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# ESSAY

## 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 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 a more robust dismissal procedure.<sup>2</sup> Over the next

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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.”).

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*

year and a half, rule makers crafted the language that would ultimately become Rule 91a.<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 wave of appellate decisions interpreting the rule began to come ashore in the first half of 2014.<sup>5</sup>

These early decisions examined various aspects of Texas's 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 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 practices 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

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*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 & W. Bradley Parker, *Rule 91a Motions to Dismiss*, in *ULTIMATE MOTIONS PRACTICE 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.*, No. 3:15-CV-1087-D, 2015 WL 5098047, at \*3 n.2 (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 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 the 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.

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 state courts have traditionally applied a “fair notice” pleading standard, requiring courts to liberally construe pleadings in favor of the pleader and against early dismissal.<sup>10</sup> But relying on the pre-91a pleading standard begs the question of what practical impact the new rule has had on Texas pleading, particularly in relationship to federal pleading and dismissal practice. Courts are split on whether Texas has adopted something like federal plausibility pleading or retained a fair-notice pleading tradition. The story actually begins almost a decade ago, however, when the United States Supreme Court announced stricter pleading standards that reverberated around the procedural world.

#### A. *Federal Pleading Reform*

Texas’s new dismissal rule was not adopted in a vacuum. Pleading and dismissal practice has been the subject of substantial (and controversial) reform at the federal level over the past decade.<sup>11</sup> In *Bell Atlantic Corp. v. Twombly* and progeny, the Supreme Court jettisoned the longstanding liberal pleading rule from *Conley v. Gibson* and replaced it with a more onerous “plausibility” pleading.<sup>12</sup>

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8. *Id.*

9. *Id.*

10. TEX. R. CIV. P. 47 (“An original pleading . . . shall contain[] a short statement of the cause of action sufficient to give fair notice of the claim involved”); *see also* *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000) (“Texas follows a ‘fair notice’ standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.”).

11. *See, e.g.*, Luke Meier, *Why Twombly Is Good Law (but Poorly Drafted) and Iqbal Will Be Overturned*, 87 IND. L.J. 709, 710–11 (2012) (noting that commentators have characterized *Twombly* and *Iqbal* as a joint “revolution” in pleading practice before criticizing some commentary for treating the two cases as analytically cohesive and observing that the opinions have been both praised and criticized).

12. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (examining allegations in complaint for plausibility), *abrogating* *Conley v. Gibson*, 355 U.S. 41 (1957).

Under the new regime, federal courts considering 12(b)(6) motions must disregard conclusory allegations and then consider whether the remaining factual allegations “plausibly” state a claim for relief. The opinions set off a firestorm of criticism from the academy and practitioners alike.<sup>13</sup> According to these voices, *Twiqbal* (as the new pleading cases, perhaps unfortunately, have come to be known) unduly raises the bar for plaintiffs, particularly those in cases with substantial information asymmetry (who need discovery to be able to more fully state a claim).<sup>14</sup> On the other side of the debate, some contend that discovery is too costly in particular contexts and that more effective pre-discovery dismissal is necessary to reign in an out-of-control litigation system.<sup>15</sup> The debate over *Twiqbal* and the costs of pretrial discovery has largely (and perhaps unduly) dominated procedure-reform discussions for years.<sup>16</sup>

### B. Confusion in Texas

In light of this context, it is no surprise that attorneys seeking dismissal (along with some commentators) frequently contend that the Supreme Court of Texas effectively adopted something like plausibility pleading when drafting 91a. The text of the rule, the relevant Texas pleading rules, and 91a’s legislative history

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13. See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (“[W]herever you stand on pleading—whether you think the federal litigation system is awash with frivolous suits, or whether you would purify the role of pleading by eliminating entirely its screening function—you should lament these recent decisions.”); Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 848 (2012) (“[T]he Supreme Court caused an enormous stir—among judges, scholars, and practitioners—over the proper pleading standard.”).

14. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009) (“Perhaps the most troublesome possible consequence of *Twombly* and *Iqbal* is that they will deny access to court to plaintiffs and prospective plaintiffs with meritorious claims who cannot satisfy their requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries.”).

