

DISMISSAL MOTIONS UNDER RULE 91a

GREGORY P. SAPIRE
CLEVELAND | TERRAZAS PLLC
4611 Bee Caves Road
Suite 306B
Austin, Texas 78746

42nd ANNUAL PAGE KEETON
CIVIL LITIGATION CONFERENCE
NOVEMBER 8-9, 2019
HOUSTON, TEXAS

CHAPTER _____

GREGORY P. SAPIRE
Cleveland Terrazas PLLC
4611 Bee Caves Road, Suite 306B
Austin, Texas 78746
gsapire@clevelandterrazas.com
Phone: (512) 431-9518

Greg represents businesses and individuals in complex, multi-party, shareholder-derivative, and class action civil litigation in both court and private arbitration. These matters concern a wide variety of claims involving breach of contract, breach of fiduciary obligations, securities fraud, noncompetition obligations, warranty disputes, trade secret misappropriation, unfair competition, usurpation of corporate opportunities, products liability, professional negligence, and regulatory issues.

Greg also has experience representing clients before federal and state regulatory agencies in investigations, contested matters, and rulemakings.

Greg has tried, either as first chair or in a supporting role, a variety of cases to juries, the bench, and arbitrators.

A significant portion of Mr. Sapire's practice involves representing banks and other secured creditors in litigation arising from leasing and lending relationships, including advice on litigation strategy related to foreclosures, workouts, repossession of collateral, and debt collection. These matters frequently involve extraordinary remedies such as receivership proceedings, writs of attachment or sequestration, and other types of emergency injunctive relief.

Mr. Sapire also counsels private sector and governmental-entity clients concerning compliance with the Texas Open Meetings Act, the Texas Public Information Act, and the federal Freedom of Information Act. He also represents them in litigation involving these statutes, including disputes over requests to governmental entities to release proprietary, trade secret, or otherwise confidential information.

Professional/Civic Activities

State Bar of Texas: Litigation, Antitrust & Business, Construction, & Administrative Law Sections
Austin Bar Association: Chair, Civil Litigation Section 2016-2017
Barrister, Lloyd Lochridge Chapter, American Inns of Court (2010-2013)
Barrister, Robert W. Calvert Chapter, American Inns of Court (2006-2008)
Vice-Chair, City of Austin Urban Transportation Commission (2006-2008)
Member, Board of Trustees, SafePlace Foundation (2005-2008)
Member, Board of Directors, Austin Jewish Academy (2010-present)
Member, American Health Lawyers Association

Professional Background

University of Texas School of Law, J.D. with Honors, 1994
University of Texas at Austin, B.A. with High Honors, Plan II Honors Program, 1990
Briefing Attorney for Chief Justice Thomas R. Phillips, Texas Supreme Court
Admitted to Practice: Texas, U.S. Court of Appeals for the Fifth Circuit, and U.S. District Courts for the Western, Eastern, Northern and Southern Districts of Texas

TABLE OF CONTENTS

	Page
1. Origins of Rule 91a.....	1
2. “Dismissal of Baseless Causes of Action” under Rule 91a.....	1
3. Contents of a Rule 91a Motion to Dismiss.....	2
3.1 No Basis in Law	4
3.2 No Basis in Fact.....	5
4. Applicable Deadlines and Related Timing Considerations.....	5
5. Hearing on Rule 91a Dismissal Motion.....	7
6. Fee-Shifting under Rule 91a	7
7. Appellate Review of Dismissals under Rule 91a.....	9

