

“RECENT TEXAS CITIZENS PARTICIPATION ACT AMENDMENTS”

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I. INTRODUCTION

In 2011, the Texas legislature enacted the Texas Citizens Participation Act (TCPA),¹ Texas’s anti-SLAPP (strategic lawsuit against public participation) statute, to protect citizens’ rights to petition, freedom of speech, and freedom of association by providing procedures for early dismissal of frivolous lawsuits implicating those rights while allowing meritorious lawsuits to proceed.² Notwithstanding its stated purpose, until the recent amendments, the TCPA provided protections that extended beyond lawsuits implicating citizens’ exercise

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¹ Tex. Civ. Prac. & Rem. Code Ann. § 27.001 *et seq.*

² *Id.* § 27.002.

of their constitutional rights.³ For example, Texas courts applied the TCPA’s dismissal procedures to cases involving breaches of non-compete and non-solicitation agreements, oil-and-gas lease disputes, and claims for misappropriation of trade secrets.⁴ On June 2, 2019, Texas Governor Greg Abbott signed House Bill 2730, which significantly amended the TCPA.⁵ This article addresses those amendments and their effect on case outcomes.⁶

II. THE TCPA BEFORE HOUSE BILL 2730

The TCPA provides a procedure for litigants to seek early dismissal of legal actions that are based on, relate to, or are in response to the litigants’ “exercise of the right of free speech, right to petition, or right of association”⁷ The pre-amendment TCPA broadly defined the terms “exercise of the right of free speech,” “exercise of the right to petition,” and “exercise of the right of association” to extend beyond constitutionally protected activities.⁸ The Texas Supreme Court made clear, for example, that the definition of the “exercise of the right of free speech” could extend to private communications⁹ and that those communications need only have a tangential relationship to a matter of public concern.¹⁰ Likewise, the “exercise of the right of association” was not limited to the “right of association” in the constitutional sense because it applied to communications “between individuals who join together to collectively express, promote, pursue, or defend common interests.”¹¹ That definition was held by some courts to extend to conduct

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

⁴ *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865 (Tex. App.—Austin 2018, pet. filed); *Lona Hills Ranch, LLC v. Creative Oil & Gas Operating, LLC*, 549 S.W.3d 839 (Tex. App.—Austin 2018, pet. granted); *Morgan v. Clements Fluids S. Tex., Ltd.*, No. 12-18-00055, 2018 WL 5796994, at *1 (Tex. App.—Tyler Nov. 5, 2018, no pet.); *Gaskamp v. WSP USA, Inc.*, No. 01-18-00079, 2018 WL 6695810, at *1 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet.); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191 (Tex. App.—Austin 2017, pet. dismissed).

⁵ Tex. H.B. 2730, 86th Leg., R.S. (2019).

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

⁷ Tex. Civ. Prac. & Rem. Code § 27.003(a).

⁸ Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(2)–(4), 2011 Tex. Gen. Laws 961 (amended 2019) (current version at Tex. Civ. Prac. & Rem. Code § 27.001(2)–(4); see also, e.g., *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018).

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

¹⁰ *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017).

¹¹ Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(2), 2011 Tex. Gen. Laws 961 (amended 2019); *Elite Auto Body LLC*, 520 S.W.3d 191 (citing *Coleman*, 512 S.W.3d 895).

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involving misappropriation of trade secrets, tortious interference with contract, conspiracy, and breach of contract.¹²

Perhaps the broadest definition in the pre-amendment TCPA is the phrase “matter of public concern,” which was defined as an issue related to “health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace.”¹³ The Supreme Court of Texas interpreted that phrase to cover allegedly defamatory oral, written, and electronic communications between employees about a failure to record the amount of petroleum and petroleum products in storage tanks as required.¹⁴ Because it found the communications had a “tangential relationship” to a task performed to reduce environmental, health, safety, and economic risks, the court determined that the communications related to a “matter of public concern” and therefore implicated the movants’ “exercise of the right of free speech.”¹⁵ The Supreme Court of Texas also held that the TCPA applied to defamation claims arising from private emails between administrators at a surgery center alleging that a nurse anesthetist engaged in a number of medically and ethically improper practices.¹⁶ The court concluded that because the emails were about “the provision of medical services by a health care professional,” the emails related to a matter of public concern as defined by the TCPA.¹⁷

Whether intentional or not by the legislature, some commentators observed that the pre-amendment version of the TCPA was the broadest in the country.¹⁸

III. THE TCPA AMENDMENTS

The TCPA amendments narrow the application of the TCPA in certain respects, make changes in response to courts’ interpretation of the TCPA’s language, and also change some procedural aspects of the statute. This section details the most significant changes to the statutory language.

