



## In the News

### Texas Appellate Court Addresses Free Speech in Context of Anti-SLAPP Statute

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#### Opinion provides good case study on impact of recent amendments to Lone Star State anti-SLAPP statute

by Shain Khoshbin

SLAPP suits (Strategic Lawsuits Against Public Participation) have become part of court dockets in recent years by plaintiffs who sometimes are actually seeking to burden critics with the cost of legal defense to compel them to abandon their criticism. SLAPP suits have become viewed in many jurisdictions as impeding freedom of speech. Anti-SLAPP statutes—which are rooted in the right to free speech—have become a standard defense tool used to put an early end to such SLAPP litigation. In fact, the frequent use and sometimes abuse of anti-SLAPP statutes has led to an effort by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to draft legislation regarding SLAPP suits. See Issues Memorandum to National Conference of Commissioners on Uniform State Laws, dated June 3, 2019, regarding “Purpose and content of Act; issues addressed by Committee.”

A gusher of a dispute in East Texas has resulted in a new Texas Court of Appeals opinion that covers the field regarding the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–.011 (TCPA), which is Texas’s version of an anti-SLAPP statute, as well as alter ego and agency law in Texas. Moreover, it raises an interesting (and unresolved) issue as to the effect of amending a petition to assert alter ego and vicarious liability claims on the timing of filing a TCPA motion to dismiss. It also provides a good opportunity to examine how the amended TCPA—which became effective on September 1, 2019 (Amended TCPA)—may impact such cases.

This article will be split into two parts. This first part of this article will examine the facts and discuss the TCPA issues addressed in *ETC Texas Pipeline, Ltd. v. Addison Expl. & Dev., LLC*, \_\_\_ S.W.3d \_\_\_, 2019 WL 3956114 (Tex. App.—Eastland, Aug. 22, 2019) (ETC Opinion). Because the ETC Opinion involved the TCPA version *prior to* the Amended TCPA, this part of the article will point out some differences that may have affected the opinion if it involved the Amended TCPA. The second part of this article will discuss the portions of the ETC Opinion regarding alter ego, vicarious liability, and agency. Moreover, in the conclusion, it will provide a bulleted summary of key changes to the Texas anti-SLAPP statute that have narrowed its scope and that also reflect the concerns and differences between the various states’ statutes that have led to the NCCUSL trying to draft legislation regarding SLAPP suits.

#### Summary of Parties & Dispute

Permian Basin Resources, LLC (PBR) is an oil company owned by Ken Moore and Bill Crow. To capitalize on a new technology to extract oil and gas, PBR needed an investor to help obtain oil and gas leases in certain land mostly within the city limits of Big Spring, Texas (the Settles Prospect). PBR and Addison Exploration & Development, LLC (Addison) agreed that Addison, through its principal officer Karl Richter, would attempt to locate an investor. See ETC Opinion at 3.

## The Agreements

Richter approached Energy Transfer, LP (Energy Transfer) about the opportunity, which was referred to Marshall McCrea, who directed Brian Beebe to meet with Richter. McCrea and Beebe were officers of Energy Transfer and of the general partner of ETC Texas Pipeline, Ltd. (ETC). Addison asserted that Beebe agreed PBR and Addison could acquire the midstream rights from the wellhead to central delivery points (CDPs), while Energy Transfer would have the midstream rights beyond the CDPs (Beebe agreement). *See id.* at 3–4.

About a month later, PBR, Addison, and ETC signed a Confidentiality and Noncompete Agreement (referred to as “confidentiality agreement” in this article) to engage in confidential negotiations regarding the purchase of oil and gas interests in the Settles Prospect. The confidentiality agreement, among other things: (1) provided that PBR would disclose confidential information to ETC, and ETC would keep it confidential; (2) prohibited ETC from acquiring any oil and gas leases in the Settles Prospect for eighteen months without the written consent of PBR/Addison; and (3) provided that any such interest acquired by ETC would, at “PBR/Addison’s” option, “be deemed to be held in trust” by ETC for the benefit of “PBR/Addison.” *See id.* at 4.

PBR and Addison then signed a fee for services agreement (referred to as “FFS agreement” in this article), wherein Addison identified ETC and another company as potential funding sources for the Settles Prospect. The FFS agreement also provided that, if (1) PBR proceeded with a funding entity identified by Addison, (2) PBR and that entity successfully acquired leases in the Settles Prospect, and (3) the leases were sold to a third-party operator, then PBR would pay Addison a certain percentage of cash it received for the leases and of the working interest PBR retained in the leases. It further provided that PBR would give Addison one-half of any midstream rights retained by PBR “to the extent that those rights could be reasonably negotiated for and reserved through a sale” of the leases. *See id.* at 5.

