TCPA PROCEDURES: STATUTORY REQUIREMENTS AND OPEN QUESTIONS

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I. Introduction

If implemented correctly, the Texas Citizen's Participation Act (TCPA) provides a very powerful tool for litigants to dismiss a broad variety of civil claims and recover a mandatory award of attorney's fees, costs, and sanctions. *See* TEX. CIV. PRAC. & REM. CODE ("CPRC") § 27.001 *et. seq.* But the statute contains many procedural hurdles both for movants who seek to utilize the TCPA and nonmovants who seek to avoid it. Given the TCPA's prolific application over the last seven years, it is critical for civil practitioners on both sides of the docket to know the rules and avoid the landmines.

II. Pleading Considerations

The TCPA has fundamentally changed the landscape of Texas pleading practice. Any party (plaintiff or defendant) seeking legal or equitable relief in a civil proceeding must consider whether the TCPA might apply to its claim for relief and, if so, plead accordingly. The consequences for failing to do so can be severe.

A. The TCPA Applies Equally to Plaintiffs and Defendants

The TCPA is triggered by filing a "legal action." CPRC § 27.003(a). The meaning of "legal action" has spawned much debate among Texas practitioners and disagreement among courts. The statute defines it as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *Id.* § 27.001(6). Although a detailed discussion of the term is beyond the scope of this article, it is important to understand that the TCPA does not follow a traditional "plaintiff v. defendant" paradigm.

Both plaintiffs and defendants can use the TCPA to dismiss requests for relief asserted by their opponents in claims, motions, and potentially other documents. *See, e.g.*, *Hawxhurst v. Austin's Boat Tours*, No. 03-17-00288-CV, 2018 Tex. App. LEXIS 2081 (Tex. App.—Austin Mar. 22, 2018, no pet.) (plaintiff successfully used TCPA to dismiss defendant's motion for sanctions); *Glassdoor Inc. v. Andra Grp., LP*, No. 05-16-00189-CV, 2017 Tex. App. LEXIS 2577 (Tex. App.—Dallas Mar. 24, 2017, pet. granted, No. 17-0463) (assuming without deciding that TCPA can be used to dismiss Rule 202 petition for presuit discovery). Thus, all parties must give serious consideration to all pleadings prior to filing.

B. In Advance of Filing a Legal Action

In deciding whether to grant a TCPA motion, the court shall consider pleadings and affidavits. CPRC § 27.006(a). Although courts have also routinely considered evidence submitted in TCPA proceedings,[1] the pleadings are unquestionably the starting place to determine both (1) whether the TCPA applies; and (2) whether the nonmovant can establish a prima facie case. Both prongs provide avenues for the nonmovant to avoid dismissal and a mandatory, adverse award of fees, costs, and sanctions under the TCPA. Thus, it is critical to plead carefully.

Regarding application of the TCPA at "step one," it is the movant's burden to demonstrate by a preponderance of the evidence that the "legal action" is within the scope of the statute. CPRC § 27.005(b)(1). Nevertheless, the movant can rely exclusively on the nonmovant's pleadings to satisfy this burden. "When it is clear from the [nonmovant's] pleadings that the action is covered by the Act, the [movant] need show no more." *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

Then the burden shifts to the nonmovant at "step two" to "establish by clear and specific evidence a prima facie case for each essential element of the claim in question." *In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015) (internal alterations omitted) (citing CPRC § 27.005(c)). This "requires more [than] mere notice pleading . . . .[G]eneral allegations that merely recite the elements of a cause of action [] will not suffice. Instead, [the party filing a legal action] must provide enough detail to show the factual basis for its claim." *Id.* at 590–91. "Bare, baseless opinions," "general averments," and "conclusory" statements do not satisfy this burden. *Id.* at 592–93 (collecting cases).

