner that the word "petition" in the "legal action" definition really means "lawsuit," the court employed a dictionary definition: "formal written request presented to a court or other official body."[214]

It also held that even if a Rule 202 request wasn't a "petition" under the TCPA, it *was* a "judicial pleading or filing that requests legal or equitable relief."[215] The court engaged in a historical analysis to demonstrate that Rule 202 owes its ancestry to several English, common-law equitable devices, and pointed out that in the medical malpractice context, the Texas Supreme Court considered a pre-suit discovery request to be a "cause of action."[216]

In *DeAngelis v. Protective Parents Coalition*, the Second Court of Appeals held the same way, and for the same reasons.[217] It also cited a federal district court opinion that noted a Rule 202 petition is a "civil action" for purposes of removal.[218]

The Fifth Court of Appeals has not gone quite as far. Although it held in 2016—in a different, albeit TCPA context—that Rule 202 petitions are "judicial proceedings" sufficient to trigger the statute's definition of "right to petition," the court stopped short of holding that requests for pre-suit discovery are "legal

---

207. Breakaway Practice, LLC v. Lowther, No. 05-18-00229-CV, 2018 WL 6695544, at *2 n.2 (Tex. App.—Dallas Dec. 20, 2018, pet. filed); Glassdoor, Inc. v. Andra Group, LP, 560 S.W.3d 281, 284 (Tex. App.—Dallas 2017), *rev'd on other grounds*, 575 S.W.3d 523 (Tex. 2019); Puig v. Hejtmancik, No. 14-17-00358-CV, 2017 WL 5472781, at *2 (Tex. App.—Houston [14th Dist.] Nov. 14, 2017, no pet.).

208. Hughes v. Giammanco, No. 01-18-00771-CV, 2019 WL 2292990, at *6–9 (Tex. App.—Houston [1st Dist.] May 30, 2019, judgment set aside; opinion not vacated); Caress v. Fortier, 576 S.W.3d 778 (Tex. App.—Houston [1st Dist.] 2019, pet. filed).

209. *Elliott*, 504 S.W.3d at 463–66.

210. *Id.* at 457–58.

211. *Id.* at 458.

212. *Id.* at 459.

213. *Id.* at 463.

214. *Id.* at 464; *Petition*, BLACK'S LAW DICTIONARY (9th ed. 2009).

215. *Id.* at 464–65.

216. *Id.*

217. DeAngelis v. Protective Parents Coal., 556 S.W.3d 836, 847–49 (Tex. App.—Fort Worth 2018, no pet.).

218. *Id.* at 849 (citing *In re* Texas, 110 F. Supp. 2d 514, 521–22 (E.D. Tex. 2000)).

actions."[219] In *Glassdoor, Inc. v. Andra Group, LP*, the court examined a TCPA motion to dismiss a Rule 202 petition filed against a website that allowed users to post anonymous reviews.[220] The petitioner was seeking to discover the identities of its reviewers.[221] The court—while noting the issue had not been well-briefed by the parties—assumed *arguendo* that a Rule 202 petition constituted a "legal action" before ultimately holding that the petitioner established a prima facie case for each element of its claim.[222] The court duplicated that approach a year later in *Breakaway Practice, LLC v. Lowther*, where it "presume[d] the [statute] applies" to TCPA motions while noting it has not actually answered that question.[223] The Fourteenth Court of Appeals has done the same.[224]

Meanwhile, the First Court of Appeals in Houston has held that Rule 202 petitions *are not* legal actions under the TCPA.[225] In *Hughes v. Giammanco*, the court took issue with its sister courts in Austin and Fort Worth, opining:

> [T]o arrive at the conclusion they have reached, one must read the TCPA's definition of a "legal action" in isolation from the Act's other provisions and minimize the doubt raised in other appellate decisions as to the TCPA's application in proceedings other than those for adjudication of a legal claim on its merits.[226]

