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Rule 91a Dismissals and Appeals

Speakers: Kennon L. Wooten and Anne Johnson

Authors: Kennon L. Wooten, Aaron Collins, Anne Johnson, Chris Knight

Kennon L. Wooten
Aaron Collins
Scott Douglass & McConnico LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
kwooten@scottdoug.com
512.495.6341
acollins@scottdoug.com
512.495.6349

Anne M. Johnson
Chris Knight
Haynes and Boone, LLP
2323 Victory Avenue # 700
Dallas, Texas 75219
anne.johnson@haynesboone.com
214.651.5376
chris.knight@haynesboone.com
214.651.5361

KENNON L. WOOTEN

SCOTT DOUGLASS & MCCONNICO LLP

303 Colorado St. Suite 2400

Austin, Texas 78701

512.495.6341

kwooten@scottdoug.com

Kennon joined Scott Douglass & McConnico LLP in 2011, after serving as the Rules Attorney for the Supreme Court of Texas, working as an associate for Baker Botts LLP (in Austin), and clerking for former Chief Justice Wallace B. Jefferson of the Supreme Court of Texas. As Rules Attorney, she handled inquiries and issues relating to local and statewide rules and assisted the Court with promulgating and amending rules. At Scott Douglass & McConnico, her docket includes a broad range of civil litigation and appeals involving, among other things, allegations of breach of fiduciary duty, breach of contract, business tort, personal injury, Medicaid fraud, and professional malpractice. She represents Fortune 500 corporations, law firms, lawyers, judges, family-owned businesses, associations, and individuals. Her education includes the University of Texas at Austin (BA with highest honors, 1999) and the University of Texas School of Law (JD with honors, 2004). She served as the Head Teaching Quizmaster in law school.

Kennon is dedicated to serving the community. She has served as a member of the Texas Commission to Expand Civil Legal Services, a member of the Supreme Court of Texas Task Force for Rules in Expedited Actions, and the President of the Austin Young Lawyers Association. She currently serves as Chair of the State Bar of Texas Court Rules Committee, Editor-in-Chief for Austin Lawyer, Secretary for the Texas Legal Service Center Board of Directors, and Treasurer of the Austin Bar Association. She is also a member of the American Law Institute, Supreme Court Advisory Committee, and Editorial Board for The Advocate.

Kennon received the Travis County Women Lawyers Association Litigation/Appellate Attorney Award in 2018, a “Standing Ovation” State Bar Volunteer Award in 2017, and a Special Commendation of the Supreme Court of Texas and State Bar in 2011, for her work relating to the disciplinary rules in Texas. She is a published author and frequent CLE speaker. She was named as a Texas Rising Star in 2008, 2009, and 2013-2017.

Aaron Collins

SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado St. Suite 2400
Austin, Texas 78701
512.495.6349
acollins@scottdoug.com

Aaron joined Scott Douglass & McConnico LLP in 2016, after clerking for the Honorable Royce C. Lamberth on the United States District Court for the District of Columbia. At Scott Douglass & McConnico, his docket includes a broad range of complex civil litigation involving, among other things, allegations of breach of fiduciary duty, breach of contract, business tort, personal injury, Medicaid fraud, and professional malpractice. Aaron represents Fortune 500 corporations, law firms, lawyers, family-owned businesses, associations, and individuals. His education includes the University of Oregon (BA 2009) and the University of Texas School of Law (JD with high honors, 2015). Aaron served as an associate editor on the Texas Law Review.

Anne M. Johnson

HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219-7673
214.651.5376
anne.johnson@haynesboone.com

Anne Johnson is an appellate lawyer in the Dallas office of Haynes and Boone, where she has practiced for 22 years. Anne is currently a member of the firm's Board of Directors, and served as Chair of the Litigation Department from 2010 to 2016.

Anne obtained Board Certification in Civil Appellate Law by the Texas Board of Legal Specialization in 2001. She has been named a Texas Super Lawyer in appellate law since 2003 and has been included in "Best Lawyers in America" by *US News and World Report* for the last ten years. Anne was named one of the Best Lawyers in Dallas by D Magazine from 2015-2018. In 2017 and 2018, Anne was honored to be named a "Recognized Practitioner" in Texas Appellate Litigation by *Chambers USA*.