Hence, if there is any possibility that the TCPA will be invoked to seek dismissal of the legal action, the pleading party should not rely on "fair notice" standards—despite the fact that Texas

Rules of Civil Procedure 45 and 47 (allowing for fair notice pleading) remain on the books. Instead, the party should diligently plead in a manner to demonstrate, for each claim pled, that (1) the TCPA does not apply or an exemption to the TCPA applies; and (2) the party has clear and specific evidence to support each element of the claim(s) pled.[2] It is important to remember that, as a result of the TCPA's expedited deadlines (*infra*, Section III), this proof will be required very soon after the legal action is filed. Because the filing of a TCPA motion will automatically halt any discovery absent a court order to the contrary (*infra*, Section IV), a pleading party should consider whether to assert all claims at once or, instead, wait to plead certain claims until after the party has obtained sufficient discovery to support those claims.

C. In Response to a TCPA Motion

Pleading parties must also be aware that they cannot avoid the statute's monetary awards simply by nonsuiting or omitting claims attacked by a TCPA motion.[3] *See, e.g.*, *Duchouquette v. Prestigious Pets, LLC*, No. 05-16-01163-CV, 2017 Tex. App. LEXIS 10364, at *6–7 (Tex. App.—Dallas Nov. 6, 2017, no pet.) (request for attorney's fees under the TCPA is "a claim for affirmative relief" that survives a nonsuit). Thus, pleading parties must ensure that their claims are demonstrably meritorious from the start.

> A TCPA motion must be filed "not later than the 60th day after the date of service of the legal action."

III. Deadlines

The TCPA is supposed to provide for a quick resolution in any case to which it applies.[4] To this end, the statute sets forth specific deadlines—with caveats—for the motion, hearing, ruling and possibly an appeal. A party "seeking the TCPA's protections must comply with the[se] requirements." *Braun v. Gordon*, No. 05-17-00176-CV, 2017 Tex. App. LEXIS 9053, at *2–3 (Tex. App.—Dallas Sept. 26, 2017, no pet.).

A. Motion

A TCPA motion must be filed "not later than the 60th day after the date of service of the legal action." CPRC § 27.003(b). The court may extend the deadline upon a showing of good cause by the movant. *Id*. There has not yet been an opinion interpreting what is required for "good cause" under this provision. It is within the trial court's discretion. *See Schimmel v. McGregor*, 438 S.W.3d 847, 856 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (where the motion was one day late and movant sought leave for late filing, and the trial court expressly noted in the order that the motion was timely filed, it constituted an implied finding of good cause to grant leave for an untimely filing); *Summersett v. Jaiyeola*, 438 S.W.3d 84, 92 (Tex. App.—Corpus Christi-Edinburg 2013, pet. denied) (trial court did not abuse its discretion in denying motion for leave, which was based on claim of lack of notice, where there was conflicting evidence, some of which indicated that movant had intentionally avoided service of suit, and had already appeared through an attorney).

As discussed above (*supra*, Section II), there is much debate about what is a "legal action." Hence, it is not always clear when the 60-day motion-filing deadline begins to run. It is clear, however, that the filing of an amended pleading that does not alter the essential nature of the action does **not** restart the 60-day deadline. *E.g.*, *Bacharach v. Garcia*, 485 S.W.3d 600, 602–03 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Hicks v. Grp. & Pension Adm'rs, Inc.*, 473 S.W.3d 518, 530 (Tex. App.—Corpus Christi 2015, no pet.). *But c.f. Walker*, 516 S.W.3d at 78–79 (where the claims were previously filed in a federal suit and then re-filed as a new matter in state court, the latter was a "legal action" that started the 60-day deadline for filing a TCPA motion).

Open questions also remain about whether the motion-filing deadline (and, presumably, other TCPA deadlines) can be tolled, stayed, or abated by the application of other procedural rules or statutes. *See, e.g.*, *Hearst Newspapers, LLC v. Status Lounge, Inc.*, No. 14-17-00310-CV, 2017 Tex. App. LEXIS 11756, at *25 (Tex. App.—Houston [14th Dist.] Dec. 19, 2017, no pet.) (abatement under Texas Defamation Mitigation Act tolled TCPA motion-filing deadline).

