

# THE NUTS AND BOLTS OF DISPOSITIVE MOTIONS

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**CHAPTER 4**

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# THE NUTS AND BOLTS OF DISPOSITIVE MOTIONS

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Given that so few cases make it to trial in this era, litigation is largely a creature of motions practice. The following six dispositive motions, three used in Texas state courts and three used in federal courts, are the primary tools attorneys use to conclude litigation. We have attempted to provide an overview of each type of motion as a practical reference to trial lawyers.

This paper covers Texas state and federal motions for summary judgment, state pleas to the jurisdiction, motions under Texas Rule of Civil Procedure 91A, motions under Federal Rule of Civil Procedure 12(b)(1), and motions under Federal Rule of Civil Procedure 12(b)(6). State pleas to the jurisdiction are roughly analogous to Federal Rule 12(b)(1) motions, while State Rule 91A motions are roughly analogous to Federal Rule 12(b)(6) motions.

## I. TEXAS PLEAS TO THE JURISDICTION

### A. Introduction

A plea to the jurisdiction challenges a court's subject matter jurisdiction to hear a case.<sup>1</sup> Without subject-matter jurisdiction over a dispute, a court may not decide the case.<sup>2</sup> Common issues that can deprive a court of subject-matter jurisdiction include lack of standing, mootness, failure to satisfy a court's minimum jurisdictional amount, and ripeness. Last but not least, governmental entities frequently use pleas to the jurisdiction to raise the issue of sovereign immunity.<sup>3</sup>

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<sup>1</sup> See *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (citing *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)).

<sup>2</sup> Dale Wainwright & Lindsay Hagans, Pleas to the Jurisdiction, 72 *The Advoc.* (Texas) 18, 18 (2015).

<sup>3</sup> *Id.*; See, e.g., *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000) (standing and jurisdictional amount); *Save Our Springs Alliance v. City of Austin*, 149 S.W.3d 674, 679 (Tex. App.—Austin 2004, no pet.) (mootness); *Perry v. Del Rio*, 66 S.W.3d 239, 244 (Tex. 2001) (ripeness).

A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without reaching the merits of the claim.<sup>4</sup> The claims may form the context in which a dilatory plea is raised.<sup>5</sup> The purpose of a dilatory plea is not to preview the merits of the case but to establish whether they should be reached at all.<sup>6</sup>

## **B. Use of Evidence**

The proper function of a plea to the jurisdiction does not authorize an inquiry so far into the substance of a claim that plaintiffs are required to put on their case simply to establish jurisdiction.<sup>7</sup> Nonetheless, the Texas Supreme Court has stated that “the issues raised by a [plea to the jurisdiction] are often such that they cannot be resolved without hearing evidence.”<sup>8</sup> As such, a plaintiff may be asked to prove facts if those facts are “primarily jurisdictional.”<sup>9</sup> The court should then hear evidence as necessary to determine whether it has subject matter jurisdiction over the case.<sup>10</sup>

*Bland Independent School District v Blue* offers the following example: “when a defendant asserts that a plaintiff organization does not have standing to assert claims on behalf of its members, an evidentiary inquiry into the nature and purpose of the organization sufficient to determine standing does not involve a significant inquiry into the substance of the claims.<sup>11</sup> In a case such as that, a determination of associational standing is a prerequisite to the case moving on to the substantive claims.<sup>12</sup> Similarly, a challenge to personal jurisdiction by special appearance,

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<sup>4</sup> *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554; Tex. R. Civ. P. 85.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 554–55.

which is a dilatory plea, almost always requires consideration of evidence.<sup>13</sup> The rules of procedure contain special rules for the consideration of such evidence.<sup>14</sup> That evidence focuses on the defendant's contacts with the forum, though of course such facts may overlap to some degree with facts about the merit of the claim.<sup>15</sup>

On the other hand, when a defendant asserts that the amount in controversy is below the court's jurisdictional limit, the plaintiff's pleadings are determinative unless the defendant specifically alleges that the amount was pleaded merely as a sham for the purpose of wrongfully obtaining jurisdiction, or the defendant can readily establish that the court should look to something other than the amount of money damages pled by the plaintiff to establish the amount in controversy, as with a case regarding an injunction or a license.<sup>16</sup>

### C. Timing

The scheduling of a hearing of a plea to the jurisdiction is at the discretion of the trial court, however, the court should determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before moving forward with the litigation.<sup>17</sup> Texas practice and rules also allow the parties to request additional time to prepare for hearings or to conduct discovery upon a showing of sufficient cause, and the court's ruling on such a motion is reviewed for abuse of discretion.<sup>18</sup> Whether the court's subject-matter jurisdiction can be determined in a preliminary hearing or should await development of the facts is left largely to the trial court's discretion.<sup>19</sup>

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<sup>13</sup> *Id.* at 555.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 554.

<sup>17</sup> *Miranda*, 133 S.W.3d at 226, 229; *Austin & N.W.R. Co. v. Cluck*, 97 Tex. 172, 77 S.W. 403, 405 (1903) (“[T]here can be no doubt that the courts of Texas must look to the Constitution of this state, the enactments of the Legislature, and the common law for their authority to proceed ....”).

<sup>18</sup> See, e.g., Tex.R. Civ. P. 166a(g), 247, 251, 252; *Miranda*, 133 S.W.3d at 229.

<sup>19</sup> *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554.

When the consideration of a trial court's subject matter jurisdiction requires the examination of evidence, the trial court has discretion to decide whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case.<sup>20</sup> When the jurisdictional challenge implicates the merits of the plaintiff's cause of action and the plea to the jurisdiction includes evidence, a trial court should review the relevant evidence to determine if a fact issue exists.<sup>21</sup> If the evidence creates a fact question regarding the jurisdictional issue, the trial cannot grant the plea to the jurisdiction, and the fact issue must be resolved by the fact finder.<sup>22</sup> However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.<sup>23</sup>

#### **D. Burden of Proof**

Whether a court has subject matter jurisdiction is a question of law.<sup>24</sup> When a plea to the jurisdiction challenges the pleadings, courts must determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause.<sup>25</sup> Courts construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent.<sup>26</sup> "If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend."<sup>27</sup> If the pleadings affirmatively negate the existence of jurisdiction, a plea to the jurisdiction may be granted without opportunity to amend.<sup>28</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Miranda*, 133 S.W.3d at 227.

<sup>22</sup> *Id.* at 227–28.

<sup>23</sup> *Id.* at 228.

<sup>24</sup> *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex.2002).

<sup>25</sup> *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex.1993).

<sup>26</sup> *Id.*

<sup>27</sup> *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002).

<sup>28</sup> *Miranda*, 133 S.W.3d 227.

A court must not proceed on the merits of a case until challenges to its jurisdiction have been decided.<sup>29</sup> This allows the state in a timely manner to extricate itself from litigation if it is truly immune based on sovereign immunity.<sup>30</sup> After the defendant asserts and supports with evidence that the trial court lacks subject matter jurisdiction, plaintiffs, when the facts underlying the merits and subject matter jurisdiction are intertwined, must show that there is a disputed material fact regarding the jurisdictional issue.<sup>31</sup>

### E. Standard of Review

Appellate courts reviewing a challenge to a trial court's subject matter jurisdiction review the trial court's ruling *de novo*.<sup>32</sup> Further, they indulge every reasonable inference and resolve any doubts in the nonmovant's favor and take as true all evidence favorable to the nonmovant.<sup>33</sup> Likewise, whether undisputed evidence of jurisdictional facts establishes a trial court's jurisdiction is also a question of law.<sup>34</sup>

**Practice Tip:** Unlike a private citizen, a state agency or its employee may file an interlocutory appeal on the denial of a plea to the jurisdiction if that plea to the jurisdiction is based upon sovereign immunity.<sup>35</sup>

## II. TEXAS RULE 91A

Rule 91a allows a party to move to dismiss a cause of action that “has no basis in law or fact.”<sup>36</sup>

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<sup>29</sup> *Id.* at 228.

<sup>30</sup> *Miranda*, 133 S.W.3d at 228.

<sup>31</sup> See *Huckabee v. Time Warner Entm't Co. L.P.*, 19 S.W.3d 413, 420 (Tex.2000); *Phan Son Van v. Pena*, 990 S.W.2d 751, 753 (Tex.1999); *Miranda*, 133 S.W.3d at 227.

<sup>32</sup> *Texas Nat. Res. Conservation Com'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002); *Miranda*, 133 S.W.3d at 228.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 226.

<sup>35</sup> *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841-42 (Tex. 2007).

<sup>36</sup> Tex. R. Civ. P. 91a.1.

