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The Texas "Anti-Slapp" Law: A Gorilla in a Baby's Pram?

Energy Law, Labor and Employment / July 27, 2017 / Andrea Johnson

Current court interpretations of the "anti-Slapp" law, and how they affect employers in the energy sector and elsewhere.

An adorable baby was born in 2011.

This baby is called the Texas anti-SLAPP law,[i] or the Texas Citizens Participation Act ("TCPA").[ii] The birth was attended to by then-Governor Perry who brought the swaddling law to eagerly-awaiting, yet diverse, "parents," such as the Better Business Bureaus of Central Texas and the American Civil Liberties Union, among many other interested "relatives."[iii]

Who wouldn't be overjoyed with such a beautiful baby?

Its purpose, so altruistic: It was heralded as the panacea to protect the courts (and defendants) from "meritless" lawsuits and to allow the First Amendment to reign free. The statute's design was to lasso those intending to silence open speech in our American society. That's a lofty goal, at least in general concept, that everyone can be proud of—like Mom, apple pie, and the American flag. So, this sweet Texas bundle of joy joined statutes and case law, of various strengths, in about 30 other states, the District of Columbia, and Guam in assuring these fundamental rights.

But, Daddy, it's an ugly baby!

"No, my dear, it's a gorilla in disguise" (picture the doting parents surprised to find an ape, bottle in its mouth, laying gurgling in the baby buggy). Had the parents rubbed the stars from their eyes when the baby was born, they would have seen the gorilla very clearly.

Broad TCPA definitions give lots of leeway to courts.

Yes, the TCPA does protect (happily) First Amendment rights, but, its value to some and apelike destruction to others goes so very much further—*perhaps too far?* That results from the words in the statute and the generous interpretation that courts have provided. Let's look at some of the statutory definitions:

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

* * *

(7) "Matter of public concern" includes 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.

Tex. Civ. Prac. & Rem. § 27.001 (2), (3) & (7).

There are more provisions, generally dealing with criticism of the government and related institutions and personalities,[iv] but, for private companies and individuals, the open-ended definitions noted above are the tools of greatest use *and* concern. They are both "beauty" and "beast" depending on the situation. Based on these *not-necessarily-First-Amendment* protections, Texas courts have held, surprisingly at times, that some purely private discussions may be subject to TCPA protection.

And, if so subject, the TCPA provides for a swift dismissal prospect, with an immediate appeal right, and the recovery of attorneys' fees.[v] So, quicker than Jack jumping over the candlestick, a "bad" lawsuit may not only be dismissed, but the plaintiff will feel the burning sting of an attorneys' fees award as well—*that baby was born a slugger!*

The *Coleman* case and defamation.

For example, the Texas Supreme Court has found that the TCPA may eliminate a defamation lawsuit, brought by an ex-employee alleging that his employer had wrongly accused him of falsifying records. *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (2017). This result was reached because ExxonMobil's termination decision reportedly was "related to" health, safety, or the environmental, economic, or community well-being.[vi]

Texas courts enforce precisely what the statute says.

Some have argued, with toothless logic, that the law should not be interpreted this way—that's not what was "intended." But the Texas Supreme Court has soundly rejected that restricted view. The statute says what it says, and, by golly and by jingo, we will give full and fair meaning to all the words.[vii]

So, a termination decision, which apparently was never reflected in Coleman's termination papers as related to "health," "safety," or the "environment,"[viii] morphed into ExxonMobil's vaulted protectable "free speech" right under the TCPA. This holding was based on the nature of Coleman's job and the implications, as it was argued, that "environmental" disaster might have followed given that Coleman had failed, per the employer, to measure certain petroleum products in a tank[ix] (which catastrophe never occurred, but that is beside the point).

Good news for employers?

This is good news for most defendants, particularly most employers, in and out of the energy sector, who will welcome this baby, ugly or not, with open arms—to keep what are often meritless lawsuits at bay–and, better yet, the defense may net a return of attorneys' fees! (Oh, Daddy, an extra baby bonus!)

We can certainly fit a lot of employment actions into the protection of one of those broad TCPA categories. In particular in the energy sector, there are lots and lots of employment issues "related to" "health," "safety," and/or the "environment." Let's also not forget the undefined statutory phrases about "economic" or "community well-being."[x] The Texas courts have graciously opened the door to employers relying on this stout TCPA defense. Without question, every employment defamation claim may be subject to immediate dismissal if one of the wide-bodied TCPA terms apply (and see discussion of the *Cavin* case below, also). From this viewpoint, we like this gorilla.

But will employers be so gung ho about the TCPA if they realize that "communications" about trade secret data may *not* be protected? That's what a May 2017 appellate decision holds in *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, — S.W.3d —, 2017 WL 1833495 (Tex. App.—Austin 2017, pet. filed).

The *Elite Auto Body* case—not so good for employers?

Distinguishing the "use" of such trade secrets as *not* having TCPA protection,[xi] the *Elite Auto Body* court ruled that TCPA dismissal was possible for that portion of the case dealing with the "talk" by ex-employees among themselves, *with* other Elite employees (solicited to come to work for a competitor), and, in fact, *within* a competitor's place of business.[xii] Using *Coleman* and other court interpretations, the appellate court determined that this was what the TCPA means when it uses the words "right of association," since the defendants sought to "promote, pursue, and defend common interests."[xiii]

Apparently, the defendants had the "common interest" of stealing business and employees from the ex-employer. That was good enough for TCPA application, as the statutory words seem to say just that.

