

DISMISSAL MOTIONS UNDER RULE 91a

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

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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

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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.

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