### A. Grounds for and Contents of Motion

In all cases except cases brought under the Texas Family Code or Chapter 14 of the Texas Civil Practice and Remedies Code, a party may file a motion “to dismiss a cause of action on the grounds that [the cause of action] has no basis in law or fact.”<sup>37</sup>

Rule 91a provides the following guidance for assessing the merits of a cause of action: “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. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.”<sup>38</sup>

A motion to dismiss must state that it is made pursuant to Rule 91a, “identify each cause of action to which it is addressed, and . . . state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.”<sup>39</sup>

The trial court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any exhibits permitted by Rule 59 of the Texas Rules of Civil Procedure.<sup>40</sup>

**Practice Tip:** A vague assertion that a cause of action is groundless will not suffice. A motion to dismiss must state specifically the reasons why each challenged cause of action has no basis in law and/or in fact

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<sup>37</sup> Tex. R. Civ. P. 91a.1; In *Ramirez v. Owens*, the trial court granted a Rule 91a motion in a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code. Because neither party complained of it on appeal, the dismissal was affirmed. No. 07-15-00152-CV, 2015 WL 7422890, at \*1 (Tex. App.—Amarillo Nov. 19, 2015, pet. denied) (mem. op.).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* 91a.2; see also *Quintanilla v. Trevino*, No. 13-15-00377-CV, 2016 WL 1552025, at \*3 (Tex. App.—Corpus Christi Apr. 14, 2016, no pet. h.) (mem. op.) (trial court erred through sue sponte dismissal without a Rule 91a motion being filed).

<sup>40</sup> Tex. R. Civ. P. 91a.6; see also *Wooley v. Schafer*, 447 S.W.3d 71, 75 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (finding Rule 91a motions to be analogous to pleas to the jurisdiction, which require a court to determine whether the pleader has alleged facts demonstrating jurisdiction).

## B. Timing Considerations

Under Rule 91a, “[a] motion to dismiss must be . . . filed within 60 days after the first pleading containing the challenged cause of action is served on the movant[.]”<sup>41</sup> Considering this tight time period, any discovery that will be helpful in determining the validity of a motion to dismiss should be initiated directly after the cause of action is pled. But a party need not engage in any discovery, much less thorough discovery, before filing a motion to dismiss under Rule 91a.<sup>42</sup>

Several deadlines in Rule 91a are based on the date the motion to dismiss is set to be heard. First, the motion must be filed at least 21 days before the hearing.<sup>43</sup> Second, “[a]ny response to the motion must be filed no later than 7 days before the date of the hearing.”<sup>44</sup> Third, a court will be precluded from ruling on the motion if, at least three days before the date of the hearing, the respondent nonsuits the challenged cause of action or the movant withdraws the motion.<sup>45</sup> Fourth, if a respondent amends the challenged cause of action at least three days before the date of the hearing, the movant may—before the date of the hearing—withdraw the motion or file an amended motion directed to the amended cause of action.<sup>46</sup>

If a movant responds to amended pleadings by filing an amended motion within the allotted time period—before the date of the hearing—the amended motion “restarts the time periods” in

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<sup>41</sup> Tex. R. Civ. P. 91a.3(a).

<sup>42</sup> See *Gonzales v. Dallas Cty. Appraisal Dist.*, No. 05-13-01658-CV, 2015 WL 3866530, at \*5 (Tex. App.—Dallas June 23, 2015, no. pet.) (mem. op.) (“Rule 91a is intended to be asserted and determined soon after the filing of the case and before the opportunity for thorough discovery.”).

<sup>43</sup> Tex. R. Civ. P. 91a.3(b).

<sup>44</sup> *Id.* 91a.4.

<sup>45</sup> *Id.* 91a.5(a); see also *Thuesen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 301 (Tex. App.—Houston [14th Dist.] 2016, no. pet.) (stating that if a claimant timely nonsuits claims that are the subject of a Rule 91a motion, the court cannot rule on the motion).

<sup>46</sup> Tex. R. Civ. P. 91a.5(b); see also *Drake v. Walker*, No. 05-14-00355-CV, 2015 WL 2160565, at \*2 (Tex. App.—Dallas May 8, 2015, no. pet.) (mem. op.) (affirming dismissal of claims and finding that an amended petition did not cancel a motion to dismiss under Rule 91a).

Rule 91a. Tex. R. Civ. P. 91a.5(d). But if any amendments, as well as nonsuits, are not filed within the allotted time period under Rule 91a, the court is prohibited from considering them.<sup>47</sup>

**Practice Tip:** If you file a motion to dismiss and then decide the grounds for the motion are faulty, withdraw the motion at least three days before the motion is set to be heard so that you can avoid incurring attorney fees and costs associated with losing the motion. For the same reason, if you file a cause of action that is challenged via a motion to dismiss and you decide the cause of action has no merit as pleaded, nonsuit or amend it at least three days before the motion to dismiss is set to be heard.

The rule requires that a court grant or deny a motion to dismiss within 45 days after the motion is filed, “unless the motion, pleading, or cause of action is withdrawn, amended, or nonsuited as specified in 91a.5.”<sup>48</sup> As indicated in Rule 91a.5, “[i]f an amended motion is filed in response to an amended cause of action in accordance with Rule 91a.5(b), the court must rule on the motion within 45 days of the filing of the amended motion and the respondent must be given an opportunity to respond to the amended motion.”<sup>49</sup>

Failure of the court to rule on a 91a motion to dismiss within the 45-day period does not preclude a later ruling. The Austin court of appeals has noted that the 45-day period during which a court “shall” deny or grant a Rule 91a motion to dismiss is merely directory rather than mandatory and is not a hard deadline that prohibits the court from considering the substance of the motion to dismiss after the expiration of the 45-day time period.<sup>50</sup>

### C. Hearing on Motion to Dismiss

A hearing on a motion to dismiss may be oral or by submission.<sup>51</sup> Regardless, “[e]ach party is entitled to at least 14 days’ notice of the hearing[.]”<sup>52</sup> Because dismissal is a “harsh

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<sup>47</sup> *Id.* 91a.5(c); *see also Dailey v. Thorpe*, 445 S.W.3d 785, 790 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (concluding that a plaintiff who chooses neither to nonsuit nor amend challenged causes of action before a hearing cannot cure a defective pleading after the hearing).

<sup>48</sup> Comment to 2013 Change to Rule 91a; *see also* Tex. R. Civ. P. 91a.3(c); *Drake*, 2015 WL 2160565, at \*2 (noting that Rule “91a.5 requires the court to rule on a motion to dismiss that has not been withdrawn”).

<sup>49</sup> Comment to 2013 Change to Rule 91a.

<sup>50</sup> *Koenig v. Blaylock*, 497 S.W.3d 595, 599 (Tex. App.—Austin 2016, pet. denied)

<sup>51</sup> Tex. R. Civ. P. 91a.6.

<sup>52</sup> *Id.*

remedy,” Rule 91a’s notice provision is strictly construed.<sup>53</sup> For example, the San Antonio court of appeals has held that a trial court must provide the parties with formal notice of a hearing before ruling on a Rule 91a motion, “regardless of whether the trial court will hold an oral hearing.”<sup>54</sup> The court also held “that Rule 91a does not contain implied notice of a hearing on the forty-fifth day after the motion is filed that triggers the other deadlines in the rule.”<sup>55</sup>

Except to the extent required to determine an award of attorney’s fees and costs, the court is prohibited from considering evidence when ruling on the motion.<sup>56</sup> The motion must be decided based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule [of Civil Procedure] 59.”<sup>57</sup>

#### **D. “Loser-Pay” Provision**

With some limited exceptions (for actions by or against a governmental entity or a public official acting in his her official capacity or under color of state law), a court is required to “award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court.”<sup>58</sup> If the claimant nonsuits the claims challenged in a Rule 91a motion, there is no “prevailing party on the motion,” and the court

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<sup>53</sup> *Gaskill v. VHS San Antonio Partners, LLC*, 456 S.W.3d 234, 238 (Tex. App.—San Antonio 2014, pet. denied).

<sup>54</sup> *Id.* at 239.

<sup>55</sup> *Id.* (concluding that a trial court erred by conducting a hearing on a Rule 91a motion without giving prior notice of said hearing).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; see also *Dailey*, 445 S.W.3d at 790 (concluding that the trial court did not err in granting a dismissal motion without giving the parties an opportunity to be heard so that credibility and/or demeanor of the parties and witnesses could be ascertained, reasoning that Rule 91a “expressly prohibits trial courts from considering the type of evidence that the [parties] complain that they were denied an opportunity to present”).