¹² *Morgan*, No. 12-18-00055, 2018 WL 5796994, at *1; *Grant*, 556 S.W.3d at 879; *Elite Auto Body LLC*, 520 S.W.3d at 193. *But see, e.g.*, *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 426 (Tex. App.—Dallas 2019, pet. denied) (movants failed to establish that TCPA applied to claims for misappropriation of trade secrets, tortious interference, conspiracy, and conversion); *Kawcak v. Antero Res. Corp.*, No. 02-18-00301-CV, 2019 WL 761480, at *17 (Tex. App.—Fort Worth Feb. 21, 2019, pet. denied) (holding that the TCPA does not apply to a conspiracy claim).

¹³ Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(7)(A)–(E), 2011 Tex. Gen Laws 961, 962 (amended 2019)

¹⁴ *Coleman*, 512 S.W.3d at 901.

¹⁵ *Id.*

¹⁶ *Lippincott*, 462 S.W.3d at 510.

¹⁷ *Id.*

¹⁸ *See* April Farris & Matthew Zorn, *State Anti-SLAPP in Federal Court: An Update from Texas*, LAW360, (Nov. 1, 2018), <https://www.law360.com/articles/1097627/state-anti-slapp-in-federal-court-an-update-from-texas> (“The TCPA is the broadest anti-SLAPP statute in the nation.”).

A. Amendments Aimed at Narrowing the TCPA’s Application

The most significant amendment alters the TCPA’s breadth. The pre-amendment TCPA applied to legal actions that are “based on, relate[] to, or [are] in response to [a] party’s exercise of the right of free speech, right to petition, or right of association.”¹⁹ The amendments removed the phrase “relates to” from section 27.003(a) and instead require the legal action to be “based on or . . . in response to a party’s exercise of the right of free speech, right to petition, or right of association”²⁰

The amendments also narrow the definition of the phrase “exercise of the right of association.” The pre-amendment TCPA defined the “exercise of the right of association” as “a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.”²¹ The amendments narrowed the definition to cover only those who “join together to collectively express, promote, pursue, or defend common interests *relating to a governmental proceeding or a matter of public concern.*”²²

In addition, although the amendments did not change the definition of “exercise of the right of free speech,” the amendments significantly changed the definition of a “matter of public concern,” which is incorporated in and integral to the meaning of the phrase “exercise of the right of free speech” (and, as amended, the phrase “exercise of the right of association”).²³ Instead of covering all “issue[s] related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace,”²⁴ the new definition only covers “a statement or activity regarding: a public official, public figure, or other person who has drawn substantial public attention due to the person’s official acts, fame, notoriety, or celebrity; a matter of political, social, or other interest to the community; or a subject of concern to the public.”²⁵ Although the amendments largely appear designed to narrow the TCPA’s application, the change in the definition of “matter of public concern” may not narrow the statute’s application as much as intended. Given most courts’ inclination to broadly interpret the statute—consistent with the statute’s instruction to “liberally” construe the language “to effectuate [the statute’s] purpose and intent

¹⁹ Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.003(a), 2011 Tex. Gen Laws 961, 962 (amended 2019).

²⁰ See Tex. Civ. Prac. & Rem. Code § 27.003(a).

²¹ See Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(2), 2011 Tex. Gen Laws 961 (amended 2019).

²² See Tex. Civ. Prac. & Rem. Code § 27.001(a)(2) (emphasis added).

²³ See Tex. Civ. Prac. & Rem. Code § 27.001(a)(3), (a)(7).