15. See, e.g., Redish, *supra* note 13, at 871 (“Because of the potential burdens of discovery, an unduly lax pleading standard cannot be imposed without seriously skewing the substantive-procedural balance towards pathological over-enforcement of the substantive law.”); cf. Richard Marcus, *Procedural Postcard from America*, 1 RUSS. L.J. 9, 17 (2013) (“As a political matter, the notion that American litigation is too costly and time-consuming has gained much force. As an empirical matter, proving or evaluating such claims is difficult and involves contentious value judgments.”).

16. Redish, *supra* note 13, at 849 (“It is probably not an overstatement to suggest that the combination of lower court confusion and intense scholarly controversy caused by two Supreme Court decisions concerning the Federal Rules over so short a time period is unprecedented.”).

make the correctness of such arguments less than obvious, however.<sup>17</sup> As a result, courts have struggled and split on 91a's impact on Texas pleading standards.<sup>18</sup>

In one early case, a Texas trial court denied a Rule 91a motion where an Internet service allegedly hosting revenge porn claimed immunity under a federal communications statute.<sup>19</sup> The trial court certified the case for interlocutory review, and the appellate court ultimately reversed the dismissal.<sup>20</sup> Along the way, the court considered, as a matter of first impression, the 91a dismissal standard.<sup>21</sup> Finding that 91a is "analogous" to federal dismissal practice, the court noted that cases "interpreting Rule 12(b)(6) are instructive."<sup>22</sup> Indeed, the court explicitly cited *Twombly's* plausibility language: "For a complaint to survive [a] Rule 12(b)(6) motion to dismiss, it must contain enough facts to state a claim to relief that is plausible on its face."<sup>23</sup>

Other courts have given sub-optimal, and potentially conflicting, guidance. For instance, in *Wooley v. Schaffer*, the court reviewed the dismissal of a convict's complaints against his former habeas attorney.<sup>24</sup> The court examined the 91a dismissal standard as a matter of first impression. Simultaneously analogizing Rule 91a motions to pleas to the jurisdiction, federal rule 12(b)(6) motions and plausibility pleading, and (at least implicitly) special exceptions practice, the court articulated a mash-up of standards before arguably adopting the fair notice standard in the 91a context.<sup>25</sup>

The confusing approach drew the comment of Chief Justice Frost.<sup>26</sup> Her concurrence pointed out distinctions between 91a and the other procedures to which the majority drew comparisons. Frost concluded:

Rule 91a is unique, an animal unlike any other in its particulars. Because this new procedural creation differs from

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17. See, e.g., Patton, *supra* note 2, at 496–501 ("There are numerous reasons why federal 'plausibility' standards should be inapplicable when deciding whether a cause of action has no basis in fact under Rule 91a.").

18. See *In re Essex Ins.*, 450 S.W.3d 524, 525 (Tex. 2014) (per curiam). The Supreme Court of Texas, in its only opinion applying Rule 91a so far, was silent with respect to the practical impact of Rule 91a on Texas pleading standards. *Id.*

19. *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 753–54 (Tex. App.—Beaumont 2014, pet. denied).

20. *Id.*

21. *Id.* at 754–55.

22. *Id.* at 754.

23. *Id.* (internal quotations omitted).

24. *Wooley v. Schaffer*, 447 S.W.3d 71 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

25. *Id.* at 76.

26. *Id.* at 79.

other procedures in its terms, benefits, and applications, courts should treat it as its own kind without analogizing it to other species, lest practitioners and trial courts fall into error by tailoring their motions and rulings to meet provisions that are different from the terms of Rule 91a.<sup>27</sup>

Despite the ambiguity of *Wooley's* approach, courts have cited the case for the proposition that Rule 91a has not disturbed Texas's traditional fair-notice pleading standard.<sup>28</sup>