<sup>58</sup> Tex. R. Civ. P. 91a.7; see also *Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 187 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (“Undisputedly, the rule mandates an award of attorney’s fees to a prevailing party, and the award is not discretionary.”); *Drake v. Chase Bank*, No. 02-13-00340-CV, 2014 WL 6493411 \*2 (Tex. App.—Fort Worth Nov. 20, 2014, no pet.) (mem. op.) (noting that Rule 91a’s “language suggests that an award of attorneys’ fees to the prevailing party on a rule 91a motion to dismiss is mandatory, not discretionary[.]” and concluding that rule does not exempt “indigent parties from paying attorneys’ fees to a party who prevails under rule 91a”).

cannot award costs and attorney's fees under Rule 91a.<sup>59</sup> A defendant who has filed a Rule 91a motion may "withdraw" the motion after seeing the response without incurring fees.<sup>60</sup> However, once a trial court has decided a Rule 91a motion, the court must "consider evidence regarding costs and fees in determining the award."<sup>61</sup>

Attorney's fees ancillary to the Rule 91a motion may also be recovered. For example, the Fort Worth Court of Appeals recently affirmed the award of costs and fees related to a motion to reconsider a dismissal under Rule 91a.<sup>62</sup> The Houston court of Appeals recently held that a prevailing party on a Rule 91a motion is entitled to recover its reasonable and necessary appellate attorney's fees.<sup>63</sup>

Two appellate courts have addressed the costs and fees provision when a party moves to dismiss multiple claims and succeeds regarding some but not all claims. The Houston Fourteenth District Court of Appeals analyzed the issue and held that a party who prevails in regard to some but not all claims must segregate its fees by claim, if possible, and can only recover fees related to the claims on which it prevailed.<sup>64</sup> The court also concluded that, if a party seeks all fees, then it has the burden to show that segregation is not required.<sup>65</sup> The Dallas Court of Appeals also addressed the impact of a mixed outcome on appeal and concluded, without analysis, that a remand was necessary for reconsideration of attorney's fees.<sup>66</sup>

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<sup>59</sup> *Thuesen*, 2016 WL 514404, at \*7-9 (reversing the trial court's award of costs and attorney's fees because, even though the defendants prevailed in the lawsuit, the defendants were not the "prevailing party on the motion").

<sup>60</sup> Tex. R. Civ. P. 91a.5(a).

<sup>61</sup> Tex. R. Civ. P. 91a.7; see also Tex. R. Civ. P. 91a.7.

<sup>62</sup> See *Drake*, 2014 WL 6493411, at \*3.

<sup>63</sup> See *Zheng*, 468 S.W.3d at 187-88.

<sup>64</sup> *Id.* at 187.

<sup>65</sup> *Id.*

<sup>66</sup> See *Drake*, 2015 WL 2160565, at \*4 ("[E]ach party has prevailed in part and the award of attorney's fees is [thus] subject to reconsideration on remand.").

**Practice Tip:** “Attorney fees awarded under [Rule] 91a.7 are limited to those associated with [a] challenged cause of action, including fees for preparing or responding to the motion to dismiss.”<sup>67</sup> Comment to 2013 Change to Rule 91a. Thus, if you expect to file a motion or have to defend against a motion, segregate your billing records to delineate clearly which fees relate to each challenged cause of action, to the extent possible.

### E. Impact on Other Procedures

Rule 91a.8 provides explicitly that a party does not submit itself to a court’s full jurisdiction by filing a motion to dismiss. Instead, the party submits to the court’s jurisdiction only in proceedings on the motion.<sup>68</sup> Finally, Rule 91a.9 provides that the dismissal “rule is in addition to, and does not supersede or affect, other procedures that authorize dismissal.”<sup>69</sup> Examples of such “other procedures” include special exceptions and motions for summary judgment.<sup>70</sup>

### F. Appellate Review of Trial Court’s Ruling

Appellate review of a trial court’s ruling under Rule 91a is generally de novo.<sup>71</sup> Thus, like trial courts, appellate courts must “construe the pleadings liberally in favor of the plaintiff, look to the pleader’s intent, and accept as true the factual allegations in the pleadings” to determine if the petition sufficiently alleges a cause of action.”<sup>72</sup> De novo review is proper because the availability of a remedy under alleged facts is a question of law and because the rule’s factual-plausibility standard is akin to a “legal-sufficiency review.”<sup>73</sup> The *City of Dallas* Court cited not only the *Wooley* opinion but also *City of Keller v. Wilson*, (Tex. 2005), for the proposition that Legal-

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<sup>68</sup> Tex. R. Civ. P. 91a.8.

<sup>68</sup> Tex. R. Civ. P. 91a.8.

<sup>69</sup> *Id.* 91a.9.

<sup>70</sup> *See, e.g., Zheng*, 468 S.W.3d at 185 (concluding that a party’s Rule 91a contention “seem[ed] to be a summary-judgment ground” that the party was entitled to have evaluated under summary judgment standards); *Townsend v. Montgomery Cent. Appraisal Dist.*, No. 14-14-00103-CV, 2015 WL 971313, at \*8 (Tex. App.—Houston [14th Dist.] Mar. 3, 2015, no pet.) (mem. op.) (refusing to apply Rule 91a deadlines to a summary judgment motion granted by a trial court).

<sup>71</sup> *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (finding that malfunctioning and other problems with 9-1-1 system did not proximately cause wrongful death as a matter of law based on the pleadings).

<sup>72</sup> *Wooley*, 447 S.W.3d at 76.

<sup>73</sup> *City of Dallas*, 494 S.W.3d at 724.

sufficiency review must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.”<sup>74</sup> Mandamus relief may also be available.<sup>75</sup>

Some courts of appeals have also “likened the standard for addressing a Rule 91a motion to the standard for addressing a motion under Federal Rule of Civil Procedure 12(b)(6), which allows dismissal if a plaintiff fails ‘to state a claim upon which relief can be granted.’”<sup>76</sup> Although some of these courts have recognized that the language in Rule 91a is not identical to the language in federal Rule 12(b)(6), they have relied on federal Rule 12(b)(6) precedent in determining whether a claim should be dismissed under Rule 91a.<sup>77</sup>

This reliance on federal jurisprudence raises the question: what remains of the fair-notice pleading standard under Rule 45 of the Texas Rules of Civil Procedure?<sup>78</sup> Some courts have recognized that Rule 91a.1 does not supersede prior pleading requirements set forth in Rule 45 of the Texas [R]ules [of Civil Procedure], but has simply modified the standard such that ‘fair notice’ must now be judged in the context of Rule 91a.”<sup>79</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *In re Essex Ins. Co.*, 450 S.W.3d 524, 526-28 (Tex. 2014) (per curiam) (trial court abused discretion by not dismissing plaintiff’s declaratory judgment claim against insurer in personal injury action).

<sup>76</sup> *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 186 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Wooley*, 447 S.W.3d at 75-76, and Fed. R. Civ. P. 12(b)(6)).

<sup>77</sup> See, e.g., *Zheng*, 2015 WL 3424702, at \*4; *Wooley*, 447 S.W.3d at 75-76; *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied); *Kidd v. Cascos*, No. 03-14-00805, 2015 WL 9436655 \*2 (Tex. App.—Austin Dec. 22, 2015, no pet.).

<sup>78</sup> See *Davis v. Metro. Lloyds Ins. Co. of Texas*, No. 4:14-CV-957-A, 2015 WL 456726, at \*2 (N.D. Tex. Feb. 3, 2015) (“As this court explained in *Plascencia*, the effect of Rule 91(a).1 [sic] . . . is to cause the pleading standard in Texas to be substantially the same as the federal standard, as outlined by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).”); *Craig Penfold Props., Inc. v. The Travelers Cas. Ins. Co.*, No. 3:14-CV-326-L, 2015 WL 356885 \*3 (N.D. Tex. Jan. 28, 2015) (“This new rule now allows a state court to do what a federal court is allowed to do under Federal Rule of Civil Procedure 12(b)(6).”).

<sup>79</sup> *Resendez v. Scottsdale Ins. Co.*, No. 1-15-CV-1082-RP, 2016 WL 756576, at \*2 (W.D. Tex. Feb. 26, 2016); see also *New Life Assembly of God of City of Pampa, Tex. v. Church Mutual Ins. Co.*, No. 2:15-CV-00051-J, 2015 WL 2234890, at \*5 (N.D. Tex. May 12, 2015) (“Rule 91a.1 has simply modified the existing Tex. R. Civ. P. 45(b) fair notice pleading standard such that fair notice must now be judged in the context of Rule 91a.”) (internal quotes omitted).

When a Rule 91a motion contains multiple grounds for dismissal and the trial court's order does not specify the ground upon which it relied, one court of appeals has held that the claimant attacking the dismissal order must "negate the validity of each ground upon which the trial court could have relied."<sup>80</sup> Thus, as when challenging orders granting summary judgments, if a party "fails to address any particular ground, [the court] must uphold the order on the unchallenged ground."<sup>81</sup>

### III. CONCLUSION

Litigants are using Rule 91a dismissal procedures successfully in a wide variety of cases. Case law relating to Rule 91a is developing rapidly. Existing case law makes clear that parties must carefully follow the procedures in Rule 91a and, to the extent possible, track separately the attorney's fees incurred with respect to each cause of action challenged in a Rule 91a motion, both in the trial court and on appeal. The full extent to which the federal Rule 12(b)(6) standards will impact Rule 91a jurisprudence remains to be determined, and only time will tell whether and how Rule 91a jurisprudence will ultimately impact fair-notice pleading standards in Texas.

### IV. TEXAS MOTIONS FOR SUMMARY JUDGMENT

A summary judgment is the primary dispositive motion used to dispose of a case before trial. A motion for summary judgment is a creature of written pleadings, so even if there is an opportunity for a hearing, parties must be careful to include all of the arguments they will rely on in the written motion. A motion for summary judgment will only be granted for a party that submits a written motion, or joins in one, so codefendants should take care not to rely on the other's motion to dispose of a claim.<sup>82</sup> In Texas state courts, there are two types of motions for summary

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<sup>80</sup> *Parkhurst v. Office of Attorney Gen. of Tex.*, 481 S.W.3d 400, 402 (Tex. App.—Amarillo 2015, no pet.).