²⁴ See Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001 (7), 2011 Tex. Gen Laws 961, 962 (amended 2019).

²⁵ See Tex. Civ. Prac. & Rem. Code § 27.001(a)(7).

fully”²⁶—the phrases “matter of political, social, or *other interest* to the community” and “a subject of concern to the public” have potential for broad application.²⁷

But the amendments did remove certain cases from its application categorically, regardless of the definitions discussed above. The amended TCPA now specifies that it *does not apply* to claims arising out of the employer-employee, officer-director, or independent contractor relationship for misappropriation of trade secrets *or* corporate opportunities or claims that seek to enforce a non-compete or non-disparagement agreement.²⁸ Nor does it apply to certain claims under the Texas Family Code, most DTPA claims, eviction suits, disciplinary proceedings against lawyers, whistleblower claims brought by governmental employees, common-law fraud claims, procedural actions, motions that do not amend or add claims, alternative dispute resolution proceedings, or post-judgment enforcement actions.²⁹ Further, governmental entities, agencies, officials, or employees cannot use the TCPA’s dismissal procedures.³⁰

B. Amendments Substantively Changing the TCPA

In certain instances, the amendments substantively change the TCPA. Perhaps most significantly, the amendments make an award of sanctions against a nonmovant discretionary instead of mandatory if the moving party prevails.³¹ But the award of attorney’s fees remains mandatory, and the revised statutory language also removes the phrase “as justice and equity may require” from section 27.009(a)(1), and therefore gives the court no discretion to modify a mandatory fee award.³² And, if the court dismisses a compulsory counterclaim that the court finds frivolous or solely intended for delay, the court may award fees to the movant.³³ Thus, the standard for obtaining attorney’s fees for dismissal of a compulsory

²⁶ See *id.* § 27.011(b).

²⁷ Compare *Grant*, 556 S.W.3d at 879 (communication regarding company’s involvement in Historically Underutilized Business program related to the government and economic wellbeing and therefore constituted communication about a “matter of public concern” covered by the TCPA), and *Batra v. Covenant Health Sys.*, 562 S.W.3d 696, 708–09 (Tex. App.—Amarillo 2018, pet. denied) (private communications about healthcare provider’s provision of medical services were about a “matter of public concern”), with *Dyer*, 573 S.W.3d at 428 (TCPA did not apply to text messages between employees of company in healthcare industry regarding alleged misappropriation of trade secrets), and *Pinghua Lei v. Nat. Polymer Int’l Corp.*, 578 S.W.3d 706, 715 (Tex. App.—Dallas 2019, no pet.) (employer’s claims against former employees did not implicate a “matter of public concern,” rendering TCPA inapplicable).

²⁸ See Tex. Civ. Prac. & Rem. Code Ann. § 27.010(a)(5).

²⁹ See *id.* § 27.010(a)(6)–(7), (8)–(11).

³⁰ See *id.* § 27.003(a).

³¹ Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(2).

³² See *id.* § 27.009(a)(1).

³³ See *id.* § 27.009(c).

counterclaim is higher than for other “legal actions.”³⁴

The pre-amendment TCPA defined the term “legal action” to include “a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.”³⁵ At least one Texas court therefore concluded that the phrase “legal action” did *not* include claims for declaratory relief because such claims were merely “type[s] of remed[ies] that may be obtained with respect to a cause of action or other substantive right”³⁶ Following the amendment of the definition of “legal action,” the TCPA now expressly applies to actions for declaratory relief.³⁷

And, similar to the amended statute’s identification of various claims to which it does not apply, as described above in subsection II.A., the amendments also identify a number of specific situations that *are* covered by the TCPA, including complaints about, or reviews or ratings of a business; communications to the public, and acts in furtherance of such communications to the public regarding dramatic, literary, musical, political, journalistic, or artistic work; and legal actions against victims of family violence that are based on or in response to public or private communications.³⁸

Finally, the amendments add a new provision stating that a TCPA ruling is inadmissible at any later stage of the case, and that the burden of proof for later stages of the case remains the same despite a TCPA ruling.³⁹

