

RULE 91A 2015 UPDATE

BY CARLOS R. SOLTERO & KAYLA CARRICK

THE TEXAS LEGISLATURE ADOPTED HOUSE BILL 274 in 2011 which led the Supreme Court to promulgate Rule 91a¹, Texas' latest attempt to approximate FED. R. CIV. P. 12(b)(6). Rule 91a has some similarities to, as well as significant differences from, Federal Rule 12(b)(6). Both provide for dismissal of cases where no basis in law exists based on the trial court's early review of the pleadings. However, unlike Federal Rule 12(b)(6), Rule 91a **requires** an award of attorneys' fees and costs to the prevailing party, and has expressly defined time periods with which the parties and the court must comply. TEX. R. CIV. P. 91a. Additionally, Texas' liberal pleading standards distinguish the Rule 91a analysis from that of Federal Rule 12(b)(6).

By its plain language, Rule 91a does not apply to cases brought under the Family Code or Chapter 14 of the Civil Practices and Remedies Code (inmate litigation). Significantly, Rule 91a provides for dismissal of suits without superseding or affecting other dismissal procedures that exist in Texas civil practice, including special exceptions, summary judgments, or dismissals for want of prosecution. TEX. R. CIV. P. 91a.9.

A. Grounds for dismissal under Rule 91a

Rule 91a provides for dismissal of causes of action on the pleadings that are not supported by a basis in law **or** fact. TEX. R. CIV. P. 91a.1.

A cause of action has no basis **in law** "if the allegations, taken as true, together with the inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* As stated by prominent commentator Timothy Patton, for decades Texas courts have resolved cases based on the "no basis in law" standard either by special exceptions or by "no cause of action" motions for summary judgment. Timothy Patton, *Motions to Dismiss Under Texas Rule 91a: Practice, Procedure and Review*, 33 Rev. of Lit. 469, 482, 485 (Summer 2014). Now Rule 91a provides an additional, expedited procedural basis for the same analysis with respect to claims that are effectively dead on arrival. *Id.* Some courts have analogized the "no basis in law" standard in Rule 91a to the analysis used by federal courts in considering motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).² However, one concurring opinion

suggests that "Rule 91a is *sui generis* and it is best not to analogize this rule to other procedural vehicles."³

A cause of action has no basis **in fact** if it is unsupported by factual allegations such that "no reasonable person could believe the facts pleaded." TEX. R. CIV. P. 91a.1. A reference point is an opinion written by U.S. Supreme Court Justice David Souter, which urges discounting allegations only if they essentially refer to "little green men", a "recent trip to Pluto", or "time travel." Patton, *Motions to Dismiss Under Texas Rule 91a*, 33 Rev. of Lit. at 492 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) (Souter, J., dissenting)). One Texas Court of Appeals described the "no reasonable person" standard as follows:

[W]e do not consider whether such allegations are likely, or even if the conduct alleged is outlandish, but only if a reasonable person could believe the alleged conduct. Reasonable people can believe conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.⁴

B. Examples of successful Rule 91a Motions

Texas courts have granted Rule 91a motions to dismiss because the claims plead had no basis in law or fact for the following causes of action: "direct action" insurance claims by a tort victim against an alleged tortfeasor's insurer⁵; negligent guardianship⁶; unreasonable collection/Texas Debt Collection Act (TDCA)/Texas Deceptive Trade Practices Act (DTPA) claims where the claimant was not a "consumer" as a matter of law⁷; DTPA claim that actually constituted a health care liability claim⁸; intentional infliction of emotional distress and harm to credit claims⁹; fraud claims failing to plead facts showing reliance by the claimant¹⁰; legal malpractice and related claims barred by the *Peeler* doctrine¹¹; claims in which the defendant was immune from suit as an interactive computer service provider under the federal Communications Decency Act¹²; cases involving governmental immunity¹³; an improper bill of review¹⁴; and cases where a party lacked capacity to be sued.¹⁵

C. Rule 91a's time periods

A motion to dismiss **must** be ruled on by the Court **within 45 days** unless the causes of action are non-suited in accordance with Rule 91a.5.

Some Rule 91a deadlines are triggered by the “hearing” date.¹⁶ A “hearing” may be a traditional oral hearing or the trial court may consider the motion by submission.¹⁷ The parties are entitled to at least 14 days’ notice of the hearing by the plain language of Rule 91a.6. A court has no discretion not to provide the requisite notice, and the failure of a trial court to grant the time provided for in Rule 91a can constitute an abuse of discretion.¹⁸

D. The mandatory award of costs and attorneys’ fees

Rule 91a **requires** the Court to award the prevailing party its reasonable and necessary attorney fees. See TEX. R. CIV. P. 91a.7. While governmental entities and public officials are exempted from the mandatory fee rule, other parties (including indigent parties) are not.¹⁹ Even before Rule 91a became effective, Texas law recognized the mandatory award of attorneys’ fees for dismissal motions of unviable claims, including in the context of health care liability claims.²⁰ When seeking to recover attorneys’ fees in connection with a Rule 91a Motion, parties should segregate the attorneys’ fees pertaining to the motion from fees incurred defending against claims that are not part of the Rule 91a motion, in the same manner segregation is required by other Texas law involving attorneys’ fees.²¹