<sup>81</sup> *Id.* (citations omitted).

<sup>82</sup> *McAllen Hosps., L.P. v. State Farm Mut. Ins. Co. of Tex.*, 433 S.W.3d 535, 542 (Tex. 2014).

judgment: a traditional motion for summary judgment and a no evidence motion for summary judgment.

### A. Traditional Motion for Summary Judgment

In a traditional motion for summary judgment, the movant must show that no issue of material fact exists and that it is entitled to judgment as a matter of law.<sup>83</sup> To prevail, a moving defendant must disprove at least one element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense.<sup>84</sup> A plaintiff, on the other hand, must show that it should prevail on each element of the cause of action, except for the amount of damages.<sup>85</sup> A traditional motion for summary judgment must be supported by pleadings on file at the time of the hearing.<sup>86</sup>

If the movant's motion and evidence establish the movant's right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment.<sup>87</sup> A fact is material when it "affects the ultimate outcome of the suit under the governing law."<sup>88</sup> A material fact issue is genuine if "reasonable... jurors could differ in their conclusions in light of" the evidence.<sup>89</sup> In other words, if evidence exists such that a reasonable jury could find the fact in favor of the nonmoving party, summary judgment cannot be granted.<sup>90</sup>

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<sup>83</sup> *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

<sup>84</sup> *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam).

<sup>85</sup> See, e.g., *Rivera v. White*, 234 S.W.3d 802, 805 (Tex. App.—Texarkana 2007, no pet.); *Fry v. Comm'n for Lawyer Discipline*, 979 S.W.2d 331, 334 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *Green v. Unauthorized Practice of Law Comm.*, 883 S.W.2d 293, 297 (Tex. App.—Dallas 1994, no writ); *Brooks v. Sherry Lane Nat'l Bank*, 788 S.W.2d 874, 876 (Tex. App.—Dallas 1990, no writ).

<sup>86</sup> Tex. R. Civ. P. 166a(c).

<sup>87</sup> *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23-24 (Tex. 2000) (per curiam).

<sup>88</sup> *Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7, 11 (Tex. App.—Fort Worth 2002, no pet.) (citing *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no pet.)).

<sup>89</sup> *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

<sup>90</sup> *Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7, 11-12 (Tex. App.—Fort Worth 2002, no pet.)

In deciding whether a fact issue exists, the court reviews the evidence in the light most favorable to the nonmovant.<sup>91</sup>

## **B. No Evidence Motion for Summary Judgment**

In a no evidence summary judgment, a party moves for summary judgment on the ground that there is no evidence of an essential element or elements of a claim or defense on which an adverse party has the burden of proof at trial.<sup>92</sup> The movant need not produce any evidence supporting its no-evidence motion.<sup>93</sup> Instead, the motion shifts the burden to the nonmovant to raise a genuine issue of material fact.<sup>94</sup> Otherwise, the court must grant the motion.<sup>95</sup>

To prevail, the movant should identify the grounds for the motion, specifically the elements of the causes of action or defense for which there is no evidence.<sup>96</sup> The grounds cannot broadly state that there is no evidence to support the claims.<sup>97</sup> Instead, the motion must provide adequate information for opposing the motion, which the Supreme Court has called a “fair notice” standard.<sup>98</sup> The degree of specificity required depends on the case.<sup>99</sup> A movant can use the pattern jury questions to help identify and attack the gaps in the evidence supporting the non-movant’s causes of action or defenses.<sup>100</sup>

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<sup>91</sup> *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); see *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)).

<sup>92</sup> *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

<sup>93</sup> TEX. R. CIV. P. 166a(i); *Home State Cnty. Mut. Ins. Co. v. Horn*, No. 12-07-00094-CV, 2008 WL 2514332, at \*2 (Tex. App.— Tyler June 25, 2008, pet. denied) (mem. op.); *Branson v. Spiros Partners Ltd.*, No. 04-07-00007-CV, 2007 WL 4547502, at \*2 (Tex. App.—San Antonio Dec. 28, 2007, no pet.) (mem. op.).

<sup>94</sup> *Home State Cnty. Mut. Ins. Co.*, 2008 WL 2514332, at \*2;

<sup>95</sup> TEX. R. CIV. P. 166a(i).

<sup>96</sup> *Id.*; *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

<sup>97</sup> *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> James M. Stanton, *How to Prevail at a Summary Judgment Hearing*, TEX. LAW., May 21, 2012.

A party that does not have the burden of proof may file a combined traditional and no evidence motion for summary judgment.<sup>101</sup> Such combined motions are common in practice.

**Practice Tip:** When reviewing case law on summary judgment, ask yourself: is the court ruling on a traditional or a no evidence motion for summary judgment? The opinion may not always make it obvious.

### C. Timing

A plaintiff may file a traditional motion for summary judgment any time after the adverse party answers the suit.<sup>102</sup> A defendant may file a motion for summary judgment at any time after the plaintiff has filed suit, even before filing an answer.<sup>103</sup> However, a motion for summary judgment must be filed and served at least twenty-one days before the time specified for the hearing on the summary judgment.<sup>104</sup> Parties may alter the deadlines for filing summary judgment motions by Rule 11 agreement.<sup>105</sup> Periods governing summary judgment procedures are counted in the same manner as for other procedural rules.<sup>106</sup>

Even though allowed, filing a traditional motion for summary judgment before filing an answer is usually not appropriate. Exceptions include when the court must only interpret a statute, interpret an unambiguous contract, or apply the statute of limitations. If the summary judgment grounds are fact-based, generally the nonmovant will have grounds for a continuance to conduct some discovery.<sup>107</sup>

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<sup>101</sup> *Binur v. Jacobo*, 135 S.W.3d 646, 650 (Tex. 2004).

<sup>102</sup> Rule 166a(a).

<sup>103</sup> TEX. R. CIV. P. 166a(b); *Zimmelman v. Harris Cnty.*, 819 S.W.2d 178, 181 (Tex. App.—Houston [1st Dist.] 1991, no writ).

<sup>104</sup> TEX. R. CIV. P. 166a(c); *Lewis v. Blake*, 876 S.W.2d 314, 315 (Tex. 1994) (per curiam).

<sup>105</sup> TEX. R. CIV. P. 11; *D.B. v. K.B.*, 176 S.W.3d 343, 347 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

<sup>106</sup> *Lewis*, 876 S.W.2d at 315-16 (citing TEX. R. CIV. P. 4) (disapproving of a series of appellate court decisions that did not add the extra three days for service by mail or telephonic document transfer); The day a motion for summary judgment is served is not included in computing the minimum twenty-one-day notice for hearing, but the day of the hearing is. *Lewis*, 876 S.W.2d at 315-16 (citing TEX. R. CIV. P. 4). If the motion is served by mail, three days are added to the twenty-one-day notice period. *Id.* at 315.

<sup>107</sup> See Judge David Hittner & Lynne Liberato, Summary Judgments in Texas: State and Federal Practice, 52 Hous. L. Rev. 773, 808 (2015).

Before filing a no-evidence summary judgment, there must be an “adequate time for discovery”, though discovery does not need to have been completed.<sup>108</sup> Specifically, the rule provides in relevant part:

(i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.<sup>109</sup>

The “Notes and Comments” section states that “[a] discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before.”<sup>110</sup>

A party waives its right to challenge failure to receive twenty-one days’ notice if that party “received notice of the hearing, appeared at it, filed no controverting affidavit, and did not ask for a continuance.”<sup>111</sup> “An allegation that a party received less notice than required by statute... may not be raised for the first time on appeal.”<sup>112</sup> A judge may not grant a summary judgment without 21 days’ notice of the setting.<sup>113</sup> However, failure to provide 21 days’ notice is only reversible if the nonmovant can show harm.<sup>114</sup> Additional notice is not required for a court to rehear a denied motion for summary judgment.<sup>115</sup>

A party opposing a motion for summary judgment must file a response at least seven days before the day of the hearing.<sup>116</sup> The seven-day rule applies to responses of all kinds, including

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<sup>108</sup> TEX. R. CIV. P. 166a(i); *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex. App. Houston — [14<sup>th</sup> Dist.] 2000, pet. denied).

<sup>109</sup> TEX. R. CIV. P. 166a(i) (emphasis added).

<sup>110</sup> TEX. R. CIV. P. 166a(i) cmt.—1997.

<sup>111</sup> *Negrini v. Beale*, 822 S.W.2d 822, 823 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1992, no writ).

<sup>112</sup> *Id.* at 823.

<sup>113</sup> *Milam v. Nat’l Ins. Crime Bureau*, 989 S.W.2d 126, 129 (Tex. App.—San Antonio 1999, no pet.).

<sup>114</sup> *Id.*

<sup>115</sup> *Winn v. Martin Homebuilders, Inc.*, 153 S.W.3d 553, 555-56 (Tex. App.—Amarillo 2004, no pet.).

