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Rule 91a: New Opportunities for Early Exits in Texas Employment Litigation

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The recently enacted Texas Rule of Civil Procedure 91a has created a new means for defendants to challenge pleadings and introduced a strategic alternative that could quickly end litigation and shift costs. This paper reviews the emerging case law in which Rule 91a has been applied and considers its significance for employment cases.

I. RULE 91a – AN OPTION TO DISMISS PLEADINGS THAT ARE FACIALLY DEFICIENT

Titled “Dismissal of Baseless Causes of Action,” Rule 91a of the Texas Rules of Civil Procedure was implemented in 2013 as the product of a Texas House Bill that called for a rule to “promote the prompt, efficient, and cost-effective resolution of civil actions.” TEX. GOV’T CODE ANN. § 22.004(h) (West 2015). Prior to the introduction of Rule 91a, Texas had no procedural equivalent to a Fed. R. Civ. P. 12(b)(6) motion, which allows federal litigants to dismiss cases for “failure to state a claim upon which relief can be granted” or for failure to plead “enough facts to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). At best, a party could challenge the facial sufficiency of a petition through special exceptions. See TEX. R. CIV. P. 91. However, under Rule 91a, a defendant now “may move to dismiss a cause of action on the grounds that it has no basis in law or fact.”

Specifically, TEX. R. CIV. P. 91a provides:

91a.1 Motion and Grounds. Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with 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.

91a.2 Contents of Motion. A motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.

A. What Standard of Pleading Must a Claimant Satisfy to Survive a Rule 91a Motion?

Early case law suggests that courts are still formulating the proper standard for review of a Rule 91a motion, as there does not appear to be consensus about what effect the rule has had on Texas pleadings standards. The analysis of a Rule 91a motion has been compared to various standards, including the federal pleading standards applied to Rule 12(b)(6) motions, traditional pleas to the jurisdiction and reviews for legal sufficiency. See *Wooley v. Schaffer*, 447 S.W.3d 71, 74–75 (Tex. App.—Houston [14th Dist.] 2014, pet. filed (Jan. 23, 2015)). In addition, some have argued that Rule 91a creates its own pleading standards and that a Rule 91a motion is “an animal unlike any other” that courts should “treat it as its own kind without analog[y].” *Id.* at 83 (Frost, C.J., concurring).

1. Does Rule 91a Introduce Federal Pleading Standards to State Law Claims?

Historically, the Texas standard for evaluating the sufficiency of pleadings has been one of “fair notice of the claim involved.” TEX. R. CIV. P. 45(b). Under this principle, the pleading must include a plain and concise statement of the plaintiff’s cause of action. *Id.* The fact that a claim is supported by legal and evidentiary conclusions, but not necessarily detailed assertions of underlying facts, has not provided grounds to dismiss a claim if the allegations as a whole give fair notice of the cause of action. *Id.* In short, the test for “fair notice” in Texas “is whether an opposing attorney of reasonable competence, with the pleadings before her, could ascertain the nature and basic issues of controversy and testimony that is probably relevant.” *Wooley*, 447 S.W.3d at 83 (Frost, C.J., concurring).

By contrast, the federal pleading standard, especially as it has evolved in recent years, is stricter than the Texas standard established by Rule 45(b). The federal standard requires that pleadings contain “enough facts to state claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Bart Turner & Assoc. v. Krenke*, 3:13-CV-2921-L, 2014 WL 1315896 (N.D. Tex. Mar. 31, 2014) (memo op.). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Federal pleadings must show there is “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

The introduction of Rule 91a may be moving the Texas pleading standard closer to the federal standard. In *GoDaddy.com, LLC v. Toups*, the first reported Texas appellate court case to review a 91a motion to dismiss, the court analogized Rule 91a motions with Rule 12(b)(6) motions but fell short of holding that courts should apply the same standards in reviewing those motions. 429 S.W.3d 752, 754–55 (Tex. App.—Beaumont 2014, pet. denied). Instead, the *GoDaddy* court held that federal standards could provide guidelines, if not strict pleading standards, and emphasized that: “[w]hile not identical, Rule 91a is analogous to Rule 12(b)(6); therefore, we find case law interpreting Rule 12(b)(6) instructive.” *Id.* at 754. In affirming a Rule 91a dismissal, the *GoDaddy* court then noted that the rule was a “proper vehicle to assert a claim of immunity,” just like a Rule 12(b)(6) motion, but the court did not opine as to whether Rule 91a changed Texas’ pleading standards. *See id.*

Case law from the federal courts provides the caveat that Rule 91a has not abrogated Texas’ “fair notice” pleading standards, but early decisions can be cited for the principle that Texas litigants now must come closer to the Rule 12(b)(6) standard if they want to avoid an early motion to dismiss. For instance, in *Rush v. Jacobs Engineering Group, Inc.*, the court cited *GoDaddy* and emphasized that, “[w]hile not identical to the Rule 12(b)(6) standard, the Texas Courts of Appeal have interpreted Rule 91a as essentially calling for a Rule 12(b)(6)-type analysis and have relied on the 12(b)(6) case law in applying Rule 91a.” No. 3:14-CV-3723-B, 2015 WL 1511122 (N.D. Tex. Apr. 2, 2015) (memo op.).

Similarly, in *Bart Turner & Assoc. v. Krenke*, an opinion issued prior to *GoDaddy*, the court denied a plaintiff’s motion for remand and granted defendant’s 12(b)(6) motion to dismiss.

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