Energy Transfer formed WesTex Energy, LLC (WesTex), a wholly owned subsidiary, to acquire the leases in the Settles Prospect. Then, PBR and WesTex signed a joint acquisition and development agreement (JADA), whereby the parties agreed, among other things, that WesTex would contribute \$15 million for the acquisition of leases in the Settles Prospect and that, on the sale of the oil and gas leases to a third-party operator, WesTex would be repaid the money it contributed and that PBR and WesTex would split any profits. *See id.*

## The Fallout

Pursuant to the JADA, PBR and WesTex began acquiring leases in the Settles Prospect. But Addison never gave written consent for the acquisitions. Subsequently, PBR told Addison that a “critical mass” of leases had been acquired and that PBR and WesTex intended to sell the leases to a third-party operator. PBR also instructed Addison to begin putting together the wellhead-to-CDPs midstream plan. *See id.*

Richter met with potential partners to develop this plan. However, he was told by PBR that WesTex demanded that Addison “cease and desist” all attempts to organize the midstream plan. PBR and WesTex later sold the leases to Rock Oil Holdings, LLC (Rock Oil) pursuant to a purchase and sale agreement (PSA). *See id.*

Pursuant to the PSA, among other things, PBR and WesTex also retained overriding royalty interests (ORRIs) on the leases it sold to Rock Oil. Subsequently, the ORRIs were assigned to Oasis Pipe Line Company (Oasis), an affiliate of Energy Transfer, and Castle Rock Royalty, LLC, an entity owned by Moore and Crow. WesTex later assigned to Richter the wellhead-to-CDPs rights for the Settles Prospect leases that WesTex owned. Nevertheless, Addison argued these rights were less valuable than the rights that it had been promised. *See id.* at 5–6.

## The Lawsuit and Appeal

Addison sued ETC, Oasis, and WesTex. In a second amended petition, Addison asserted claims against ETC for breach of the confidentiality agreement and the Beebe agreement, and for fraud; against ETC and WesTex for tortious interference with the FFS agreement; and against ETC, WesTex, and Oasis for unjust enrichment. *See id.* at 6.

1. The fourth amended petition adding Energy Transfer.

Almost a year later, Addison filed a fourth amended petition in which it named Energy Transfer as a defendant, dropped its tortious interference and unjust enrichment claims, and added claims against ETC, Oasis, and WesTex based on breach of a fiduciary duty. Addison alleged claims against ETC for breach of the confidentiality agreement, breach of the Beebe agreement, breach of fiduciary duty, and fraud, and against Oasis and WesTex for knowing participation in ETC's breach of fiduciary duty.

[NOTE 1 AS TO AMENDED TCPA: Amended TCPA § 27.010(a) identifies various new types of actions to which the TCPA does not apply, including an exemption for "a legal action based on a common law fraud claim." Amended TCPA § 27.010(a)(12).]

Although not asserting any direct claims against Energy Transfer, Addison added Energy Transfer as a defendant under what appeared to be alter ego and/or vicarious liability theories. *See id.* at 1–2, 6–7.

**The TCPA motion to dismiss.**

ETC, Oasis, WesTex, and Energy Transfer then filed a TCPA motion to dismiss arguing, *inter alia*, that the TCPA applied because Addison's claims were based on communications made while movants were exercising their rights of free speech or association under the TCPA. After the trial court denied the motion to dismiss, ETC, Oasis, WesTex, and Energy Transfer (collectively, "appellants") appealed, arguing that trial court erred by denying the motion because: (1) based on Addison's newly asserted "vicarious liability" claim, the motion was timely as to all claims against the appellants; (2) the TCPA applied because Addison's claims were based on communications made while the appellants were exercising their right of free speech or right of association under the TCPA; and (3) Addison failed to produce clear and specific evidence of a prima facie case for each element of its claims. The appellants also argued that, even if Addison met its burden, the trial court was required to dismiss Addison's claims because the appellants proved their affirmative defenses by a preponderance of the evidence. *See id.* at 1–2.

The Court of Appeals (1) affirmed the trial court's order denying the motion to dismiss as to Addison's breach of contract and fraud claims against ETC; and (2) reversed the order denying the motion to dismiss as to Addison's vicarious liability claim against Energy Transfer, breach of fiduciary duty claim against ETC, and knowing participation in breach of fiduciary duty claim against Oasis and WesTex. *See id.* at 2.

## Free Speech and the TCPA

In the ETC opinion, the court summarized the purpose and basic tenets of the TCPA. Its purpose is 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." TCPA § 27.002; *see* ETC Opinion at 7 (other citations omitted). And it provides an expedited procedure to dismiss a "legal action" that appears to stifle the defendant's exercise of the rights protected by the statute. *See id.* (citations omitted). A defendant must file its motion to dismiss within sixty days of service of the legal action. TCPA § 27.003(b); *see* ETC Opinion at 8.