<sup>116</sup> TEX. R. CIV. P. 166a(c).

traditional responses, cross-motions for summary judgment, a special exception due to a lack of clarity or ambiguity in the motion for summary judgment, and amended pleadings.<sup>117</sup>

The nonmovant must obtain leave of court to file a late response.<sup>118</sup> To file a late response, the filer must show good cause and no undue prejudice to the movant. The court has discretion whether or not to allow a late response. If a court allows a late response, the court “must affirmatively indicate in the record acceptance of the late filing,” though the bar for what indicates acceptance is fairly low.<sup>119</sup>

A movant should file a reply if the movant objects to a nonmovant’s evidence.<sup>120</sup> However, the movant is not entitled to use its reply to amend its motion for summary judgment or to raise new and independent summary-judgment grounds.<sup>121</sup> Neither may a movant rely on his or her reply to the nonmovant’s response to provide the requisite specificity (to state the elements of the claim for which there is no evidence) required when filing a no-evidence motion for summary

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<sup>117</sup> *Murphy v. McDermott Inc.*, 807 S.W.2d 606, 609 (Tex. App.—Houston [14th Dist.] 1991, writ denied); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 n.7 (Tex. 1993) (finding that any confusion regarding an exception must be responded to in written form, filed, and served at least seven days before the hearing); *Sosa v. Cent. Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam).

<sup>118</sup> *Neimes v. Kien Chung Ta*, 985 S.W.2d 132, 139 (Tex. App. — San Antonio 1998, pet. dism’d by agr.) (citing TEX. R. CIV. P. 166a(c)).

<sup>119</sup> See, e.g., *Shore v. Thomas A. Sweeney & Assocs.*, 864 S.W.2d 182, 184-85 (Tex. App.—Tyler 1993, no writ) (holding that the docket entry allowing a late response satisfied Texas Rule of Civil Procedure 166a). *But see Energo Int’l Corp. v. Modern Indus. Heating, Inc.*, 722 S.W.2d 149, 151-52 (Tex. App.—Dallas 1986, no writ) (stating that a docket entry is inadequate indication of acceptance).

<sup>120</sup> See *Alaniz v. Hoyt*, 105 S.W.3d 330, 339 (Tex. App.—Corpus Christi 2003, no pet.) (observing that failure to file objections in writing or at the hearing results in waiver of any error on appeal), *abrogated on other grounds by Fort Brown Villas III Condo. Ass’n v. Gillenwater*, 285 S.W.3d 879 (Tex. 2009) (per curiam).

<sup>121</sup> *Reliance Ins. Co. v. Hibdon*, 333 S.W.3d 364, 378 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

judgment.<sup>122</sup> The movant may file a reply up until the day of the hearing, unless local rules say otherwise.<sup>123</sup> A special exception must be filed at least three days prior to the hearing.<sup>124</sup>

If the plaintiff amends the pleadings after the defendant files a motion for summary judgment, the defendant will likely have to amend or supplement the motion to address it. That is why it is beneficial to have a discovery control plan in place and file a motion for summary judgment after the deadline for amending pleadings.

#### D. The Hearing

A motion for summary judgment is based on written argument and written evidence.<sup>125</sup> An oral hearing is not required, but a hearing date or submission date must be set.<sup>126</sup> The hearing is a review of the written motion, response, reply, and attached evidence, with no oral testimony.<sup>127</sup> This means that the court may not consider oral objections to summary judgment evidence that are not also within filed pleadings.<sup>128</sup> At the hearing, counsel should object to oral testimony not based on the written documents on file.<sup>129</sup> However, parties may waive these restrictions: “An oral

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<sup>122</sup> *Barnes v. Tex. A&M Univ. Sys.*, No. 14-13-00646-CV, 2014 WL 4915499, at \*6 (Tex. App.—Houston [14th Dist.] Sept. 30, 2014, no pet.); *Meru*, 136 S.W.3d at 390 n.3.

<sup>123</sup> See, e.g., *Ennis, Inc. v. Dunbrooke Apparel Corp.*, 427 S.W.3d 527, 530 n.1 (Tex. App.—Dallas 2014, no pet.) (noting with approval that the trial court took under advisement the movant’s reply that was filed on the day of the hearing); *Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, LLP*, 404 S.W.3d 75, 88 & n.4 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Wright v. Lewis*, 777 S.W.2d 520, 522 (Tex. App.—Corpus Christi 1989, writ denied) (concluding that there was no harm in allowing objections to be filed before or even on the day of the hearing); *Reynolds v. Murphy*, 188 S.W.3d 252, 259 (Tex. App.—Fort Worth 2006, pet. denied); *But see DALL. CNTY. (TEX.) CIV. DIST. CT. LOC. R. 2.09* (“[R]eply briefs in support of a motion for summary judgment must be filed and served no less than three days before the hearing.”).

<sup>124</sup> *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 n.7 (Tex. 1993) (citing TEX. R. CIV. P. 21).

<sup>125</sup> TEX. R. CIV. P. 166a(c).

<sup>126</sup> *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) (per curiam).

<sup>127</sup> TEX. R. CIV. P. 166a(c); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 n.4 (Tex. 1992); *Richards v. Allen*, 402 S.W.2d 158, 160-61 (Tex. 1966).

<sup>128</sup> *But see Aguilar v. LVDVD, L.C.*, 70 S.W.3d 915, 917 (Tex. App.—El Paso 2002, no pet.) (suggesting a ruling can be implied).

<sup>129</sup> See *El Paso Assocs., Ltd. v. J.R. Thurman & Co.*, 786 S.W.2d 17, 19-21 (Tex. App.—El Paso 1990, no writ) (affirming the sustaining of an objection to oral testimony at a summary judgment hearing and declaring that no oral testimony was received); *Nash v. Corpus Christi Nat’l Bank*, 692 S.W.2d 117, 119 (Tex. App.—Dallas 1985, writ ref’d n.r.e.) (concluding that it is improper for a trial court to hear testimony of witnesses at a summary judgment hearing).

waiver or agreement made in open court satisfies [R]ule 11 if it is described in the judgment or an order of the court.”<sup>130</sup>

### E. Evidence

Summary judgment evidence may consist of deposition transcripts, interrogatory answers, other discovery responses, pleadings, admissions, affidavits (including sworn or certified papers attached to the affidavits), unsworn declarations, stipulations of the parties, and authenticated or certified public records.<sup>131</sup> Generally, pleadings cannot constitute summary judgment evidence, unless the movant uses the nonmovant’s pleadings to show some deficiency in the nonmovant’s claims or defenses.<sup>132</sup> Pleadings used in this manner include the motion for summary judgment and the response.<sup>133</sup>

The rules of evidence fully apply to summary judgment proceedings.<sup>134</sup> The standard of review on appeal for the admission or exclusion of evidence is abuse of discretion.<sup>135</sup> The “reasonable juror” standard is used to determine whether a fact issue exists.<sup>136</sup> “To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court’s ruling was in error and that the error probably caused the rendition of an improper judgment.”<sup>137</sup> One major difference between evidence at trial and evidence at hearings

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<sup>130</sup> *Clement v. City of Plano*, 26 S.W.3d 544, 549 (Tex. App.—Dallas 2000, no pet.), *overruled on other grounds by Telthorster v. Tennell*, 92 S.W.3d 457 (Tex. 2002).

<sup>131</sup> TEX. R. CIV. P. 166a(c).

<sup>132</sup> *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Hidalgo v. Sur. Sav. & Loan Ass’n*, 462 S.W.2d 540, 545 (Tex. 1971); *Watson v. Frost Nat’l Bank*, 139 S.W.3d 118, 119 (Tex. App.—Texarkana 2004, no pet.); *Hidalgo*, 462 S.W.2d at 543 n.1.

<sup>133</sup> *Hidalgo*, 462 S.W.2d at 545.

<sup>134</sup> *Fort Brown Villas III Condo. Ass’n v. Gillenwater*, 285 S.W.3d 879, 881-82 (Tex. 2009) (per curiam); *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam).

<sup>135</sup> *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30-31 (Tex. 1997) (per curiam).

<sup>136</sup> Hittner & Liberato, *supra* note 102, at 889.

<sup>137</sup> *Patrick v. McGowan*, 104 S.W.3d 219, 221 (Tex. App.—Texarkana 2003, no pet.).

on motions for summary judgment is that “a summary judgment cannot be based on an attack of a witness’s credibility.”<sup>138</sup>

Summary judgment evidence must be filed concurrently or before the filing it supports.<sup>139</sup> Summary judgment evidence may be filed late with leave of court granted by written order, so long as the evidence is filed before judgment.<sup>140</sup> To admit evidence that would be excluded for filing late, a party must show good cause or the lack of unfair surprise or unfair prejudice.<sup>141</sup>

A claim of inability to obtain discovery necessary to defeat a summary judgment may be waived if the respondent did not request a continuance on that basis.<sup>142</sup> A party’s explanation of how an expert will testify, in response to a discovery request, is not competent summary judgment evidence.<sup>143</sup>

**Practice Tip:** A no evidence motion for summary judgment has similar standards to those of directed verdicts. In other words, if there is enough evidence to defeat a directed verdict, there is enough evidence to defeat a no evidence motion for summary judgment.

