

Are Texas Anti-SLAPP Motions Proper Legal Vehicles to Challenge Standing and, Thus, Subject Matter Jurisdiction?

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The Texas Citizens Participation Act (TCPA), or anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, is a heavily litigated topic in Texas. The TCPA is designed “to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” Tex. Civ. Prac. & Rem. Code § 27.002. It “protects citizens. . . . from retaliatory lawsuits that seek to intimidate or silence them.” *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015).

But is a TCPA motion a proper vehicle to challenge standing and, thus, the subject-matter jurisdiction of the court *ab initio* and, if so, how does it work? Despite the girth of Texas caselaw regarding the TCPA, there are few Texas cases specifically addressing this important issue. On Tuesday however, the Houston [1st Dist.] Court of Appeals issued a detailed opinion discussing this issue and concluded that—even when standing is challenged in a TCPA motion—it does not mean that a court must analyze that challenge using the TCPA’s burden-shifting procedure. *See Reynolds v. Sanchez Oil and Gas Corp.*, No. 01-18-00940-CV, 2023 WL 3311116, at *5 (Tex. App.—Houston [1st Dist.] May 9, 2023, no pet. h.) (“*Reynolds*”).

This article examines the reasoning of the Court of Appeals in *Reynolds* for that conclusion, how that court resolved the standing challenge raised in the context of a TCPA motion to dismiss and some other Texas cases that provide additional insights on the issue.

I. Summary of *Reynolds*

Reynolds has an extensive factual and procedural history, and discusses multiple TCPA-related issues. This article focuses on the issue of whether a TCPA motion is a proper vehicle to challenge standing. Therefore, this section provides a brief background of the case, sufficient to understand how the issue being addressed herein arose in the case.

A. Nature of Case

Reynolds is basically a trade secret misappropriation case. More specifically, Sanchez Oil and Gas Corp., Sanchez Energy Corp., and Sanchez Production Partners LP (collectively, the “Sanchez parties”) “allegedly invested in and developed ‘a wide array of valuable trade secret materials’ that provides them with ‘extensive competitive advantages in the oil and gas industry.’” 2023 WL 3311116, at *1. The Sanchez parties hired three individuals as engineers, Benjamin “B.J.” Reynolds (“B.J. Reynolds”), Mark Mewshaw (“Mewshaw”), and Wes Hobbs (“Hobbs”). As part of their jobs, these engineers had to access the Sanchez parties’ confidential information and agreed to maintain such information as strictly confidential. *See id.* at *2.

B.J. Reynolds accepted employment with the Sanchez parties’ competitor, Terra Energy Partners LLC (“Terra”). Both before and after resigning from his employment with the Sanchez parties, he allegedly misappropriated the Sanchez parties’ confidential information. And, once employed at Terra, he allegedly assisted Terra in competing with the Sanchez parties and used the Sanchez parties’ confidential information and trade secrets to help Terra. In addition, B.J. Reynolds

and Terra allegedly began soliciting other employees from the Sanchez parties, including Mewshaw and Hobbs, who also allegedly misappropriated the Sanchez parties' confidential information before resigning and joining Terra. See *id.* at *2-3.

B. Procedural History

The Sanchez parties filed suit against B.J. Reynolds, Mewshaw, Hobbs and Terra. They asserted various claims, including for trade secret misappropriation. *Reynolds*, 2023 WL 3311116, at *3. After defendants filed a TCPA motion to dismiss, the Sanchez parties filed a first amended petition. Later, the Sanchez parties filed a second amended petition. Defendants then filed an amended TCPA motion seeking to dismiss most of the asserted causes of action. The trial court denied the amended TCPA motion. See *id.* at *3 and 3 n. 4.

Defendants appealed. The Court of Appeals affirmed, holding that the amended TCPA motion was untimely because the second amended petition did not assert a new "legal action," as defined by the TCPA. *Id.* at *3-4. After the Texas Supreme Court issued two opinions conflicting with that decision, defendants petitioned the Texas Supreme Court for review. The Texas Supreme Court subsequently vacated that decision and remanded to the Court of Appeals to reconsider its holding as to the timeliness of the amended TCPA motion and to reach any remaining issues on appeal. See *id.* at *4.

