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The University of Texas School of Law
727 East Dean Keeton Street
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THE REVIEW OF LITIGATION

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Motions to Dismiss Under Texas Rule 91a: Practice, Procedure and Review

Timothy Patton*

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* Board certified in civil appellate law since 1987 by the Texas Board of Legal Specialization and author of *Summary Judgments in Texas: Practice, Procedure and Review* (LexisNexis 3d ed. 2013). I would like to thank Deb Grant, grammarian, proofreader, typo-inconsistency catcher extraordinaire; Suzette, my wife, who knows far more about trial practice than I and provided valuable input on procedural and evidentiary issues; and Andrew Bluebond, Brian Young, Rachel Ratcliffe, Matt Buongiorno, TJ Harris, and everyone else on the staff at *The Review of Litigation* for their hard work.

I. INTRODUCTION

Effective March 1, 2013, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact under newly adopted Texas Rule of Civil Procedure Rule 91a.[1] Before the adoption of Rule 91a, Texas courts had long rejected attempts to transform special exceptions or motions for summary judgment into a practice akin to Federal Rule of Civil Procedure 12(b)(6) or otherwise allow a party to pursue a "motion to dismiss" absent authorization by statute or procedural rule.[2] With the advent of Rule 91a, however, Texas now has a motion-to-dismiss procedure applicable to all categories of civil litigation other than family law and inmate suits. This Article analyzes the procedural and substantive aspects of filing and responding to Rule 91a motions and is designed to provide real-world, practical assistance to attorneys,

1. Final Approval of Rules for Dismissals and Expedited Actions, 76 Tex. B.J. 221, 221–23 (2013).

2. *See infra* Part VIII (discussing motion to dismiss practice in Texas state courts prior to adoption of Rule 91a).

trial judges, and appellate courts.

II. RULE 91a—THE BASICS

Applicability. Rule 91a applies to cases pending on or filed after March 1, 2013.[3] The rule does not apply to cases brought under the Family Code or Chapter 14 of the Texas Civil Practice and Remedies Code (inmate litigation).[4]

Grounds for Dismissal. A party may move to dismiss a cause of action on the grounds that it has no basis in law or fact.[5] "No basis in law" means the allegations, if "taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought."[6] "No basis in fact" means "no reasonable person could believe the facts pleaded."[7]

Contents of Motion. The motion to dismiss must: (1) state that it is made pursuant to Rule 91a; (2) identify each cause of action it addresses; and (3) "state specifically the reasons" why the challenged cause of action has no basis in law, no basis in fact, or both.[8]

Timing. The motion to dismiss must be: (1) filed within sixty days after the first pleading containing the challenged cause of action is served on the movant; (2) filed at least twenty-one days before the motion is heard; and (3) "granted or denied" by the trial court within forty-five days after being filed.[9]

Response. Any response to the motion to dismiss must be filed no later than seven days before the date of the hearing.[10] A

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3. Final Approval of Rules, *supra* note 1, at 221–23.

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

5. *Id.* A cause of action challenged by a Rule 91a motion to dismiss could appear in a petition, a counterclaim, or a cross-claim. For ease of reference, this Article will generally treat the challenged cause of action as appearing in a petition with the defendant as the movant under Rule 91a and the plaintiff as the non-movant.

6. *Id.*; *see also infra* Parts III(C), VII(E).

7. TEX. R. CIV. P. 91a.1; *see also infra* Parts III(D), VII(E).

8. TEX. R. CIV. P. 91a.2; *see also infra* Part IV(A).

9. TEX. R. CIV. P. 91a.3; *see also infra* Part V(A)–(B).

10. TEX. R. CIV. P. 91a.4; *see also infra* Parts IV(B), V(C). Rule 91a refers to the party opposing the motion to dismiss as the "respondent" rather than the more commonly used "non-movant." TEX. R. CIV. P. 91a.4. For clarity, this Article will

response, however, is not required by Rule 91a.[11] If the movant files an amended motion, the non-movant must be given an opportunity to respond to the amended motion.[12]

Impact of Nonsuit, Amendment, or Withdrawal of Motion. The trial court may not rule on the motion to dismiss if, at least three days before the date of the hearing, the non-movant nonsuits the challenged cause of action or the movant withdraws its motion.[13] If the non-movant amends the challenged cause of action at least three days before the date of the hearing, the movant, prior to the hearing date, may withdraw or amend its motion.[14] The filing of an amended motion restarts the time periods in Rule 91a.[15]

Mandatory Ruling. Except by agreement of the parties, the trial court is required to rule on the motion to dismiss within forty-five days unless that motion has been withdrawn or the challenged cause of action nonsuited.[16] When deciding whether a motion is ripe for a ruling or when ruling on the merits of the motion, however, the court cannot consider a nonsuit or amendment unless that nonsuit or amendment was filed in compliance with the deadlines imposed by Rule 91a.[17]

Hearing. The trial court may, but is not required to, conduct an oral hearing on the motion to dismiss.[18] In other words, the court may decide the merits of the motion based solely on the parties' written submissions.[19] When ruling on the merits of the motion, the court cannot consider evidence but "must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59."[20] The parties are entitled to

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use "non-movant" when referring to the party whose cause of action has been challenged by the motion to dismiss.

11. *See infra* Part IV(B).

12. TEX. R. CIV. P. 91a cmt. 2013; *see also infra* Part V(B)(2).

13. TEX. R. CIV. P. 91a.5(a); *see also infra* Part V(B)(2), (C)(2).

14. TEX. R. CIV. P. 91a.5(b); *see also infra* Part V(B)(2), (C)(2).

15. TEX. R. CIV. P. 91a.5(d); *see also infra* Part V(B)(2).

16. TEX. R. CIV. P. 91a.5(c); *see* TEX. R. CIV. P. 91a, cmt. 2013; *see also infra* Parts VI–VII.

17. TEX. R. CIV. P. 91a.5(c); *see also infra* Part V(B)(2), (C)(2), (E).

18. TEX. R. CIV. P. 91a.6; *see also infra* Part VI(A)(1).

19. TEX. R. CIV. P. 91a cmt. 2013; *see also infra* Part VI(A)(1).

20. TEX. R. CIV. P. 91a.6; *see also infra* Parts III(E), VI.

fourteen days' notice of the hearing.[21]

Mandatory Award of Costs and Fees. The trial court "must award" the prevailing party on the motion to dismiss all costs and reasonable and necessary attorney's fees "incurred."[22] Attorney's fees recoverable under Rule 91a are limited to fees related to the challenged cause of action, including fees for preparing or responding to the motion to dismiss.[23] In contrast to a ruling on the merits of the motion where consideration of evidence by the trial court is prohibited by Rule 91a, the court "must" consider evidence when determining an award of costs and fees.[24] Rule 91a's provision regarding awarding costs and fees does not apply to an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law.[25]

Impact on Venue and Jurisdiction. By filing a motion to dismiss, the movant neither waives nor consents to venue or personal jurisdiction.[26] Rather, the movant submits to the trial court's jurisdiction only in proceedings on the motion and is bound by the court's ruling on the motion, including an award of costs and fees.[27]

Cumulative Procedure. Rule 91a is an additional procedure and does not supersede or have an impact on other procedures that authorize dismissal.[28]

III. DISMISSAL STANDARDS UNDER RULE 91a

A. The Statutory Origin of Rule 91a's Dismissal Standards

One stated objective of Governor Rick Perry, the GOP-controlled legislature, and their supporters for the tort reform legislation pending in 2011 (HB 274) was to create a system

21. TEX. R. CIV. P. 91a.6; *see also infra* Part V(B).
22. TEX. R. CIV. P. 91a.7; *see also infra* Parts VI(D), VII(D)(2).
23. TEX. R. CIV. P. 91a.7; *see also infra* Part VI(D)(2).
24. TEX. R. CIV. P. 91a.7; *see also infra* Part VI(D)(2).
25. TEX. R. CIV. P. 91a.7.
26. TEX. R. CIV. P. 91a.8; *see also infra* Part V(A).
27. TEX. R. CIV. P. 91a.8; *see also infra* Part V(A).
28. TEX. R. CIV. P. 91a.9; *see also infra* Part VIII.

providing for the early dismissal of lawsuits.[29] According to HB 274's supporters, an early dismissal procedure would, among other things, protect defendants from frivolous and costly lawsuits, strengthen the economy, and enhance the fairness of the court system.[30]

On May 30, 2011, Governor Perry signed into law § 22.004(g) of the Texas Government Code, which was part of HB 274.[31] Section 22.004(g) provides in its entirety:

> 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. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. The rules shall not apply to actions under the Family Code.[32]

The direction provided to the Texas Supreme Court by the legislature in § 22.004(g) regarding the creation of an early dismissal procedure has been accurately described as "skeletal."[33] The court

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29. Press Release, Office of the Governor Rick Perry, Gov. Perry: Lawsuit Reforms Will Expedite Justice for Legitimate Claims and Help Strengthen Texas' Economic Climate (Mar. 14, 2011), http://governor.state.tx.us/news/press-release/15822; Press Release, Office of the Governor Rick Perry, Gov. Perry: We Must Reform, Streamline State Government (Feb. 8, 2011), http://governor.state.tx.us/news/press-release/15674; *see also* House Comm. on Judiciary and Civil Jurisprudence, Bill Analysis, Tex. H.B. 274, 82nd Leg., R.S. (2011) (summarizing positions of supporters of HB 274), *available at* http://www.hro.house.state.tx.us/pdf/ba82R/HB0274.PDF [hereinafter Tex. H.B. 274 Analysis]; *see also infra* Part VI(D)(1).

30. *See* Tex. H.B. 274 Analysis, *supra* note 29.

31. Press Release, Office of the Governor Rick Perry, Gov. Perry: Loser Pays Lets Employers Spend Less Time in the Courtroom, More Time Creating Jobs (May 30, 2011), http://governor.state.tx.us/news/press-release/16203; Vicky Garza, *Perry Signs Tort Reform Bill Into Law*, AUSTIN BUS. J., May 31, 2011, http://www.bizjournals.com/austin/news/2011/05/31/perry-signs-tort-reform-bill.html.