Anne's recent Texas appellate representations include (1) affirmance of summary judgment for the National Football League in a tortious interference case; (2) reversal of a jury's \$4 million nuisance verdict and rendition of a take-nothing judgment in *Aruba v. Parr*, a case widely publicized as the first "fracking" trial, and (3) serving as appellate counsel during a multi-week \$100 million personal injury trial that was successfully resolved prior to verdict. Outside of Texas, Anne recently obtained a reversal of a district court's summary judgment in an appeal to the Sixth Circuit Court of Appeals in a case involving antitrust claims under the Sherman Act.

Anne is a Leader of the UT Center for Women in the Law and a Master in the Patrick E. Higginbotham Inn of Court. She also serves on the boards of Family Gateway, Alcuin School, and New Friends New Life, and the Texas Law Alumni Association Executive Committee.

Anne was born and raised in England, and maintains dual US/UK citizenship. She graduated with honors from the University of Pennsylvania in 1992 and from the University of Texas School of Law in 1995. Anne and her husband, Nathan Johnson (UT Law '93), have three children: Finn (age 17), Theo (age 15), and Sophie (age 13).

Chris Knight

HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
214.651.5361
chris.knight@haynesboone.com

Chris Knight is an associate in the Dallas office of Haynes and Boone, where his practice focuses on state and federal appeals. Before joining Haynes and Boone, Chris served as a judicial law clerk to the Honorable Leslie Southwick of the United States Court of Appeals for the Fifth Circuit. Before that, he served as a judicial law clerk to the Honorable Jeff Brown of the Texas Supreme Court.

Since joining Haynes and Boone, Chris has represented clients throughout the trial and appellate process in both state and federal court. He has prepared trial and appellate briefs on a variety of topics, from business torts to sovereign immunity to a defendant's right to exculpatory evidence under *Brady v. Maryland*. Chris is a member of the Appellate and Litigation sections of the State Bar of Texas and the Texas Supreme Court Historical Society.

Chris graduated *summa cum laude* (first in his class) from SMU Dedman School of Law in 2015 and from Abilene Christian University in 2012. He and his wife, Brittany, have an eighteen-month-old daughter, Grace.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	DISMISSAL PROCEDURES	2
A.	Legislative History and Promulgation of Rule 91a2	
B.	Overview of Rule 91a Procedures	2
1.	Grounds for and Contents of Motion.....	2
2.	Timing Considerations.....	3
3.	Hearing on Motion to Dismiss.....	5
4.	“Loser-Pay” Provision	6
5.	Impact on Other Procedures.....	8
6.	Standard of Review for Rule 91a Rulings	8
C.	Unresolved Issues	9
1.	The Impact of Removal on Rule 91a’s Filing Deadline	9
2.	To Amend or to Withdraw: That is the Question	9
3.	The Interplay of Rule 91a and Fair-Notice Pleading Standards	10
III.	APPELLATE OPTIONS.....	12
A.	Mandamus	12
B.	Permissive Interlocutory Appeal.....	14
IV.	CONCLUSION	15

INDEX OF AUTHORITIES

CASES

<i>AC Interests, L.P. v. Texas Comm'n on Env'tl. Quality</i> , 543 S.W.3d 703 (Tex. 2018).....	5
<i>Aguilar v. Morales</i> , No. 08-15-00098-CV, 2017 WL 192910 (Tex. App.—El Paso Jan. 18, 2017, pet. filed).....	10, 11
<i>Arthur Andersen & Co. v. Perry Equip. Corp.</i> , 945 S.W.2d 812 (Tex. 1997).....	6
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	11
<i>Bahr v. Emerald Bay Property Owners Ass'n., Inc.</i> , 2018 WL 2341312 (Tex. App.—Beaumont May 24, 2018, no pet. h.).....	10, 14
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	11, 12
<i>Boatner v. Reitz</i> , No. 03-16-00817-CV, 2017 WL 3902614 (Tex. App.—Austin Aug. 22, 2017, no pet.)	8
<i>Brogdon v. Ruddell</i> , 717 S.W.2d 675 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).....	9
<i>City of Dallas v. Sanchez</i> , 494 S.W. 3d 722 (Tex. 2016) (per curiam).....	8, 11, 12
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005).....	11
<i>ConocoPhillips Co. v. Koopmann</i> , ___ S.W.3d ___, 2018 WL 1440639 (Tex. Mar. 23, 2018).....	7, 12, 13, 14
<i>Cypress Creek EMS v. Dolcefino</i> , No. 01-16-00929-CV, 2018 WL 1597463 (Tex. App.—Houston [1st Dist.] Apr. 3, 2018, no pet. h.)	6, 7
<i>Davis v. Motiva Enters., L.L.C.</i> , No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied).....	14