C. Amendments to the TCPA’s Procedure

In addition to narrowing the TCPA’s scope and, in certain cases, specifying the TCPA’s application or non-application, the amendments also make various changes to the TCPA’s procedures for dismissal. For example, instead of requiring a court order to extend the 60-day deadline for moving to dismiss, the amendments provide that the parties may mutually agree to extend the deadline.⁴⁰ In addition, the moving party must now provide notice of the hearing at least 21 days before the hearing date, and the responding party must respond at least seven days before the hearing date.⁴¹ But, the parties can change both deadlines by mutual agreement or

³⁴ See *id.* § 27.009(a) (providing that parties may obtain attorney’s fees in defending a legal action “[e]xcept as provided by Subsection (c),” which covers compulsory counterclaims).

³⁵ Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(6), 2011 Tex. Gen. Laws 961, 962 (amended 2019).

³⁶ *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 330 (Tex. App.—Austin 2018, pet. filed) (emphasis omitted).

³⁷ Tex. Civ. Prac. & Rem. Code Ann. § 27.001(6).

³⁸ See *id.* § 27.010(b)–(c).

³⁹ See *id.* § 27.0075.

⁴⁰ Tex. Civ. Prac. & Rem. Code Ann. § 27.003(b).

⁴¹ See *id.* § 27.003(d)–(e).

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by court order.⁴²

The amendments further specify that, in addition to pleadings and affidavits, courts can consider evidence that would be admissible under Texas Rule of Civil Procedure 166a (i.e., the summary-judgment rule) in determining whether legal action is subject to the TCPA.⁴³

Further, if awarding sanctions, the court is now required to issue findings regarding whether a party brought the legal action to deter or prevent the movant from exercising its constitutional rights.⁴⁴

Finally, the amendments changed the dismissal standard for defenses (previously referred to as “valid defense[s]” and now described as “affirmative defense[s]” in the amendments) and now require the a moving party relying on the affirmative defense to show it is entitled to judgment as a matter of law.⁴⁵ The change was in response to arguments that the old standard, which only required proof of the affirmative defense “by a preponderance of the evidence,” unconstitutionally infringed on the right to a trial by jury.⁴⁶

IV. DIFFERING OUTCOMES UNDER PRE- AND POST-AMENDMENT TCPA

The new statutory language would likely change the outcome of a number of Texas cases interpreting the pre-amendment TCPA. For example, in *ExxonMobil Pipeline Company v. Coleman*, a former ExxonMobil Pipeline Company employee sued the company and two supervisors for defamation based on communications about the former employee’s alleged failure to record storage volumes of tanks containing petroleum products.⁴⁷ The company and the supervisors moved to dismiss under the TCPA, but the trial court and court of appeals denied the motion and concluded that the TCPA did not apply.⁴⁸ The Texas Supreme Court reversed and held that the communication was an exercise of the right of free speech under the TCPA because it involved a “matter of public concern” that related to health, safety, environmental, and economic issues.⁴⁹ The statute now more narrowly defines the phrase “matter of public concern.”⁵⁰ The new definition does not include issues “related to” health, safety, environment, or economic concerns and,

⁴² *See id.*

⁴³ *See id.* § 27.006(a).

⁴⁴ *See id.* § 27.007(a).

⁴⁵ Tex. Civ. Prac. & Rem. Code Ann. § 27.005(d).

⁴⁶ Compare Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.005(b), 2011 Tex. Gen Laws 961, 963 (amended 2019) with Tex. Civ. Prac. & Rem. Code Ann. § 27.005(b).

⁴⁷ *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 897 (Tex. 2019).

⁴⁸ *Id.* at 900.

⁴⁹ *Id.* at 900–901.

⁵⁰ *Id.* at 898.

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instead, requires communications regarding issues of “concern to the public.”⁵¹ Moving forward, private communications between supervisors regarding whether an employee fulfilled an obligation to record storage volumes of tanks containing petroleum products would likely not fall within the new definition of “matter of public concern.”