B. Response

The TCPA does not contain a deadline by which the nonmovant must file a response, and "[t]he Texas Rules of Civil Procedure include no *general* rule for when a response should be filed in relation to a hearing." *MVS Int'l Corp. v. Int'l Advert. Sols., LLC*, No. 08-16-00173-CV, 2017 Tex. App. LEXIS 9556, at *11 (Tex. App.—El Paso Oct. 11, 2017, no pet.). As such, the response may be filed at any time prior to the hearing, and it is common practice for nonmovants to do so. *See id.* ("[H]ad the Legislature intended a formal response deadline, such as with summary judgments, it could have included such a provision. We are not empowered to create such a rule by judicial fiat.").

However, practitioners must remain mindful of a trial court's broad discretion to control its own docket, which may include

requiring parties to file a TCPA response sooner. *See Mission Wrecker Serv., S.A. v. Assured Towing, Inc.*, No. 04-17-00006-CV, 2017 Tex. App. LEXIS 7226, at *9 (Tex. App.—San Antonio Aug. 2, 2017, pet. denied) (trial court did not abuse discretion in sustaining objection that response filed fifteen minutes prior to hearing was untimely because the absence of a deadline cannot be used as a tool to ambush opposing counsel).

Practitioners should always check local rules to determine if a court-specific deadline may require filing the response by a certain date. The supreme court has not yet addressed whether a trial court can alter this or any other deadline under the TCPA by rule or agreement.

C. Hearing

"A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion." CPRC § 27.004(a). The hearing date may be extended if "the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties." *Id*. If one of those exceptions is present, then the hearing can "occur" at a later date, "but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c)." *Id*. Under subsection (c), if the trial court allows discovery under section 27.006(b), then the hearing can "occur" up to but no more than 120 days from the date of service of the motion. *Id*. § 27.004(c); *see also Morin v. Law Office of Kleinhans Gruber, PLLC*, No. 03-15-00174-CV, 2015 Tex. App. LEXIS 8799, at *6 n.3 (Tex. App.—Austin Aug. 21, 2015, no pet.) (discussing preservation concerns regarding an extended hearing date).

Many open questions remain, like:

- Does the court need to make specific findings to support a delayed hearing?
- Must the determination to extend be made prior to expiration of the 60-day deadline? What if the motion was never originally set within that period?
- What constitutes "good cause" for an extension?
- Do the requirements of "setting" the hearing or having it "occur" mean that the hearing must "conclude" by that date, or can the court recess and re-convene?
- The statute is silent on any notice of hearing requirement. Presumably the default 3-day notice requirement of TRAP 21 applies. Is the lack of adequate notice a legitimate basis for extension of the hearing date?
- Can the hearing be conducted on briefs or is an oral hearing required?
- What happens if the trial court refuses to conduct a hearing?
- Can the hearing deadline be tolled, stayed, or abated by the application of other rules or statutes?

D. Ruling

The court must rule on the TCPA motion on or before 30 days from the date of the *hearing*. CPRC § 27.005(a). If the court does not rule by that date, then the motion is denied by operation of law. CPRC § 27.008(a); *Inwood Forest Cmty. Improvement Ass'n v. Arce*, 485 S.W.3d 65, 71–72 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (motion was denied by operation of law 30 days after hearing, despite trial court's oral expression at hearing of intent to grant motion and its signing of orders granting motion more than 30 days later); *Avila v. Larrea*, 394 S.W.3d 646, 656 (Tex. App.—Dallas 2013, pet. denied) (motion was denied by operation of law where, 28 days after hearing, court granted request for discovery and purported to extend hearing but did not rule on motion within 30 days).

If no hearing is conducted, then it appears the motion cannot be denied by operation of law because there is no triggering date from which the ruling deadline could run. *Wightman-Cervantes v. Hernandez*, No. 02-17-00155-CV, 2018 Tex. App. LEXIS 1150, at *8 (Tex. App.—Fort Worth Feb. 9, 2018, pet. denied) (agreeing with the Fifth Court of Appeals and Fifth Circuit). On the other hand, it appears trial courts should not *sua sponte* deny TCPA motions without a hearing or consideration on the merits. *See Reeves v. Harbor Am.*, No. 14-17-00518-CV, 2018 Tex. App. LEXIS 4068, at *9–10 (Tex. App.—Houston [14th Dist.] June 7, 2018, no pet. h.) (trial court denied motion without a hearing or response based on its perception that motion was being used to avoid discovery; appellate court reversed and remanded for consideration of TCPA's merits).

