

## **Texas Supreme Court Ditches Long-Standing Precedent To Hold Conspiracy Is A Derivative Claim Governed By The Statute Of Limitations For The Underlying Tort**

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Dirty Harry Callahan once warned, “A man’s got to know his limitations.” Last Friday, the Supreme Court of Texas helped us out on that front.

In *Agar v. Electro Circuits Int’l*, No. 17-0630, 2019 WL 1495211 (Tex., April 5, 2019), the Supreme Court of Texas conclusively established how limitations will operate with respect to civil conspiracy claims here in Texas, and in the process rejected decades of precedent on the subject from the state’s intermediate courts of appeals.

In a unanimous opinion written by Justice John Devine (with newly minted Justice Brett Busby not taking part), the court held that “civil conspiracy is a derivative claim that takes the limitations period of the underlying tort that is the object of the conspiracy,” rather than being governed by a fixed statute of limitations.

The court first resolved a threshold issue on which it acknowledged prior case law (including decisions from the Supreme Court, itself) had left “Texas’s position ... arguably unclear.” It confirmed that “civil conspiracy is a theory of vicarious liability and not an independent tort.” Then, “[h]aving determined that civil conspiracy is not an independent tort,” the court explained, “it follows that the claim does not have its own statute of limitations.” Instead, “a civil conspiracy claim is connected to the underlying tort and survives or fails alongside it.”

The ruling brings Texas in line with the majority of other jurisdictions throughout the country that have considered the question. The court noted that the highest courts in four other states had held civil conspiracy to be “a theory of derivative liability that shares a limitations period with that of its underlying tort.” And it observed that the intermediate courts of appeals of at least six other states, including New York, California, and Illinois, had done so as well.

But reaching this conclusion required the Supreme Court to disapprove the decisions of every Texas intermediate court of appeals to have addressed the issue. All 12, the court said, had held a conspiracy to be governed by the two-year statute of limitations in Texas Civil Practice & Remedies Code §16.003, applicable to most torts in Texas.

Invoking the previously unbroken chain of Texas intermediate appeals court precedent, *Electro Circuits International* protested that the court “should not overturn the court of appeals’ decades-long uniform application of the two-year limitations period to civil conspiracy.”

But the Supreme Court made clear it was not constrained by those prior decisions, observing that “a long history of mistaken application alone is insufficient to counsel against correcting the error.” Nor, the court said, was the Legislature’s failure to clarify or amend the statutes of limitations in the face of that prior precedent to be taken as “evidence that those decisions are in line with the statutory scheme.”

The Supreme Court also went on to hold that a conspiracy claim accrues, and the limitations period begins to run, along with the underlying tort. It rejected a separate “last overt act” accrual rule for conspiracy.

On the issue of accrual—unlike the main issue regarding which limitations period applies to conspiracy—the court observed that the law in other jurisdictions is not entirely uniform, with some states having adopted the rule that a claim for conspiracy “does not accrue until the last overt act of the conspiracy.” But the somewhat limited precedent in Texas aligned with those jurisdictions that “treat[ed] each underlying tort of the conspiracy as having its own limitations which runs from the time the act is committed” and the resulting injury occurs, and the Supreme Court agreed with that approach.

The court explained that, where a claimant alleges a conspiracy to commit multiple torts, this can lead to a somewhat odd result: with the conspiracy claim accruing and limitations running separately with respect to each underlying tort, there may be multiple potential points of accrual and therefore different limitations deadlines for such a single, but multifaceted, conspiracy claim.

In its ruling on the case, the Houston Fourteenth Court of Appeals had stayed the course uniformly established by Texas precedent to that point (including its own prior decision in *Mayes v. Stewart*, 11 S.W.3d 440 (Tex. App. – Houston [14th Dist.] 2000, pet. denied), holding conspiracy to be governed by the two-year statute of limitations in §16.003.

But when the court of appeals denied rehearing en banc, Chief Justice Kem Thompson Frost issued a concurring opinion in which she explained at some length why the vicarious- or derivative-liability theory of conspiracy limitations is the “better” and “sounder” rule.

Chief Justice Frost declined to dissent from the denial of en banc review at the appeals-court level, concerned about creating a rift with the First Court of Appeals with which her court shares jurisdiction. But she used her concurrence to urge the Supreme Court of Texas to “clarify the law in this murky area and announce this new rule for applying the statute of limitations to civil conspiracy” in Texas, i.e., the rule the Supreme Court pronounced in *Agar*, thereby establishing that “sounder rule” as the uniform standard to be applied throughout the state.

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