TABLE OF AUTHORITIES

Cases	Pages
<i>Aguilar v. Morales</i> , No. 08-15-00098-CV, 2017 Tex. App. LEXIS 369 (Tex. App.—Austin Feb. 24, 2017, pet. denied).....	1
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	8
<i>Auzenne v. Great Lakes Reins.</i> , PLC, 497 S.W.3d 35 (Tex. App.—Houston [14th Dist.] 2016, no pet.).....	3
<i>Auzenne v. Great Lakes Reinsurance, PLC</i> , No. 14-15-00159-CV, 2016 WL 2758615 (Tex. App.—Houston [14th Dist.] May 10, 2016, no pet.)	3
<i>Bass v. Waller County Sub-Reg'l Planning Comm'n</i> , 514 S.W.3d 908 (Tex. App.—Austin 2017, no pet.).....	9
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 554 (2007)	8
<i>Boswell v. Ector County Ind. Sch. Dist.</i> , No. 11-15-00013-CV, 2016 WL 1443606 (Tex. App.—Eastland Apr. 7, 2016, no pet.)	3
<i>Chambers v. Tex. Dep't of Transp.</i> , No. 05-13-01537-CV, 2015 WL 1756087 (Tex. App.—Dallas Apr. 17, 2015, no pet.)	8, 4
<i>Chisholm v. Bewley Mills</i> , 287 S.W.2d 943 (Tex. 1956).....	5
<i>City of Austin v. Liberty Mutual Ins.</i> , 431 S.W.3d 817 (Tex. App.—Austin 2014, no pet.).....	3, 10, 5
<i>City of Dallas v. Sanchez</i> , 494 S.W.3d 722 (Tex. 2016).....	4, 8, 10, 1
<i>Comm'n for Lawyer Discipline v. Hanna</i> , 513 S.W.3d 175 (Tex. App.—Houston [14th Dist.] 2016, no pet.)	2
<i>ConocoPhillips v. Koopmann</i> , 547 S.W.3d 858, 863 (Tex. 2018)	10
<i>ConocoPhillips Co. v. Koopmann</i> , 542 S.W.3d 643, 650 (Tex. App.—Corpus Christi 2016), <i>aff'd in part, rev'd in part</i> , 547 S.W.3d 858 (Tex. 2018).....	7, 2

<i>Craig Penfold Props., Inc. v. The Travelers Cas. Ins. Co.</i> , No. 3-14-CV-326-L, 215.....	8
<i>Dailey v. Thorpe</i> , 445 S.W.3d 785 (Tex. App.—Houston [1st Dist.] 2014, no pet.).....	3, 5, 6, 5
<i>Davis v. Metro Lloyds Ins. Co. of Texas</i> , No. 4:14-CV-957-A, 2014 WL 456726 (N.D. Tex. Feb. 3, 2015)	8
<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)	4
<i>DeVoll v. Demonbreun</i> , No. 04-14-00116-CV, 2014 WL 7440314 (Tex. App—San Antonio Dec. 31, 2014, no pet.)	8, 5
<i>Ditto v. Campos</i> , No. 13-15-00517, 2016 Tex. App. LEXIS 12522 (Tex. App.—Corpus Christi, Nov. 23, 2016, no pet.).....	2
<i>Drake v. Chase Bank</i> , No. 02-13-00340-CV, 2014 WL 6493411 (Tex. App.—Fort Worth Nov. 20, 2014, no pet.)	6, 7, 5
<i>Drake v. Walker</i> , No. 05-14-00355-CV, 2015 WL 2160565 (Tex. App.—Dallas May 8, 2015, no pet.)	5, 7, 8, 4
<i>Drake v. Walker</i> , No. 15-14-00355-CV, 2015 WL 216565 (Tex. App.—Dallas May 8, 2015, no pet.) (mem. op).....	5
<i>Estate of Sheshtawy</i> , 478 S.W.3d 82 (Tex. App.—Houston [14th Dist.] 2015, no pet.).....	4, 4
<i>Evans v. Fuller</i> , No. 14-14-01019-CV, 2016 Tex. App. LEXIS 11267 (Tex. App.—Houston [14th Dist.], Oct. 18, 2016, no pet.)	2
<i>Galan Family Trust v. State</i> , No. 03-15-00816-CV, 2017 Tex. App. LEXIS 1574 (Tex. App.—Austin Feb. 24, 2017, pet. filed).....	1
<i>Gaskill v. VHS San Antonio Partners, LLC</i> , 456 234, 238 (Tex. App.—San Antonio 2014, pet. denied).....	6
<i>Gaskill v. VHS San Antonio Partners, LLC</i> , 456 S.W.3d 234 (Tex. App.—San Antonio 2014, pet. denied).....	5

