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**Dismissal Procedures Under
Texas Rule of Civil Procedure 91a**

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I. INTRODUCTION

The Supreme Court of Texas (the “Court”) has broad authority to promulgate and amend rules governing practice and procedure in civil actions. Tex. Const. art. V, § 31(b) (directing the Court to “promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts”); Tex. Gov’t Code Ann. § 22.004(a) (West Supp. 2015) (“The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.”). To ensure that this power is sufficiently robust, the Legislature even allows the Court to repeal statutes through rules to the extent that the rules address procedural—as opposed to substantive—matters. *Id.* § 22.004(c) (providing that “a rule adopted by the [Court] repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed” and setting forth a procedure for repealing statutes through rules). Generally, the Court must publish all Texas Rules of Civil Procedure for 60 days before they become effective. *Id.* § 22.004(b). Proposed rules are published in the *Texas Bar Journal* and in administrative orders posted on the Court’s website (at <http://www.txcourts.gov/supreme/administrative-orders.aspx>). The Court invites public comments during this 60-day period, analyzes the comments received (with assistance from its Rules Attorney), and often modifies proposed rules in response to comments.¹

Sometimes new rules and amendments to existing rules are prompted by legislative mandate. At other times, the Court decides to promulgate or amend rules on its own initiative, often because members of the bar or the general public have identified a need for change.

In the last few years, the Court has promulgated several rules in response to legislative mandates. This article addresses one set of these rules: the rules governing dismissal procedures.

II. DISMISSAL PROCEDURES

A. Impetus for Rules Governing Dismissal Procedures

The dismissal procedures in Rule 91a of the Texas Rules of Civil Procedure stem from House Bill 274, which the 82nd Legislature enacted in 2011. In the bill, the Legislature added subsection (g) to Section 22.004 of the Texas Government Code and mandated the Court to “adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence.” *Id.* § 22.004(g). The Legislature also provided that “[t]he rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss” and “shall not apply to actions under the Family Code.” *Id.* Finally, the Legislature added Section 30.021 to the Texas Civil Practice and Remedies Code, which reads: “In a civil proceeding, on a trial court’s granting or denial, in whole or in part, of a motion to dismiss filed under the rules adopted by the [Court] under Section 22.004(g), Government Code, the court shall award costs and reasonable and necessary attorney’s fees to the prevailing party.” Tex. Civ. Prac. & Rem. Code Ann. § 30.021 (West 2015). Of note, however, “actions by or

¹ For more information on rulemaking, see Chief Justice Nathan L. Hecht, Martha G. Newton & Kennon L. Wooten, *How Texas Court Rules are Made* (May 13, 2016), <http://www.txcourts.gov/rules-forms/rules-standards.aspx>.

against the state, other governmental entities, or public officials acting in their official capacity or under color of law” are excluded from Section 30.021. *See id.*

B. Overview of Rules Governing Dismissal Procedures

In an administrative order dated November 13, 2012, the Court issued a proposed version of Rule 91a. *See* Misc. Docket No. 12-9191 (Nov. 13, 2012) (attached hereto as **Exhibit A**). The Court revised the proposed rule in response to public comments received and issued the final version of Rule 91a in an administrative order dated February 12, 2013. *See* Misc. Docket No. 13-9022 (Feb. 12, 2013) (attached hereto as **Exhibit B**).

Rule 91a allows a party to move to dismiss a cause of action that “has no basis in law or fact.” Tex. R. Civ. P. 91a.1. Since Rule 91a took effect on March 1, 2013, it has been analyzed in multiple Texas cases relating to multiple types of causes of action.² The discussion below