IV. Discovery

Once a TCPA motion is filed, all discovery is automatically suspended unless the court allows limited discovery based on a showing of good cause. CPRC §§ 27.003(c), .006(b). There is not yet a definitive interpretation of what constitutes "good cause" for this purpose. *See, e.g.*, *Bilbrey v. Williams*, No. 02-13-00332-CV, 2015 Tex. App. LEXIS 2359, at *43 (Tex. App.—Fort Worth Mar. 12, 2015, no pet.) (where party provided *no* explanation to support his request for discovery, he failed to establish good cause). A petition for writ of mandamus was filed on this issue but was denied by both the Third Court of Appeals (No. 03-17-00372-CV) and the Texas Supreme Court (No. 17-0536) without comment.

The statute does not provide a deadline by which nonmovants must request the right to conduct discovery. It is advisable to file a motion for this purpose as soon as possible after the TCPA motion is filed. Additionally, nonmovants should also preserve a record to demonstrate that any denial of their request for discovery constitutes harmful (*i.e.*, reversible) error.

V. Findings of Fact

The TCPA provides that, on a request by the movant, the court "shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation." CPRC § 27.007(a). Presumably a successful movant would request these findings to support an award of sanctions against the nonmovant under section 27.009. There is no deadline specified to make the request but, if it is made, then the findings "must" be issued within 30 days of the request. *Id*. § 27.007(b).

Section 27.007 is titled, "Additional Findings." However, there is not a single other reference to "findings" within the TCPA, so what are these findings "additional" to? The Texas Supreme Court held that the TCPA does not "forbid" other findings. *Greer v. Abraham*, 489 S.W.3d 440, 443 n.3 (Tex. 2016). Still, the Second Court of Appeals recently held that the trial court was "without authority" to find that the nonmovant's petition was "willful" or "malicious" because these characterizations are not the type of "improper purpose" contemplated by section 27.007(a). *McGibney v. Rauhauser*, No. 02-16-00244-CV, 2018 Tex. App. LEXIS 2797, at *36–42 (Tex. App.—Fort Worth Apr. 19, 2018, pet. filed, No. 18-0495).

Remember that an interlocutory appeal by an unsuccessful movant from the denial of its TCPA motion will automatically stay *all* trial proceedings. CPRC § 51.014(b)-(c). Thus, if a party intends to seek any findings, the request should be made sufficiently in advance of any appeal/stay.

Several open questions remain about this procedure, including:

- What is the deadline to request findings under section 27.007(a)?
- Does the court have authority to issue other/additional findings?
- If so, what is the deadline to request any other findings?
- Do the general deadlines and procedures for findings/conclusions under Rules 296-299 apply in a TCPA context?

VI. Appeals

A. Right to Appeal

Motion Denied: Any denial of a TCPA motion (in whole or in part) constitutes an interlocutory order because it leaves claims pending for trial. An unsuccessful movant is entitled to pursue an interlocutory appeal from such a ruling, regardless of whether it was made by express order or by operation of law. CPRC § 27.008(a), § 51.014(a)(12).

Motion Granted: If a TCPA motion is aimed at the entirety of claims in the suit and is granted in full, thereby disposing of all claims and parties, then it results in a final judgment from which a regular appeal may be pursued. If the motion is granted in a manner that dismisses only some of the pending claims, then it is interlocutory, and there is no express right to pursue an interlocutory appeal of the partial grant. *See, e.g.*, *Pulliam v. City of Austin*, No. 03-17-00131-CV, 2017 Tex. App. LEXIS 3325, at *2–3 (Tex. App.—Austin Apr. 14, 2017, no pet.).

