



## In the News

### Texas Appellate Court Addresses Free Speech in Context of Anti-SLAPP Statute: Part 2

October 25, 2019 | (Time to read: 9 minutes)

by Shain Khoshbin – October 24, 2019

The first part of this article (posted on October 1, 2019) examined the facts and discussed the anti-SLAPP 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”). It discussed 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. It also compared the TCPA version involved in the ETC Opinion with the amended TCPA—which became effective on September 1, 2019 (referred to in this article as “the amended TCPA”) and pointed out some differences that may have affected the ETC Opinion if it involved the Amended TCPA.

This second part of the article will discuss the portions of the ETC Opinion regarding alter ego, vicarious liability, and agency. Then, it will provide a summary of key changes to the Texas antiSLAPP statute, which also reflect concerns that led to an effort by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to draft legislation regarding “strategic lawsuits against public participation,” or “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” (referred to in this article as “the NCCUSL Memo”). Defined terms from the ETC Opinion are provided in the first part of this article.

#### Alter Ego & Vicarious Liability

In its fourth amended petition, among other things, plaintiff Addison named Energy Transfer as a defendant, dropped its tortious interference and unjust enrichment claims, and added claims against ETC, Oasis, and WestTex based on breach of a fiduciary duty. 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. More specifically, Addison alleged:

At the outset, Energy Transfer has been added as a party because it is liable for the acts of its officers named herein, who are also officers of WestTex and ETC and through them controlled these entities, and because Energy Transfer formed WestTex solely for the purpose of acquiring oil and gas leases in the Settles Prospect and intended to retain the midstream rights in those leases once the leases were sold.

#### ETC Opinion at 6.

If the movant on a TCPA motion satisfies its initial 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). On appeal in the ETC case, appellants argued that Addison failed to carry this burden. In that regard, the court noted that a prima facie case is “the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.” See ETC Opinion at 14 (citations omitted).

### Alter Ego

The court first considered whether Addison produced clear and specific evidence of a prima facie case that Energy Transfer is vicariously liable for the conduct of ETC or WesTex, and stated that Addison “appears to have pleaded an ‘alter ego’ theory for vicarious liability.” *Id.* at 15. In so doing, the court acknowledged that Texas law respects corporate formation and separateness and sets a high bar for “piercing the corporate veil.”

The court explained that the formation of affiliated corporations to limit liability while pursuing common goals is legal and is commonplace. Thus, a subsidiary corporation and a parent corporation are considered separate and distinct “persons” as a matter of law for the purposes of legal proceedings. *See id.* (citations omitted). It further explained that courts will generally observe the separateness of corporations even when one company dominates or controls the other company, or treats the other company as a mere department, instrumentality, or agency, and that corporations are not liable for each other’s obligations merely because of centralized control, mutual purposes, and shared finances. *See id.* at 15–16 (citations omitted). Rather, it held that there must also be evidence of abuse, injustice, and inequity before one corporation may be held liable for another corporation’s obligations, and that it must appear that the corporate entity of the subsidiary is being used as a sham to perpetuate a fraud, to avoid liability, to avoid the effect of a statute, or for other exceptional circumstances. *See id.* at 16 (citations omitted).

Because the court found that Addison did not plead, and offered no evidence of, any abuse, injustice, or inequity that would support holding Energy Transfer liable for the conduct of its subsidiaries, it held that Addison failed to produce clear and specific evidence that Energy Transfer was vicariously liable for the conduct of ETC and WesTex based on an alter ego theory. *See id.*

### Agency

In its response to the TCPA motion to dismiss, Addison also argued that ETC, WesTex, McCrea, and Beebe were Energy Transfer’s agents and acted within the scope of their authority regarding the acts and omissions at issue. Therefore, the court considered whether Addison produced clear and specific evidence that ETC, WesTex, McCrea, or Beebe acted as Energy Transfer’s agent such that Energy Transfer can be held liable for their conduct. *See id.* at 17.