32. TEX. GOV'T CODE ANN. § 22.004(g) (West 2013).

33. Lamont A. Jefferson & J. Iris Gibson, *New Rules – Dismissal and Expedited Actions: History and Practical Considerations*, *in* 36TH ANNUAL ADVANCED CIVIL TRIAL COURSE, Aug. 21–23, Oct. 17–Nov. 1, 2013, at 4 (State Bar Tex. ed., 2013).

was simply told to adopt rules to permit the dismissal of baseless causes of action by motion without evidence, require the trial court to rule on the motion within forty days and,[34] through another tort reform statute adopted in 2011, require the trial court to award attorney's fees and costs to the prevailing party.[35] Notably, the legislature did not provide any guidance on its intended meaning for the phrase "no basis in law or fact."

In response to § 22.004(g), the Texas Supreme Court adopted Rule 91a, which established the following standards for a motion to dismiss an allegedly baseless cause of action:

> 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.[36]

B. Texas' Fair Notice Pleading Standards

Analyzing the potential impact of Rule 91a's new procedure, authorizing the dismissal of a cause of action based on the pleadings alone necessarily requires a discussion of existing pleading requirements under Texas law. Texas is a "fair notice" pleading state.[37] This has been described as a relatively liberal pleading

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34. TEX. GOV'T CODE ANN. § 22.004(g) (West 2013).

35. TEX. CIV. PRAC. & REM. CODE ANN. § 30.021 (West 2013); *see also infra* Part VI(D)(1).

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

37. Low v. Henry, 221 S.W.3d 609, 612 (Tex. 2007) ("Texas follows a 'fair notice' standard for pleading."); *accord* Tex. Mut. Ins. Co. v. Ledbetter, 251 S.W.3d 31, 37 (Tex. 2008); Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 896–97 (Tex. 2000); *see also* Moore v. Pulmosan Safety Equip. Corp., 278 S.W.3d 27, 34 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) ("We acknowledge that Texas is a fair notice pleading state . . . .").

standard.[38] This fair notice standard is embodied in Rule 45 and Rule 47 of the Texas Rules of Civil Procedure.[39]

The test for determining if a petition provides fair notice is whether the opposing party and its counsel can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.[40] The trial judge is not free to ignore broadly stated or largely conclusory allegations under Texas' notice pleading standards under Rule 45(b).[41] To the contrary, Rule 45 rejects any distinction between factual allegations and factual or legal conclusions, which, as the authors of a leading treatise on Texas procedure have observed, involves an "inherently unworkable metaphysical distinction."[42] The fair notice test simply focuses on whether a pleading provides the opposing party with adequate

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38. *See Low*, 221 S.W.3d at 612 ("Texas follows a 'fair notice' standard for pleading . . . [a] relatively liberal standard.").

39. TEX. R. CIV. P. 45(b) (requiring that pleadings "consist of a statement in plain and concise language of the plaintiff's cause of action . . . [and t]hat an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole"); TEX. R. CIV. P. 47(a) (requiring pleadings to include "a short statement of the cause of action sufficient to give fair notice of the claim involved"). In 2013, Rule 47 was amended to require the parties to plead into or out of the recently-adopted expedited litigation process that became effective at the same time as Rule 91a. Rule 47 also requires the parties to provide greater specificity on the dollar amount of damages claimed. *See* TEX. R. CIV. P. 47, Cmt. 2013; Final Approval of Rules note 1, at 221; *see also infra* note 166 (explaining that 2013 amendment to Rule 47 does not change Texas' fair notice pleading standard for purposes of litigating motions to dismiss cause of action under Rule 91a).

40. *Horizon/CMS*, 34 S.W.3d at 896; *see* Roark v. Allen, 633 S.W.2d 804, 809–10 (Tex. 1982) (stating that the objective of fair notice standard is to provide opposing party and counsel with sufficient information to prepare defense); *see also* Cline v. Guar. Bond Bank, 404 S.W.3d 139, 142 (Tex. App.—Texarkana 2013, no pet.) ("'Fair notice' requires that an opposing attorney of reasonable competence can ascertain the nature and basic issues of the controversy.").

41. *See* TEX. R. CIV. P. 45(b) (providing that pleading legal conclusions is not objectionable if "allegations as a whole" provide "fair notice" to opposing party). Fair notice pleading has been the standard in Texas since the Texas Rules of Civil Procedure were adopted in 1941. Jefferson & Gibson, *supra* note 33, at 4. When adopted, Rule 45 eliminated the burden to plead *facts* and, in its place, only required a "plain and concise" statement of the plaintiff's cause of action or the defendant's ground of defense. *Id.*

42. 2 ROY MCDONALD & ELAINE CARLSON, TEXAS CIVIL PRACTICE § 7:4[a]–[b] (2d ed. 2003).

information to prepare a defense rather than trying to pigeonhole allegations into supposedly acceptable or unacceptable categories.[43]

Unless the trial court has sustained special exceptions, plaintiffs are entitled to plead their theories of liability (causes of action) in general and broad language.[44] Absent sustained special exceptions, the judge "must construe the pleading liberally in the pleader's favor and construe the petition to include all claims that reasonably may be inferred from the language used in the petition, even if the petition does not state all the elements of the claim in question."[45]

As just mentioned, a petition will be viewed as providing fair notice of the plaintiff's claims even if some elements of an alleged cause of action are omitted.[46] In fact, essential allegations missing from the plaintiff's petition may be supplied by the defendant's pleading when determining whether the defendant had fair notice of the plaintiff's theories of liability.[47]

Indeed, the fair notice pleading standard is a relatively liberal approach to pleading sufficiency. As just one example, a conclusory negligence allegation that does little more than recite elements of the cause of action (duty, breach of duty, causation, and damages) provides fair notice to the defendant and will support a judgment for the plaintiff.[48] Specifically identifying the particular acts allegedly

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43. *See id.*

44. *See* Burnett v. Sharp, 328 S.W.3d 594, 598–99 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (explaining the "longstanding policy that courts should read pleadings liberally to reach the merits of the claims asserted rather than passing on the merits at the pleading stage"); *see also* Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491, 494–95 (Tex. 1988) (noting that the Texas Rules require that pleadings give fair notice of the claim asserted).

45. *Burnett*, 328 S.W.3d at 598–99; *accord* Gulf, Colo. & Santa Fe Ry. v. Bliss, 368 S.W.2d 594, 599 (Tex. 1963); *see Horizon/CMS*, 34 S.W.3d at 897 ("When a party fails to specially except, courts should construe the pleadings liberally in favor of the pleader.").

46. Roark v. Allen, 633 S.W.2d 804, 809 (Tex. 1982); San Saba Energy, L.P. v. Crawford, 171 S.W.3d 323, 336 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

47. Alan Reuben Chevrolet, Inc. v. Grady Chevrolet, Ltd., 287 S.W.3d 877, 884 (Tex. App.—Dallas 2009, no pet.).

48. *See* Willock v. Bui, 734 S.W.2d 390, 391–92 (Tex. App.—Houston [1st Dist.] 1987, no writ) ("A fair interpretation of the petition is that the appellee claims that he and the appellant were involved in an automobile collision, and that

constituting negligence is not required.[49] The ultimate issue is whether an opposing attorney of reasonable competence, after reviewing the pleading, can ascertain the basic issues in controversy and the potentially relevant testimony.[50] If this test is satisfied, it is irrelevant whether an allegation may be classified as "factual," an "ultimate fact," a "factual conclusion," or a "legal conclusion."[51] On the other hand, even when liberally construing a petition under the fair notice rule, a court cannot read into a petition a cause of action not actually contained in the pleading.[52]

Lastly, the Texas "fair notice" standard for pleading sufficiency has been accurately described as "more relaxed"[53] and "more lenient"[54] than the federal standard. More specifically, "[T]he federal standard is more stringent than the Texas pleading standard with respect to the sufficiency of the allegations to state a claim or cause of action."[55] This distinction between state and federal pleading standards could be highly significant or not significant at all, depending on the extent to which, if any, Texas courts construe

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he was injured as a result of the appellant's negligence.").

49. Baker v. Charles, 746 S.W.2d 854, 855 (Tex. App.—Corpus Christi 1988, no writ); *see also* Vann v. Conner, No. 01-12-00021-CV, 2013 Tex. App. LEXIS 381, at *4 (Tex. App.—Houston [1st Dist.] Jan. 17, 2013, pet. filed) (mem. op.) ("[P]etition did not allege the specific basis for recovery . . . but in the absence of special exceptions, the basis for recovery may be inferred from the context . . . ."); Discovery Operating, Inc. v. BP Am. Prod. Co., 311 S.W.3d 140, 162 (Tex. App.—Eastland 2010, pet. denied) (holding that, even though the plaintiff failed to expressly identify any statutes allegedly violated, allegations provided fair notice of the plaintiff's intent to rely on statutory liability theory).

50. 2 MCDONALD & CARLSON, *supra* note 42, § 7:4[b].

51. *Id.*

52. Deep Water Slender Wells v. Shell Int'l Exploration & Prod., 234 S.W.3d 679, 689 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); San Saba Energy, L.P. v. Crawford, 171 S.W.3d 323, 336 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

53. Chandler Mgmt. Corp. v. First Specialty Ins. Corp., No. 3:12-CV-2541-L, 2013 U.S. Dist. LEXIS 13417, at *14 (N.D. Tex. Jan. 31, 2013).

54. Holmes v. Acceptance Cas. Corp., 942 F. Supp. 2d 637, 645 (E.D. Tex. 2013).

55. *Chandler Mgmt. Corp.*, 2013 U.S. Dist. LEXIS 13417, at *15; *see also* Flowers v. Deutsche Bank Nat'l Tr. Co., No. 3:12-CV-3890-L, 2013 U.S. Dist. LEXIS 131020, at *7 (N.D. Tex. Sept. 13, 2013) ("Moreover, because this case was removed from state court, Texas's 'fair notice' pleading standard rather than the stricter federal standard applies.").