Specifically, the court agreed with the dissent in *In re Elliott* that the word "petition" in the definition of "legal action" referred to the pleading instrument in which a plaintiff brings and maintains a lawsuit, and not the broader notion of a formal written request presented to a court.[227] It reasoned, "[c]onstruing 'petition' more generically would render the Legislature's inclusion of the other procedural devices enumerated in the definition of a 'legal action' meaningless because those devices also are formal written requests presented to a court and, thus, would be 'petitions' in the broader sense of the word."[228]

It further held that even though a Rule 202 petition is "a judicial pleading or filing"—so as to implicate the "catch all" component of the "legal action" definition—it is not one that "requests legal or equitable relief":

---

219. Watson v. Hardman, 497 S.W.3d 601, 606 (Tex. App.—Dallas 2016, no pet.).

220. Glassdoor, Inc. v. Andra Group, LP, 560 S.W.3d 281, 284 (Tex. App.—Dallas 2017), *rev'd on other grounds*, 575 S.W.3d 523 (Tex. 2019).

221. *Id.*

222. *Id.* at 293–94 ("For purposes of this opinion, we specifically do not decide whether a Rule 202 petition is a 'legal action' for Chapter 27 purposes because even if it were [the non-movant produced clear and specific evidence of a potentially viable claim].").

223. Breakaway Practice, LLC v. Lowther, No. 05-18-00229-CV, 2018 WL 6695544, at *2 (Tex. App.—Dallas Dec. 20, 2018, pet. filed).

224. Puig v. Hejtmancik, No. 14-17-00358-CV, 2017 WL 5472781, at *2 (Tex. App.—Houston [14th Dist.] Nov. 14, 2017, no pet.).

225. Hughes v. Giammanco, No. 01-18-00771-CV, 2019 WL 2292990, at *6–9 (Tex. App.—Houston [1st Dist.] May 30, 2019, judgment set aside; opinion not vacated); Caress v. Fortier, 576 S.W.3d 778 (Tex. App.—Houston [1st Dist.] May 9, 2019, pet. filed).

226. *Hughes*, 2019 WL 2292990, at *5.

227. *Id.* at *6 (quoting *In re* Elliott, 504 S.W.3d 455, 475 (Tex. App.—Austin 2016, orig. proceeding) (Pemberton, J. concurring).

228. *Id.*

> A Rule 202 petition is neither an end in and of itself nor a "procedural vehicle for the vindication of a claim." It does not change the relationship between the parties. Rather, it is a means of obtaining discovery to evaluate whether to pursue the vindication of a claim that may, or may not, be shown to exist through the pre-suit discovery.[229]

While the court agreed that an order compelling a person to submit to a deposition before she has been sued would not be available without Rule 202, it is still not a "benefit" equivalent to a legal or equitable remedy.[230] "At its core, Rule 202 entitles the successful petitioner to discovery, which, again, is only a tool in aid of evaluating whether to pursue a remedy later."[231] And, as the court pointed out, "the testimony secured by a Rule 202 deposition may conclusively demonstrate no action from which to seek a remedy at all."[232]

The *Hughes* court concluded by observing that Rule 202 had already built in protections that were similar—if not more stringent—to the TCPA.[233] It posited that the "specific and limited" discovery upon a showing of good cause (the TCPA's standard) may very well be looser than the benefit/burden balancing test of Rule 202.[234] And the court pointed out that the Texas Supreme Court has already cautioned courts "to take a hard look at petitions for pre-suit discovery to prevent abuse of the rule."[235]

The Texas Supreme Court had the opportunity to settle the appellate-district split in early 2019 when it granted review on the Dallas court's *Glassdoor* case.[236] But rather than addressing Rule 202's applicability, it instead dismissed the case on mootness grounds.[237] That didn't stop the First Court of Appeals in *Hughes* from using friendly language from the Texas Supreme Court's *Glassdoor* opinion.[238] But which approach the Court will ultimately adopt is anybody's guess.[239]

B. *Applicability to Pre-suit Correspondence Under Right to Petition*

One thing that *has not* changed in the new TCPA is the definition of the "right to petition."[240] That definition has already led to several unpredictable applications, including actions filed in response to pre-suit demand letters.[241] In *Long Canyon Phase II and III Homeowners Association, Inc. v. Cashion*, the Third Court of

