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## Rule 91a Dismissals and Appeals

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## I. INTRODUCTION

Rule 91a of the Texas Rules of Civil Procedure 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. Having been on the books for over five years, Rule 91a has been cited in over 200 Texas opinions, including federal opinions.<sup>1</sup>

As issues relating to Rule 91a have percolated through the court system, many issues pertaining to 91a motions have been resolved or at least clarified. For example, Texas courts have uniformly held that appellate attorney’s fees arising from Rule 91a motions are recoverable (even though their recoverability is not addressed explicitly in Rule 91a) and that a trial court can rule on a 91a motion more than 45 days after the motion is filed (even though Rule 91a indicates otherwise).

Other issues have arisen under Rule 91a that either have not been addressed or remain unclear. Open questions include the following: (1) how removal to federal court impacts Rule 91a deadlines; (2) whether a movant may amend a 91a motion when a respondent has not amended the cause of action addressed by the motion; and (3) whether Rule 91a has modified the fair-notice pleading standard and, relatedly, whether the heightened pleading standards applicable in federal cases were incorporated into Texas jurisprudence through Rule 91a.

In regard to appellate issues specifically, the appellate pathway for interlocutory orders under Rule 91a is less clear than it is for ordinary appeals. Barring an explicit interlocutory-appellate right under section 51.014 of the Civil Practice and Remedies Code, there are two plausible appellate options: (1) mandamus or (2) permissive interlocutory appeal under section 51.014(d). The most appropriate option must be determined on a case-by-case basis.

After providing an overview of Rule 91a’s background and operation, this article addresses some unresolved issues that practitioners may confront when pursuing or defending against Rule 91a motions and the appellate options available for interlocutory orders under Rule 91a. The research in this article is current through May 24, 2018. The original version of this article was prepared shortly after Rule 91a’s promulgation. This article has been updated several times since then.<sup>2</sup> This is the first update with in-depth analysis of 91a issues relating to mandamus proceedings and permissive interlocutory appeals.

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<sup>1</sup> As of May 24, 2018, a search for “91a” in Westlaw yielded a total of 215 opinions (after deducting duplicative entries and withdrawn opinions from the list of search results)—148 opinions from Texas state courts and 70 opinions from Texas federal courts. A lot of the federal jurisprudence on Rule 91a developed in cases regarding alleged improper joinder that were issued before the Fifth Circuit’s holding that federal pleading standards, rather than state pleading standards, apply to determine whether a plaintiff has stated a claim against a nondiverse defendant. *See Int’l Energy Ventures Mgmt., LLC v. United Energy Grp., Ltd.*, 818 F.3d 193, 208 (5th Cir. 2016).

<sup>2</sup> Prior versions of this article include: (1) Kennon L. Wooten and Anthony Arguijo, *Rule 91a Dismissal Procedures: Basic Considerations and Unanswered Questions*, 80 ADVOC.: STATE BAR LITIG. SEC. REP. 60 (2017); (2) Kennon L. Wooten, *Dismissal Procedures Under Texas Rule of Civil Procedure 91a* (presented at the Harris County Civil District Judges’ CLE Program on August 2, 2016); (3) Kennon L. Wooten, Cindy Saiter, and Carlos Soltero, *Dismissal Procedures Under Texas Rule of Civil Procedure 91a* (presented at the 39th Annual Advanced Civil Trial Course on July 13, 2016); (4) Kennon L. Wooten and Cindy Saiter, *Dismissal Procedures Under Texas Rule of Civil*

## II. DISMISSAL PROCEDURES

### A. Legislative History and Promulgation of Rule 91a

Rule 91a stems from House Bill 274, which was enacted by the 82nd Legislature in 2011. In that bill, the Legislature added subsection (g) to Section 22.004 of the Government Code and mandated the Supreme Court of Texas (hereinafter referred to as the “Court” or “Supreme Court of Texas”) 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.” Tex. Gov’t Code Ann. § 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 Civil Practice and Remedies Code, providing as follows: “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. Of note, however, “actions by or 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.*

In an administrative order dated November 13, 2012, the Court issued a proposed version of Rule 91a along with an explanatory per curiam opinion. *See* Misc. Docket No. 12-9191 (Nov. 13, 2012) (attached 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 as **Exhibit B**). Rule 91a took effect on March 1, 2013. The rule has not been amended since its effective date.

### B. Overview of Rule 91a Procedures<sup>3</sup>

#### 1. 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.” Tex. R. Civ. P. 91a.1.<sup>4</sup> At least one court has held that, in the absence of a 91a dismissal motion, a trial court cannot invoke Rule 91a’s

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*Procedure 91a* (presented at the 26th Annual Conference on State and Federal Appeals, June 10, 2016); and (5) Kennon L. Wooten, *Expedited Actions and Dismissal Rules* (presented by then Rules Attorney Martha Newton at the State Bar College 16th Annual Summer School on July 17, 2014). Some of the content in the original version of this article derived from a State Bar of Texas webcast on March 19, 2013, entitled *The New Dismissal Rule and Rules for Expedited Actions: Tips and Traps for the Unwary*. The webcast’s participants were Michael G. Guajardo, the Honorable Elizabeth Ray, the Honorable Alan Waldrop, Kennon L. Wooten, and Dan K. Worthington,

<sup>3</sup> This section addresses exemplar cases that shed light on procedural issues relating to Rule 91a. Substantive legal issues relating to 91a motions are decided on a case-by-case basis and are beyond the scope of this particular article.

<sup>4</sup> 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.).

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