Rule 91a as incorporating practice under Federal Rule of Civil Procedure 12(b)(6).[56]

C. *No Basis in Law*

1. In General

Rule 91a.1 provides: "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."[57] As will be discussed, the phrase "no basis in law" appears elsewhere in one rule and two statutes, but cases construing those provisions are unlikely to be helpful when applying Rule 91a.[58] As will also be addressed, there is a substantial body of law focusing on the defendant's entitlement to judgment because of the plaintiff's alleged failure to plead a viable cause of action or claim for relief in its petition.[59] Although not involving the precise phrase "no basis in law," this body of law should nevertheless provide guidance for determining when a cause of action is baseless under Rule 91a.[60]

2. Using Existing Texas Procedures to Apply Rule 91a.1's "No Basis in Law" Standard

a. Procedures Superficially Similar to Rule 91a.1's "No Basis in Law" Standard

Rule 13 authorizes the trial court to impose sanctions based on the filing of a groundless pleading. Rule 13's definition of "groundless" incorporates the phrase "no basis in law."[61] However, Rule 13's definition of "groundless" requires the court to combine an objective analysis of the cause of action pled ("no basis in law or fact") with an inquiry into the pleader's "good faith," which

56. *See infra* Part III(D)(2).
57. TEX. R. CIV. P. 91a.1.
58. *See infra* Part III(C)(2)(a).
59. *See infra* Part III(C)(2)(b).
60. *See infra* Part III(C)(2)(b).
61. TEX. R. CIV. P. 13.

necessarily includes subjective components.[62] Therefore, cases involving sanctions might not be particularly useful when applying Rule 91a's "no basis in law" test because the dismissal rule involves a purely objective analysis of the legal validity of the challenged cause of action without regard for the pleader's mental state.[63]

Chapter 14 of the Civil Practice and Remedies Code allows a trial court to dismiss an inmate's claims, filed *in forma pauperis*, if the court concludes the claim is frivolous.[64] A claim is frivolous under Chapter 14 if it has "no arguable basis in law."[65] Although case law is not entirely consistent,[66] most courts of appeals have concluded that a claim has no arguable basis in law if the legal theory on which the claim is based is "indisputably meritless."[67] Applying this definition of "no basis in law" used in inmate litigation in a rote manner to Rule 91a cases could prove problematic—and not just because the "indisputably meritless" test has somewhat uncertain aspects. In Chapter 14 cases, courts have recognized that a pro se inmate's petition should be viewed with "liberality and patience" and that an inmate is generally "not held to the stringent standards

62. *See id.* ("'Groundless' for purposes of this rule means no basis in law or fact *and not warranted by good faith argument for the extension, modification, or reversal of existing law*.") (emphasis added); *see also* Great W. Drilling, Ltd. v. Alexander, 305 S.W.3d 688, 698 (Tex. App.—Eastland 2009, no pet.) (concluding that bad faith under Rule 13 requires a showing of "dishonest, discriminatory, or malicious purpose").

63. *See* TEX. R. CIV. P. 91a.1; *see also infra* Part VII(E)(1).

64. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(2) (West 2013). *See generally* Hamilton v. Williams, 298 S.W.3d 334, 339 (Tex. App.—Fort Worth 2009, pet. denied).

65. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(b)(2) (West 2013). Chapter 13, governing the dismissal of actions filed *in forma pauperis*, also partially defines "frivolous" as an action having "no arguable basis in law." *Id.* § 13.001(b)(2).

66. *See* Burnett v. Sharp, 328 S.W.3d 594, 597–98 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (discussing seemingly inconsistent case law on whether determination that inmate "failed to state a cause of action as a matter of law" equates with decision that inmate's claim has "no arguable basis in law").

67. *E.g.*, *Burnett*, 328 S.W.3d at 600; Hamilton v. Pechacek, 319 S.W.3d 801, 809 (Tex. App.—Fort Worth 2010, no pet.); Nabelek v. Dist. Attorney of Harris Cnty., 290 S.W.3d 222, 228 (Tex. App.—Houston [14th Dist.] 2006, no pet.); Minix v. Gonzales, 162 S.W.3d 635, 637 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

applied to formal pleadings drafted by attorneys."[68] In marked contrast, attorneys who draft pleadings containing the cause of action challenged by a Rule 91a motion should not receive the liberal benefit of doubt that is afforded to pro se prisoners.[69]

b. Procedures Closely Resembling Rule 91a.1's "No Basis in Law" Standard

Actually, there's no need to search for an already-existing rule or statute using the exact phrase "no basis in law" to determine the meaning of "no basis in law" under Rule 91a.[70] For decades, Texas trial and appellate courts have resolved cases on the pleadings by deciding that the plaintiff's petition did not state a valid cause of action under Texas law. They have done so by using two procedures: special exceptions[71] and motions for summary judgment.[72] Under both procedures, as with Rule 91a, the court accepts the plaintiff's allegations and reasonable inferences arising from those allegations as true, and then decides whether the plaintiff has stated a viable cause of action in its pleading.[73]

There is no substantive difference between a liability allegation that fails to state a claim and a cause of action that has no basis in law. The fact that cases in the special exception and summary judgment contexts do not employ the precise words "no basis in law" is a semantical distinction if any distinction at all. If

68. *E.g.*, *Minix*, 162 S.W.3d at 637; *see also Hamilton*, 298 S.W.3d at 339; Scott v. Gallagher, 209 S.W.3d 262, 266 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

69. *See* HON. JANE BLAND, HON. BILL BOYCE, & HON. GREG PERKES, *What's Appealing About the New Dismissal and Expedited Trial Rules*, 23RD ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS, June 13–14, 2013, at 10 (stating that although Rule 91a's language "suggests a parallel" with dismissal standards under Chapter 14, "no special 'patience' would be mandated for attorney-drafted pleadings").

70. *See id.* (suggesting that practitioners take care in relying on federal rule 12(b)(6) authorities when litigating under Rule 91a and instead "look for analogies that can be drawn to existing Texas dismissal procedures").

71. *See* TEX. R. CIV. P. 91.

72. *See* TEX. R. CIV. P. 166a.

73. *See infra* notes 84–87 and accompanying text (discussing the requirement that before dismissing on special exceptions or rendering "no cause of action" summary judgment, trial judge ordinarily must take allegations in petition as true).

the plaintiff has not stated a claim for relief under Texas law then its alleged cause of action has no basis in law for Rule 91a purposes. To use Rule 91a.1's wording, the defendant is entitled to prevail, whether pursuing special exceptions, a motion for summary judgment, or a Rule 91a motion to dismiss, if the taken-as-true allegations "do not entitle the claimant to the relief sought."[74]

Courts have long viewed special exceptions as a proper method to determine whether the plaintiff has stated a cause of action.[75] When deciding whether special exceptions should be sustained, the trial judge must accept the plaintiff's allegations and reasonable inferences from those allegations as true[76]—just as the judge must when evaluating the plaintiff's allegations under Rule 91a.[77] After sustaining special exceptions but before dismissing the plaintiff's claims, the trial judge is generally required to first give the plaintiff an opportunity to amend the pleading to state a viable cause of action.[78] If the plaintiff still has not stated a cause of action after amendment and the remaining portions of the petition also fail to state a viable claim, the trial court may dismiss the case.[79] Appellate courts have upheld dismissals based on the plaintiff's failure to state a claim in cases where, had Rule 91a been in existence, dismissal on the grounds that the challenged claim was baseless would likewise

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

75. *See, e.g.*, Gatten v. McClarley, 391 S.W.3d 669, 673 (Tex. App.—Dallas 2013, no pet.); Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); Buecher v. Centex Homes, 18 S.W.3d 807, 809 (Tex. App.—San Antonio 2000), *aff'd on other grounds*, 95 S.W.3d 266 (Tex. 2002).

76. *See, e.g.*, *Gatten*, 391 S.W.3d at 674; James v. Easton, 368 S.W.3d 799, 803 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); Martin v. Clinical Pathology Labs., Inc., 343 S.W.3d 885, 891 (Tex. App.—Dallas 2011, pet. denied).

77, TEX. R. CIV. P. 91a.1.

78. *See* Parker v. Barefield, 206 S.W.3d 119, 120–21 (Tex. 2006); *Gatten*, 391 S.W.3d at 673; *see also* Baylor Univ. v. Sonnichsen, 221 S.W.3d 632, 635 (Tex. 2007) ("Generally, when the trial court sustains special exceptions, it must give the pleader an opportunity to amend the pleading, unless the pleading defect is of a type that amendment cannot cure."); *see also infra* notes 416–418 and accompanying text (describing circumstances when trial court need not provide a plaintiff with opportunity to amend before dismissing on special exceptions).

79. *See* Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 10 (Tex. 1974); *Gatten*, 391 S.W.3d at 673–74; *Alpert*, 178 S.W.3d at 405.

have been appropriate. Examples include dismissals involving liability allegations which, even if true, were insufficient to overcome qualified immunity rules;[80] claims asserting a duty of care not recognized under Texas law;[81] tort causes of action pursued against a defendant whose only potential liability was in contract;[82] and a wrongful termination claim based on an alleged exception to the employment-at-will doctrine not recognized in Texas.[83]

Texas case law dealing with "no cause of action" summary judgments should be particularly useful in applying Rule 91a. If the plaintiff's "petition affirmatively demonstrates that no cause of action exists or that plaintiff's recovery is barred," the trial court is entitled to render summary judgment on the pleadings against the plaintiff and for the defendant.[84] Before granting summary judgment on the pleadings, the court must take "all allegations, facts, and inferences in the pleadings as true and view[] them in a light most favorable to the pleader,"[85]—the same perspective required by Rule 91a.[86] After reviewing the pleadings in this light, if the trial court correctly concludes that the plaintiff has failed to state a viable cause of action or otherwise pled himself out of court, the court is entitled

80. *E.g.*, Easton v. Phelan, NO. 01-10-01067-CV, 2012 Tex. App. LEXIS 3710, at *20–21 (Tex. App.—Houston [1st Dist.] May 10, 2012, no pet.) (mem. op.).

81. *E.g.*, *Gatten*, 391 S.W.3d at 673–77.

82. *E.g.*, Owen v. Option One Mortg. Corp., No. 01-10-00412-CV, 2011 Tex. App. LEXIS 5843, at *21–22 (Tex. App.—Houston [1st Dist.] July 28, 2011, pet. denied) (mem. op.).

83. *See, e.g.*, Martin v. Clinical Pathology Labs., Inc., 343 S.W.3d 885, 891 (Tex. App.—Dallas 2011, pet. denied).