[NOTE 2 AS TO AMENDED TCPA: Amended TCPA § 27.003(b) provides that the parties, upon mutual agreement, may extend the time to file the motion (in addition to receiving an extension from the court on showing of good cause).]

In such a motion to dismiss, the Court held that the movant has the initial burden to prove by a "preponderance of the evidence" that the legal action is "based on, related to, or in response to" the movant's exercise of the right of free speech, the right of association, or the right to petition. TCPA §§ 27.003(a), .005(b); *see* ETC Opinion at 7 (other citations omitted). If the movant satisfies this burden, the burden then shifts to the nonmovant to establish by clear and specific evidence a prima facie case for each essential element of the claim in question. TCPA § 27.005(c); *see* ETC Opinion at 7-8 (other citations omitted).

[NOTE 3 AS TO AMENDED TCPA: Amended TCPA § 27.003(a) has deleted the phrase “relates to” and added “or arises from any act of that party in furtherance of the party’s communication or conduct described by Section 27.010(b)” (which, in the amended TCPA, provides certain exceptions for the media and online business reviews under the amended TCPA § 27.010(a)). This appears to narrow the scope of the TCPA. Moreover, the amended TCPA § 27.005(b) has replaced the phrase “shows by a preponderance of the evidence” with the word “demonstrates” and again deleted the phrase “relates to.”]

The Court held that the trial court is also required to dismiss a legal action if “the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim.” TCPA § 27.005(d); see ETC Opinion at 8.

[NOTE 4 AS TO AMENDED TCPA: Amended TCPA § 27.005(d) has replaced the phrase “establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim” with “establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.”]

## **The Timeliness of the Motion**

The court held that Energy Transfer’s TCPA motion was timely because it was filed within 60 days after Energy Transfer was served with the fourth amended petition. However, it held that the motion was not timely as to ETC, Oasis, and WesTex because they were served with Addison’s legal action more than 60 days before Addison asserted its claims against them. The court reasoned that an amended pleading that does not add new parties or claims does not restart the deadline for filing a TCPA motion. See ETC Opinion at 8–9 (citations omitted).

[NOTE 5 AS TO AMENDED TCPA: Amended TCPA § 27.001(6)(A) now states that the term “legal action” does not include, among other actions/proceedings, “a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief.” The court’s ruling thus somewhat presaged the amendment to the TCPA on this point concerning re-setting of TCPA deadlines.]

And, although an amended petition asserting claims based on new factual allegations may reset a TCPA deadline as to the newly added substance, the court reasoned that additional details in a subsequent petition do not restart the time for filing a motion to dismiss if the same essential factual allegations as to the claim were presented in an earlier petition. See *id.* at 9 (citations omitted).

In this regard, the court noted that the amended petition alleged, for the first time, that ETC owed Addison a fiduciary duty, that ETC breached that duty, and that Oasis and WesTex knowingly participated in that breach. Therefore, it held the TCPA motion was timely filed as to those claims. But because the court found that the amended petition did not alter the essential nature of Addison’s claims against ETC for breach of contract and fraud, it held that the amended petition did not restart the deadline for filing a TCPA motion for those claims and, thus, ETC forfeited the protections of the statute as to those claims. See *id.* at 9–10 (citations omitted).

Importantly, the court acknowledged Appellants’ argument that, regardless of ETC’s failure to timely file a TCPA motion as to Addison’s breach of contract and fraud claims, ETC could join Energy Transfer’s motion because Addison’s “claim for secondary liability necessarily puts in play every element of those primary causes of action.” *Id.* at 10. The appellants argued that any other approach “would lead to illogical results, potentially letting a vicariously-liable defendant avoid judgment while imposing liability on the direct defendant.” *Id.* Nonetheless, the court avoided ruling on that issue. Namely, it held: “Although we question whether the filing of a new vicarious liability claim can ‘undo’ a direct defendant’s forfeiture of its rights under the TCPA, it is not necessary for us to resolve that issue in this appeal.” *Id.*

## **Freedom Of Speech & The Commercial Speech Exception**

### **Matter of public concern.**

The court held the “exercise of the right of free speech” is a communication made in connection with a matter of public concern. TCPA § 27.001(3); see ETC Opinion at 11. A “matter of public concern” includes an issue related to health or safety; environmental, economic, or community wellbeing; the government; a public official or public figure; or a good, product, or service in the marketplace. See *id.* § 27.001(7); ETC Opinion at 11.

[NOTE 6 AS TO AMENDED TCPA: Amended TCPA § 27.001(7) substantially amended the definition for “matter of public concern.” For example, it replaced “includes an issue related to (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace,” with: “‘Matter of public concern’ means a statement or activity regarding: (A) a public official, public figure, or other person who has drawn substantial public attention due to the person’s official acts, fame, notoriety, or celebrity; (B) a matter of political, social, or other interest to the community; or (C) a subject of concern to the public.” This too seemingly narrows the scope of matters that would fall within the meaning of “matter of public concern.”