<i>Drake v. Chase Bank</i> , No. 02-13-00340-CV, 2014 WL 6493411 (Tex. App.—Fort Worth Nov. 20, 2014, no pet.) (mem. op.).....	6
<i>Drake v. Walker</i> , No. 05-14-00355-CV, 2015 WL 2160565 (Tex. App.—Dallas May 8, 2015, no pet.) (mem. op.).....	4
<i>Eagle Gun Range, Inc. v. Bancalari</i> , 495 S.W.3d 887 (Tex. App.—Fort Worth 2016, no pet.).....	14
<i>Gaskill v. VHS San Antonio Partners, LLC</i> , 456 S.W.3d 234 (Tex. App.—San Antonio 2014, pet. denied)	5
<i>GoDaddy.com, LLC v. Toups</i> , 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied).....	10, 14, 15
<i>Grantham v. J & B Sausage Co., Inc.</i> , No. 14-15-00227-CV, 2016 WL 2935874 (Tex. App.—Houston [14th Dist.] May 17, 2016, no pet.) (mem. op.).....	8
<i>Guillory v. Seaton, LLC</i> , 470 S.W.3d 237 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).....	3, 10
<i>Helena Chem. Co. v. Wilkins</i> , 47 S.W.3d 486 (Tex. 2001).....	5
<i>Henke Grain Co. v. Kennan</i> , 658 S.W.2d 343 (Tex. App.—Corpus Christi 1983, no writ).....	9
<i>HMR Funding LLC v. Melford Ankrum & Best Transp. Servs., Inc.</i> , No. 14-17-00702-CV, 2017 WL 6102784 (Tex. App.—Houston [14th Dist.] Dec. 7, 2017, no pet.)	15
<i>Holland v. Davis</i> , No. 05-15-01173-CV, 2016 WL 3547982 (Tex. App.—Dallas June 28, 2016, no pet. h.) (mem. op.).....	8
<i>In re Butt</i> , 495 S.W.3d 455 (Tex. App.—Corpus Christi 2016, orig. proceeding)	3, 4, 5, 13
<i>In re Columbia Med. Ctr. of Las Colinas</i> , 306 S.W.3d 246 (Tex. 2010).....	12
<i>In re Essex Ins. Co.</i> , 450 S.W.3d 524 (Tex. 2014).....	10, 13

<i>In re Estate of Mathis</i> , 543 S.W.3d 927 (Tex. App.—Eastland 2018, no pet.)	6
<i>In re Houston Specialty Ins. Co.</i> , No. 14-17-00928-CV, 2017 WL 6330984 (Tex. App.—Houston [14th Dist.] Dec. 12, 2017, no pet.)	13
<i>In re J.C.</i> , 399 S.W.3d 235 (Tex. App.—San Antonio 2012, no pet.).....	14, 15
<i>In re Keenan</i> , 501 S.W.3d 74 (Tex. 2016).....	12
<i>In re McAllen Med. Ctr., Inc.</i> , 275 S.W.3d 458 (Tex. 2008).....	12
<i>In re Odebrecht Constr., Inc.</i> , No. 13-17-00289-CV, 2018 WL 1737074 (Tex. App.—Corpus Christi Apr. 11, 2018, no pet. h.) (mem. op.).....	8, 11, 13
<i>In re Prudential Ins. Co. of Am.</i> , 148 S.W.3d 124 (Tex. 2004).....	12
<i>In re Tex. Dep’t of Family & Protective Servs.</i> , 210 S.W.3d 609 (Tex. 2006).....	12
<i>In re Univ. of the Incarnate Word</i> , 469 S.W.3d 255 (Tex. App.—San Antonio 2015) (orig. proceeding).....	9
<i>Int’l Energy Ventures Mgmt., LLC v. United Energy Grp., Ltd.</i> , 818 F.3d 193 (5th Cir. 2016)	1
<i>Johnson v. City of Shelby</i> , 135 S.Ct. 346 (2014).....	11
<i>Kidd v. Cascos</i> , No. 03-14-00805, 2015 WL 9436655 (Tex. App.—Austin Dec. 22, 2015, no pet.).....	10
<i>Koenig v. Blaylock</i> , 497 S.W.3d 595 (Tex. App.—Austin 2016, pet. denied).....	5, 13
<i>McClain v. Dell, Inc.</i> , No. 07-15-00141-CV, 2015 WL 5674885 (Tex. App.—Amarillo Sept. 24, 2015, pet. denied) (mem. op.).....	8
<i>Odam v Tex. Credit Union</i> , No. 5-16-00077-CV, 2017 WL 3634274(Tex. App.—Dallas Aug. 24, 2017, no pet.)	6