Nevertheless, if an order partially grants and partially denies a TCPA motion, and the movant appeals from the portion of the order denying its motion, then the nonmovant should consider perfecting a cross-appeal from the portion of the order granting the motion. *See Pickens v. Cordia*, 433 S.W.3d 179, 183 (Tex. App.—Dallas 2014, no pet.) (court had jurisdiction over appeal, which challenged partial denial of motion to dismiss, and cross-appeal, which challenged partial grant of motion to dismiss), *disapproved of on other grounds by Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). *But see Horton v. Martin*, No. 05-15-00015-CV, 2015 Tex. App. LEXIS 6003, at *7–8 (Tex. App.—Dallas June 15, 2015, no pet.) (court lacked jurisdiction over attempted interlocutory appeal of an order granting a motion to dismiss). Nonmovants can also consider pursuing permissive appeals or petitions for writ of mandamus to seek review of an interlocutory order granting a TCPA motion. *See* CPRC § 51.014(d); Tex. R. App. P. 28.3; Tex. R. Civ. P. 168; *In re Spex Grp. US LLC*, No. 05-18-00208-CV, 2018 Tex. App. LEXIS 1884, at *6 (Tex. App.—Dallas Mar. 14, 2018, orig. proceeding, pet. dism'd).

B. Perfection of Appeal

Interlocutory: To perfect an interlocutory appeal, appellant must file a notice of accelerated appeal complying with Texas Rule of Appellate Procedure 25.1 within 20 days of the order. Tex. R. App. P. 26.1(b). Post-order motions (such as a motion to reconsider) will not extend this deadline. Tex. R. App. P. 28.1(b). Beyond the regular notice contents, Rule 25.1(d)(6) requires the appellant, "in an accelerated appeal,

[to] state that the appeal is accelerated and state whether it is a parental termination or child protection case, as defined in Rule 28.4." Appellant should also state the basis of interlocutory jurisdiction (CPRC § 51.014(a)(12)), and that the appeal stays all proceedings in the trial court per section 51.014(b).

Regular: To perfect a regular appeal from a final judgment, appellant must file its notice of appeal within 30 days of the final judgment. Tex. R. App. P. 25.1, 26.1. This deadline may be extended by certain post-judgment filings. *See* Tex. R. App. P. 26.1(a)(1)-(4); Tex. R. Civ. P. 329b.

Extensions: A motion for extension of time to file the notice of appeal may be filed before (and up to 15 days after) the original deadline to perfect appeal. *See* Tex. R. App. P. 10.5(b), 26.3, 28.1(b). A "reasonable explanation" to support the request must be provided. *Houser v. McElveen*, 243 S.W.3d 646 (Tex. 2008).

C. Stay Pending Appeal

Perfecting appeal from the denial of a TCPA motion automatically stays the trial and "all other proceedings in the trial court" pending resolution of the appeal. CPRC § 51.014(b)-(c). "[T]he stay set forth in section 51.014 is statutory and allows no room for discretion," and it "cannot be circumvented by simply severing claims in the trial court." *In re Bliss & Glennon Inc.*, No. 01-13-00320-CV, 2014 LEXIS 119, at *6-7 (Tex. App.—Houston [1st District] 2014, orig. proceeding).

If the trial court issues an order in violation of the stay, the order is voidable, not void; thus, a party must object in the trial court to preserve error. *Roach v. Ingram*, No. 14-16-00790-CV, 2018 Tex. App. LEXIS 3982, at *13–14 (Tex. App.—Houston [14th Dist. June 5, 2018, no pet h.).

D. Standard of Review

Appellate courts review a denial of a TCPA motion de novo, regardless of "whether the motion is denied by written order or by operation of law." *Mem'l Hermann Health Sys. v. Khalil*, No. 01-16-00512-CV, 2017 LEXIS 7474, at *4 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied). Under this standard, the Court "make[s] an independent determination and appl[ies] the same standard used by the trial court in the first instance." *Cox Media Grp., LLC v. Joselevitz*, 524 S.W.3d 850, 859 (Tex. App.—Houston [14th Dist.] 2017, no pet.). *But c.f. Sloat v. Rathbun*, 513 S.W.3d 500, 503–04 & n.2–3 (Tex. App.—Austin 2015, pet. dism'd) (discussing possibility that a sufficiency analysis might be appropriate for some issues under the TCPA).