### C. Federal Courts Take Educated Guesses

Federal courts have also had the opportunity to guess at Texas's new pleading standards in the context of diversity removals. Defendants sometimes remove cases where the plaintiff has simultaneously sued diverse and non-diverse defendants on the theory that the non-diverse defendant was improperly joined.<sup>29</sup> The reasoning in such cases goes that the state-court plaintiff joined the non-diverse defendant on a thin or non-existent factual basis to defeat diversity jurisdiction.<sup>30</sup> When the plaintiff seeks to remand, the court must consider whether the plaintiff sufficiently pleaded a claim against the non-diverse defendant.<sup>31</sup> Texas federal courts examining improper joinder typically employ state-court pleading standards out of fairness to plaintiffs who plead in accordance with the forum court's rules.<sup>32</sup>

Federal courts, like their state counterparts, have struggled to understand the impact of Rule 91a on Texas's pleading standard. Some federal courts have adopted a 12(b)(6)-like analysis, complete with plausibility pleading requirements.<sup>33</sup> At the other

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27. *Id.* at 84.

28. *See, 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.) (citing *Wooley* for the proposition that “we 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.”).

29. *See, e.g.,* *Linron Properties, Ltd. v. Wausau Underwriters Ins.*, No. 3:15-CV-00293-B, 2015 WL 3755071, at \*1–2 (N.D. Tex. June 16, 2015) (deciding motion to remand on the basis of improper joinder of non-diverse defendant).

30. *See, e.g.,* *Short v. JPMorgan Chase Bank, N.A.*, No. 3:15-CV-1953-M-BN, 2015 WL 4635883, at \*2 (N.D. Tex. Aug. 4, 2015) (“A defendant alleging that a non-diverse defendant is improperly joined has the heavy burden of demonstrating . . . inability of the plaintiff to establish a cause of action against the non-diverse party in state court.”) (internal quotations omitted).

31. *See id.*

32. Indeed, the Fifth Circuit has, in recent weeks, published an opinion settling the question of whether state or federal standards apply when courts decide the improper joinder question. *See Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, \_\_\_ F.3d \_\_\_, No. 14-20552, 2015 WL 4979009, at \*3 (5th Cir. Aug. 21, 2015) (holding that in the improper joinder context “in accordance with at least three unpublished decisions of our court, . . . the Texas pleading standard applies.”).

33. *See, e.g.,* *Rush v. Jacobs Eng'g Grp., Inc.*, No. 3:14-CV-3723-B, 2015 WL 1511122, at \*5 (N.D. Tex. Apr. 2, 2015) (citing plausibility pleading precedent before holding that

end of the spectrum, some courts (relying on the 5th Circuit's recent reliance on Texas's fair notice standard without reference to Rule 91a) have concluded that Rule 91a has had limited impact on pleading practice in Texas.<sup>34</sup> Obviously, federal courts' interpretations of a Texas procedural rule are not binding on Texas state courts, but they are instructive. Unfortunately for practitioners, federal Rule 91a opinions (like Texas's own courts) are split.

#### *D. Unanswered Questions*

For now, practitioners (and indeed intermediate courts that have not yet spoken on the issue) should treat questions about Rule 91a's practical impact on Texas pleading practice as unsettled. For those arguing that fair notice pleading still reigns, the text of the rule, adopted in the era of *Twiqbal*, does not explicitly mention plausibility pleading.<sup>35</sup> Nor does the legislative history appear to indicate that the supreme court was bound to a plausibility concept.<sup>36</sup> Likewise, the supreme court left the fair-notice provision of Rule 47 untouched, suggesting that nothing has changed.<sup>37</sup>

On the other hand, the text of Rule 91a suggests that at least something has changed in Texas pleading practice. As one appellate court astutely noted, it seems inconsistent to apply the traditional pleading standard's recitation that courts must accept the factual allegations in a petition as "true" when Rule 91a expressly commands trial courts to weigh whether a reasonable person could believe those same facts.<sup>38</sup>

### III. RULE 91A MISCELLANY

In the first year-plus of Rule 91a's existence, courts around the state have issued dozens of 91a opinions, including one from

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"Plaintiff has stated a *plausible* claim against [the non-diverse defendant] for tortious interference and, therefore, that Plaintiff was properly joined as a party in this matter.") (emphasis added).

34. See, e.g., *Mainali Corp. v. Covington Specialty Ins.*, No. 3:15-CV-1087-D, 2015 WL 5098047, at \*3 n.2 (N.D. Tex. Aug. 31, 2015) ("The court has continued to apply the 'fair notice' pleading standard in a manner that is unaltered by Rule 91a.").