#### F. Burden of Proof and Standard of Review

A trial court’s granting of a summary judgment is reviewed *de novo* on appeal.<sup>144</sup> Any evidence that was presented at the trial level is considered in the light most favorable to the nonmovant, and any disputed evidence favorable to the nonmovant will be taken as true.<sup>145</sup> A no evidence motion for summary judgment will be upheld if there is no more than a scintilla of evidence offered to prove a challenged element, or if the evidence established conclusively the

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<sup>138</sup> *State v. Durham*, 860 S.W.2d 63, 66 (Tex. 1993).

<sup>139</sup> TEX. R. CIV. P. 166a(c).

<sup>140</sup> *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996); *Beavers v. Goose Creek Consol. I.S.D.*, 884 S.W.2d 932, 935 (Tex. App.—Waco 1994, writ denied).

<sup>141</sup> *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687-88 (Tex. 2002).

<sup>142</sup> *Elizondo v. Krist*, 415 S.W.3d 259, 267-69 (Tex. 2013).

<sup>143</sup> *Kiesel v. Rentway*, 245 S.W.3d 96, 101 (Tex. App.—Dallas 2008, pet. Dism’d).

<sup>144</sup> *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013) (per curiam).

<sup>145</sup> *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

opposite of the challenged element.<sup>146</sup> More than a scintilla exists when the evidence is such that it “would enable reasonable and fair-minded people to differ in their conclusions.”<sup>147</sup>

## V. FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1): CHALLENGING SUBJECT MATTER JURISDICTION

Federal Rule of Civil Procedure 12(b)(1) functions similarly to state pleas to the jurisdiction: It is often used to challenge subject matter jurisdiction of the court, and is therefore to assert the sovereign immunity of a defendant.<sup>148</sup> It is also used to allege that the case should not be in federal court for lack of diversity or federal question jurisdiction, and to challenge the plaintiff’s standing to bring the suit.<sup>149</sup> Other reasons to bring a 12(b)(1) motion include contesting ripeness, mootness, lack of supplemental jurisdiction, and the abstention doctrine. Like a 12(b)(6) motion, a 12(b)(1) motion must be in writing, but whereas a court *may* address a failure to state a claim *sua sponte*, a court *has a duty* to address a lack of subject matter jurisdiction *sua sponte*.<sup>150</sup> Like a state plea to the jurisdiction, a court may resolve a 12(b)(1) motion with or without a hearing.

### A. Burden of Proof and Use of Evidence

#### 1. Facial Attacks

There are two kinds of 12(b)(1) motions. The first is a facial attack on the pleadings, which challenges the sufficiency of the allegations in the complaint. Once a defendant files a motion to dismiss for lack of subject matter jurisdiction, it is the plaintiff’s burden to affirmatively establish that the court has subject matter jurisdiction.<sup>151</sup> In a facial attack, the allegations in the complaint

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<sup>146</sup> *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

<sup>147</sup> *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

<sup>148</sup> *See, e.g., Harrison v. Potter*, 323 F. Supp. 2d 593, 604 (S.D.N.Y. 2004).

<sup>149</sup> § 1350 Motions to Dismiss—Lack of Jurisdiction Over the Subject Matter, 5B Fed. Prac. & Proc. Civ. § 1350 (3d ed.).

<sup>150</sup> *United Inv’rs Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 967 (9th Cir. 2004) (citing *Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 128 (3d Cir.1998))

<sup>151</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992).

are taken as true and construed in the light most favorable to the nonmovant.<sup>152</sup> A respondent to a 12(b)(1) motion facially attacking the pleadings should consider amending the pleading, which can be done once as a “matter of course” under Rule 15(a) within twenty-one days after the defendant’s answer or the 12(b)(1) motion is served, whichever is earlier.<sup>153</sup>

## 2. Factual Attacks

The second kind of 12(b)(1) motion asserts the facts alleged in the complaint that establish the court’s jurisdiction are not true. Such a motion is often triggered through the use of affidavits, testimony, or other evidence.<sup>154</sup> When the facts are contested, the plaintiff must establish the facts that give the court jurisdiction by a preponderance of the evidence.<sup>155</sup> Unlike a 12(b)(6) motion or a facial attack, allegations in the pleading are not taken as true and the court can weigh the evidence.<sup>156</sup> The court has broad discretion to hear evidence should it choose to have a hearing, and may even defer its decision on the motion in order to conduct limited discovery.<sup>157</sup>

## B. Timing

If possible, the court should resolve the outcome of a 12(b)(1) motion before it resolves most other issues because a court lacking in subject matter jurisdiction does not have the authority to rule on other issues.<sup>158</sup> The only issues that clearly come before a lack of subject matter jurisdiction are a lack of personal jurisdiction, *forum non conveniens*, and discretionary transfers

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<sup>152</sup> *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009).

<sup>153</sup> Fed. R. Civ. P. 15(a).

<sup>154</sup> *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1096 (5th Cir. 1989), *aff’d sub nom. Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990).

<sup>155</sup> *Id.*

<sup>156</sup> *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 423 (5th Cir. 2013).

<sup>157</sup> *See Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994).

<sup>158</sup> *Id.*

of venue.<sup>159</sup> Despite that, lack of subject matter jurisdiction may be asserted at any time and is never waived, and may even be considered for the first time on appeal.<sup>160</sup>

### C. Appeals and the Standard of Review

A plaintiff may appeal a 12(b)(1) motion that has been granted, but a defendant may not appeal one that has been denied.<sup>161</sup> Generally, a dismissal for lack of subject-matter jurisdiction is reviewed *de novo*.<sup>162</sup> However, if the court ruled on a disputed issue of fact in response to an attack on the facts, that factual finding is reviewed for clear error.<sup>163</sup>

## VI. FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6): FAILURE TO STATE A CLAIM

A case may be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). A motion for failure to state a claim based on the rule challenges the sufficiency of the plaintiff's complaint.<sup>164</sup> Such a motion should be granted if the plaintiff has not alleged facts that entitle it to relief.<sup>165</sup> A 12(b)(6) motion is also appropriate to respond to deficiencies in the complaint's statements of fact, as in when the facts alleged are speculative and do not provide the defendant with fair notice of the claim.<sup>166</sup> A 12(b)(6) motion must be in writing, but a court may also dismiss a complaint *sua sponte* on the same grounds as a 12(b)(6) motion.<sup>167</sup> A 12(b)(6) motion may be filed any time up to a trial on the merits.<sup>168</sup> In granting a 12(b)(6) motion, a court

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<sup>159</sup> *Id.*

<sup>160</sup> *Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, 666 F.3d 932, 935 (5th Cir. 2012).

<sup>161</sup> *Hosp. House, Inc. v. Gilbert*, 298 F.3d 424, 429 n.5 (5th Cir. 2002).

<sup>162</sup> *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 857 (5th Cir. 2003).

<sup>163</sup> *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 481 (6th Cir. 2009).

<sup>164</sup> *See Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir.1992).

<sup>165</sup> Fed. R. Civ. P. 12(b)(6).

<sup>166</sup> *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>167</sup> Fed. R. Civ. P. 7; *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir.2006).

<sup>168</sup> Fed. R. Civ. P. 12(h)(2); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 507 (2006).

can dismiss with or without prejudice, but generally dismisses without prejudice the first time the claim has been filed and allows the plaintiff to amend its pleadings.<sup>169</sup>

### A. Burden of Proof

A court will grant a 12(b)(6) motion if the defendant shows that the complaint fails to state a claim which is plausible on its face.<sup>170</sup> A claim is plausible on its face when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the pleaded claims.<sup>171</sup> Conclusory allegations of law, inferences unsupported by pleaded, plausible facts, and formulaic recitations of the law will not defeat a 12(b)(6) motion.<sup>172</sup> An allegation is conclusory where it is a “threadbare recital of the elements of a cause of action, supported by mere conclusory statements.”<sup>173</sup> Where there are nonconclusory factual allegations, the court must treat them as if they are true to determine whether they would entitle a plaintiff to relief, in which case a court will deny the motion.<sup>174</sup> In so doing, the court must indulge all reasonable inferences in favor of the nonmovant.<sup>175</sup>

The *Twombly/Iqbal* standard is a heightened pleading standard and a lower standard for granting a 12(b)(6) motion than the previous standard that a 12(b)(6) motion should only be granted if the defendant proved beyond any doubt that the plaintiff could prove no facts that would entitle him to relief.<sup>176</sup>

**Practice Tip:** It can be difficult to determine what makes facts plausible as opposed to not plausible, especially since a court is not supposed to rule based simply on a judge’s disbelief of the claims. However, the more specific and logical the facts, the better.

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<sup>169</sup> *Curley v. Perry*, 246 F.3d 1278, 1281-82 (10<sup>th</sup> Cir.2001).

<sup>170</sup> *Iqbal*, 556 U.S. at 678.

<sup>171</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007).

<sup>172</sup> *Iqbal*, 556 U.S. at 678.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Ruivo v. Wells Fargo Bank, N.A.*, 766 F.3d 87, 90 (1st Cir. 2014); *Kirkcaldy v. Richmond Cty. Bd. of Educ.*, 212 F.R.D. 289, 294 (M.D.N.C. 2002).