<i>Glass Cars, Inc. v. Ortiz</i> , No. 05-15-00117-CV, 2016 Tex. App. LEXIS 8910 (Tex. App.—Dallas Aug. 16, 2016, no pet.)	7, 8
<i>GoDaddy.com, LLC v. Toups</i> , 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied)	8, 5
<i>Gonzalez v. Dallas Cty. Appraisal Dist.</i> , No. 05-13-01658-CV, 2015 WL 3866530 (Tex. App.—Dallas June 23, 2015, no pet.)	4, 8, 4
<i>Grantham v. J&B Sausage Co.</i> , 14-15-00227-CV, 2016 Tex. App. LEXIS 5168 (Tex. App.—Houston [14th Dist.] May 17, 2016, no pet.).....	3
<i>Guillory v. Seaton, LLC</i> , 470 S.W.3d 237 (Tex. App.—Houston [1st Dist.] 2015, pet. denied)	3, 3
<i>Guzder v. Haynes & Boone</i> , LLP, No. 01-13-00985-CV, 2015 WL 3423731 (Tex. App.—Houston [1st Dist.] May 28, 2015, no pet.)	4
<i>Highland Capital Mgmt., LP v. Looper Reed & McGraw, PC</i> , No. 05-15-00055-CV, 2016 WL 164528 (Tex. App.—Dallas Jan. 14, 2016, pet. denied)	4, 3
<i>Holland v. Davis</i> , No. 05-15-01173-CV, 2016 Tex. App. LEXIS 6829 (Tex. App.—Dallas, June 28, 2016, no pet.)	2
<i>In the Guardianship of Peterson</i> , No. 01-15-00567-CV, 2016 Tex. App. LEXIS 9364 (Tex. App.—Houston [1 st Dist.] Aug. 25, 2016, no pet.).....	5, 2
<i>In re Butt</i> , 495 S.W.3d 455 (Tex. App.—Corpus Christi 2016, no pet.).....	10, 1, 3
<i>In re Essex Ins. Co.</i> , 450 S.W.3d 524 (Tex. 2014) (per curiam) (orig. proceeding).....	3, 10, 1
<i>See In re HMR Funding, LLC</i> , No. 14-18- at 00085-CV, 2018 Tex. App. LEXIS 5877 at *9-*10 (Tex. App.—Houston [14 th Dist.] July 31, 2018, no pet.)	11
<i>In re Odebrecht Constr., Inc.</i> , 548 S.W.3d 739, 744 (Tex. App.—Corpus Christi 2018, no pet.) (mandamus)	10
<i>In re Sisk</i> , 14-13-00785-CV, 2014 WL 5492804 (Tex. App.—Houston [14th Dist.] Oct. 30, 2014, pet. denied)	5

<i>In re Wood Group PSN Inc.</i> , No. 04-18-00418-CV, 2018 Tex. App. LEXIS 8030 at *14 (Tex. App.—San Antonio Oct. 3, 2018, no pet. hist.)	5
<i>Jackson v. Port Arthur Indep. Sch. Dist.</i> , No. 09-15-00227-CV, 2017 WL 1425589 at *5 (Tex. App.—Beaumont Apr. 25, 2016, no pet.) (mem. op.)	3
<i>Kidd v. Cascos</i> , No. 03-14-00805, 2015 WL 9436655 (Tex. App.—Austin Dec. 22, 2015, no pet.)	8, 4
<i>Koenig v. Blaylock</i> , 497 S.W.3d 595 (Tex. App.—Austin 2016, pet. denied)	5, 2
<i>Machetta v. Millard</i> , No. 01-17-00857-CV, 2018 Tex. App. LEXIS 8734 *2 (Tex. App.—Houston [1 st Dist.] Oct. 25, 2018, no pet. hist.)	4
<i>Marshall v. Enter. Bank</i> , No. 10-16-00379-CV, 2018 Tex. App. LEXIS 7421 at *6-*7 (Tex. App.—Waco Sept. 5, 2018, no pet. hist.) (mem. op.)	6
<i>McClain v. Dell, Inc.</i> , No. 07-15-00141-CV, 2015 WL 5674885 (Tex. App.—Amarillo Sept. 24, 2015, pet. denied)	4
<i>Merrick v. Heller</i> , 500 S.W.3d 671 (Tex. App.—Austin 2016, pet. denied)	2
<i>New Life Assembly of God of City of Pampa, Tex. v. Church Mutual Ins. Co.</i> , No. 2:15-CV-0051-J, 2015 WL 2234890 (N.D. Tex. May 12, 2015).....	9
<i>Parkhurst v. Office of Attorney Gen. of Tex.</i> , 481 S.W.3d 400 (Tex. App.—Amarillo 2015, no pet.).....	9, 3
<i>Quintinilla v. Trevino</i> , No. 13-15-00377-CV, 2016 WL 1552025 (Tex. App.—Corpus Christi Apr. 14, 2016, no pet.)	2
<i>Reaves v. City of Corpus Christi</i> , 518 S.W.3d 594 (Tex. App.—Corpus Christi 2017, no pet.).....	9, 5, 3, 1
<i>Resendez v. Scottsdale Ins. Co.</i> , No. 1-15-CV-1082-RP, 2016 WL 756576 (W.D. Tex. Feb. 26, 2016)	9
<i>Shumway v. Whispering Hills of Comal Cnty. Tex. Prop. Owners Ass’n</i> , No. 03-15-00513-CV, 2016 Tex. App. LEXIS 8822 (Tex. App.—Austin, Aug. 16, 2016, no pet.)	2
<i>Stallworth v. Ayers</i> , 510 S.W.3d 187 (Tex. App.—Houston [1st Dist.] 2016, no pet.).....	3, 1