A “communication” includes “the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” § 27.001(1); see ETC Opinion at 11.]

The court explained that (1) private communications made in connection with a matter of public concern can fall within the TCPA’s definition of the exercise of the right of free speech; (2) the TCPA does not require for the communications to specifically mention a matter of public concern or have more than a “tangential relationship” to such a matter so long as the statements are “in connection with” issues “related to” any of the matters of public concern listed in the TCPA (see Notes 3 and 6 above as to Amended TCPA); and (3) its analysis is focused on the pleadings and, when it is clear from the plaintiff’s pleadings that the action is covered by the TCPA, the defendant has met its burden. See ETC Opinion at 11-12 (citations omitted).

[NOTE 7 AS TO AMENDED TCPA: Amended TCPA § 27.006(a)—now called “PROOF”—adds that the trial court also shall consider “evidence a court could consider under Rule 166a [summary judgment evidence].”]

The court found that the amended petition alleged that Appellants made oral and written communications about the various pertinent agreements, acquiring oil and gas interests in the Settles Prospect, and the division of the midstream rights. It found the underlying basis of all of Addison’s claims was that, as part of these communications, Addison was promised that any interests acquired in the Settles Prospect without Addison’s written consent would be held in trust for Addison and that Addison would have the right to collect oil and natural gas at the wellheads in the Settles Prospect and transport it. See *id.* at 12.

The court explained that Addison asserted it did not receive the rights or interests that it was promised. And the court found that, in support of its claims, Addison alleged that Energy Transfer had “an extensive pipeline system and other midstream infrastructure” in the area of the Settles Prospect, and also produced evidence that ETC and Sunoco Logistics Partners, LP, a subsidiary of Energy Transfer, had existing pipelines in the area of the Settles Prospect that were used to transport crude oil and natural gas products. See *id.* at 12. It further found that: (1) Beebe’s proposal to PBR anticipated that all crude oil and natural gas from the Settles Prospect would be delivered to these existing pipelines; and (2) the JADA stated that a “principal motivation” for WesTex to enter the agreement was its “anticipated ability to negotiate and retain the right to provide transportation, processing, marketing, and other services” with respect to oil and gas produced from the Settles Prospect. See *id.*

The court held that, as a matter of law, the appellants’ communications about acquiring the oil and gas leases in the Settles Prospect and the right to gather and transfer oil and gas from those leases to the existing pipelines were at least tangentially related to an existing service in the marketplace, a “matter of public concern” under the TCPA. See *id.* at 13 (citations omitted).

[NOTE 8 AS TO AMENDED TCPA: Once again, Amended TCPA § 27.001(7) substantially amended the definition for “matter of public concern” to, among other things, delete the phrase “includes an issue related” and delete the phrase “(E)”

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a good, product, or service in the marketplace,” thereby seemingly narrowing the scope of matters falling within the meaning of “matter of public concern.”]

It also held that, because Addison’s claims related to the appellants’ exercise of their right of free speech as defined by the TCPA, the appellants met their burden of establishing that the TCPA applies to Addison’s claims. *See id.*; *see also* Notes 3, 6 and 8 above as to Amended TCPA. Notably, however, the court’s opinion included a footnote stating that “our conclusion that the communications in this case fall within the scope of the TCPA should not be read as a determination that all communications made in connection with a private business dispute are protected by the statute.” ETC Opinion at 13 n. 7 (citations omitted).

## **Commercial speech exemption.**

Addison argued that, even if the appellants established that the TCPA applies to its claims, the claims fall within the “commercial speech” exemption of the TCPA. TCPA § 27.010(b); *See* ETC Opinion at 13 (other citations omitted).

[NOTE 9 AS TO AMENDED TCPA: Although Amended TCPA § 27.010 kept the language from this commercial speech exemption in Amended TCPA § 27.010(a)(2), it also added many other exemptions, and exceptions to some of those exemptions. *See also* Note 1 above as to Amended TCPA.]

In that regard, the court explained the exemption applies when (1) the defendant was primarily engaged in the business of selling or leasing goods; (2) the defendant made the statement or engaged in the conduct on which the claim is based in its capacity as a seller or lessor of those goods or services; (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services defendant provides; and (4) the intended audience of the statement or conduct was actual or potential customers of defendant for the kind of goods or services the defendant provides. *See* ETC Opinion at 13 (citations omitted). It further explained that Addison, as the nonmovant, had the burden of proving the statutory exemption. *See id.* at 14 (citations omitted).

The court found, however, that all the communications relied on by Addison were made between the parties to the alleged Beebe agreement, the confidentiality agreement, or the JADA—not to any potential customer of a service provided by the appellants. And, thus, it held that Addison failed to prove that the commercial speech exception applies. *See id.*

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