---

229. *Id.* at *7–9; TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6) (West 2017).
230. *Hughes*, 2019 WL 2292990, at *9.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* (citing *In re* Wolfe, 341 S.W.3d 932, 933 (Tex. 2011) (directing courts to "strictly limit and carefully supervise presuit discovery to prevent abuse of the rule")).
236. Glassdoor, Inc. v. Andra Group, LP, 575 S.W.3d 523 (Tex. 2019).
237. *Id.* at 531.
238. Hughes v. Giammanco, No. 01-18-00771-CV, 2019 WL 2292990, at *8 (Tex. App.—Houston [1st Dist.] May 30, 2019, judgment set aside; opinion not vacated).
239. As of the date of this article's publication, the Texas Supreme Court has not granted a Petition for Review in any case in which Rule 202's applicability is at issue.
240. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(4) (West 2017).
241. *See* Long Canyon Phase II and III Homeowners Ass'n, Inc. v. Cashion, 517 S.W.3d 212, 220–21 (Tex. App.—Austin 2017, no pet.).

Appeals examined a dispute between a Homeowners Association and two of its residents.[242] The HOA had sent the residents a letter threatening fines and a lawsuit.[243] The residents responded by filing suit themselves, not only for injunctive and declaratory relief, but also for damages for harassment, negligence, and severe emotional distress.[244]

The HOA filed a motion to dismiss the plaintiffs' affirmative claims for relief under the TCPA, arguing that its demand letter was an exercise of its right to petition because the Property Code required it to send notice before filing suit, thereby rendering the letter a "communication . . . pertaining to" "a judicial proceeding."[245] The Austin court disagreed with that position, holding that "judicial proceeding" means "an actual, pending judicial proceeding."[246] But it nevertheless held that the letter *was* an exercise of the HOA's right to petition because it fell under the definition's "catchall" provision: "any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state."[247] While conceding that the letter was between private parties and not addressed to the government, the court wrote, "[t]he established understanding under First Amendment jurisprudence, both now and at the time of the TCPA's enactment, was that presuit demand letters generally fall within the 'right to petition,'" and that the statute "reflects legislative intent that the definition be consistent with and incorporate the nature and scope of the 'right to petition' that had been established in constitutional jurisprudence."[248]

Although it's easy to fear the *Cashion* holding might be used to stymie *all* declaratory judgment actions—which are typically triggered by pre-suit demand or cease-and-desist letters—it's important to remember the HOA was *not* trying to use the TCPA to dismiss the plaintiffs' declaratory claims.[249] Rather, it was only seeking dismissal of the claims for damages the plaintiffs' alleged *were the result of the demand letter itself*—those "coercive," as opposed to declaratory, claims for relief.[250] It's that procedural posture that squares *Cashion* with the majority of courts that say cease-and-desist letters and other threats of litigation are "petitioning" activity.[251]

It also could explain the apparent discord between *Cashion* and *Levatino v. Apple Tree Café Touring, Inc.*, a Fifth Court of Appeals decision that declined to

242. *Id.* at 215–16.

243. *Id.* at 215.

244. *Id.* at 215–16.

245. *Id.* at 219–20. Importantly, the HOA expressly withdrew the portion of its motion challenging the plaintiffs' declaratory judgment claims. *Id.* at 218. In other words, it only sought dismissal of the claims for damages that allegedly flowed from the demand letter itself—the harassment, negligence, and emotional distress claims—and not the declaratory relief claims that were effectively "mirror images" of their own claims for relief. *See* Robert T. Sherwin, *Shoot First, Litigate Later: Declaratory Judgment Actions, Procedural Fencing, and Itchy Trigger Fingers*, 70 OKLA. L. REV. 793, 805 (2018).

246. *Id.* at 220.

247. *Id.*

248. *Id.*

249. *Id.* at 218.