84. *See, e.g.*, Peek v. Equip. Serv. Co., 779 S.W.2d 802, 805 (Tex. 1989); Delgado v. Combs, No. 07-11-00273-CV, 2012 Tex. App. LEXIS 8610, at *5–7 (Tex. App.—Amarillo Oct. 15, 2012, no pet.) (mem. op.); Equitable Recovery, L.P. v. Health Ins. Brokers of Tex., L.P., 235 S.W.3d 376, 388 (Tex. App.—Dallas 2007, pet. dism'd); *see also infra* notes 416–428 and accompanying text (discussing whether trial court is obligated to provide claimant with opportunity to amend before rendering "no cause of action" summary judgment).

85. Natividad v. Alexsis, Inc., 875 S.W.2d 695, 699 (Tex. 1994); Conquest Drilling Fluids, Inc. v. Tri-Flo Int'l, Inc., 137 S.W.3d 299, 309 (Tex. App.—Beaumont 2004, no pet.).

86. *See* TEX. R. CIV. P. 91a.1 (providing that a cause of action has no basis in law if allegations, taken as true, together with inferences reasonably drawn from allegations do not entitle claimant to relief sought).

to render a "no cause of action" summary judgment.[87] There are numerous examples of "no cause of action" summary judgments, affirmed on appeal, where granting a Rule 91a motion to dismiss would have been equally proper:

- Plaintiff's liability claims were based on the Texas Penal Code—a statute that does not create private civil causes of action.[88]
- The trial court correctly granted summary judgment because plaintiffs' pleadings did not state a cause of action but alleged facts, which if proven, would have established the defendant's sovereign immunity defense.[89]
- Plaintiff's claim, based on the existence of an implied statutory cause of action for wrongfully terminating a public employee for filing a grievance, did not state a claim recognized under existing Texas law.[90]
- The trial court correctly granted a "no cause of action" summary judgment because defendants owed no duty to plaintiffs based on the allegations in the plaintiffs' petition and duty is an essential element of a cause of action for negligence.[91]

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87. *See Peek*, 779 S.W.2d at 805 (stating that "unless the petition affirmatively demonstrates that no cause of action exists or that plaintiff's recovery is barred, we require the trial court to give plaintiff an opportunity to amend before granting a motion to dismiss on a motion for summary judgment"); Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 10 (Tex. 1974).

88. *Delgado*, 2012 Tex. App. LEXIS 8610, at *5–7. Probably the clearest example of a cause of action that should be dismissed as having no basis in law is when the plaintiff is attempting to recover on a theory of liability not recognized in Texas. *See, e.g.*, Trevino v. Ortega, 969 S.W.2d 950, 952 (Tex. 1998) (refusing to recognize spoliation of evidence as independent tort); Nelson v. Krusen, 678 S.W.2d 918, 925 (Tex. 1984) ("[T]here is no cause of action in Texas for wrongful life"); San Saba Energy, L.P. v. McCord, 167 S.W.3d 67, 73 (Tex. App.—Waco 2005, pet. denied) (collecting cases holding that Texas does not permit one party to a contract to sue another party to the contract for conspiracy to breach contract).

89. Perser v. Perser, 738 S.W.2d 783, 784 (Tex. App.—Fort Worth 1987, writ denied).

90. Johnson v. Waxahachie Indep. Sch. Dist., 322 S.W.3d 396, 399–400 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

91. Kehler v. Eudaly, 933 S.W.2d 321, 325 (Tex. App.—Fort Worth 1996,

- Plaintiff failed to state a claim by alleging facts that established that his Texas Tort Claims Act claims were based on providing or failing to provide police protection, which is an exempt activity under the Act.[92]
- Plaintiff's allegations of intentional infliction of emotional distress, even when taken as true, failed to rise to the level of outrageous misconduct required to state a valid claim.[93]
- Plaintiffs failed to allege a viable cause of action for fraud because their fraud claims were based on communications during the course of the litigation which were absolutely privileged.[94]
- Plaintiffs "did not plead a cause of action" and "cite[d] no authority" that issuing a notice of cancellation of a health insurance policy (without more) constituted extreme and outrageous misconduct.[95]

3. Applying Rule 91a to Unsettled or Novel Legal Theories

An additional aspect of "no basis in law" under Rule 91a warrants mention. Rule 13, the sanctions rule, defines "groundless" as meaning "no basis in law . . . and *not warranted by good faith argument for the extension, modification, or reversal of existing*

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writ denied).

92. Strickland v. Denver City, 559 S.W.2d 116, 118–19 (Tex. Civ. App.—Eastland 1977, no writ); *see also* Clawson v. Wharton Cnty., 941 S.W.2d 267, 271–73 (Tex. App.—Corpus Christi 1996, writ denied) (affirming summary judgment because the plaintiffs alleged facts that, if proved, would establish sovereign immunity defense).

93. Natividad v. Alexsis, Inc., 875 S.W.2d 695, 698–99 (Tex. 1994).

94. Settle v. George, No. 02-11-00444-CV, 2012 Tex. App. LEXIS 5831, at *8–10 (Tex. App.—Fort Worth July 19, 2012, no pet.) (mem. op.).

95. Winters v. Parker, 178 S.W.3d 103, 105–06 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

law."[96] The original draft of the dismissal rule proposed by the Supreme Court Advisory Committee[97] essentially tracked Rule 13's language so that "no basis in law" would have encompassed claims not warranted by existing law or an extension, modification or reversal of existing law.[98] A non-partisan group of lawyers representing both sides of the docket, consisting of members from the American Board of Trial Advocates, the Texas Association of Defense Counsel, and the Texas Trial Lawyers Association, also provided a proposed draft of a dismissal rule[99] to then-Justice and now-Chief Justice Nathan Hecht, the member of the Texas Supreme

96. TEX. R. CIV. P. 13 (emphasis added); McIntyre v. Wilson, 50 S.W.3d 674, 687–88 (Tex. App.—Dallas 2001, pet. denied) (reversing Rule 13 sanctions against some appellants who raised a good faith argument for extending, modifying or reversing existing law while affirming sanctions against other appellant who did not). The definition of "groundless" in the Texas Civil Practice and Remedies Code chapter on sanctions similarly encompasses claims not warranted by a good faith argument for extending, modifying or reversing existing law. TEX. CIV. PRAC. & REM. CODE ANN. § 9.001(3)(B) (West 2013).

97. The Supreme Court Advisory Committee "assists the [Texas] Supreme Court in the continuing study, review and development of . . . [the rules of procedure for Texas courts]." *See* Order Appointing Supreme Court Advisory Comm. at 1, (Tex. Dec. 28, 2011) Misc. Docket No 11-9259, *available at* www.supreme.courts.state.tx.us/MiscDocket/11/11925900.pdf. "The committee drafts rules as directed by the Court; solicits, summarizes, and reports to the court the views of the bar and the public on court rules and procedures; and makes recommendations for change." *Id.* "Votes taken by the Committee are solely for informational purposes . . . and not binding on the Court." *Id.*

98. *See* Mike Logan & Kevin Madden, *Litigation Alert: Texas' Proposed Motion to Dismiss: A Work in Progress*, KANE RUSSELL COBEMAN & LOGAN PC (Aug. 2012), *available at* http://www.krcl.com/index.php?src=gendocs&ref=Litigation-Alert%202012%200801; Joshua A. Green, *Initial Draft of the New Texas Motion to Dismiss Rules*, KROGER BURRUS (Dec. 2, 2011), *available at* http://www.krogerlaw.com/blog/2011/12/initial-draft-of-the-new-texas-motion-to-dismiss-rules/; *see also* Supplementary Material from Meeting of Supreme Court Advisory Committee (Nov. 18–19, 2011), *available at* http://www.supreme.courts.state.tx.us/rules/scac/2011/supplementary/sc11182011.pdf. A subsequent draft of the committee's proposed dismissal rule also included language tracking Rule 13. *See* Supplementary Material from Meeting of the Supreme Court Advisory Committee (Dec. 9–10, 2011), *available at* http://www.supreme.courts.state.tx.us/rules/scac/2011/supplementary/sc12092011.pdf.

99. *See* Frank Gilstrap, *Loser Pays—Then and Now*, SOLO & SMALL FIRM SECTION, DALLAS BAR ASSOCIATION, (Nov. 2, 2011) 13, *available at* http://www.dallasbar.org/system/files/loserpays--thenandnow.pdf?download=1.

Court charged with oversight of the rules of procedure.[100] The group's proposed rule included a section stating: "Nothing in this rule shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under federal, state, or local laws, including civil rights laws."[101] However, the version of Rule 91a adopted by the Texas Supreme Court does not contain any language comparable to the original draft of the Rules Committee or the proposal of the bipartisan working group.[102]

So . . . does Rule 91a, as adopted, mean that a cause of action must have a basis in law under *current* Texas law to avoid dismissal? What about a cause of action that has yet to be *expressly* recognized as viable, but there is a compelling argument for acknowledging its viability because Texas law on the issue is unsettled or silent? Changes in society and in the law may well justify treating a cause of action as a viable theory of liability even though that theory lacks a clear legal basis under *current* Texas law—or at least sufficiently viable to allow the non-movant an opportunity to pursue discovery, develop its case, and have the merits determined based on evidence (via summary judgment or trial), as opposed to losing on the pleadings weeks after filing suit.[103] "*Stare decisis* is not an inexorable command."[104] Otherwise, Texas would still be treating

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100. Supreme Court of Texas, Liaison Assignments (Feb. 1, 2013), http://www.supreme.courts.state.tx.us/Advisories/Liaison_Assignments_022013.pdf. The official Texas Supreme Court website states: "Throughout his service on the Court, Chief Justice Hecht has overseen revisions to the rules of administration, practice, and procedure in Texas courts." *Chief Justice Nathan L. Hecht*, THE SUPREME COURT OF TEXAS (Feb. 19, 2014), http://www.supreme.courts.state.tx.us/court/justice_nhecht.asp. Justice Hecht was appointed by Governor Perry to serve as Chief Justice of the Texas Supreme Court to replace Wallace Jefferson, who retired, and took the oath of office on October 1, 2013. Lowell Brown, *Hecht Takes Oath as Texas Supreme Court Chief Justice*, TEXAS BAR BLOG (Oct. 1, 2013), blog.texasbar.com/2013/10/articles/news/hecht-takes-oath-as-texas-supreme-court-chief-justice/.

101. *See supra* note 98 (citing online records of Supreme Court Advisory Committee, including non-partisan working group's proposed dismissal rule).