Defendants argued four issues in *Reynolds*, including that plaintiffs did not meet their burden to establish by clear and specific evidence a prima facie case of each element of the challenged claims. See *id.* at *1. Addressing each of the issues necessary to dispose of the appeal, the Court of Appeals affirmed in part and reversed and rendered in part. See *id.* at *1, 20.

C. Focus Of This Article

This article focuses on an issue addressed in *Reynolds* that has received far less attention thus far by Texas courts than the other issues raised by defendants. Namely, as part of the argument that plaintiffs did not meet their burden to establish a prima facie case of each element of the challenged claims, Terra argued: (i) that the Sanchez parties did not prove that they owned the trade secrets at issue; (ii) therefore, they did not establish standing to assert their trade secret misappropriation claims; and (iii) thus, the trial court lacked subject-matter jurisdiction over those claims. See *Reynolds*, 2023 WL 3311116, at *4-5.

II. Is a TCPA Motion a Proper Vehicle To Challenge Standing and, Thus, Subject Matter Jurisdiction?

A. *Reynolds*' Standing/Jurisdiction Analysis

The Court of Appeals in *Reynolds* began by pointing out that "standing is a component of subject-matter jurisdiction, which is 'essential to the authority of a court to decide a case,' and it may be raised at any time." *Id.* at *4 (quoting *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44, 445 (Tex. 1993)). Then, it proceeded to explain the approach used to resolve a subject-matter jurisdiction challenge, as follows:

"Whether a court has subject-matter jurisdiction is an issue of law that we review de novo. A defendant may challenge the court's jurisdiction by challenging the pleadings or the existence of jurisdictional facts. If the pleadings are challenged, we determine whether the pleader has alleged facts affirmatively demonstrating the court's jurisdiction. We construe the pleadings liberally in favor of the pleader, look to the pleader's intent and accept as true the unchallenged factual jurisdictional allegations in the pleadings. If the challenge is to the existence of jurisdictional facts, the challenger must first assert—and support with evidence—that the trial court lacks subject-matter jurisdiction. If the challenger supports the assertion with evidence, then the plaintiff must show that a disputed material fact exists regarding the jurisdictional issue."

Reynolds, 2023 WL 3311116, at *4 (citations omitted).

The *Reynolds* court highlighted that, rather than challenging the pleadings, Terra argued that the Sanchez parties were required to prove their ownership of the confidential information at issue by clear and specific evidence pursuant to the

TCPA's burden-shifting framework in Tex. Civ. Prac. & Rem. Code § 27.005(c) ("The court may not dismiss a legal action under [the TCPA] if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question."). *Id.* at *5.

The Court of Appeals rejected this argument. *Id.* ("Terra cites no authority supporting this argument."). It acknowledged that subject-matter jurisdiction could be challenged by different legal vehicles, such as a plea to the jurisdiction or a motion for summary judgment. However, when the challenge is raised in a TCPA motion to dismiss, the Reynolds court concluded that a court need not analyze jurisdiction using the TCPA burden-shifting procedure. Therefore, it held that the Sanchez parties were not required to prove standing by clear and specific evidence as part of their burden under the TCPA framework.

Instead, they were required to plead facts affirmatively demonstrating the court's jurisdiction. In so holding, the Court of Appeals noted that "Terra did not present any evidence negating the jurisdictional allegations, and therefore the Sanchez parties were not required to prove that a disputed material fact existed regarding standing." *Id.*

Accordingly, after examining the second amended petition, the Reynolds court concluded that the facts alleged in that petition established that the Sanchez parties have standing to assert their trade secret misappropriation claims, and overruled Terra's jurisdictional sub-issue. *Id.*