Certain aspects of TCPA rulings are matters within the trial court's discretion, such as whether to extend deadlines, whether to allow discovery, and the amounts of fees/sanctions to be awarded. These matters are reviewed for an abuse of discretion. *See, e.g.*, *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016); *Ruder v. Jordan*, No. 05-16-00742-CV, 2018 Tex. App. LEXIS 970, at *7 (Tex. App.—Dallas Feb. 2, 2018, no pet.); *Summersett*, 438 S.W.3d at 92.

Many TCPA opinions hold that the evidence should be reviewed "in the light most favorable to the nonmovant." *See, e.g.*, *Robert B. James, DDS, Inc. v. Elkins*, No. 04-17-00160-CV, 2018 Tex. App. LEXIS 3802, at *5 (Tex. App.—San Antonio May 30, 2018, pet. filed, No. 18-0640); *Sloat*, 513 S.W.3d at 504 (holding this would be true under either a de novo or sufficiency standard of review); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80–81 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). There is currently a petition pending in the supreme court that challenges this standard. *See Cosmopolitan Condo. Owners Ass'n v. Class A Inv'rs Post OAK, LP*, No. 01-16-00769-CV, 2017 Tex. App. LEXIS 3834, at *9 (Tex. App.—Houston [1st Dist.] Apr. 27, 2017, pet. denied, 2018 Tex. LEXIS 275) (now on rehearing).

> Appellate courts review a denial of a TCPA motion de novo, regardless of "whether the motion is denied by written order or by operation of law."

E. Disposition of Appeal

Some appellate courts hold that, if the motion was properly denied because the TCPA did not apply, then the reviewing court lacks jurisdiction to hear the appeal of the motion to dismiss; as such, the appellate court should dismiss the appeal for a want of jurisdiction rather than affirm the denial of the motion. *See, e.g.*, *Jardin v. Marklund*, 431 S.W.3d 765, 774 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Other courts hold that the proper outcome is to affirm because the movant is the "master of his motion." *Id.* at 775 (Frost, J., dissenting); *see also, e.g.*, *Adams v. Starside Custom Builders, LLC*, No. 05-15-01162-CV, 2016 Tex. App. LEXIS 6840, at *14 (Tex. App.—Dallas June 28, 2016), *rev'd on other grounds*, 547 S.W.3d 890 (Tex. 2018). Until the Texas Supreme Court resolves this question, the best practice is to be familiar with the holdings from the jurisdiction where you are practicing.

VII. Conclusion

The TCPA's broad scope, expedited deadlines, and mandatory monetary awards make it a powerful weapon that can be used by both plaintiffs and defendants in a response to wide variety of legal actions. However, many procedural questions remain unanswered, and new questions continuously arise as unique circumstances occur in the course of litigation, and as creative litigants test the statute's parameters. To protect clients' interests in this shifting landscape, Texas litigators must carefully consider the TCPA's applicability and requirements from the outset of a legal dispute.

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[1] *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) (such proof must be considered "irrespective of whether [it is] formally offered [] as evidence"); *Bedford v. Spassoff*, 520 S.W.3d 901, 906 (Tex. 2017) (considering evidence in petition and TCPA response, and noting that Court reviewed documents that were filed in clerk's record or presented to the trial court in the reporter's record); *see also Price v. Buschemeyer*, No. 12-17-00180-CV, 2018 Tex. App. LEXIS 2314, *13-15 (Tex. App.—Tyler Mar. 29, 2018, pet. filed, No. 18-0409) (discussing evidentiary review standards by various courts in TCPA context).

[2] The TCPA requires courts "to treat any claim by any party on an individual and separate basis." *Robert B. James, DDS, Inc. v. Elkins*, No. 04-17-00160-CV, 2018 Tex. App. LEXIS 3802, at *15 (Tex. App.—San Antonio May 30, 2018, pet. filed, No.18-0640).

[3] *Randolph v. Walker*, 29 S.W.3d 271, 274–75 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("An amended pleading supersedes and supplants all previous pleadings."). The omission of a party or a claim in a subsequent pleading operates as a dismissal of such party or claim as if a formal order of dismissal had been entered. Tex. R. Civ. P. 65.

[4] In reality, the opposite often results because of the right to interlocutory appeal, which may proceed all the way to the Texas Supreme Court, and the automatic stay that suspends all other proceedings in the interim.