<i>Stedman v. Paz</i> , No. 13-13-00595-CV, 2015 WL 5157598 (Tex. App.—Corpus Christi Sept. 2, 2015, no pet.)	4
<i>Tex. City Patrol, LLC v. El Dorado Ins. Agency, Inc.</i> , No. 01-15-01096-CV, 2016 Tex. App. LEXIS 7359 (Tex. App.—Houston [1st Dist.] July 12, 2016, no pet.)	2
<i>Thomas v. Long</i> , 207 S.W.3d 334 (Tex. 2006).....	9
<i>Thomas v. 462 Thomas Family Properties, LP</i> , No. 05-16-01161-CV, 2018 Tex. App. LEXIS 6040 at *5-*6 (Tex. App.—Dallas Aug. 2, 2018, pet. filed)	3
<i>Thuesen v. Amerisure Ins. Co.</i> , No. 14-14-006666-CV, 2016 WL 514404 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, no pet.)	4, 7
<i>Townsend v. Montgomery Cent. Appraisal Dist.</i> , No. 14-14-00103-CV, 2015 WL 971313 (Tex. App.—Houston [14th Dist.] Mar. 3, 2015, no pet.)	1, 4
<i>Vasquez v. Legend Natural Gas III, L.P.</i> , 492 S.W.3d 448 (Tex. App.—San Antonio 2016, no pet.)	8, 3
<i>Walker v. Owens</i> , 01-15-00361-CV, 2016 WL 1590681 (Tex. App.—Houston [1st Dist.] Apr. 19, 2016, no pet.)	5, 3
<i>Walker v. Packer</i> , 827 S.W.2d 833 (Tex. 1992).....	10
<i>Wooley v. Schafer</i> , 447 S.W.3d 71 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).....	8, 4, 3, 2
<i>Yeske v. Piazza Del Arte, Inc.</i> , No. 14-15-00633-CV, 2016 Tex. App. LEXIS 13607 (Tex. App.—Houston [14th Dist.] Dec. 22, 2016, no pet.) (mem. op.).....	1
<i>Zheng v. Vacation Network, Inc.</i> , 468 S.W.3d 180 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).....	8, 7, 6, 1
Statutes	
Government Code § 22.004	1
Tex. Civ. Prac. & Rem. Code Ann. § 30.021.....	1
Tex. Civ. Prac. & Rem. Code § 51.014.....	9, 10

Tex. Gov't Code Ann. § 22.004(g)-(h) 1

Rules

Fed. R. Civ. P. 12(b)(6) 1, 2, 8

Tex. R. Civ. P. 458, 9

Tex. R. Civ. P. 592

Tex. R. Civ. P. 91a*passim*

DISMISSAL MOTIONS UNDER RULE 91a

1. Origins of Rule 91a¹

Rule 91a of the Texas Rules of Civil Procedure became effective on March 1, 2013 as the result of House Bill 274, passed by the 82nd Legislature in 2011. The bill called generally for “rules to promote the prompt, efficient, and cost-effective resolution of civil actions,” and specifically for “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)-(h) (West 2015). The statute 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.* § 22.004(g).

In conjunction with enacting Section 22.004 of the Government Code, the Legislature also added Section 30.021 to the Texas Civil Practice and Remedies Code, which provides that “[i]n 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 [Texas Supreme Court] under Section 22.004(g), Government Code, the court shall award costs and reasonable and necessary attorneys’ fees to the prevailing party.” Tex. Civ. Prac. & Rem. Code Ann. § 30.021 (West 2015). This fee-shifting statute, however, specifically excepts from its scope “actions by or against the

state, other governmental entities, or public officials acting in their official capacity or under color of law.” See *id.*

2. “Dismissal of Baseless Causes of Action” under Rule 91a.