By its plain language, the trial court may not consider evidence pertaining to the underlying motion on the merits, but **must** consider evidence on the costs and fees issues. TEX. R. CIV. P. 91a.6–7. Frequently, parties submit affidavits seeking to establish the reasonableness of the attorneys’ fees, but in some instances live testimony has also been presented to establish the reasonableness of the fees which are evaluated using the familiar *Arthur Andersen* factors.²²

There has been some debate as to the scope of attorneys’ fees based on the language of the rule that literally authorizes awarding fees “in the trial court.” Does this mean that appellate attorneys’ fees are not authorized in connection with Rule 91a motions? What if the dismissal of a claim based on Rule 91a is reversed on appeal?²³ Or does this mean that only the trial court (as opposed to appellate courts) has the authority to award conditional attorneys’ fees? One recent

opinion carefully discusses the language of the rule, the comment, and construes the language to include appellate fees, in part because “they are part of the fees incurred to ultimately prevail, if the ruling is appealed.”²⁴

E. Standards of review and approach to analyzing Rule 91a motions

In *In re Essex Insurance Company*, probably the leading Texas case on Rule 91a to date, the Texas Supreme Court recognized that mandamus relief is available for the denial of a Rule 91a motion to dismiss where the trial court abuses its discretion.²⁵ While mandamus relief is potentially available, several cases have simply denied mandamus relief without a detailed opinion.²⁶ Interlocutory appeals are generally not available from the denial of a Rule 91a motion²⁷, but an interlocutory appeal may be proper if it is based on a challenge of the subject-matter jurisdiction of the trial court, effectively making it a plea to the jurisdiction.²⁸

There has been some debate as to the scope of attorneys’ fees based on the language of the rule that literally authorizes awarding fees “in the trial court.”

Courts discuss “strictly construing” Rule 91a motions because dismissal on the pleadings is a harsh remedy²⁹, and construe pleadings liberally in favor of the plaintiff with efforts to consider the pleader’s intent.³⁰ Six of the Texas

courts of appeals have issued pre-*Essex* opinions applying a “*de novo*” review to Rule 91a rulings.³¹

F. Some unresolved questions on attorneys’ fees

From discussions of Rule 91a motions with other lawyers, some questions recur with respect to Rule 91a in practice. What must or should the court do when there are disputes over who is the “prevailing party” when a movant seeks to dismiss more than one claim or cause of action and prevails on some, but fails to prevail (and therefore, necessarily, the non-movant prevails) on others?³² Should fee awards be further segregated by the specific claim or cause of action to be recoverable? Should the trial court award all fees to both sides? Should the trial court tally up the number of claims on which the movant and non-movant prevail, and declare an “overall prevailing party”? In that “mixed result” situation, does the trial court have any discretion not to award fees given the plain language of Rule 91a? These are interesting questions and so far, no controlling case has definitively answered them.

G. Concluding observations

If Rule 91a was intended to create a widely used “loser pays” system, it has failed. If Rule 91a was intended to increase the

risks of marginal or outright untenable claims and thereby streamline lawsuits, it appears to have had some modest success. Many Rule 91a motions result in one side or the other withdrawing the motion or amending or non-suiting the challenged pleading. Perhaps future rule changes may also assist in bringing central legal or factual issues to the foreground earlier in litigation and further assist in reducing the cost of litigation.

Carlos R. Soltero is a partner in the Austin office of McGinnis Lochridge. Mr. Soltero is Board Certified in Personal Injury Trial Law and represents plaintiffs and defendants in civil litigation, including business and property disputes, malpractice, personal injury and wrongful death cases. He received his J.D. from Yale Law School.

Kayla Carrick is an associate in the Austin office of McGinnis Lochridge. Ms. Carrick's practice focuses on general civil litigation. She is a graduate of the University of Texas School of Law and served as a judicial clerk for Texas Supreme Court Justice Jeff Brown prior to joining the firm. ★

¹ Tex. S. Ct. Misc. Dkt. No. 13-9022, Feb. 12, 2013 (applicable to all cases filed on or after March 1, 2013 except those filed in justice court).

² *Wooley v. Schaffer*, 447 S.W.3d 71, 75–76 (Tex. App. Houston [14th Dist.] 2014, pet. filed); *GoDaddy.com, LLC v. Troups*, 429 S.W.3d 752, 753–54 (Tex. App. Beaumont 2014, pet. denied) (considering federal *Twombly* and *Iqbal* standards as part of the Rule 91a analysis).

³ *Wooley*, 447 S.W.3d at 83 (Frost, J., concurring).

⁴ *Drake v. Walker*, No. 05-14-00355-CV, 2015 WL 2160565, at *3 (Tex. App.—Dallas May 8, 2015, no. pet. h.) (mem. op.).

⁵ *In re Essex Ins. Co.*, 450 S.W.3d 524, 525–28 (Tex. 2014) (orig. proceeding).