<i>Quaestor Invs., Inc. v. State of Chiapas</i> , 997 S.W.2d 226 (Tex. 1999).....	9
<i>Quintanilla v. Trevino</i> , No. 13-15-00377-CV, 2016 WL 1552025 (Tex. App.—Corpus Christi Apr. 14, 2016, no pet.) (mem. op.).....	3, 5
<i>Ragsdale v. Progressive Voters League</i> , 801 S.W.2d 880 (Tex. 1990) (per curiam).....	6
<i>Ramirez v. Owens</i> , No. 07-15-00152-CV, 2015 WL 7422890 (Tex. App.—Amarillo Nov. 19, 2015, pet. denied) (mem. op.).....	2
<i>Reaves v. City of Corpus Christi</i> , 518 S.W.3d 594 (Tex. App.—Corpus Christi 2017, no pet.)	passim
<i>Resendez v. Scottsdale Ins. Co.</i> , No. 1-15-CV-1082-RP, 2016 WL 756576 (W.D. Tex. Feb. 26, 2016)	11
<i>Romero v. Gonzalez</i> , No. 13-16-00172-CV, 2017 WL 771893 (Tex. App.—Corpus Christi Feb. 8, 2018, no pet.)	15
<i>Ruth v. Crow</i> , No. 03-16-00326-CV, 2018 WL 2031902 (Tex. App.—Austin May 2, 2018, no pet. h.) (mem. op.).....	3, 4, 5, 8
<i>Stallworth v. Ayers</i> , 510 S.W.3d 187 (Tex. App.—Houston [1st Dist.] 2016, no pet.)	10
<i>Target Corp. v. Ko</i> , No. 05-14-00502, 2014 WL 3605746 (Tex. App.—Dallas July 21, 2014, no pet.)	15
<i>Thuesen v. Amerisure Ins. Co.</i> , 487 S.W.3d 291 (Tex. App.—Houston [14th Dist.] 2016, no pet.).....	4, 6
<i>Vasquez v. Legend Natural Gas III, LP</i> , No. 04-14-00899-CV, 2016 WL 1729390 (Tex. App.—San Antonio Apr. 29, 2016, pet. filed).....	8
<i>Walker v. Owens</i> , No. 01-15-00361-CV, 2016 WL 1590681 (Tex. App.—Houston [1st Dist.] Apr. 19, 2016, no pet.)	5, 11
<i>Walker v. Packer</i> , 827 S.W.2d 833 (Tex. 1992).....	12

<i>Yeske v. Piazza Del Arte, Inc.</i> , 513 S.W.3d 652 (Tex. App.—Houston [14th Dist.] 2016, no. pet.).....	11
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STATUTES

Tex. Civ. Prac. & Rem. Code § 51.012	12
Tex. Civ. Prac. & Rem. Code § 51.014(d).....	13, 14
Tex. Civ. Prac. & Rem. Code § 51.014(f).....	14
Tex. Civ. Prac. & Rem. Code Ann. § 30.021 (West 2015).....	2
Tex. Gov’t Code Ann. § 22.004(g).....	2

RULES

Fed. R. Civ. P. 12(b)(6).....	10, 11
Tex. R. App. P. 28.3(d).....	15
Tex. R. App. P. 28.3(c).....	14
Tex. R. Civ. P. 59.....	6
Tex. R. Civ. P. 91a.....	<i>passim</i>

OTHER AUTHORITIES

Comment to 2013 Change to Rule 91a.....	4, 5, 7
Misc. Docket No. 12-9191 (Nov. 13, 2012)	2
Misc. Docket No. 13-9022 (Feb. 12, 2013).....	2

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.¹

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.² This is the first update with in-depth analysis of 91a issues relating to mandamus proceedings and permissive interlocutory appeals.

¹ 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).

² 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 Procedures³

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.1.⁴ At least one court has held that, in the absence of a 91a dismissal motion, a trial court cannot invoke Rule 91a’s

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,

³ 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.

⁴ 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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