The change in the definition of “exercise of the right of association” similarly would have changed case outcomes. For example, in *Grant v. Pivot Technology Solutions, Ltd.*, the Austin Court of Appeals held that the TCPA applies to communications between people who join together to pursue the common interest of obtaining employment with a new employer and ensure that their business could operate as a Historically Underutilized Business.⁵² The amended TCPA changed the definition of “exercise of the right of association” to require the common interest to relate to “a governmental proceeding or a matter of public concern,”⁵³ which was not the case in *Grant*. Further, even if the definition of “exercise of the right of association” had not changed, the amended TCPA would have changed the outcome in *Grant* because the statute now provides that it does not apply to legal actions arising from an officer-director or employer-employee relationship that seek to enforce non-competition agreements.⁵⁴

Likewise, in *Morgan v. Clements Fluids South Texas, Ltd.*, the Tyler Court of Appeals held that the TCPA applied to claims for breach of contract (non-compete and non-solicitation agreements) and misappropriation of trade secrets.⁵⁵ The amended TCPA would have changed the outcome of *Morgan* because it specifically does not apply to legal actions arising from an employer-employee relationship and that seek to enforce non-compete agreements or recovery for misappropriation of trade secrets.⁵⁶

Other changes in the TCPA, such as the change in the definition of the phrase “legal action” or the carve-out from the term “party,” also would change case outcomes. The Austin Court of Appeals previously held, for example, that a claim for declaratory relief was not a “legal action,”⁵⁷ but the amended TCPA now explicitly includes claims for declaratory relief.⁵⁸ Another court concluded that the TCPA applies to claims against public employees acting in their official

⁵¹ Compare Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(7), 2011 Tex. Gen Laws 961, 962 (amended 2019), with Tex. Civ. Prac. & Rem. Code Ann. § 27.001(7).

⁵² *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 879 (Tex. App.—Austin 2018, pet. filed).

⁵³ Compare Act of June 17, 2011, 82nd Leg., R.S., ch. 341, § 27.001(2), 2011 Tex. Gen Laws 961 (amended 2019) with Tex. Civ. Prac. & Rem. Code Ann. § 27.001(2).

⁵⁴ Tex. Civ. Prac. & Rem. Code Ann. § 27.010(a)(5).

⁵⁵ No. 12-18-000552018, WL 5796994, at *3.

⁵⁶ Tex. Civ. Prac. & Rem. Code § 27.010(a)(5).

⁵⁷ *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 303 (Tex. App.—Austin 2018, pet. filed).

⁵⁸ Tex. Civ. Prac. & Rem. Code Ann. § 27.001(6)(A).

capacities,⁵⁹ but the amended TCPA now expressly excludes application to government officials or employees in their official capacities.⁶⁰

Perhaps the most striking change in outcomes results from the change in language regarding an award of sanctions to a prevailing movant. Numerous cases previously held that the pre-amendment TCPA required a mandatory sanctions award to the prevailing movant.⁶¹ By changing the word “must” to the word “may” and by requiring a finding regarding whether the party bringing the legal action did so to prevent the movant from exercising its constitutional rights “[i]f the court awards sanctions,” the TCPA’s amendments render sanctions not only discretionary but also only applicable in limited situations.⁶²

As reflected by the examples of differing outcomes under the pre- and post-amendment TCPA, the version of the statute that applies in a case can be outcome-determinative. The next section, therefore, discusses when the amended version of the TCPA applies.

V. APPLICABILITY OF THE AMENDMENTS

House Bill 2730 states that it “takes effect September 1, 2019.”⁶³ It is therefore clear that the amended TCPA applies to suits filed on or after that date. But what if a litigant amends a petition to add claims or parties or files a counterclaim or cross-claim in a pending lawsuit? Would the TCPA’s amendments apply to the amendment, counterclaim, or cross-claim?

With respect to amendments made after September 1, 2019, it appears the outcome will depend on whether the amendment involves different factual allegations or adds a new party that is not a predecessor or successor of an existing party. It is likely that an amended pleading filed after the effective date asserting a new cause of action *based on different factual allegations* than those asserted in an original petition or asserting claims against a new party will be subject to the amended TCPA.⁶⁴ But an amended pleading filed after the effective date that

⁵⁹ Roach v. Ingram, 557 S.W.3d 203, 220 (Tex. App.—Houston [14th Dist.] 2018, pet. filed).