250. *See* Sherwin, *supra* note 245, at 824 (discussing the nature of declaratory relief, as distinguished from traditional "coercive" relief where a party has a claim for damages).

251. *See* Rock River Commc'ns, Inc. v. Universal Music Grp., Inc., 745 F.3d 343, 351 (9th Cir. 2014); Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 99–100 (2d Cir. 2000); Glass Equip. Dev., Inc. v. Besten, Inc., 174 F.3d 1337, 1344 (Fed. Cir. 1999); Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1367 (5th Cir. 1983).

apply the TCPA to a suit brought in response to a demand letter.[252] There, recording artist Erykah Badu's company had brought a declaratory suit against an individual who claimed to be her manager.[253] After the individual sent Badu two demand letters seeking "millions of dollars," the company sought a declaration that he was not her manager and therefore was owed no money.[254] The Dallas court said the demand letters did not pertain to a judicial proceedings, even though they threatened potential defamation claims.[255] The court also disagreed the letters were communications "reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body": "[T]hese letters were [not] 'reasonably likely' to encourage judicial consideration or review. Rather, they sought to avoid judicial review of the dispute."[256]

The Texas Supreme Court may very well be called upon to eventually answer the question of whether presuit correspondence constitutes the type of petitioning activity contemplated by the statute.[257] But the exact procedural posture of the case—specifically, whether the plaintiff's claim only seeks a declaration of rights raised by the correspondence, or whether the claim seeks coercive, affirmative relief for injuries caused by the correspondence—should play an enormous role in how the court rules.[258]

VI. NEW OPEN QUESTIONS

The 2019 legislative changes to the TCPA both answered and left open questions that had been percolating since its passage in 2011.[259] But the changes also create some new open questions. With the altered definitions of "matter of public concern" and "right of association," they naturally raise issues about the continued viability of two important Texas Supreme Court cases—*ExxonMobil Pipeline Co. v. Coleman*,[260] and *Lippincott v. Wisenhunt*[261] —as well as the scope of the right to associate.

A. *Interpretation of New "Matter of Public Concern" Definition*

In 2017, the Texas Supreme Court decided *ExxonMobil Pipeline Co. v. Coleman*, a case that has had far-reaching effects on how lower courts have analyzed

252. Levatino v. Apple Tree Café Touring, Inc., 486 S.W.3d 724 (Tex. App.—Dallas 2016, pet. denied).

253. *Id.* at 726.

254. *Id.*

255. *Id.* at 728.

256. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(4)(C) (West 2017)).

257. As of the date of this article's publication, the Texas Supreme Court has not granted a Petition for Review in any case in which the application of the TCPA to presuit correspondence is at issue.

258. *Compare* Long Canyon Phase II and III Homeowners Ass'n, Inc. v. Cashion, 517 S.W.3d 212, 220–21 (Tex. App.—Austin 2017, no pet.) (applying the TCPA to presuit correspondence), *with Levatino*, 486 S.W.3d at 726 (rejecting the TCPA's application to presuit correspondence).

259. *See supra* Sections II and IV.

260. ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895 (Tex. 2017).

261. Lippincott v. Wisenhunt, 462 S.W.3d 507 (Tex. 2015).

the TCPA.[262] *Coleman* was a rather routine defamation claim; an Exxon employee had been fired for allegedly failing to perform his job duties, which included recording the fluid volume of storage tanks each night (a process known as "gauging the tanks").[263] He claimed, however, that reports of his job dereliction were false, and so he sued his superiors for defamation.[264] Exxon moved to dismiss under the TCPA, arguing that gauging the tanks was important to "reduce the potential environmental, health, safety, and economic risks associated with noxious and flammable chemicals overfilling and spilling onto the ground."[265] As a result, anything it said about its employee failing to accomplish that job was a matter of public concern, and therefore an exercise of its free speech rights.[266]

The Fifth Court of Appeals had affirmed the trial court's denial of Exxon's motion, holding that, at most, the communications about the employee's failure to gauge the tank "had only a tangential relationship to health, safety, environmental, and economic concerns," and at their core, comprised an internal employment dispute.[267] But on appeal, the Texas Supreme Court said the Dallas court had "improperly narrowed 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."[268] Because the statute didn't require anything more than a tangential relationship, Exxon's communications satisfied the definition of "matter of public concern."[269]