<sup>176</sup> *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984)

**B. A Seminal Case: *Ashcroft v. Iqbal***

One of two seminal 12(b)(6) cases (the other being *Bell Atlantic v. Twombly*), *Ashcroft v. Iqbal* is especially relevant to government practice as it involved a claim alleging civil rights violations by officers at the highest level of the executive branch.<sup>177</sup> The plaintiff alleged that the defendants, Robert Mueller, head of the FBI, and Attorney General John Ashcroft, had violated his First and Fifth Amendment rights by implementing a policy that allegedly targeted Muslims based on their religion, resulting in the plaintiff's incarceration and wrongful treatment in the aftermath of the 9-11 attacks.<sup>178</sup> Existing law made clear that the defendants would only be liable if they acted with a discriminatory purpose.<sup>179</sup> Applying *Twombly*, the Supreme Court ruled that allegations describing the plaintiff's wrongful treatment by government employees and describing the policy enacted by the defendants were not enough, because those facts, taken as true, would not show discriminatory intent where there were legitimate nondiscriminatory explanations for implementing the policy, namely ensuring the security of the United States in the aftermath of 9-11.<sup>180</sup>

**C. Evidence**

Generally, no evidence is allowed in a hearing on a 12(b)(6) motion; the court must decide the motion solely by the content of the plaintiff's complaint.<sup>181</sup> If evidence is considered, then the claim becomes one for summary judgment.<sup>182</sup> However, courts may consider documents attached or incorporated by reference into the complaint, or those documents "solely" relied on and integral to the complaint.<sup>183</sup>

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<sup>177</sup> *Iqbal*, 556 U.S. at 669.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 676.

<sup>180</sup> *Id.* at 677, 687.

<sup>181</sup> *Speaker v. U.S. Dept. of H&HS Ctrs. For Disease Control & Prevention*, 623 F.3d 1371, 1379 (11<sup>th</sup> Cir. 2010).

<sup>182</sup> Fed. R. Civ. P. 12(d).

<sup>183</sup> See *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5<sup>th</sup> Cir. 2011); *Roth v. Jennings*, 489 F.3d 499, 509 (2<sup>d</sup> Cir. 2007).

**D. Response**

A typical response should emphasize that the court must assume all material facts alleged are true, and demonstrate how the complaint provides fair notice and shows a plausible claim for relief.<sup>184</sup> There is no deadline under the federal rules for filing a response. However, a better response might be to amend the complaint to address the alleged deficiencies. A Plaintiff may only amend once “as a matter of course” within twenty-one days after the defendant’s answer or the 12(b)(6) motion is served, whichever is earlier.<sup>185</sup> If leave is necessary to amend, a plaintiff should file a response that asks for leave to amend.

**E. Standard of Review**

A defendant generally cannot appeal a trial court’s denial of a Rule 12(b)(6) motion.<sup>186</sup> There is a limited exception where a judge states in the order that the opinion involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may advance the termination of the litigation.<sup>187</sup> On the other hand, a plaintiff can immediately appeal an order granting a motion 12(b)(6) which is to be expected given that such an order is a final decision on some or all of a plaintiff’s claims.<sup>188</sup> Courts of appeals review a district court’s order granting a 12(b)(6) motion *de novo*.<sup>189</sup>

**F. Examples of successful 12(b)(6) motions:**

- The defendant was entitled to municipal immunity under state law.<sup>190</sup>

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<sup>184</sup> *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555-56.

<sup>185</sup> Fed. R. Civ. P. 15(a). Note that there may also be a deadline to amend in the local rules.

<sup>186</sup> *Jackson v. City of Atlanta, Tex.*, 73 F.3d 60, 62 (5th Cir. 1996).

<sup>187</sup> 28 U.S.C.A. § 1292.

<sup>188</sup> *See, e.g., Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 527 (5th Cir. 1996).

<sup>189</sup> *Id.*

<sup>190</sup> *Carter v. Cornwell*, 983 F.2d 52, 54-55 (6th Cir. 1993).

- The complaint did not allege specific instances of discrimination, but discrimination generally.<sup>191</sup>
- The complaint alleged fraud but did not allege a false or misleading act by defendant.<sup>192</sup>
- The complaint alleged facts that were not plausible, because they were clearly contradicted by a promissory note referred to in the complaint whose veracity was not contested.<sup>193</sup>

## VII. FEDERAL MOTIONS FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 governs summary judgments in Federal Court. Like the state version, the rule states that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>194</sup> A federal motion for summary judgment is a creature of written motions, even more so than a state motion for summary judgment. Oral hearings for summary judgment motions are not required and rarely granted.<sup>195</sup>

### A. Timing

The only timing requirement of a federal motion for summary judgment is that it must be filed within thirty days after the close of discovery unless local rules or a scheduling order state otherwise.<sup>196</sup> Unlike the state rule, there is no specific time by which motions must be served on the opposing party.<sup>197</sup> Courts are generally permitted to rule on summary judgment motions without giving the parties notice that the court will decide the motion by a certain date.<sup>198</sup> However,

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<sup>191</sup> *Coyne v. City of Somerville*, 972 F.2d 440, 442-445 (1<sup>st</sup> Cir. 1992).

<sup>192</sup> *Royal Bus. Grp. V. Realist, Inc.*, 933 F.2d 1056, 1065-66 (1<sup>st</sup> Cir. 1991).

<sup>193</sup> *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10<sup>th</sup> Cir. 2013).

<sup>194</sup> FED. R. CIV. P. 56(a).

<sup>195</sup> Hittner & Liberato, *supra* note 102, at 935; *See* FED. R. CIV. P. 56.

<sup>196</sup> FED. R. CIV. P. 56(b).

<sup>197</sup> Hittner & Liberato, *supra* note 102, at 935; *See* FED. R. CIV. P. 56.

<sup>198</sup> *Hall v. Smith*, 497 F. App'x 366, 374 (5<sup>th</sup> Cir. 2012) (per curiam) (quoting *Daniels v. Morris*, 746 F.2d 271, 275 (5<sup>th</sup> Cir. 1984)).

courts must give notice if they intend to make a summary judgment decision *sua sponte*.<sup>199</sup> The Federal rules do not provide a deadline to respond; local rules and scheduling orders determine the date by which responses and replies must be filed.<sup>200</sup>

## B. Discovery and Evidence

To move for summary judgment when it bears the burden of proof, a party should begin by identifying each claim or defense on which summary judgment is sought.<sup>201</sup> To win summary judgment, the movant must demonstrate by admissible evidence that there is no genuine dispute as to any material fact concerning each element of its claim for relief.<sup>202</sup> As the defendant has the burden of proof on affirmative defenses, a plaintiff may win summary judgment on the defense by demonstrating the absence of evidence on an affirmative defense.<sup>203</sup>

When a movant files for summary judgment on a claim for which it does not have the burden of proof, it bears the burden to demonstrate the absence of a genuine dispute as to any material fact on the adverse party's claim.<sup>204</sup> The moving party cannot rely on conclusory

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<sup>199</sup> *Atkins v. Salazar*, 677 F.3d 667, 678 (5th Cir. 2011).

<sup>200</sup> FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments; *See* N. DIST. TEX. LOCAL R. 7.1(f) ("Unless otherwise directed by the presiding judge, a party who has filed an opposed motion may file a reply brief within 14 days from the date the response is filed.").

<sup>201</sup> FED. R. CIV. P. 56(a). Among the 2010 amendments to Rule 56 was the explicit clarification that a party may request summary judgment as to part of a claim or defense. *See id.* ("A party may move for summary judgment, identifying each claim or defense--or the *part* of each claim or defense--on which summary judgment is sought." (emphasis added)).

<sup>202</sup> *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *see also Ruby Robinson Co. v. Kalil Fresh Mktg., Inc.*, No. H-08-199, 2010 WL 3701579, at \*3-4 (S.D. Tex. Sept. 16, 2010) (granting summary judgment to an intervenor in an action under the Perishable Agricultural Commodities Act upon the finding by the court that, based on the submitted evidence, two individual defendants were shareholders, directors, and officers of a company in default and exercised sufficient control over the company to justify individual liability for failure to maintain trust assets).

<sup>203</sup> *See id.*

<sup>204</sup> FED. R. CIV. P. 56(a); *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 544 (5th Cir. 2005) ("On summary judgment, the moving party is not required to present evidence proving the absence of a material fact issue; rather, the moving party may meet its burden by simply 'pointing to an absence of evidence to support the nonmoving party's case.'" (quoting *Armstrong v. Am. Home Shield Corp.*, 333 F.3d 566, 568 (5th Cir. 2003))); *see also Chambers v. Sears Roebuck & Co.*, 428 F. App'x 400, 407 (5th Cir. 2011) (per curiam) ("The moving party...need not negate the elements of the non-movant's case. The moving party may meet its burden by pointing out the absence of evidence supporting the nonmoving party's case." (citation omitted) (internal quotation marks omitted)). This burden can be particularly difficult in certain kinds of cases. For example, "[s]ummary judgment is rarely appropriate in negligence and products

statements but must instead specifically show the absence of evidence showing a genuine dispute.<sup>205</sup>

If a nonmovant shows by affidavit or declaration specific reasons that it has not had sufficient time to present essential facts to respond to a summary judgment motion, a court has broad authority to fashion the appropriate relief necessary.<sup>206</sup> Failure by a respondent to do so could waive a prematurity argument on appeal.<sup>207</sup> The Fifth Circuit has commented that “a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course,” but a party must still show specific facts in support of its motion for continuance.<sup>208</sup>

“If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact . . . the court may . . . consider the fact undisputed for purposes of the motion [or] grant summary judgment.”<sup>209</sup> However, a district court may not grant a summary judgment motion simply because the opposing party failed to respond.<sup>210</sup>

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liability cases, even if the material facts are not in dispute.” *Little v. Liquid Air Corp.*, 952 F.2d 841, 847 (5th Cir. 1992).