Why apply the TCPA here? Was it Elite Auto Body's size or unsophisticated lack of contractual confidentiality or noncompete obligations[xiv]? Or, maybe, the "trade secrets" being communicated lacked true substance (a guess), or one might imagine that the lawsuit was pleaded with the lazy vagueness that afflicts some petitions (in hindsight, the company should have relied only on the "use" of trade secrets, not on the alleged generalizations of so-called "communications"). All these issues would ordinarily be ways to defend a case like this. But why bother with sometimes ineffective defenses (at least when the case starts) when the TCPA packs a deadly one-two punch and can get the case dismissed right away?

The *Elite Auto Body* case is a warning. As we can see, the TCPA can be used as both a shield protecting, and a sword against, employers. In the shield *Coleman* case, the statute brought a defamation case to an end, protecting an employer; in the sword *Elite Auto Body* decision, the statute shut down (a portion of) an employer's trade secret litigation—at least that based on the kibitzing of ex-employers going to work at a competitor.

As a final side note on current cases, particularly in the defamation area, a somewhat sad (though also comical) case of familial relations definitely gone bad is the just-issued decision, *Cavin v. Abbott*.[xv] While not an employment case, it shows how the courts will rely on the TCPA to dismiss lawsuits. The same appellate court as that in *Elite Auto Body* rejected defamation and other allegations (excepting an assault claim), based on numerous over-the-top written statements by parents, the Cavins, that their daughter's finance (and later husband) "*won her hand through the use of 'Marxist' brainwashing, hypnotic implantation of phobias and false memories, or similar mind control tactics*."[xvi] And, the court reached this decision even though the record was replete with bizarre and arguably aggressive harassment by the parents. The court essentially wrapped itself in the unrestricted language of the TCPA and concluded that the statements were "free speech" because the statements touched on "health" (though not in the public sector).[xvii]

Time will tell as to whether *Elite Auto Body* and *Cavin* will stand. We know that Elite Auto Body has asked the Texas Supreme Court for review,[xviii] which may or may not happen. If there is no review, the decision will govern Texas law. For the time being, however, both decisions show us that the TCPA is a law to be reckoned with and analyzed carefully; it is an exceedingly robust defense with application to a wide range of situations.

What's a mother to do?

Take a good look at the baby. It is a lot bigger and stronger and more like a gorilla than we all might have thought when the law came into being six years ago.

In approaching any lawsuit, think through the ramifications—whether on the prosecution or defense. *Ask*: Have I sufficiently pled around the law (for example, in a trade secrets case) or can I use the TCPA to exit out of a lawsuit early (and get my fees!). All of that also begs the question of what the employer has done to protect its rights when the employment relationship starts—with a noncompete and/or confidentiality agreement. Laying this groundwork is key to all employment relationships and protecting the employer's business.

If we at KRCL can help you maneuver around these "anti-SLAPP" land mines or answer other employment questions, please call on us. Andrea Johnson, Director, ajohnson@krcl.com, 713-425-7433.

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[i] "SLAPP" refers to lawsuits called "strategic lawsuits against public participation." "Anti-SLAPP" laws seek to stop such claims and redress a defendant's rights if sued, with the ostensible goal of protecting free speech.

[ii] Tex. Civ. Prac. & Rem. § 27.001, *et. seq.* As the statute proclaims, "[t]he purpose of this chapter 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." *Id*. at § 27.002.

[iii] An eclectic group supported passage, including those noted in text and the Texas Association of Broadcasters, the Coalition of HOA Reform, the Homeowners for Better Building, Public Citizen, the Texas Press Association, the Institute for Justice, the Consumers Union, the Freedom of Information Foundation of Texas, and the Institute for Justice. The Texas Legislature passed the bill unanimously, and it was signed into law on June 17, 2011.

[iv] Tex. Civ. Prac. & Rem. § 27.001 (4)–(6) & (8)–(9) (defining the right to petition, governmental proceedings, legal actions, official proceedings, and public servants).

[v] Tex. Civ. Prac. & Rem. § 27.003–09.

[vi] *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 901 (2017) (per curiam) (Coleman's measurement duties were done, "at least in part, to reduce the potential environmental, health, safety, and economic risks associated with noxious and flammable chemicals overfilling and spilling onto the ground.") (citations omitted).

[vii] *Id*. at 899 ("objective ... to give effect to the Legislature's intent ... the Legislature included each word in the statute for a purpose ....") (citing *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam)) (other citations omitted).

[viii] *Id*. at 900 ("communications related to Coleman's job performance, made 'no mention of health, safety, the environment, or Exxon's economic interests,' and related only to a personnel matter") (citing the discussion by the lower appellate court).

[ix] *Id*. at 901.

[x] *See* Tex. Civ. Prac. & Rem. § 27.001 (7)(B).

[xi] *Elite Auto Body LLC v. Autocraft Bodywerks, Inc*., — S.W.3d —, 2017 WL 1833495, at *4 (Tex. App.—Austin 2017, pet. filed).

[xii] *Id*. at *8.

[xiii] *Id*.

[xiv] *Id*. (see endnote xiii).

[xv] *Cavin v. Abbott*, — S.W.3d —, 2017 WL 3044583 (Tex. App.—Austin 2017).

[xvi] *Id.* at *1.

[xvii] *Id.* at *10-12.

[xviii] The petition was filed on July 10, 2017.

Related Attorneys

Andrea Johnson