The Texas Supreme Court issued Rule 91a in an administrative order dated February 12, 2013, under which the rule became effective on March 1, 2013. See Misc. Docket No. 13-9022 (Feb. 12, 2013). The rule is entitled “Dismissal of Baseless Causes of Action.”

As of the date of this paper, at least 47 Texas appellate court opinions have substantively addressed Rule 91a since it took effect. **Table 1** lists those opinions and summarizes the key issues in each of them.²

A party does not subject itself to the court’s full jurisdiction by filing a Rule 91a dismissal motion. Instead, the movant “submits to the court’s jurisdiction only in proceedings on the motion” Tex. R. Civ. P. 91a.8. Indeed, Rule 91a “is in addition to, and does not supersede or affect, other procedures that authorize dismissal.” *Id.* 91a.9. Such “other procedures” include special exceptions and summary judgment motions. See, e.g., *Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 185 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *Townsend v. Montgomery Cen. Appraisal Dist.*, No. 14-14-00103-CV, 2015 WL 971313, at *8 (Tex.

¹ This paper builds on the paper by 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.

² The summary of cases in **Table 1** includes only Texas appellate cases that substantively analyze Rule 91a, and therefore omits, among other cases, Texas cases that merely reference the rule and federal cases involving Rule 91a.

App.—Houston [14th Dist.] Mar. 3, 2015, no pet.) (mem. op.) (rejecting application of Rule 91a deadlines to a summary judgment motion granted by the trial court).

Rule 91a has been compared to Federal Rule of Civil Procedure 12(b)(6), which provides for dismissal of actions that fail to state a cognizable claim. See, e.g., *Wooley v. Schaffer*, 447 S.W.3d 71, 74-75 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). One commentator has noted, however, that although Rule 91a appears similar in some respects to Rule 12(b)(6), “the Supreme Court Advisory Committee and its subcommittee went out of their way to make clear that the dismissal rule is not merely a little [R]ule 12(b)(6).”³

Whatever the case, prior to the adoption of Rule 91a, Texas civil procedure provided no mechanism other than special exceptions under Rules 90 and 91 by which to challenge the sufficiency of pleadings. See Tex. R. Civ. P. 91. Under Rule 91a, however, a party “may move to dismiss a cause of action on the grounds that it has no basis in law or fact.” Specifically, Rule 91a provides in substantive part:

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.

Tex. R. Civ. P. 91a.1.⁴

In a suit asserting a claim with no basis in law, Rule 91a may be largely redundant to special exceptions—while, unlike special exceptions, imposing a mandatory attorneys’ fees award against the losing party. For suits asserting claims with no basis in fact, Rule 91a may offer the only opportunity for an expedited resolution.⁵

3. Contents of a Rule 91a Motion to Dismiss

A Motion to Dismiss under Rule 91a must state that it is made pursuant to the rule, “identify each cause of action to which it is addressed, and . . . state specifically the reasons the cause of action has no basis in law, no basis in fact, or both. *Id.* Rule 91a.2; see also *Quintinilla v. Trevino*, No. 13-15-00377-CV, 2016 WL 1552025, at *3 (Tex.

³ Hon. Randy Wilson, *From My Side of the Bench: Motions to Dismiss*, *The Advocate*, Winter 2013 at 81.

⁴ The court in *Ramirez v. Owens* affirmed the dismissal by the trial court of a claim pursuant to Rule 91a in a case governed by Chapter 14 of the Texas Civil Practice & Remedies Code because neither party complained of it on appeal. No. 07-15-00152-CV, 201 WL 7422890, at *1 (Tex. App.—Amarillo Nov. 19, 2015 (pet. denied) (mem. op.)).

⁵ Implying some skepticism whether many cases will be dismissed under Rule 91a for lacking any basis in fact, one district judge noted soon after the rule became effective that while “useful to dismiss the pro se nut suits . . . even if you are awarded attorneys’ fees . . . collecting such fees could prove challenging.” Hon. Randy Wilson, *From My Side of the Bench: Motions to Dismiss*, *The Advocate*, Winter 2013 at 82.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Dismissal Motions Under Rule 91a

Also available as part of the eCourse

[2018 Page Keeton Civil Litigation eConference](#)

First appeared as part of the conference materials for the
42nd Annual Page Keeton Civil Litigation Conference session
"Early Dismissal Trends: 91a Dismissals and Anti-SLAPP"