<sup>205</sup> *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 440 (5th Cir. 2000).

<sup>206</sup> FED. R. CIV. P. 56(d); *see also* Bradley Scott Shannon, *Why Denials of Summary Judgment Should Be Appealable*, 80 TENN. L. REV. 45, 57 (2012) (“[S]ubdivision [56(d)] virtually assures that a plaintiff will get the time necessary to amass the information that she needs to avoid an adverse ruling....”). A district court’s denial of a Rule 56(d) motion is reviewed on appeal for abuse of discretion. *Curtis v. Anthony*, 710 F.3d 587, 594 (5th Cir. 2013) (per curiam).

<sup>207</sup> *Carner v. La. Health Serv. & Indem. Co.*, 442 F. App’x 957, 961 (5th Cir. 2011) (per curiam) (“We have stated that our court has foreclosed a party’s contention on appeal that it had inadequate time to marshal evidence to defend against summary judgment when the party did not seek Rule 56(f) [now rule 56(d)] relief before the summary judgment ruling. As [appellant] failed to raise this issue before the district court, the issue has been waived.” (first alteration in original) (citations omitted) (internal quotation marks omitted)); *Tate v. Starks*, 444 F. App’x 720, 730 & n.12 (5th Cir. 2011) (Smith, J., dissenting).

<sup>208</sup> *Six Flags, Inc. v. Westchester Surplus Lines Ins. Co.*, 565 F.3d 948, 963 (5th Cir. 2009); *But see Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 257 (5th Cir. 2013) (affirming the district court’s denial of a motion for continuance that was filed late and that failed to state specific facts in support); *Am. Family Life Assurance Co. of Columbus v. Biles*, 714 F.3d 887, 893-95 (5th Cir. 2013) (per curiam) (evaluating the sufficiency of the purported discovery-- a deposition--to conclude that the district court’s denial was not an abuse of discretion, given that the deposition would not have influenced the outcome of the case).

<sup>209</sup> FED. R. CIV. P. 56(e)(2), (3).

<sup>210</sup> *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 468 (5th Cir. 2010).

The quantum of proof for evidence at summary judgment is the same as the quantum of proof required at trial. For example, if a plaintiff must prove a fact by clear and convincing evidence, then a court must grant a motion for summary judgment unless the plaintiff has introduced evidence that would allow a reasonable jury to find by clear and convincing evidence that the disputed fact exists.<sup>211</sup> In deciding whether to grant summary judgment, the court views all evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in favor of the nonmoving party.<sup>212</sup>

**Practice Tip:** The seminal cases for federal summary judgment are *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and it is worth refreshing your memory of them before writing a summary judgment motion.

### C. Response

If the movant satisfies its initial burden, the burden shifts to the respondent to avoid summary judgment by coming forward with specific facts to show that there is a genuine dispute for trial.<sup>213</sup>

To show a genuine issue of material fact so as to defeat summary judgment it is not enough that “there is some metaphysical doubt as to the material facts.”<sup>214</sup> Instead, the respondent must show that “the record taken as a whole could . . . lead a rational trier of fact to find for the nonmoving party.”<sup>215</sup> “[S]ummary judgment will not [be granted] if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the

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<sup>211</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

<sup>212</sup> *Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 395 (5th Cir. 2013).

<sup>213</sup> *Firman v. Life Ins. Co. of N. Am.*, 684 F.3d 533, 538 (5th Cir. 2012) (“Once the movant carries [its] burden, the burden shifts to the nonmovant to show that summary judgment should not be granted.”);

<sup>214</sup> *Id.* at 586.

<sup>215</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

nonmoving party.”<sup>216</sup> Further, the less plausible the claim, the stronger the evidence required to overcome summary judgment.<sup>217</sup>

A genuine dispute as to any material fact necessary to defeat summary judgment cannot be established by allegations contained in the respondents pleadings but must be established by evidence such as, documents, depositions, affidavits, and answers to interrogatories.<sup>218</sup> A response may consist of: admissible summary judgment evidence;<sup>219</sup> a memorandum of points and authorities;<sup>220</sup> objections to the movant’s evidence;<sup>221</sup> and a request for more time for discovery, if appropriate.<sup>222</sup> In lieu of submitting evidence, a respondent may rely on evidence submitted by the movant.<sup>223</sup> A respondent cannot simply rely on evidence in the record to avoid summary judgment but must “articulate the precise manner in which the submitted or identified evidence supports his or her claim.”<sup>224</sup>

#### D. Appeals

The denial of a motion for summary judgment is ordinarily not appealable.<sup>225</sup> Instead, a party whose summary judgment motion was denied must generally wait to appeal until after a

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<sup>216</sup> *Anderson*, 477 U.S. at 248; *Haverda v. Hays Cnty.*, 723 F.3d 586, 591 (5th Cir. 2013); *R & L Inv. Prop., L.L.C. v. Hamm*, 715 F.3d 145, 149 (5th Cir. 2013).

<sup>217</sup> *Id.*

<sup>218</sup> *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010); *Stahl v. Novartis Pharm. Corp.*, 283 F.3d 254, 264-65 (5th Cir. 2002); FED. R. CIV. P. 56(c)(1)(A).

<sup>219</sup> FED. R. CIV. P. 56(c)(2); *see also Harris ex rel. Harris v. Pontotoc Cnty. Sch. Dist.*, 635 F.3d 685, 692 (5th Cir. 2011) (stating that hearsay evidence cannot create a genuine dispute of material fact to avoid summary judgment). *But see Crostley v. Lamar Cnty., Tex.*, 717 F.3d 410, 423-24 (5th Cir. 2013) (providing that hearsay statements can be considered by a court when ruling on qualified immunity-based summary judgment motions grounded in whether probable cause existed).

<sup>220</sup> *See, e.g., S. DIST. TEX. LOCAL R. 7.1(B)* (requiring opposed motions to be accompanied by authority).

<sup>221</sup> FED. R. CIV. P. 56(c)(2); *see also Cutting Underwater Techs. USA, Inc. v. ENI U.S. Operating Co.*, 671 F.3d 512, 515 (5th Cir. 2012) (observing that objections under Rule 56(c)(2) have replaced the necessity of filing independent motions to strike).

<sup>222</sup> FED. R. CIV. P. 56(d); *see also supra* Part 2.I.D (elaborating on Rule 56(d)).

<sup>223</sup> *Smith ex rel. Estate of Smith v. United States*, 391 F.3d 621, 625 (5th Cir. 2004) (directing the nonmovant to point out “the precise manner in which the submitted or identified evidence supports his or her claim”); *Isquith ex rel. Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186, 199-200 (5th Cir. 1988).

<sup>224</sup> *CQ, Inc. v. TXU Mining Co.*, 565 F.3d 268, 273 (5th Cir. 2009).

<sup>225</sup> *Hogan v. Cunningham*, 722 F.3d 725, 730 (5th Cir. 2013).

court has entered a judgment after a trial on the merits.<sup>226</sup> Exceptions exist where the trial court was ruling on two competing motions for summary judgment, or where the trial court certifies the summary judgment for permissive appeal.<sup>227</sup>

A grant of a motion for summary judgment is appealable, and is reviewed *de novo*.<sup>228</sup> On those occasions where an appellate court has a chance to review the denial of a motion for summary judgment, it may review whether a fact is material, but not whether the fact is genuine.<sup>229</sup> An appellate court can affirm a summary judgment that was granted on incorrect grounds if it finds separate grounds to grant summary judgment.<sup>230</sup> However, it can generally only do so on the factual record before the trial court.<sup>231</sup>

#### **E. State Motions Compared to Federal Ones**

Given the similarities between summary judgments at the state and federal level, it can be useful to highlight the major differences between the two. Summary judgments may be granted *sua sponte* at the federal level, but not at the state level. It follows that a federal court may grant a summary judgment on grounds not stated in the motion for summary judgment at the federal level, but not at the state level. Thus, a federal court may simply rule on a motion, without giving a notice of intention to rule as is required at the state level.

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<sup>226</sup> See 28 U.S.C.A. § 1291.

<sup>227</sup> See *Dore Energy Corp. v. Prospective Inv. & Trading Co.*, 570 F.3d 219, 224 (5th Cir. 2009);

<sup>228</sup> *Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 277 (5th Cir. 2008).

<sup>229</sup> *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004).

<sup>230</sup> *Bluebonnet Hotel Ventures, L.L.C. v. Wells Fargo Bank, N.A.*, 754 F.3d 272, 276 (5th Cir. 2014).

<sup>231</sup> *Id.*