Of course, now gone is the specifically enumerated list of five subjects that make up the definition of "matter of public concern."[270] Instead, in its place is a more generalized definition, taken in part from the United States Supreme Court's decision in *Snyder v. Phelps*,[271] that will require courts to analyze whether a defendant's communications were made in connection to a public figure or public official; a matter of political, social, or other interest to the community; or a subject of concern to the public.[272] So what, if anything, is left of *Coleman*?

In one sense, the "tangential" relationship aspect of the holding is likely dead; without a list of specific topics, it's hard to see a lower court holding that something is only "tangentially related" to a matter of interest or a subject of concern (it either is, or it isn't).[273] On the other hand, the core of the holding—that lower courts shouldn't "read in" to the statute language that isn't there, will certainly live on.[274]

As to how *Coleman* would have been decided under the TCPA amendments? That is anyone's guess. Exxon would certainly argue—for the same reasons it did in 2017—that given the dangerous consequences of an employee's failure to record the

---

262. *See, e.g.*, McDonald Oilfield Ops., LLC v. 3B Inspection, LLC, No. 01-18-00118-CV, 2019 WL 3330966, at *10 (Tex. App.—Houston [1st Dist.] July 25, 2019, no pet. h.) (examining *Coleman* and its impact).

263. *Coleman*, 512 S.W.3d at 897.

264. *Id.*

265. *Id.* at 901.

266. *Id.*

267. *Coleman*, 464 S.W.3d. at 846.

268. *Coleman*, 512 S.W.3d at 901.

269. *Id.* at 900–01.

270. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7) (West 2017).

271. Snyder v. Phelps, 62 U.S. 443, 453 (2011).

272. CIV. PRAC. & REM. § 27.001(7) (eff. Sept. 1, 2019).

273. *See Coleman*, 512 S.W.3d at 901.

274. *See id.*

volume of storage tanks, communications about that failure would be "a subject of concern to the public."[275] But the employee would likely argue that under such a standard, the job performance of almost any employee would now be a "matter of public concern." While questions about Exxon's safety record or its policies toward training and supervising its employees would undoubtedly meet the definition, does the public really care about the failure of one employee to record a gauge's reading—especially if that failure didn't lead to any accident?[276] Those are the types of questions with which courts will now wrestle under the new statute.

Perhaps an easier question to answer is the continued viability of *Lippencott v. Wisenhunt*, one of the first TCPA cases taken up by the Texas Supreme Court.[277] There, the court held that in order to qualify as a matter of public concern, the communication at issue need not be a "public communication."[278] In other words, privately communicated speech is just as subject to the statute as that made publicly.[279] In that case, the question pertained to privately sent emails about a nurse anesthetist and whether he was endangering patients.[280] The court held the TCPA clearly applied, as the suit was based on communications concerning matters of public concern.[281] Interestingly, the court relied on non-TCPA jurisprudence—in addition to the TCPA's enumeration of health or safety, community well-being, and the provision of services in the marketplace—to hold that free speech was implicated: "We have previously acknowledged that the provision of medical services by a health care professional constitutes a matter of public concern."[282]

While it's possible one could make the argument that the Legislature's efforts to narrow the scope of the TCPA are a sign it intended to overrule *Lippincott*'s "private speech" holding, attempts to make a bright line distinction were rejected in the legislative process.[283] Still, courts may be called on to clarify *Lippincott*'s continued application to communications that are not made to the public at large.[284]

B. Interpretation of New "Right of Association" Definition

To be sure, the new definition of "right of association" is far more limited than the old.[285] Although it no longer requires a "communication," it now demands that the collective expression, promotion, pursuit, or defending of common interests

---

275. *See id.*

276. *See, e.g.*, HBO v. Harrison, 983 S.W.2d 31, 38 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (analyzing whether the public has an independent interest in the qualifications and performance of a particular employee).