² *See, e.g., In re Essex Ins. Co.*, 450 S.W.3d 524, 526-28 (Tex. 2014) (per curiam) (orig. proceeding) (holding that trial court abused discretion by not dismissing plaintiff’s declaratory judgment claim against insurer in personal injury action); *Walker v. Owens*, No. 01-15-00361-CV, 2016 WL 1590681 *3 (Tex. App.—Houston [1st Dist.] Apr. 19, 2016, no pet.) (affirming dismissal of prisoner’s claims for violation of due process); *Vasquez v. Legend Natural Gas III, L.P.*, No. 04-14-00899-CV, 2016 WL 1729390 *4-7 (Tex. App.—San Antonio Apr. 29, 2016, no pet. h.) (affirming dismissal of negligence claim because no legal duty existed); *Boswell v. Ector Co. ISD*, No. 11-15-00013-CV, 2016 WL 1443606 *3-4 (Tex. App.—Eastland Apr. 7, 2016, no pet. h.) (mem. op.) (affirming dismissal of whistleblower, breach of contract and non-client claims against attorney); *Highland Capital Management, LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528 *2-6 (Tex. App.—Dallas Jan. 14, 2016, pet. filed) (mem. op.) (affirming dismissal of theft, breach of duty, conversion, tortious interference with contract, civil conspiracy and disparagement on attorney immunity doctrine); *Parkhurst v. Office of Attorney General of Texas*, 481 S.W.3d 400, 402 (Tex. App.—Amarillo 2015, no pet.) (affirming dismissal of petition for bill of review); *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 243 (Tex. App.—Houston [1st Dist.] 2015, pet. filed) (affirming dismissal of negligent undertaking claims); *Kidd v. Cascos*, No. 03-14-00805, 2015 WL 9436655 (Tex. App.—Austin Dec. 22, 2015, no pet.) (affirming dismissal of request for declaratory judgment that Seventeenth Amendment was not constitutionally ratified); *Stedman v. Paz*, No. 13-13-00595-CV, 2015 WL 5157598 *3 (Tex. App.—Corpus Christi-Edinburg Sept. 2, 2015, no pet.) (reversing dismissal of application to revive judgment by *scire facias*); *McClain v. Dell, Inc.*, No. 07-15-00141-CV, 2015 WL 5674885 *3 (Tex. App.—Amarillo Sept. 24, 2015, pet. denied) (mem. op.) (affirming dismissal of DTPA, Theft Liability Act, conspiracy and violation of “statutes and rules” claims on *res judicata* grounds); *Gonzales v. Dallas Cty. Appraisal Dist.*, No. 05-13-01658-CV, 2015 WL 3866530, at *4-5 (Tex. App.—Dallas June 23, 2015, no. pet.) (mem. op.) (affirming dismissal of taxpayer’s suit alleging improper property appraisal); *Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 185-86 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (reversing dismissal of claims under Texas Timeshare Act and affirming dismissal of fraudulent inducement claim); *In Estate of Sheshtawy*, 478 S.W.3d 82, 86 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (affirming dismissal of claim to enjoin sale of homestead when petition admits homestead rights were waived); *Guzder v. Haynes & Boone, LLP*, No. 01-13-00985-CV, 2015 WL 3423731, at *3-8 (Tex. App.—Houston [1st Dist.] May 28, 2015, no pet. h.) (mem. op.) (affirming dismissal of party’s fraud and civil conspiracy claims against law firm and lawyers who represented opposing parties in prior dispute); *Drake v. Walker*, No. 05-14-00355-CV, 2015 WL 2160565, at *2-4 (Tex. App.—Dallas May 8, 2015, no pet.) (mem. op.) (reversing dismissal of negligence claims and affirming dismissal of deceptive trade practices claim in dental malpractice case); *Chambers v. Tex. Dep’t of Transp.*, No. 05-13-01537-CV, 2015 WL 1756087, at *2-3 (Tex. App.—Dallas Apr. 17, 2015, no pet.) (mem. op.) (affirming dismissal of bill of review as having no basis in law); *Davis v. Motiva Enters., L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *1-5 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (mem. op.) (relying on federal Communications Decency Act to affirm dismissal of claims against employer for negligent supervision, entrustment, and undertaking); *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.) (holding that Rule 91a provisions do not apply to summary judgment motions); *DeVoll v. Demonbreun*, No. 04-14-00116-CV, 2014 WL 7440314, at *1-3 (Tex. App.—San Antonio Dec. 31, 2014, no pet.) (affirming dismissal of debtor’s

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