35. TEX. R. CIV. P. 91a.

36. See, e.g., *Patton*, *supra* note 2, at 496–97 (arguing that the legislative history behind the relevant statute indicates that Rule 91a was not intended to change Texas pleading practice).

37. The court did recently amend Rule 47 to require a more specific statement of the relief sought in civil actions, primarily to facilitate the function of new rules aimed at tiering discovery based on the amount of damages at stake. See TEX. R. CIV. P. 47. Subsection (a), however, still requires only that a party give "a short statement of the cause of action sufficient to give fair notice of the claim involved." TEX. R. CIV. P. 47(a).

38. *Drake v. Walker*, No. 05-14-00355-CV, 2015 WL 2160565, at \*3 (Tex. App.—Dallas May 8, 2015, no pet. h.) ("[W]e question whether, when determining whether no reasonable person could believe the facts pleaded, we must accept the pleaded facts as true.").



the Supreme Court of Texas. This Essay surveys a few decisions that are particularly relevant to courts and lawyers practicing under the new regime, including opinions covering notice-and-hearing, pleading amendments, availability of mandamus, and attorney-fee issues.

#### A. *Notice-and-Hearing Requirement Strictly Construed*

Parties who fail to set a Rule 91a hearing, and provide proper notice to the other side, may be out of luck. Rule 91a.6 requires “at least 14 days’ notice” of the “hearing on the motion to dismiss.”<sup>39</sup> Parties facing dismissal motions must file responses “no later than 7 days before the date of the hearing.”<sup>40</sup> These notice provisions exist against the backdrop of a rule requiring courts to grant or deny 91a motions “within 45 days after the motion is filed.”<sup>41</sup>

In *Gaskill v. VHS San Antonio Partners, LLC*, the court considered whether parties must give fourteen days’ notice of dismissal hearings when asking the court to decide the dismissal motion by submission.<sup>42</sup> In *Gaskill*, a malicious peer review case filed by a doctor against a hospital, the hospital moved to dismiss.<sup>43</sup> On the forty-second day after the motion was filed, the hospital attempted to get it heard (presumably because of the approaching forty-five day deadline for the court to rule).<sup>44</sup>

The hospital postured its request to the court as a motion to have the dismissal decided without oral argument (thereby, according to the hospital’s argument, eliminating the need for a “hearing” notice), enlarge the time for a rule 91a decision, or, in the alternative, reduce the hearing-notice times in the rule.<sup>45</sup> With fewer than three days’ notice to the plaintiff, the trial court heard the hospital’s request and granted the motion to dismiss.<sup>46</sup>

On appeal, the court appropriately held that Rule 91a’s notice provision should be strictly construed because dismissal is a “harsh remedy.”<sup>47</sup> Whether motions to dismiss under the rule are decided after an oral hearing or “hearing” by submission, parties facing dismissal are entitled to notice.<sup>48</sup> Because the plaintiff had

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39. TEX. R. CIV. P. 91a.6.

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

41. TEX. R. CIV. P. 91a.3.

42. *Gaskill v. VHS San Antonio Partners, LLC*, 456 S.W.3d 234, 237–38 (Tex. App.—San Antonio 2014, pet. filed).

43. *Id.* at 236.

44. *See id.* at 237.

45. *Id.*

46. *Id.*

47. *Id.* at 238.

48. *See id.* at 237.

no notice of the Rule 91a hearing, the court reversed the dismissal.<sup>49</sup>

### *B. Limited Post-Dismissal Pleading Amendments*

Rule 91a.5 provides that a party facing a dismissal motion may nonsuit the challenged cause of action.<sup>50</sup> Likewise, the party may amend its petition (presumably) to strengthen the allegations in response to the challenges raised by the movant.<sup>51</sup> If the cause of action is nonsuited at least three days before the hearing, the trial court may not rule on the motion.<sup>52</sup> And if the party facing dismissal amends its pleadings at least three days before the hearing, the movant may withdraw or amend its motion to dismiss.<sup>53</sup>