277. Lippincott v. Wisenhunt, 462 S.W.3d 507 (Tex. 2017).

278. *Id.* at 509.

279. *Id.*

280. *Id.* at 508–09.

281. *Id.* at 509–10.

282. *Id.* at 510 (citing Neely v. Wilson, 418 S.W.3d 52, 70 nn.12, 26 (Tex. 2013) (determining that the public had a right to know about a doctor's alleged inability to practice medicine due to a mental or physical condition).

283. *Compare* Tex. H.B. 2730, 86th Leg. R.S. (2019) (which passed), *with* Tex. S.B. 1981, 86th R.S. (2019) (which did not pass and would have required a legal action to be based on the exercise of constitutional rights "in a place or context that is open to the public.").

284. *See Lippincott*, 462 S.W.3d at 509.

285. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2) (West 2017), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2) (eff. Sept. 1, 2019).

relate to either a governmental proceeding or a matter of public concern.[286] Both of those terms—"governmental proceeding" and "matter of public concern"—are likewise defined by the statute.[287] But as discussed earlier, the "matter of public concern" definition has undergone its own wholesale changes.[288] So, to an extent, the scope of "right of association" will be somewhat depend on how the "public concern" definition is interpreted.[289]

For example, what would happen in *Combined Law Enforcement Associations of Texas v. Sheffield* under the new TCPA?[290] That's not entirely clear. As discussed in Section II, that case involved an allegation by a fired police-union employee that he was defamed by other employees of the union.[291] The union was able to successfully invoke the TCPA, claiming that any statements its employees made about the plaintiff were in pursuit of their common interest in representing police officers.[292] The statements the plaintiff claimed were defamatory accused him of criminal conduct.[293] Would those statements be a matter of interest to society?[294] Would they be of concern to the public?[295] The Texas Supreme Court has held that allegations of criminality concern the well-being of the community as a whole.[296] If the answer to these questions is yes, *Sheffield* will apply with as much force as it did prior to the amendments.

In short, there is no question the new "right of association" definition will exclude many cases that came under the old version of the statute. But just how limiting the new definition will be will hinge, in large part, on how courts construe the new meaning of "matter of public concern."

VII. CONCLUSION AND TRENDS

While Texas was refining its TCPA to better serve its purpose, the national trend toward the adoption of broad Anti-SLAPP statutes continued. The new statutes, passed in Tennessee[297] and Colorado[298] both in 2019, like the TCPA, address the core purpose of removing litigation strategy from among the weapons for extinguishing public criticism.

Courts and legislatures continue to recognize that the timely remedy to most critical speech has always been more speech—not a meritless lawsuit:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless

286. CIV. PRAC. & REM. § 27.001(2) (eff. Sept. 1, 2019).
287. *Id*. § 27.001(5), (7) (eff. Sept. 1, 2019).
288. *See supra* Section III.A.1.
289. *See* CIV. PRAC. & REM. § 27.001(2), (7) (eff. Sept. 1, 2019).
290. *See* Combined Law Enf't Assn's of Tex. v. Sheffield, No. 03–13–00105–CV, 2014 WL 411672, at *10 (Tex. App.—Austin Jan. 31, 2014, pet. denied).
291. *Id*. at *1–2.
292. *Id*. at *5.
293. *Id*. at *2.
294. *See* CIV. PRAC. & REM. § 27.001(7) (eff. Sept. 1, 2019).
295. *See id.* (eff. Sept. 1, 2019).
296. Adams v. Starside Custom Builders, LLC, 547 S.W.3d 890, 896 (Tex. 2018).
297. H.B. 777, The Tennessee Public Participation Act (eff. July 1, 2019).
298. H.B. 19-1324, Colorado's Anti-SLAPP statute (eff. July 1, 2019).

> the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.[299]

By removing the threat of abusive litigation as a weapon in the battle for public opinion, the TCPA re-levels the playing field. It penalizes the deceitful player who uses the courtroom to silence a critic who is telling the truth.

299. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).