In that regard, the court explained that, to establish an agency relationship, the evidence must show that the purported agent consented to act on the principal’s behalf and subject to the principal’s control, and that the purported principal authorized the agent to act on its behalf. *See id.* (citations omitted). It explained that: (1) Texas law does not presume agency; (2) a principal is liable for the acts of its agent only when the agent has actual or apparent authority to do the act or when the principal ratifies the act; and (3) the party alleging agency has the burden of proving it. *See id.* at 17–18 (citations omitted). Furthermore, it explained that the mere existence of a subsidiary corporation that performs a beneficial function for the parent does not automatically establish the existence of an agency relationship. *See id.* at 18 (citations omitted).

Regarding Addison’s agency theory, the court found Addison only alleged that: (a) there was a parent—subsidiary relationship between Energy Transfer, as the parent, and ETC and WesTex, as the subsidiaries; (b) the companies had overlapping officers; and (c) Energy Transfer “controlled” the other two corporations through those officers. *See id.* However, it found that the allegation of “control” by Energy Transfer was only conclusory and thus insufficient to establish a prima facie case. It also found that, other than the existence of common officers, Addison did not plead any facts or produce any evidence to support that either ETC or WesTex was acting on behalf of Energy Transfer, as opposed to their own behalf. Thus, it held that Addison failed to produce clear and specific evidence that either ETC or WesTex was Energy Transfer’s agent. *See id.* (citation omitted).

Moreover, as to Addison’s arguments that McCrea and Beebe were Energy Transfer’s agents, the court explained that an individual can act as an agent for more than one principal. *See id.* at 18– 19 (citations omitted). In that regard, it found that Addison produced no evidence that McCrea or Beebe acted as the agents of Energy Transfer, as opposed to the agents of ETC or WesTex. Thus, the court held that Addison failed to carry its burden of producing clear and specific evidence of a prima facie case for each element of its allegation that Energy Transfer was vicariously liable for the conduct of ETC and WesTex on an alter ego theory or for the conduct of ETC, WesTex, McCrea, or Beebe based on an agency theory. *See id.* at 19. The court also held that Addison adduced no evidence that ETC owed Addison a fiduciary duty and, thus,

failed to establish by clear and specific evidence a prima facie case of its breach of fiduciary duty claim. See *id.* at 9 (citations omitted). And because it failed to establish that ETC breached a fiduciary duty to Addison, Addison also failed to carry its burden as to its claim that Oasis and Westex knowingly participated in that breach. See *id.* at 19–20 (citations omitted).

### The State of the Law on Anti-SLAPP Statutes and Summary of Changes in the TCPA

Given the prevalent use (and sometimes abuse) of anti-SLAPP statutes across numerous jurisdictions, the comparison in the first part of this article of the TCPA with the Amended TCPA in the context of the ETC Opinion, foreshadows the narrowing of such statutes across the country. Indeed, this narrowing of such statutes—as well as attempts to bring uniformity to such statutes—is reflected in the NCCUSL memo.

- The NCCUSL memo stated that, in 1989, “Washington became the first state to pass what is known as an ‘anti-SLAPP’ law. Since then, 31 other states, as well as the District of Columbia and the territory of Guam, have likewise enacted various forms of legislation to address SLAPP cases. The most recent enactment was by Colorado in 2019.” NCCUSL Memo at 2–3 (citations omitted). It also mentioned that most of the anti-SLAPP statutes differ from each other in some respect—some broader in scope, some narrower in scope, some requiring higher burdens of proof—“[b]ut it’s safe to say that purpose of the typical so-called ‘anti-SLAPP’ law is to root out and end frivolous cases—those brought only to harass or punish one’s critics—before the costs of litigation escalate and prevent a defendant from mounting a defense.” *Id.* at 3. See also *State Anti-SLAPP Laws*, Public Participation Project website (last visited September 25, 2019) (identifying the scope of anti-SLAPP laws in Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, and Washington).