But what happens if a pleading party fails to amend before a Rule 91a hearing and resulting dismissal? According to one court, the pleader is out of luck. In *Dailey v. Thorpe*, the trial court dismissed a lawsuit based on a real-property conveyance gone bad.<sup>54</sup> After determining that the trial court properly dismissed the case, the court denied the plaintiffs' request to replead to correct their "defective" pleadings.<sup>55</sup> Besides not asking the trial court for leave to amend, the plaintiffs' argument also failed because "Rule 91a contemplates that a plaintiff faced with a motion to dismiss under [the] rule may choose to either nonsuit or amend the challenged causes of action *prior* to the hearing."<sup>56</sup> Thus, it appears that, despite analogies to federal 12(b)(6) practice with respect to pleading standards, Rule 91a (as its text indicates)<sup>57</sup> is stricter than federal pleading-amendment practice. Indeed, the rule does not allow pleading parties to "cure any defects after the fact."<sup>58</sup>

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49. *Id.* at 239. The plaintiff had no notice, a fatal flaw in the process according to the court. Because the plaintiff had no notice, the court did not decide questions about trial-court power to reduce or enlarge the Rule 91a time periods. *Id.*

50. TEX. R. CIV. P. 91a.5(a).

51. TEX. R. CIV. P. 91a.5(b).

52. TEX. R. CIV. P. 91a.5(a).

53. TEX. R. CIV. P. 91a.5(b). An amended motion to dismiss restarts the timetables for responses, amendments, and nonsuits. TEX. R. CIV. P. 91a.5(d).

54. *Dailey v. Thorpe*, 445 S.W.3d 785, 786 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

55. *Id.* at 790.

56. *Id.* (emphasis added).

57. See TEX. R. CIV. P. 91a.5.

58. *Dailey*, 445 S.W.3d at 790.

C. *Mandamus Available for Denial of a Motion to Dismiss*

An order denying a motion to dismiss is interlocutory, preventing review by traditional appeal.<sup>59</sup> On the other hand, an order granting a motion to dismiss is often final (or may be made final through a severance or other procedure to isolate a dismissed claim or claimant) allowing immediate appellate review. Must litigants who wrongfully lose a Rule 91a motion to dismiss endure a lengthy trial process on the should-have-been-dismissed claim? The Supreme Court of Texas, in its first published 91a opinion, answered that question with a resounding *no*.<sup>60</sup>

In *In re Essex*, a trial court denied a 91a motion filed by a commercial insurer in response to a declaratory judgment claim filed by a person injured at an insured's facility.<sup>61</sup> The insurer argued that the no-direct-action rule (which prohibits third-parties to insurance agreements from filing claims against the insurer directly) precluded the claim.<sup>62</sup>

The supreme court, on mandamus, reversed, holding that denying the 91a motion was an abuse of discretion.<sup>63</sup> According to the court, the plaintiff's suit directly against the insurer was plainly improper.<sup>64</sup> Moreover, the court went on to hold that if the insurer were forced to endure "fatally flawed" proceedings that would result from the 91a denial, it would be left with no adequate remedy on appeal.<sup>65</sup> Accordingly, mandamus was appropriate to review the trial court's interlocutory order.<sup>66</sup>

Thus, the court answered one big question in an unsurprising way but left others unanswered. Most notably, the court was silent on the pleading standard in the 91a context. Indeed, the opinion did not even mention standards. In one sense, this is not surprising—the dismissal dispute concerned a pure question of law with little factual dispute, perhaps the simplest context in which to apply 91a and one that avoids the "plausibility" question.

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59. See, e.g., *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 753–54 (Tex. App.—Beaumont 2014, pet. denied). In certain immunity cases and other cases where an interlocutory review is statutorily available, the denial of a 91a motion may be reviewable on interlocutory appeal. *E.g., id.*

60. *In re Essex*, 450 S.W.3d at 528.

61. *Id.* at 525.

62. *Id.*

63. *Id.* at 528.

64. *Id.* at 527.

65. *Id.* at 528.

66. *Id.*

#### D. Mandatory Trial and Appellate Attorney Fees

Rule 91a requires courts to award the prevailing party on a motion to dismiss reasonable and necessary attorney fees.<sup>67</sup> This mandatory scheme unquestionably requires courts to award fees incurred in the trial court in most circumstances. The propriety of awarding appellate attorney fees to prevailing parties on appeal, however, is less than clear. At least one court has weighed in, however, and concluded that the rule requires courts to award appellate attorney fees to prevailing parties as well.