B. Other Texas Cases Discussing TCPA Motions Challenging Standing

Dovetailing with Reynolds, the Houston [14th Dist.] Court of Appeals in *Buzbee v. Clear Channel Outdoor, LLC*, 616 S.W.3d 14 (Tex. App.—Houston [14th Dist.] 2020, no pet.) ("*Buzbee*") stated that "courts have considered jurisdictional challenges raised by a number of different means, including: (1) pleas to the jurisdiction; (2) motions for summary judgment; (3) special exceptions; (4) objections to capacity; and (5) on the court's own motion." *Id.* at 21-22 (citations omitted). Moreover, the *Buzbee* court held that—even when raised in a TCPA motion—the court need not analyze jurisdiction using the TCPA burden-shifting mechanism. *See id.* at 21-22; see also *Nguyen v. Trinh*, No. 14-21-00110-CV, 2022 WL 805820, at *5 (Tex. App.—Houston [14th Dist.] March 17, 2022, no pet.) ("Because standing may be raised at any time and in any manner, we consider the issue when raised in the context of a TCPA motion. *See Buzbee v. Clear Channel Outdoor, LLC*, 616 S.W.3d 14, 22 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (reviewing standing under a plea-to-the-jurisdiction standard when raised in the context of a TCPA motion)."); cf. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724-25 (Tex. 2016) ("The dismissal grounds under Rule 91a have been analogized to a plea to the jurisdiction, which requires a court to determine whether the pleadings allege facts demonstrating jurisdiction. . . . To determine whether dismissal under Rule 91a is required in this case, we thus consider whether the pleadings, liberally construed, allege sufficient facts to invoke a waiver of governmental immunity under the Tort Claims Act.") (citations omitted).

Therefore, as also quoted in Reynolds (2023 WL 3311116, at *5), the *Buzbee* court (1) held that "the TCPA burden-shifting procedure is not a proper framework to analyze appellees' standing and mootness arguments, and we are not constrained to analyze those arguments under the TCPA rubric even though appellees brought them to the court's attention in the context of such a motion", 616 S.W.3d at 23; and (2) stated that "the TCPA burden-shifting procedure" is a mechanism ill-suited for resolving whether a court is authorized to decide" such a controversy, *id.* at 22. The *Buzbee* court explained why it considered the TCPA's burden-shifting framework to be "ill-suited" for resolving a standing/jurisdiction challenge, as follows:

"To begin with, the TCPA is a procedural vehicle to address the merits of a claim. Nowhere does chapter 27 mention jurisdiction, and nothing within its text discusses the possibility or propriety of dismissal due to jurisdictional defects. . . . Unlike a dismissal for lack of standing, a dismissal under the TCPA is a judgment on the merits and carries res judicata implications. The TCPA presupposes jurisdictional standing. Accordingly, because a court is obliged to dismiss a lawsuit without reaching the merits when a plaintiff lacks standing, *the absence of standing at the outset of a lawsuit deprives the court of jurisdiction to apply the TCPA at all.* Appellees cite no authority in which a court has dismissed a claim on standing or mootness grounds because the plaintiff failed to present jurisdictional evidence as part of its prima facie case in response to a TCPA motion to dismiss. . . . Because the TCPA focuses on the merits, and jurisdictional challenges do not, and because the form by which standing is raised typically is unimportant, we construe the part of appellees' motions

to dismiss presenting standing and mootness arguments as though they were raised in a dilatory plea, like a plea to the jurisdiction.”

Id. at 22-23 (citations omitted) (emphasis added). And the Court of Appeals in *Reynolds* largely embraced *Buzbee*'s reasoning. See *Reynolds*, 2023 WL 3311116, at *5.