⁶⁰ See Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a).

⁶¹ See, e.g., Serafine v. Blunt, No. 03-16-00131-CV, 2017 WL 2224528, at *7 (Tex. App.—Austin May 19, 2017, pet. denied); Sullivan v. Abraham, 472 S.W.3d 677, 683 (Tex. App.—Amarillo 2014), *rev'd in part on other grounds*, 488 S.W.3d 294 (Tex. 2016).

⁶² See Tex. Civ. Prac. & Rem. Code Ann. §§ 27.007(a), 27.009(a)(2).

⁶³ Tex. H.B. 2730, 86th Leg., R.S. (2019).

⁶⁴ See James v. Calkins, 446 S.W.3d 135, 145 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Props., LP, 452 S.W.3d 343, 350 (Tex. App.—Corpus Christi 2013, no pet.); see also, e.g., Jordan v. Hall, 510 S.W.3d 194, 198–99 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (holding that the 60-day deadline to file a motion to dismiss under the TCPA is not reset by “amended petition that adds no new claims and relies upon the same factual allegations as an original petition); Miller Weisbrod, L.L.P. v. Llamas-Soforo, 511 S.W.3d 181, 193–94 (Tex. App.—El Paso 2014, no pet.) (60-day deadline to file TCPA motion to

asserts a new cause of action *based on the same factual allegations* as those asserted in the original petition (or an amended pleading that merely modifies an already existing cause of action) possibly will continue to be subject to the prior version of the TCPA.⁶⁵

In *San Jacinto Title Services of Corpus Christi LLC v. Kingsley Properties LP*, the Corpus Christi Court of Appeals addressed whether claims against defendants were subject to the TCPA where the suit was filed in 2010 (i.e., before the legislature enacted the TCPA), but the plaintiff amended its petition after the TCPA’s enactment.⁶⁶ The court held that the TCPA did not apply to the amended petition because, although it added a claim and ostensibly added a party, the amended petition was based on the same facts as the original petition and the new party was merely the successor-in-interest to a previously-named party and therefore was not a new entity.⁶⁷

In contrast, however, in *James v. Calkins*, the 1st District Court of Appeals in Houston held that the TCPA applied even though the lawsuit had been pending before the TCPA was enacted because the petition was amended after the TCPA to add a cause of action based on different factual allegations.⁶⁸ The court distinguished *San Jacinto Title* because, unlike that case, “[h]ere, the amended petition filed after the statute’s effective date included substantively different factual allegations and all the causes of action alleged in the amended petition were new causes of action.”⁶⁹

Although case law has not addressed whether the TCPA applies to counterclaims or cross-claims asserted after the effective date of the TCPA (or, as here, amendments), the reasoning of *San Jacinto Title* and *James* would probably apply the TCPA to counterclaims and cross-claims because, like new claims asserted in an amended pleading, those, too, are “legal action[s]” as defined by the TCPA.⁷⁰

VI. CONCLUSION

The TCPA’s amendments substantively change when the statute applies (and doesn’t apply), the dismissal procedures, and whether movants are entitled to sanctions if they prevail. Although the amendments narrow the TCPA’s application, it remains to be seen how significantly they will restrict the application

dismiss not extended by second amended petition because party against whom claims were made had been added in the first amended petition and 60-day deadline thus ran from the filing of the first amended petition).

⁶⁵ See *James*, 446 S.W.3d at 145; *San Jacinto Title*, 452 S.W.3d at 350.

⁶⁶ *San Jacinto Title*, 452 S.W.3d at 349–50.

⁶⁷ See *id.* at 350–51.

⁶⁸ See *James*, 446 S.W.3d at 146.

⁶⁹ *Id.*

⁷⁰ See Tex. Civ. Prac. & Rem. Code Ann. § 27.001(6).

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of the TCPA. Regardless, during this transition period, it will be key to determine whether the original or amended TCPA applies to the claims in your lawsuit.