In *Zheng v. Vacation Network, Inc.*, the court reviewed a trial court's dismissal of statutory Texas Timeshare Act claims and common law fraud claims against a timeshare company.<sup>68</sup> After dismissing plaintiff's claims, the trial court awarded attorney fees to the movant-timeshare company.<sup>69</sup>

The plaintiff appealed, and the court ultimately reversed the trial court's dismissal of the statutory claims but affirmed the dismissal of the fraud claims.<sup>70</sup> To the extent plaintiff prevailed on appeal, he asked the court to reverse the trial court's award of attorney fees for the defendants and award plaintiff his own appellate attorney fees.<sup>71</sup>

The defendants contended that Rule 91a.7 did not provide for appellate attorney fee awards and instead limited any award to fees incurred in the trial court.<sup>72</sup> The court of appeals rejected this argument, holding instead that the language of 91a.7 allows—even mandates—appellate attorney fee awards.<sup>73</sup> Looking to the language of the rule, the court noted that “there is nothing to suggest that ‘all costs and reasonable and necessary attorney fees’ excludes appellate costs and fees which are generally recoverable when attorney’s fees are authorized.”<sup>74</sup>

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

68. *Zheng v. Vacation Network, Inc.*, No. 14-13-01136-CV, 2015 WL 3424702, at \*1 (Tex. App.—Houston [14th Dist.] May 28, 2015, pet. filed); see also Carlos R. Soltero & Kayla Carrick, *Rule 91a 2015 Update*, 72 ADVOC. (TEX.), Fall 2015, at 28, [http://www.mcginislaw.com/images/uploads/news/Rule\\_91A\\_2015\\_Update.pdf](http://www.mcginislaw.com/images/uploads/news/Rule_91A_2015_Update.pdf) (discussing attorney fee issues arising from Rule 91a practice). The court also reviewed, and affirmed, the trial court's dismissal of claims against the president of the timeshare company. *Zheng*, 2015 WL 3424702, at \*1.

69. *Id.* at \*1.

70. *Id.* at \*5, \*7.

71. Be sure to have a court reporter at your 91a fee hearing. In a recent case, a Texas court refused to disturb a fee award where the losing party did not object to the absence of a reporter and the fee hearing went untranscribed. See *Gonzales v. Dall. Cty. Appraisal Dist.*, No. 05-13-01658-CV, 2015 WL 3866530, at \*4 (Tex. App.—Dallas June 23, 2015, no pet.).

72. See *Zheng*, 2015 WL 3424702, at \*5–6.

73. *Id.* at \*6.

74. *Id.*

The court ordered the trial court, on remand, to segregate fees by causes of action—plaintiff prevailed on some and defendants prevailed on others—without regard to whether those fees were incurred at the trial or appellate level.<sup>75</sup>

The message from this case is clear—litigants should proceed with caution in dismissal appeals. Appealing a 91a dismissal, only to have the decision affirmed, could leave the losing litigant facing a substantial fee award. On the flip side, parties that obtain unsound dismissals in the trial court risk having trial-court fee awards flipped against them on appeal and then having additional appellate fees heaped on top. By requiring the award of appellate fees to prevailing parties, Texas courts have ratcheted up the stakes in the dismissal game. The goal is, apparently, to limit frivolous lawsuits and meritless appeals. The result, however, may be to chill legitimate claims and dismissal motions in close cases.

#### IV. CONCLUSION

More than a year of Rule 91a decisions has left us without answers to the most pressing dismissal-practice question—what impact has the rule had on pleading specificity requirements relative to federal pleading, particularly in cases where parties allege that “no reasonable person” could believe the facts as pleaded?<sup>76</sup> Hopefully, in the year to come, the supreme court will weigh in to articulate a coherent explanation of where Texas stands on the pleading spectrum post-91a. In the meantime, expect some disarray on that question, and continued refinement of dismissal practice’s other details.

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75. *See id.* at \*6–7.

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