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**EMERGING ISSUES IN TEXAS  
DISMISSAL PRACTICE: PLEADING  
STANDARDS AND (IMPORTANT)  
MISCELLANY**

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I. INTRODUCTION

Texas Rule of Civil Procedure 91a created a new mechanism to dismiss baseless causes of action in Texas state trial courts.<sup>1</sup> The rule has its roots in a 2011 legislative directive to the Supreme Court of Texas to adopt

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1. See TEX. R. CIV. P. 91a.1 (“[A] party may move to dismiss a cause of action on the grounds that it has no basis in law or fact.”).

a more robust dismissal procedure.<sup>2</sup> Over the next year and a half, with the supreme court's oversight, the language that would ultimately become Rule 91a was crafted.<sup>3</sup> The provision went into effect in March 2013.<sup>4</sup> In the ensuing months, litigants around the state began filing 91a motions, and the first in a wave of appellate decisions interpreting the rule came ashore in the first half of 2014.<sup>5</sup>

These early decisions examined various aspects of Texas' new dismissal practice but left many important questions unanswered. Indeed, answers to the most fundamental question—the impact of Rule 91a on Texas pleading standards—are in disarray.<sup>6</sup> This short Essay is

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2. TEX. GOV'T CODE ANN. § 22.004(g) (West 2011) (“The supreme court shall adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence.”); *see also, e.g.*, Timothy Patton, *Motions to Dismiss Under Rule 91a: Practice, Procedure, and Review*, 33 REV. LITIG. 469, 474–75 (2014) (describing the legislative origins of Rule 91a and noting that a more effective procedure for the early dismissal of lawsuits was a priority for Governor Rick Perry and the legislature in 2011).

3. TEX. R. CIV. P. 91a; *see also, e.g.*, David Chamberlain and W. Bradley Parker, *Rule 91a Motions to Dismiss*, ULTIMATE MOTIONS PRAC., Sept. 20, 2013, at 2 (State Bar Tex. ed., 2013) (noting that the supreme court adopted Rule 91a in February 2013).

4. TEX. R. CIV. P. 91a.

5. *See, e.g.*, *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 822 (Tex. App.—Austin 2014, no pet.) (examining a Rule 91a motion used to mount a subject-matter-jurisdiction challenge in the governmental immunity context); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754–55, 762 (Tex. App.—Beaumont 2014, pet. denied) (comparing Rule 91a to Federal Rule of Civil Procedure 12(b)(6) and ultimately reversing denial of Rule 91a motion to dismiss).

6. *Compare, e.g.*, *Stedman v. Paz*, No. 13-13-00595-CV, 2015 WL 5157598, at \*2 (Tex. App.—Corpus Christi Sept. 2, 2015, no pet. h.) (“[W]e apply the fair notice pleading standard applicable in Texas to determine whether the allegations of the petition are sufficient to allege a cause of action.”), *and Mainali Corp. v. Covington Specialty Ins. Co.*, No. 3:15-CV-1087-D, 2015 WL 5098047, at \*3 (N.D. Tex. Aug. 31, 2015) (stating that in the improper joinder context (which typically relies on Texas state-law pleading standards), “the court has continued to apply the “fair notice” pleading standard in a manner

meant as a basic case-law update that addresses the pleading-standard question and other emerging issues in Texas motion-to-dismiss practice.

The Essay proceeds in two parts. First, it examines emerging questions about how Texas dismissal and pleading practice compare with federal plausibility pleading. Second, the Essay surveys a smattering of interesting Rule 91a cases that courts and lawyers should note as they proceed through the dismissal process in state court.

## II. TEXAS STATE-COURT PLEADING STANDARDS: FAIR- NOTICE, PLAUSIBILITY, OR SOMETHING ELSE

Rule 91a lays out the standard for dismissal with deceptive simplicity. Courts should dismiss any cause of action with no “basis in law or fact.”<sup>7</sup> According to the text of the rule, a cause of action is legally baseless if the allegations in the petition “taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.”<sup>8</sup> A cause of action has no basis in fact where “no reasonable person could believe the facts pleaded.”<sup>9</sup>

In application, the meaning of these provisions is more complicated, and courts have struggled to articulate how the rule has changed Texas pleading practice. Indeed, pleading standards and dismissal practice are inextricably intertwined. If a pleading stands in the place of evidence as the sole (or primary) record courts are to consider when deciding whether to dismiss a claim, the contents of the pleading largely control the outcome of the motion. Texas

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that is unaltered by Rule 91a. In fact, the Fifth Circuit has now held in a published opinion that the Texas notice pleading standard applies when deciding whether a defendant has been improperly joined.”) (internal citations omitted), *with GoDaddy.com*, 429 S.W.3d at 754-55, 762 (holding that court considers whether plaintiff’s pleading “contains ‘enough facts to state a claim to relief that is plausible on its face.’”) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

7. TEX. R. CIV. P. 91a.1.

8. *Id.*

9. *Id.*

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