102. *See* TEX. R. CIV. P. 91a.1. Consequently, Rule 91a effectively imposes a more stringent pleading standard than the sanctions rule, Rule 13.

103. *See* Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986) (discussing the "heavy burden" to persuade the Court that stare decisis must yield in favor of changes in society).

104. Payne v. Tennessee, 501 U.S. 808, 828 (1991); *see* El Chico Corp. v. Poole, 732 S.W.2d 306, 310 (Tex. 1987) (discussing refusal to acknowledge

children as economic assets (i.e., livestock) in wrongful death actions rather than compensating parents for their intangible, emotional injuries suffered as a result of their child's death.[105] Although Texas trial and intermediate appellate courts should not be allowed to flatly ignore contrary Texas Supreme Court authority when deciding that a challenged cause of action is valid in Texas, they should have the authority to allow a claim involving evolving, unsettled or novel areas of law to survive dismissal at the pleading stage.[106]

4. "No Basis in Law" vs. "No Basis in Fact"

As just discussed, whether a cause of action has no basis in law under Rule 91a appears to be a clear-cut inquiry outside of litigation involving novel claims or unsettled areas of law. But as the next section reflects, evaluating whether a cause of action has no basis in fact has the potential to be far more problematic.

But, any uncertainty or controversy arising from Rule 91a.1's "no reasonable person could believe" definition of "no basis in fact"[107] should not spill over into litigation involving the rule's "no basis in law" provision.[108] When deciding whether a cause of action

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dramshop liability cause of action as "outdated and unrealistic" while stressing that "the common law is not frozen or stagnant, but evolving, and it is the duty of this court to recognize the evolution"), *superseded by statute*, Dram Shop Act, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Sess. Law Serv. 303 (amended 2005) (current version at TEX. ALCO. BEV. CODE ANN. § 2.02 (West 2012), *as recognized in* F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 684 (2002).

105. *See* Sanchez v. Schindler, 651 S.W.2d 249, 251–52 (Tex. 1983) (overruling 25 decisions and joining vast majority of other states recognizing that parent's wrongful death recovery should not be limited to pecuniary loss caused by child's death).

106. *See* McGary v. City of Portland, 386 F.3d 1259, 1270 (9th Cir. 2004) ("However, the fact that McGary's claim does not fall within the four corners of our prior case law does not justify dismissal under Rule 12(b)(6). On the contrary, Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development .... [T]he court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions.") (internal citations and quotations omitted).

107. *See infra* Part III(D).

108. *See* 7 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE

has no basis in law, the court is required to take the pleader's allegations and inferences from those allegations as true.[109] The court simply applies Texas law to accepted-as-true allegations—an objective analysis involving a pure question of law.[110] In contrast, when determining whether a challenged cause of action has any basis in fact, the court is required to question the believability of the pleader's allegations[111]—a considerably less objective and demonstrably more subjective and amorphous inquiry.[112]

D. No Basis in Fact

1. Rule 91a.1's "No Reasonable Person Could Believe" Standard

Rule 91a.1 states: "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded."[113] This "no reasonable person could believe" standard for testing the viability of a cause of action has no counterpart in any Texas rule or statute.[114]

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§ 103.02[1] (2014) ("Civil Procedure Rule 91a.1's standards may be interpreted in harmony with these [fair notice] pleading standards, particularly in the context of *legally* baseless claims.").

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

110. *See infra* Part VII(E)(1)–(2).

111. *See* TEX. R. CIV. P. 91a.1 ("A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.").

112. Stated another way, if the federal "plausibility" standard or some variation of that standard is adopted as the "no basis in fact" standard under Rule 91a, that would have no impact on a court's "no basis in law" analysis where the court is required to assume that the challenged allegations are true and plausible. *See infra* Part III(D)(2).

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

114. The phrase does not appear in any Texas statute or rule. Under Chapter 14 of the Civil Practice and Remedies Code, intermediate appellate courts have concluded that an inmate's in forma pauperis lawsuit may be dismissed for having no arguable basis in *law* (not *fact*) if based on "wholly incredible or irrational factual allegations." *See, e.g.*, Nabelek v. Dist. Attorney of Harris Cnty., 290 S.W.3d 222, 228 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); Minix v. Gonzales, 162 S.W.3d 635, 637 (Tex. App.—Houston [14th Dist.] 2005, no pet.); Gill v. Boyd Distrib. Ctr., 64 S.W.3d 601, 603 (Tex. App.—Texarkana 2001, pet. denied). There is, however, essentially no case law under Chapter 14 attempting to define what constitutes a "wholly incredible or irrational factual allegation" that might be helpful in applying Rule 91a.1's "no reasonable person could believe" test. *See infra* Part III(C)(2)(a).

What a reasonable person could or could not believe seems to create a hopelessly subjective test[115]—particularly since Rule 91a prohibits the court from considering evidence that, if allowed, might place pleaded facts in context.[116] "Absent an evidentiary hearing, one might ask how a court could possibly evaluate whether a pleading advances facts that no reasonable person could believe."[117] Moreover, the decision on what should or should not be believable to a reasonable person will inevitably vary from judge to judge depending on each judge's life experiences, professional background, political persuasion, ethnicity, gender and a host of other intangible factors.[118]

In addition, lawsuits are sometimes based on improbable factual scenarios that for some are difficult to imagine initially, yet are ultimately established as true by the evidence.[119] Many eminently reasonable people would never have believed that one of the largest automobile manufacturers in the world would have engaged in a cost-benefit analysis and decided that it somehow made far more sense to pay settlements for burn deaths and burn injuries

115. *See* Jefferson & Gibson, *supra* note 33, at 5 (observing that the definition of "no basis in fact" in Rule 91a.1 "is not defined in Texas jurisprudence and is obviously highly subjective").

116. DAVID E. CHAMBERLAIN & W. BRADLEY PARKER, *Rule 91a Motions to Dismiss*, ULTIMATE MOTIONS PRACTICE (State Bar of Texas), Sept. 20, 2013, at 5; *see also* TEX. R. CIV. P. 91a.6 (prohibiting trial judge from considering evidence when ruling on merits of motion to dismiss).

117. CHAMBERLAIN & PARKER, *supra* note 116.

118. *See infra* notes 145–149 and accompanying text (discussing authorities questioning propriety of allowing judges to decide viability of cause of action based on intangible criteria outside four corners of challenged pleading).

119. JEFFERSON & GIBSON, *supra* note 33, at 1 ("Determining at the pleading stage that a set of facts is so implausible that no reasonable person could believe them seems daunting.").

than to add a $10 design feature to its vehicles, that would have prevented the accidents.[120]

One way to avoid this subjectivity component is to take Rule 91a.1's definition of "no basis in fact" at face value. This would mean that the trial judge would be required to take factual allegations as true, believable, and supporting the cause of action alleged unless those allegations fall into the unimaginable or fantastical category.[121] To use the words of United States Supreme Court Justice David Souter, a court could not discount allegations as unbelievable unless they "are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel."[122] This approach appears consistent with Texas' current pleading standards.[123]

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120. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 384 (Cal. Ct. App. 1981) ("Through the results of the crash tests Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted 'conscious disregard' of the probability of injury to members of the consuming public.").

121. *See* 7 DORSANEO, *supra* note 108, § 103.02[1].

122. Ashcroft v. Iqbal, 556 U.S. 662, 696 (2009) (Souter, J., dissenting).

123. *See supra* Part III(B). This approach would also be consistent with the views of a Texas state district judge who frequently writes on practical, procedural and substantive aspects of Texas trial practice:

> Rule 91a is a useful tool to dismiss the occasional nut suits that we sometimes encounter. For example, one Harris County judge recently dismissed a case under rule 91a where the handwritten petition stated she was murdered by defendants, resurrected by God at jail where she had been incarcerated for 330 years. "It took a time machine and Jesus Christ to get [me] out of jail."

Hon. Randy Wilson, *From My Side of the Bench: Motions to Dismiss*, 65 THE ADVOC. (TEXAS) 80, 81–82 (2013); *cf.* 7 DORSANEO, *supra* note 108, § 103.02[1] (stating that Rule 91a.1's "no reasonable person could believe" language could be viewed as either following Justice Souter's "little green men" approach or creating something analogous to federal "plausibility" requirements).

2. Does "No Reasonable Person Could Believe" = "Plausibility"?

a. Introduction

Some commentators have viewed Rule 91a (other than its loser-pays provision) as the functional equivalent of the federal dismissal rule, Rule 12(b)(6), concluding that federal dismissal standards may be relied on when construing and litigating Rule 91a motions to dismiss.[124] Others question whether the wholesale incorporation of federal pleading and dismissal concepts into Texas practice can be reconciled with Rule 91a's language and with this state's long-accepted "fair notice" approach to pleadings.[125]

As previously discussed, under Texas' liberal pleading rules, the court is required to accept broad-based and even conclusory allegations as true—especially in the absence of special

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124. *E.g.*, Frank O. Carroll III, *TRCP 91a: A State Court 12(b)(6)?*, TEXAPPBLOG: APPELLATE LAW FOR NON-APPELLATE LAWYERS (May 7, 2013), http://texappblog.com/2013/05/07/trcp-91a-a-state-court-12b6/; Thomas G. Ciarlone, Jr., *Sweeping New Amendments to Texas Practice Rules: Good News for Corporate Defendants?*, BURLESON LLP ATTORNEYS & ADVISORS (March 7, 2013), http://www.burlesonllp.com/?t=40&an=23197&format=xml; Scott Dayton, *Texas Finally Promulgates Its Version of FRCP 12(b)(6)*, PRODUCT LIABILITY MONITOR (Feb. 2, 2013), http://product-liability.weil.com/uncategorized/texas-finally-promulgates-its-version-of-frcp-12b6/; Daniel O'Brien, *So You Want Your Day In Court? -- Texas' New Expedited Trial Rules*, AVVO http://www.avvo.com/legal-guides/ugc/so-you-want-your-day-in-court----texas-new-expedited-trial-rules. This commentary, though, consists more of observations or predictions than detailed analysis.