⁶ *In re Estate of Doris J. Simon*, No. 14-15-00212-CV, 2015 WL 1928802, at *1 (Tex. App. Houston [14th Dist.] April 28, 2015, no. pet. h.).

⁷ *DeVoll v. Demonbreun*, No. 04-14-0016-CV, 2014 WL 7440314, at *2 (Tex. App. San Antonio Dec. 31, 2014, no. pet.).

⁸ *Drake v. Walker*, 2015 WL 2160565, at *4.

⁹ *Drake v. Chase Bank*, No. 02-13-00340-CV, 2014 WL 6493411, at *1–2 (Tex. App. Fort Worth Nov. 20 2014, no. pet.) (mem. op.).

¹⁰ *DeVoll v. Demonbreun*, 2014 WL 7440314, at *3.

¹¹ *Wooley*, 447 S.W.3d at 78.

¹² *GoDaddy.com, LLC*, 429 S.W.3d at 756–61; *Davis v. Motiva Enterprises, L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. filed) (noting petition did not contain sufficient facts to show notice, and “nothing more than conclusory statements” would not suffice).

¹³ *Marzett v. McGraw*, No. 05-14-00573-CV, 2015 WL 1886827, at *1 (Tex. App. Dallas April 27, 2015, no. pet. h.) (mem. op.); *City*

of Austin v. Liberty Mut. Ins., 431 S.W.3d 817, 827 (Tex. App. Austin 2014, no. pet.).

¹⁴ *Chambers v. Texas Dep't of Transp.*, No. 05-13-01537-CV, 2015 WL 1756087, at *3 (Tex. App.—Dallas Apr. 17, 2015, no. pet. h.).

¹⁵ *Sophus v. Houston Police Dept.*, No. 01-14-00021-CV, 2015 WL 730133 (Tex. App. Houston [1st Dist.] Feb. 19, 2015, no. pet.) (mem. op.).

¹⁶ *Gaskill v. VHS San Antonio Partners, LLC*, 456 S.W.3d 234, 236–38 (Tex. App.—San Antonio 2014, pet. filed).

¹⁷ *Gaskill*, 456 S.W.3d at 238.

¹⁸ *Gaskill*, 456 S.W.3d at 238.

¹⁹ *Drake v. Chase Bank*, 2014 WL 6493411, at *2.

²⁰ *See Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010) (affirming attorneys' fees award in health care liability dismissal context under TEX. CIV. PRAC. & REM. CODE §74.351(b)(1)).

²¹ *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311–14 (Tex. 2006).

²² *Drake v. Chase Bank*, 2014 WL 6493411, at *3.

²³ One court found that a prevailing party was entitled to attorneys' fees incurred in connection with defending against a motion to reconsider the granting of a Rule 91a motion. *Drake v. Chase Bank*, 2014 WL 6493411, at *3.

²⁴ *Zheng v. Vacation Network, Inc.*, No. 14-13-01136-CV, 2015 WL 3424702, at *6 (Tex. App.—Houston [14th Dist.], n.p.h.).

²⁵ *In re Essex Ins. Co.*, 450 S.W.3d at 528.

²⁶ *See e.g., In re Gutierrez*, No. 13-14-00660-CV, 2014 WL 6602310 (Tex. App. Corpus Christi Nov. 20, 2014, orig. proceeding [mand. denied]) (mem. op.); *In re Equity Indus. L.P.*, No. 14-14-00460-CV, 2014 WL 2902241 (Tex. App. Houston [14th Dist.] June 24, 2014, orig. proceeding) (mem. op.).

²⁷ *See, e.g., In re South Central Houston Action*, No. 14-15-00162-CV, 2015 WL 1508726 (Tex. App. Houston [14th Dist.] March 31, 2015, orig. proceeding) (mem. op.).

²⁸ *City of Austin*, 431 S.W.3d at 822 n.1.

²⁹ *Gaskill*, 456 S.W.3d at 238.

³⁰ *City of Dallas v. Sanchez*, 449 S.W.3d 645, 650 (Tex. App. Dallas 2014, pet. filed).

³¹ *Drake v. Chase Bank*, 2014 WL 6493411, at *1–2 (citing *Wooley v. Schaffer*, 447 S.W.3d 71 (Tex. App. Houston [14th Dist.] 2014, pet. filed) (However, in *Drake v. Chase Bank*, the court mentioned the trial court did not “abuse its discretion” in granting fees); *City of Dallas*, 449 S.W.3d at 649 n.3; *Dailey v. Thorpe*, 445 S.W.3d 785, 788 (Tex. App.—Houston [1st Dist.] 2014, no. pet.); *GoDaddy.com, LLC*, 429 S.W.3d at 753–54; *City of Austin*, 431 S.W.3d at 822).

³² *See e.g., City of Dallas*, 449 S.W.3d at 649 (trial court granted City's motion to dismiss claims of use/misuse of equipment or failure to train, but denied the motion as to equipment failure or malfunction); *Drake v. Walker*, 2015 WL 2160565, at *4 (“Because of our disposition of this issue, each party has prevailed in part and the award of attorney's fees is subject to reconsideration on remand.”).