The TCPA, which is Texas’s version of an anti-SLAPP statute, has often been used by creative business litigators to seek an early end to lawsuits. The ETC Opinion reflects an example of such a case. It is important to note, however, that Texas Governor Greg Abbott signed HB 2730 (the Amended TCPA) into law on June 2, 2019. The amended TCPA became effective on September 1, 2019, and applies only to an action filed on or after that effective date. As discussed in the first part of this article, the amended scope of the TCPA, as well as its changes to other procedural and evidentiary requirements under the TCPA, perhaps could have led to a different result in the ETC Opinion.

Some of the key changes include:

- Amending the definition of “legal action” to cover claims for “declaratory relief,” and to exclude: (A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief; (B) alternative dispute resolution proceedings; and (C) post-judgment enforcement actions.
- Amending the definition of “exercise of the right of association” by requiring it to relate to “a governmental proceeding or a matter of public concern.”
- Essentially rewriting the definition of “matter of public concern” to now mean 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.
- Amending the TCPA’s scope by removing the provision that the action need only “relate to” a party’s exercising of its constitutional rights as defined by the TCPA, and requiring that the action be “based on” or “in response” to a party’s exercising of the right of free speech, right to petition, or right of association, or arises from any act of that party in furtherance of the party’s communication or conduct described by TCPA § 27.010(b).
- Amending the TCPA’s scope to exclude, among other actions: (1) a legal action arising from an officer-director, employee-employer, or independent contractor relationship that: (a) seeks recovery for misappropriation of trade secrets or corporate opportunities; or (b) seeks to enforce a non-disparagement agreement or a covenant not to compete; (2) certain Family Code matters and applications for protective order pursuant to the Code of Criminal

Procedure; (3) eviction suits; (4) attorney disciplinary proceedings; and (5) actions based on common law fraud claims—although there are some exceptions to certain of these exemptions for the media and online business reviews and ratings.

- Amending the movant's burdens of proof to show that a legal action is based on or in response to the exercise of the right of free speech, the right to petition, or the right of association, to require that the movant "demonstrate" (rather than show by preponderance of the evidence) that the legal action is covered by the TCPA.
- Amending the movant's burden to prove an affirmative defense by requiring the party to show it is entitled to judgment as a matter of law.
- Clarifying that the trial court may consider evidence that would be admissible under the summary judgment standard.
- Amending the TCPA's mandatory award of attorneys' fees to remove recovery of "other expenses", and to also allow a discretionary sanctions award against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in the TCPA.
- Expressly providing that neither the court's ruling on the motion nor the fact that it made such a ruling shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by the ruling.
- Amending the filing deadlines to require that—*unless otherwise provided by agreement of the parties* (or court order)—the movant must provide at least 21 days' notice before the date of the hearing on that party's TCPA motion to dismiss, and the non-movant's response is due no later than seven days prior to the date of the hearing.

Of note, on August 23, 2019, the Fifth Circuit Court of Appeals issued its opinion, *Klocke v. Watson*, \_\_\_ F.3d \_\_\_, 2019 WL 3977545 (Aug. 23, 2019), as revised (5th Cir. Aug. 29, 2019), holding that Texas' anti-SLAPP statute conflicts with the Federal Rules of Civil Procedure and does not apply in federal diversity actions. Federal circuit courts of appeal disagree regarding the applicability of state anti-SLAPP statutes in federal court. It remains to be seen whether the Supreme Court steps in to resolve the growing circuit split.

*Shain Khoshbin is a partner with Munck Wilson Mandala, LLP, in Dallas, Texas.*

*Note: This article does not constitute legal advice. It provides general information, which may or may not be correct, complete or current at the time of reading. The content is not intended to be used as a substitute for specific legal advice or opinions.*

© 2019 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

### Related People

- Shain A. Khoshbin, PC