125. *See* BLAND ET AL., *supra* note 69, at 8–10; Janet Hendrick, *New Texas State Court Rules for Motions to Dismiss and Expedited Trials*, FISHER & PHILLIPS LLP, ATTORNEYS AT LAW (May 24, 2013), http://www.laborlawyers.com/new-texas-state-court-rules-for-motions-to-dismiss-and-expedited-trials; *see also* ROY MCDONALD & ELAINE CARLSON, TEXAS CIVIL PRACTICE § 9:27:20 (2d. ed. Supp. 2013) ("It is not clear if Rule 91a is intended to impose more onerous pleading requirements."); *Texas Litigation Update: Motion to Dismiss*, TEX. LITIG. PRAC. NEWSL. (FisherBroyles LLP, Austin & Dallas, Tex.), Feb. 2013, at 1 ("It remains to be seen how Texas courts will interpret 'no basis in law or fact' in comparison to the 'plausibility' standard of *Twombly* and *Iqbal*, the U.S. Supreme Court's sister decisions about 12(b)(6) motions."), *available at* http://www.fisherbroyles.com/wp-content/uploads/2013/02/2013Q1-Texas-Litigation-Update.pdf.

exceptions.[126] Additionally, Texas' pleading standards are widely viewed as different from and more relaxed than federal standards.[127]

Indeed, federal courts take a markedly different approach in reviewing the sufficiency of a pleading that contains conclusory or general allegations when determining whether that pleading states a claim upon which relief can be granted. The legal and factual conclusions pled by the plaintiff are disregarded by a federal judge when deciding whether to dismiss under Rule 12(b)(6), while non-conclusory factual allegations—even though accepted as true—are examined for "plausibility."[128] Consequently, a federal judge deciding a motion to dismiss under Rule 12(b)(6) is entitled to ignore general or broadly stated allegations that a Texas judge, deciding a motion under Rule 91a, is arguably required to construe liberally.

b. The Federal "Plausibility" Requirement

Since comparisons between Texas Rule 91a and Federal Rule 12(b)(6) are inevitable, a more detailed discussion of "plausibility" pleading requirements is warranted. The federal "plausibility" test arises from the interplay between two federal rules, Rule 12(b)(6) and Rule 8, as construed in two United States Supreme Court decisions, *Bell Atlantic Corporation v. Twombly*[129] and *Ashcroft v. Iqbal*.[130]

In *Twombly*, the Supreme Court "retired" its long-time dismissal standard of "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim would entitle him to relief."[131] In its place, the court announced that to satisfy Rule 8's pleading standard and survive dismissal under Rule

126. *See supra* Part III(B).

127. *See supra* note 38 and accompanying text.

128. Ashcroft v. Iqbal, 556 U.S. 662, 678–81 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007); FED. R. CIV. P. 12(b)(6); *see also infra* Part III(D)(2)(b).

129. 550 U.S. 544 (2007).

130. 556 U.S. 662 (2009).

131. The "no set of facts" standard originated in *Conley v. Gibson*, 355 U.S. 41, 45 (1957). According to the *Twombly* majority, that standard had "earned its retirement" after fifty years of use. 550 U.S. at 563.

12(b)(6), a complaint must consist of more than a mere "recitation of the elements of a cause of action" and speculation about wrongdoing.[132] Rather, the complaint must include sufficient, non-conclusory allegations "plausibly suggesting (not merely consistent with)" the defendant's liability for wrongdoing that "nudge" the plaintiff's claim "across the line from conceivable to plausible."[133] In other words, the complaint must be "plausible on its face."[134]

In *Iqbal*, the Supreme Court elaborated on *Twombly*'s plausibility pleading requirements, stating:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"[135]

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132. *Twombly*, 550 U.S. at 555.

133. *Id.* at 557, 570.

134. *See id.* at 570. When discussing the requirement that a claim be "plausible" to survive dismissal under Rule 12(b)(6), the *Twombly* majority engaged in an extended discussion concerning the high costs of discovery and the time-consuming nature of antitrust litigation which "will push cost-conscious defendants to settle even anemic cases." *Id.* at 558–60.

135. *Iqbal*, 556 U.S. at 678. In other words, under *Twombly* and *Iqbal*, pleading a "possibility" of liability is insufficient while "plausibility" is sufficient and "probability" is not required. *See id.* at 678; *Twombly*, 550 U.S. at 555, 570. This aspect of the federal "plausibility" standard has been viewed as less than a model of clarity:

> The Court explained in Iqbal that "the plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." This is a little unclear because plausibility, probability, and possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a

According to the *Iqbal* court, applying the court's plausibility standard requires a "two-pronged approach."[136] First, the court only assumes the truth of "well-pleaded facts" and is free to disregard "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements."[137] In other words, the court begins by "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."[138] Then, the court decides whether the well-pleaded facts assumed as true state "a plausible claim for relief."[139] Determining whether a complaint states a plausible claim for relief will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[140]

So, here's *The Question*. Should Rule 91a.1's "no reasonable person could believe" test be construed as effectively incorporating federal "plausibility" pleading requirements into Texas practice? As will be discussed, the answer should be "No."

c. *The Case Against "Plausibility" Under Rule 91a*

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.

First, the original version of HB 274, as introduced in the legislature, explicitly directed the Texas Supreme Court to "model" dismissal rules after Rules 9 and 12 of the Federal Rules of Civil

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zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring.

Atkins v. City of Chicago, 631 F.3d 823, 831 (7th Cir. 2011) (internal citations omitted); *see also infra* notes 167–170 and accompanying text (questioning the efficacy and practicality of attempting to differentiate between possibility, plausibility, and probability).

136. *Iqbal*, 556 U.S. at 679. *Iqbal* also clarified that the "plausibility" analysis announced in *Twombly* was not limited to antitrust litigation but applies to all civil actions in federal district courts. *Id.*

137. *Id.* at 678.

138. *Id.* at 679.

139. *Id.*

140. *Id.*

Procedure.[141] The statute requiring the supreme court to adopt a motion to dismiss procedure does not mention the Federal Rules nor does Rule 91a.[142] Under well-settled rules of statutory construction, deleting all references to the Federal Rules from HB 274 before the bill was enacted into law could easily be viewed as indicative of a legislative intent to not incorporate federal dismissal and pleading standards into Texas law.[143] Indeed, the legislative history for HB 274 reflects that the bill's supporters specifically disclaimed any intent to "change the forms of pleadings in Texas . . . [or to] require the [Texas] Supreme Court to make a change in specificity of pleadings."[144]

Second, Texas is a "fair notice" pleading state.[145] Allowing a judge to rely on his or her "judicial experience and common sense"[146] and parse fine-line distinctions between factual allegations, which must be taken as true, and conclusory statements, which can be freely disregarded, to decide whether a claim is "plausible," is irreconcilable with Texas' system of notice pleading.[147] Moreover,

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141. *See* H.B. 274, 82nd Leg., R.S. (Tex. 2011). Federal Rule 9 requires certain matters, such as fraud or mistake, to be pleaded with "particularity." FED. R. CIV. P. 9(b). Federal Rule 12 deals with defensive pleadings and provides, inter alia, that the defense of "failure to state a claim upon which relief can be granted" may be raised by motion. FED. R. CIV. P. 12.

142. *See* TEX. GOV'T CODE §22.004(g); TEX. R. CIV. P. 91a; *see also supra* Part III(A).

143. *See* Transp. Ins. Co. v. Maksyn, 580 S.W.2d 334, 338 (Tex. 1979) ("The deletion of a provision in a pending bill discloses the legislative intent to reject the proposal. Courts should be slow to put back that which the legislature has rejected.") (internal citation omitted); Berry v. State Farm Mut. Ins. Co., 9 S.W.3d 884, 891 (Tex. App.—Austin 2000, no pet.) (explaining that courts should presume the legislature deleted language from pending legislation for purpose). Rule 12(b)(6) has been construed as having been effectively rewritten to include a "plausibility" component, a pleading–dismissal approach that the Texas Legislature arguably rejected by deleting all references to the federal rules. *See id.*; *see also* McCurry v. Chevy Chase Bank, 233 P.3d 861, 863 (Wash. 2010) (concluding that *Twombly* and *Iqbal* re-wrote Rule 12(b)(6) to allow dismissal based on a "failure to state a [plausible] claim upon which relief can be granted").

144. Tex. H.B. 274 Analysis, *supra* note 29.

145. *See supra* Part III(B).

146. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

147. *See infra* notes 150–154, 156–158 and accompanying text (discussing jurisdictions declining to incorporate "plausibility" standards into their pleading practices and questioning propriety of permitting judge to decide validity of cause

injecting plausibility requirements into Texas pleading practice would effectively re-write Rules 45 and 47[148] and dramatically change standards in use since the Texas Rules of Civil Procedure became effective in 1941.[149]

Third, when directly faced with the issue, true notice-pleading jurisdictions have consistently rejected incorporating *Twombly* and *Iqbal*'s "plausibility" standards into their practices.[150] For multiple reasons, these jurisdictions have refused (often emphatically) to allow claims to be dismissed as "implausible" early in the litigation based on the pleadings alone:

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of action based on intangible and subjective criteria outside the four corners of challenged pleading); *see also* 2 MCDONALD & CARLSON, *supra* note 42, § 7:4[b] (describing effort to distinguish between factual statements, conclusions, "ultimate fact[s]" and similar terms as discarded by Texas' adoption of notice pleading in 1941 and as "inherently unworkable metaphysical distinction"); Jefferson & Gibson, *supra* note 33, at 1 ("The new rule [Rule 91a] does nothing to change the fact that 'fair notice' is the standard by which plaintiffs' pleadings are to be judged.").

148. *See infra* note 159 and accompanying text (noting that numerous courts in notice-pleading jurisdictions have declined to adopt federal "plausibility" requirements concluding, in part, that such a major change in pleading practice should only be implemented through the rule-making process).

149. 2 MCDONALD & CARLSON, *supra* note 42, § 7:4[a]–[b] (2d ed. 2003). After the upcoming detailed analysis of reasoning used by other jurisdictions to reject the federal "plausibility" standard, we'll return to why Texas should similarly repudiate federal pleading requirements or, at a minimum, decline to incorporate "plausibility" into Texas pleading practice without first going through the formal rule-making process. *See infra* note 159 and accompanying text.