Notably, the *Buzbee* court also stated that a court “**should and must**” consider the issue of standing when raised in the context of a TCPA motion because standing can be “raised at any time and in any manner”. *Id.* at 22 (emphasis added); see *Comcast Corp. v. Houston Baseball Partners LLC*, 627 S.W.3d 398, 408 (Tex. App. Houston [14th Dist.] 2021, pet. dismissed) (“In *Buzbee*, we acknowledged that, because standing may be raised at any time and in any manner, a court should and must consider the issue when raised in the context of a TCPA motion. But because the TCPA serves an initial merits-screening function and is ‘ill-suited for resolving whether a court is authorized to decide a controversy,’ we said standing arguments raised in a TCPA motion to dismiss should be treated as though raised in a dilatory plea, like a plea to the jurisdiction.”) (citations omitted); *cf. de la Torre v. de la Torre*, 613 S.W.3d 307, 312-314 (Tex. App.—Austin 2020, no pet.) (“In this case we need not consider the presence or absence of the statutory elements of the claim in question because Armando’s claim lacks an equally fundamental component of a prima facie case: standing. See *Holcomb v. Waller County*, 546 S.W.3d 833, 840 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (reversing denial of TCPA motion to dismiss after holding that nonmovant could not make out prima facie case in absence of standing to pursue claim). . . . The dissent would affirm the denial of Crystal’s motion to dismiss, reasoning that because the trial court lacked jurisdiction over the object of that motion, the trial court also lacked jurisdiction to award fees or sanctions under the relevant provisions of the TCPA. . . . We respectfully disagree with the dissent and with our sister courts, as the statute provides no support for the construction. . . . We hold that the TCPA . . . authorizes an award of fees and sanctions where a litigant successfully challenges a legal action on jurisdictional grounds.”) (various citations omitted).

The *Reynolds* court engaged in a standing/jurisdictional analysis in the context of a TCPA motion. However, it did not expressly hold that a court “should and must” do so—or discuss some seemingly contrary caselaw (and neither did the *Buzbee* court). *Cf. Llanelly Enterprises Ltd. v. Bouknight*, No. 01-19-00505-CV, 2021 WL 1031551, at *3 (Tex. App.—Houston [1st Dist.] Mar. 18, 2021, no pet.) (“A lack of subject-matter jurisdiction may be raised by a plea to the jurisdiction or a motion for summary judgment. Appellant has cited no authority to show that it may be raised in a TCPA Motion to Dismiss. And, although appellant filed a Plea to the Jurisdiction in the trial court, he did not obtain a ruling on it, and it is not before this Court on interlocutory appeal. . . .”) (citations omitted); *Thomas v. Wm. Charles Bundren & Assocs. L. Grp. PLLC*, No. 05-20-00632-CV, 2021 WL 3159795, at *3-4 (Tex. App.—Dallas July 26, 2021, no pet.) (“We begin with Bundren’s contention that Appellants lacked standing to seek dismissal under the TCPA. . . . Bundren argues that Appellants lacked standing to bring the motion to dismiss because they were not parties to the Ameripro lawsuit and, at best, were speaking only as agents of Oak Mortgage. This argument conflates the concept of standing with the merits of a motion to dismiss under the TCPA. . . . Whether an agent is entitled to seek the TCPA’s protections for statements made on behalf of a principal is a question of the TCPA’s applicability, not the trial court’s jurisdiction to resolve the issue. We conclude that the doctrine of standing did not apply to deprive the trial court of jurisdiction to decide Appellants’ TCPA motion.”) (citations omitted).

III. Practice Pointers

Texas courts continue to try to define the contours of the TCPA. This includes how to deal with TCPA motions that challenge standing and, thus, subject matter jurisdiction. Therefore, when considering such a challenge:

- Evaluate the advantages and disadvantages to raising such a challenge in a TCPA motion to dismiss, and whether to instead file a separate plea to the jurisdiction.
- When doing so, consider the impact that the plea (and any corresponding ruling) may have on any concurrently-filed or later-filed TCPA motion (and how to time the filings and corresponding hearings).

- If the decision is to assert the challenge in a TCPA motion to dismiss, evaluate whether to assert the challenge on the pleading alone or submit evidence on the issue.
- Consider whether the factual allegations in the relevant pleading, when liberally construed in favor of the pleader, affirmatively demonstrate the court's jurisdiction to hear the cause.
- Also consider whether to challenge the jurisdictional factual allegations in the pleading and present evidence negating those jurisdictional allegations, thereby prompting the pleader to submit evidence in response that shows a disputed material fact exists regarding the jurisdictional issue.

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