



# New Texas State Court Rules For Motions To Dismiss And Expedited Trials

Publication

5.24.13

Effective March 1, 2013, the Texas Supreme Court revised the Texas Rules of Civil Procedure by 1) allowing defendants, for the first time in Texas state court practice, to file the equivalent of a Federal Rule 12(b)(6) motion, and 2) providing an expedited trial procedure for cases involving less than \$100,000 in controversy. Both of these revisions could prove valuable for our clients with cases filed in Texas state court.

## Early Dismissal of Meritless Cases: Rule 91a

### 1. The Basics

Under new Rule 91a, a party may move to dismiss a cause of action that has “no basis in law or fact.” A claim has no basis in law if the allegations, taken as true, together with any reasonable inferences, “do not entitle the claimant to relief.” A claim has no basis in fact if “no reasonable person could believe the facts as pleaded.” As parties begin to file motions under Rule 91a, the law will develop as Texas courts interpret the Rule 91a standard, which differs from the “plausibility” standard from the U.S. Supreme Court’s Rule 12(b)(6) decisions in *Twombly* and *Iqbal*, familiar to federal litigators.

- A motion to dismiss a baseless case under Rule 91a must:
- state that it is made pursuant to Rule 91a;
- identify each cause of action to which it is addressed; and
- specifically state the reasons that the cause of action has no basis in law, fact, or both.

### 2. Timing

A Rule 91a movant must file the motion within 60 days after the first pleading that contains the cause of action at issue is served on the movant and at least 21 days before the hearing on the motion. Each party is entitled to 14 days’ notice of the hearing, although the court may decide the motion on the written submissions. The response is due seven days before the hearing. If the respondent amends the cause of action at least three days before the hearing, the movant may withdraw or amend the motion.

If the movant amends the motion, the Rule 91a time periods begin again. If the respondent nonsuits at least three days before the hearing, the court may not rule on the motion to dismiss. If the

at least three days before the hearing, the court may not rule on the motion to dismiss. If the respondent's amendment or nonsuit is not timely, however, the court must rule on the motion and may not consider the amendment or nonsuit.

### **3. The Court's Ruling**

The court must rule on the motion within 45 days after its filing, which seems to invite movants to seek mandamus relief if the court fails to timely rule. The court may not consider any evidence in deciding the motion.

### **4. Mandatory Fee Award**

Except in litigation by or against the government, the prevailing party on a Rule 91a motion is entitled to an award of fees and costs incurred on the challenged cause of action. The trial court must consider evidence in deciding the amount of the mandatory award.

### **5. Application**

Rule 91a applies to all cases, including those pending on March 1, 2013, other than cases brought under the Texas Family Code or in inmate litigation.

### **6. Effect on Order of Pleadings**

Rule 91a does not affect the order of pleadings under the Texas Rules of Civil Procedure: a party seeking to make a special appearance or motion to transfer venue must still file those pleadings before filing a Rule 91a motion to dismiss.

## **Expedited Actions: Rule 169**

### **1. The Basics**

Cases (other than those filed in justice court or brought under the Texas Family Code, Property Code, or Tax Code, or healthcare liability claims brought under Chapter 74 of the Texas Civil Practice & Remedies Code) where the amount of controversy is \$100,000 or less (including penalties, costs, expenses and attorney fees) and no non-monetary relief will now be governed by expedited trial procedures, which include streamlined discovery and a trial schedule aimed at swift resolution. Rule 169 is mandatory, absent the exceptions discussed below.

In addition to new Rule 169, the Texas Supreme Court revised the following existing rules:

- Rule 47(c): a claimant must specify a range of monetary relief sought. In a multi-claimant case, each claimant must plead that he or she seeks monetary relief of \$100,000 or less for the case to be considered an expedited action.
- Rule 190.2: all expedited actions are subject to Level 1 discovery and parties may no longer opt out of Level 1 by agreement.
- Rule 190.5: the court may modify a discovery control order or re-open discovery in an expedited action. In other cases, the court must modify discovery schedules for good cause.

## 2. Removal of Cases from the Expedited Process

Cases must be removed from the expedited process for any of the following reasons:

- a claimant amends his or her pleading to seek more than \$100,000;
- a claimant amends his or her pleading to seek non-monetary relief; or
- “for good cause shown.”

The comments to Rule 169 provide some guidance on whether “good cause” exists, which may include:

- cases where damages sought by multiple claimants against the same defendant total more than \$100,000;
- cases where a defendant has filed a compulsory counterclaim in good faith that exceeds \$100,000;
- cases that require an interpreter; and
- cases where the number of parties and witnesses or the complexity of the legal and factual issues warrants removal from the expedited process.

## 3. Referral of the Expedited Case to ADR

Under the final version of Rule 169(d), the court may refer the case to ADR unless the parties have agreed not to engage in ADR. The ADR procedure must meet the following parameters:

- it may not exceed a half-day in length;
- it may not exceed a total cost of twice the amount of the applicable civil filing fees; and
- it must be completed no later than 60 days before the initial trial setting.

The parties may agree to engage in a form of ADR other than as provided for in the Rule.

## 4. Continuances of Expedited Actions

A court may continue an expedited case twice, not to exceed a total of 60 days.

## 5. Trial of Expedited Actions

On any party’s motion, the court must set the case for trial to begin within 90 days after the discovery deadline. Each side has eight hours at trial, a change from five hours under the previous version of the Rule. The court may extend additional time to “no more than twelve hours per side” on motion for good cause.

## The Takeaway

- Texas lawyers handling cases in state court should consider filing a Rule 91a motion to dismiss if the circumstances support one. Given the 40-day deadline, counsel should make a relatively

the circumstances support one. Given the 60-day deadline, counsel should make a relatively prompt decision about the viability of a Rule 91a motion.

- In light of the mandatory fee award provision of Rule 91a, counsel should give due consideration to the viability of the motion and likelihood that the moving party will prevail.
- The expedited action rules should allow Texas counsel to resolve relatively low-dollar cases more efficiently and cost-effectively on behalf of our clients that are defending Texas state court actions.