150. *See* Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 608 (Iowa 2012) ("For the most part, state high courts have declined to adopt the new standard announced in *Twombly* and *Iqbal*."); Brilz v. Metro. Gen. Ins. Co., 285 P.3d 494, 500 (Mont. 2012) ("For the most part, state high courts have declined to adopt the new 'plausibility' standard announced in *Twombly* and *Iqbal*."); Edwin W. Stockmeyer, Note, *Challenging the Plausibility Standard Under the Rules Enabling Act*, 97 MINN. L. REV. 2379, 2385–86 (2013) ("[M]ajority" of state appellate courts have either rejected the plausibility standard or declined to apply it."). When state courts have incorporated "plausibility" requirements, they have generally felt either bound by U.S. Supreme Court holdings when interpreting their own version of Rule 12(b)(6) or their pleading requirements already exceeded notice-pleading standards used by Texas and other states. *See, e.g.*, Doe v. Bd. of Regents of Univ. of Neb., 788 N.W.2d 264, 274–78 (Neb. 2010); Sisney v. Best, Inc., 754 N.W.2d 804, 809 (S.D. 2008); Potomac Dev. Corp. v. District of Columbia, 28 A.3d 531, 543–44 (D.C. 2011).

- The federal "plausibility" standard incorporates an assessment and determination of the plaintiff's likelihood of success on the merits so that the trial judge weighs facts alleged to see if they "plausibly" present a claim for relief at the earliest stage of the litigation.[151] In turn, this means "a trial judge can dismiss a claim, even where the law does provide a remedy for the conduct alleged by the plaintiff, if that judge does not believe it is plausible the claim will ultimately succeed."[152] This "fact-weighing and merits-based determination" is inconsistent with notice-pleading and the role of a motion to dismiss which challenges only the legal sufficiency of the plaintiff's pleading.[153]

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151. Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 431–32 (Tenn. 2011); *accord* Syed v. Mobil Oil Mar. I., Inc, No. 2011-SCC-0010-Civ, 2012 N. Mar. I. LEXIS 22, at *17–19 (Dec. 31, 2012) (relying on reasoning of Tennessee Supreme Court in *Webb* and emphasizing that "plausibility" requirements "would prematurely close the doors of justice on plaintiffs"). In an exhaustive analysis, the Supreme Court of Tennessee cited and quoted heavily from articles and other sources mostly critical of the "plausibility" standard while acknowledging that the *Twombly* and *Iqbal* decisions have defenders. *See Webb*, 346 S.W.3d at 430–37; *see also* McCauley v. City of Chicago., 671 F.3d 611, 622 (7th Cir. 2011) (Hamilton, J., dissenting) ("[S]ince *Iqbal* was decided, the lower federal court decisions seeking to apply the new 'plausibility' standard are wildly inconsistent with each other, and with the conflicting decisions of the Supreme Court."); *Hawkeye Foodservice*, 812 N.W.2d at 608 ("The 'plausibility standard' created by the two cases [*Twombly* and *Iqbal*] has generated a great deal of discussion, much of it negative."); Natalma McKnew, *I Just Love a Good Debate! Twombly and Iqbal Five Years Later*, 33 FRANCHISE L.J. 1, 32, 43 ("[C]ourts applying the [plausibility] inquiry embrace widely varying approaches . . . [and] unsettled issues in the current courts abound . . . .").

152. McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863 (Wash. 2010) (en banc); *accord Hawkeye Foodservice*, 812 N.W.2d at 608 (quoting *McCurry*, 233 P.3d at 863 refusing to adopt "plausibility standard" and declining "to depart from our well-established standard").

153. *Webb*, 346 S.W.3d at 432; *see also* Madrid v. Village of Chama, 283 P.3d 871, 876 (N. Mex. 2012) ("The plausibility standard created by the two U.S. Supreme Court cases adds a determination of likelihood of success on the merits so that a trial judge can dismiss a claim, even where the law does provide a remedy, if that judge does not believe it is plausible the claim will succeed. New Mexico is a notice-pleading state, requiring only that the plaintiff allege facts sufficient to put the defendant on notice of his claims. As a result, our appellate

- *Iqbal*'s holding, that a trial judge should look to "judicial experience and common sense" when deciding whether a claim is plausible, impermissibly allows the court to go outside the four corners of the challenged pleading and "enhances the risk of denying a remedy despite the truth of the plaintiff's allegations."[154]
- The fact–conclusion dichotomy established by *Twombly* and *Iqbal*, where the court accepts well-pleaded facts as true but is free to disregard conclusions, is problematic because the distinction between a factual and conclusory allegation is often unclear and will inevitably vary from judge to judge.[155] Moreover, in notice-pleading jurisdictions, the plaintiff is not required to set out the facts on

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courts have never required trial courts to consider the merits of a plaintiff's allegations when deciding a motion to dismiss, and we see no justification for requiring such technical forms of pleadings now.") (citation omitted).

154. Stockmeyer, *supra* note 150, at 2388 (allowing the trial court to dismiss at pleading stage based on "judicial experience and common sense . . . raises potential concerns implicating the Tennessee constitutional mandate that 'the right of trial by jury shall remain inviolate'") (internal citation omitted); Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 196–97 (W. Va. 2010) (Benjamin, J., dissenting) ("I am not certain that a 'plausibility' standard at the initial pleading level is necessarily a good thing . . . [and] I am uncertain how predictable the current federal standard may be given that each judge has a different level of experience in making such determinations.").

155. *Webb*, 346 S.W.3d at 433 (quoting Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 22–24 (2010) (stating that factual–legal dichotomy created by *Twombly* and *Iqbal* is "shadowy at best" and vests trial judges with "virtually unbridled discretion"). *See generally* Stockmeyer, *supra* note 150, at 2386–87 (recognizing that many state pleading standards allow lawsuits to go forward that would be precluded by "plausibility" standard's fact–conclusion dichotomy).

which its claim is based, much less provide a detailed recitation of facts to avoid dismissal.[156]

- Requiring a showing of "plausibility" at the pre-discovery stage of the litigation presents an unacceptable risk of a disproportionate dismissal rate in cases where there is an "information asymmetry," i.e., litigation where the information needed to draft a well-pleaded complaint resides exclusively within the defendant's control and possession. Litigation involving questions of malice, intent, state of mind, discrimination, or conspiracy, are often decided based on information "found only in the defendant's files and computers."[157]
- Adopting a "plausibility" requirement would represent a substantial if not drastic departure from notice-pleading standards and inject uncertainty and unpredictability into a practice that has been stable and predictable for decades.[158] Such a major change

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156. *See, e.g., Madrid*, 283 P.3d at 876 (reaffirming that a plaintiff need only assert sufficient facts to place a defendant on notice of its claims and is not required to meet federal "plausibility" requirements); Colby v. Umbrella, Inc., 955 A.2d 1082, 1087 n.1 (Vt. 2008) ("We recently reaffirmed our minimal notice pleading standard in *Alger*, 181 Vt. 309, 2006 VT 115, ¶ 12, 917 A.2d 508, and are unpersuaded by the dissent's argument that we should now abandon it for a heightened standard."); *Roth*, 700 S.E.2d, at 189 n.4 (refusing to adopt "the more stringent pleading requirements" under *Twombly* and *Iqbal* because West Virginia does not require plaintiff to allege facts on which claim is based but only provide "fair notice").

157. *See Webb*, 346 S.W.3d at 434–35 (quoting Arthur R. Miller, *A Double Play*, 60 DUKE L.J., 45–46 (2010); *see also* Syed v. Mobil Oil Mar. I., Inc., No. 2011 – SCC – 0010 – CIV, 2012 N. Mar. I. LEXIS 22, at *17–19 (Dec. 31, 2012) (relying on *Webb* while observing that adopting "plausibility" requirements "would prematurely close the doors of justice on plaintiffs").

158. *Webb*, 346 S.W.3d at 430 ("If this Court were to follow the Supreme Court's lead in *Twombly/Iqbal* and 'reinterpret' Tennessee Rule of Procedure 8 to mandate the new plausibility standard, it would similarly require the substantial alteration or abandonment of pleading principles that have been stable and predictable for forty years in Tennessee."); Colby v. Umbrella, Inc., 955 A.2d 1082, 1086 n.1 (Vt. 2008) (Whether *Twombly* "creates a new and heightened pleading standard[,] . . . and it is arguable in light of conflicting interpretations of *Twombly*[,] . . . we have relied on the *Conley* standard for over twenty years, and are in no way bound by federal jurisprudence in interpreting our state pleading

in procedure should "come by operation of the normal rule-making process, not by judicial fiat in the limited context of a single case."[159] "This [rule-making] process permits policy considerations to be raised, studied, and argued in the legal community and the community at large."[160]

- The "plausibility" requirement is based on policy concerns unique to federal trial courts. Absent a record establishing that these concerns are warranted (discovery costs attributable to meritless lawsuits),[161] there is no need to depart from long accepted pleading standards; and even if those concerns appear justified, these are the type of policy issues that should be considered in the rule-making process.[162]

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rules . . . and are unpersuaded . . . that we should now abandon it for a heightened standard.") (internal citation omitted); *McCurry*, 233 P.3d at 864 (finding no "basis to fundamentally alter our interpretation of CR 12(b)(6) that has been in effect for nearly 50 years").

159. *Webb*, 346 S.W.3d at 434–35; *accord* Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 347 (Ariz. 2008) (en banc) (reasoning that "Arizona has not revised the language or interpretation of Rule 8 in light of *Twombly*" and that any change must come through the Arizona rule-making process); Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 536–37 (Del. 2011) (declining to change Delaware's pleading standard from "conceivability" to "plausibility"); *McCurry*, 233 P.3d at 863 ("The appropriate forum for revising the Washington rules is the rule-making process."); *see also Roth*, 700 S.E.2d at 197 (Benjamin, J., dissenting) (concluding that it is "preferable that we consider [changing pleading standards] in the reflection of rule-making rather than in the vacuum of an individual case before us on appeal").

160. *McCurry*, 233 P.3d at 864.

161. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–60 (2007) (citing discovery costs as a reason for adopting the "plausibility" standard); *see also supra* note 134 (noting emphasis of *Twombly* court on expensive and time-consuming nature of antitrust litigation).

162. Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 608 (Iowa 2012); *Webb*, 346 S.W.3d at 435–37; *McCurry*, 233 P.3d at 863–64; *see also* Syed v. Mobil Oil Mar. I., Inc., No. 2011–SCC – 0010–Civ, 2012 N. Mar. I. LEXIS 22, at *18 (Dec. 31, 2012) ("We are not aware of any evidence demonstrating the presence of rampant discovery abuse by plaintiffs in the Commonwealth that would justify adopting the 'plausibility' standard. Likewise, while Commonwealth trial courts have heavy caseloads, we nonetheless decline to adopt a heightened pleading standard at this time as to do so would prematurely close the doors of justice on plaintiffs.").

Every reason advanced by these jurisdictions for refusing to incorporate federal "plausibility" standards into their pleading practice applies with equal force to Texas. In particular, such a drastic departure from Texas' fair notice pleading standard, used with success and largely without criticism for over seventy years,[163] would be appropriate—*if ever*[164]—only after all relevant policy and practical considerations are carefully studied by the public, the bar, and the judiciary through the rule-making process.[165] In fact, the legislative history for HB 274 demonstrates that while the supporters of the dismissal rule did not intend for the supreme court to make

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163. *See supra* Part III(B); *see also* MCDONALD & CARLSON, *supra* note 42, § 7:4[b] (stating that Texas pleading practice focuses on notice rather than attempting to categorize allegations by type).

164. *See supra* note 159 and accompanying text (summarizing reasoning used by notice-pleading jurisdictions when rejecting *Twombly* and *Iqbal* "plausibility" requirements). In particular, the premise that a judge is entitled to decide whether allegations are "plausible" based on his or her "common sense" is a scary thought for some:

> Increasingly, members of the Court in cases like *Iqbal* and *Twombly* appear to see allegations not through the lens of detached, impartial observers, but rather through the eyes of conforming social elites. Thus, corporations are presumed to operate in legitimate ways motivated only by the quest for lawful profit; law enforcement and other government officials are presumed to operate by-the-book in a focused mission to protect innocents from the multitude of deviants; and employers are presumed to make hiring, firing, and promotion or transfer decisions based wholly on merit rather than on prejudice against members of various protected classes.

A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 199 (2010). Or, as the great American philosopher, John Prine, once said, "That common sense don't make no sense . . . ." John Prine, *Common Sense*, *on* COMMON SENSE (Atlantic Records 1975)

165. *See supra* note 159 and accompanying text (discussing Arizona, Delaware, Tennessee, and Washington's forceful rejection of changing their pleading standard from notice-pleading to "plausibility," concluding, inter alia, that such substantial changes in long-accepted practices should only come through rule-making process); *see also Texas Court Rules: History and Process*, TEXAS SUPREME COURT (Nov. 1998), http://www.supreme.courts.state.tx.us/rules/history.asp (excerpted from Nathan L. Hecht & E. Lee Parsley, Procedural Reform: Whence and Whither, *in* PRACTICING LAW UNDER THE NEW RULES AND APPELLATE PROCEDURE (1997).

changes in pleading specificity requirements, they acknowledged that if the court believed that changes were needed, the court would do so only after "tak[ing] its normal approach to changes in the rules and would implement them only after careful study and deliberation."[166]

Fourth, and ignoring for the moment the fundamental disconnect of trying to shoehorn "plausibility" into notice-pleading practice generally,[167] Rule 91a appears to have a disconnect unique and specific to Texas. It is questionable whether Rule 91a.1's "no reasonable person could believe" test can be (or more importantly should be) equated with "plausibility" as a matter of the English language. Under the "plausibility" standard, alleged facts have to amount to more than a showing that it is "conceivable" or "possible" that the defendant is liable.[168] Yet, if a fact is "conceivable" or

166. *See* Tex. H.B. 274 Analysis, *supra* note 29. Rule 47 was amended in 2013 at the same time Rule 91a went into effect. The purpose of the amendment was to require parties to plead into or out of the expedited actions process, also adopted in 2013, and to require greater specificity in the dollar amount of the damages claimed. TEX. R. CIV. P. 47 cmt. 2013. While the comment (but not the amended rule) refers to requiring greater specificity for the "relief" sought by a party, that single sentence cannot reasonably be viewed as indicative of an intent to undo decades of settled Texas law merely requiring a party to provide fair notice of its alleged "cause of action." *See id.* There is a decided difference between pleading a cause of action and pleading the relief available under that cause of action. *See* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 69 (1992) ("The Government's position, however, mirrors the very misunderstanding over the difference between a cause of action and the relief afforded under it . . . ."). And while the comment also refers to the addition of paragraphs (c)(2)–(5) of the revised rule as requiring more information regarding the "nature" of the case filed, those new paragraphs deal solely with "relief" as well, the specificity requirements for dollar amount of damages claimed, not specificity requirements for causes of action. TEX. R. CIV. P. 47 cmt. 2013.

167. *See supra* notes 150–162 and accompanying text (analyzing the reasoning used by courts when criticizing and declining to adopt federal "plausibility" pleading requirements).

168. *See supra* Part III(D)(2)(b) and notes 131–140 and accompanying text (summarizing *Iqbal* and *Twombly* decisions); *see also* Courie v. Alcoa Wheel & Forged Prods., 577 F.3d 625, 629–30 (6th Cir. 2009) ("Indeed, while this new *Iqbal/Twombly* standard screens out the 'little green men' cases . . . it is designed to also screen out cases that, while not utterly impossible, are 'implausible.' Exactly how implausible is 'implausible' remains to be seen, as such a malleable standard will have to be worked out in practice.") (internal citations omitted); *cf.* Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC, 27 A.3d 531,

"possible," then that fact could easily be something that a "reasonable person could believe." Or not.[169] In truth, the whole how-many-angels-can-sit-on-the-head-of-a-pin quandary of trying to distinguish between "possibility," "conceivability," "plausibility," and "probability" with Rule 91a's "no reasonable person could believe" then thrown into that impenetrable swamp, illustrates perfectly why Texas courts should not construe Rule 91a as abandoning fair notice pleading practice.[170]

E. Interrelationship Between Rule 91a and Rule 59

1. Rule 59: In General

Rule 91a.6 prohibits the trial court from considering evidence when ruling on the motion to dismiss and requires the court to

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536–37 (Del. 2011) (declining to change Delaware's pleading standard from "conceivability" to the "higher" standard of "plausibility").

169. Unless there is an obvious bright-line demarcation (i.e., "little green men"), then Texas will have more than 600 trial judges and appellate justices, each independently deciding, based on his or her own unique experiences and common sense, what a reasonable person could or could not believe. *See* Gerhart Husserl, JOURNAL OF SOCIAL PHILOSOPHY (July 1940) ("Law is what a judge dispenses. The judge, however, is no representative of the average man's common sense. A certain remoteness from the experiences of everyday life and a certain rigidity of viewpoint are essential to his role as judge."), *quoted in* THE NEW YORK PUBLIC LIBRARY BOOK OF 20TH CENTURY AMERICAN QUOTATIONS 520 (1992); Bertrand Russell, *An Outline of Intellectual Rubbish*, UNPOPULAR ESSAYS 82, 111 (1950) ("Man is a credulous animal and must believe something. In the absence of good grounds for belief, he will be satisfied with bad ones.").

170. *See* Sacksteder v. Senney, No. 24993, 2012 Ohio App. LEXIS 3914, at *27–28 (Sep. 28, 2012) ("The interstitial, definitional progression from the 'fantastic' (e.g., 'little green men') through 'speculative,' 'conceivable,' 'possible,' 'plausible,' 'reasonably founded,' 'consistent with liability,' 'suggestive of liability,' to 'probability,' can be the legal equivalent of explaining the progression from a quark to the Higgs boson."). One Texas court of appeals, albeit with no analysis of any of the legal, practical or policy considerations discussed in this Article or by courts in other notice-pleading states, recently concluded that by adopting Rule 91a, Texas effectively incorporated Federal Rule 12(b)(6) into Texas practice. *See* GoDaddy.Com, LLC v. Toups, 2014 Tex. App. LEXIS 3891, at *3–6 (Tex. App.—Beaumont April 10, 2014, pet. filed) (finding case law interpreting Federal Rule 12(b)(6) to be "instructive" and testing the sufficiency of plaintiff's allegations challenged by Rule 91a motion to dismiss under federal plausibility standards).

"decide the motion based solely on the pleading of the cause of action, *together with any pleading exhibits permitted by Rule 59.*"[171] In other words, when determining whether to dismiss a cause of action as baseless, the trial court must evaluate the challenged claim—as alleged—in light of any documentary exhibits allowed by Rule 59.[172]

What "pleading exhibits" does Rule 59 permit? Rule 59 states that "[n]otes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on" may be made part of the pleading if attached, filed, or referenced into the pleading.[173] Under Rule 59, a properly attached/incorporated exhibit becomes part of the pleading and may be considered "in aid and explanation of the allegations" in that pleading.[174] In addition to the written instruments listed in Rule 59, courts have considered a variety of documents as part of a pleading, including contracts,[175] insurance policies,[176] assignments,[177] freight bills,[178] zoning commission orders,[179] shipping instructions,[180] Railroad Commission orders,[181] and security agreements.[182]

Rule 59 additionally states: "[P]leadings shall not be deemed

171. TEX. R. CIV. P. 91a.6 (emphasis added). This is the only reference in Rule 91a to Rule 59.

172. *Id.*

173. TEX. R. CIV. P. 59.

174. *Id.*

175. Hanger Gen. Contractors v. Greater Swenson Grove Baptist Church, 597 S.W.2d 32, 34 (Tex. Civ. App.—Austin 1980, no writ); Centennial Royalty Co. v. Byrd & Foster Drilling Co., 464 S.W.2d 420, 423 (Tex. Civ. App.—El Paso 1971, no writ).

176. Eagle Life Ins. Co. v. Spencer, 591 S.W.2d 589, 591 (Tex. Civ. App.—Corpus Christi 1979, no writ).

177. HSBC Bank USA, N.A. v. Watson, 377 S.W.3d 766, 775 (Tex. App.—Dallas 2012, pet. dism'd).

178. Climate Eng'g Co. v. Merchs. Fast Motor Lines, Inc., 459 S.W.2d 695, 698 (Tex. Civ. App.—Austin 1970, no writ).

179. Riner v. City of Hunters Creek, 403 S.W.3d 919, 923 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

180. Asgrow Seed Co. v. Gulick, 420 S.W.2d 438, 440 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).

181. Sw. Stone Co. v. R.R. Comm'n, 173 S.W.2d 325, 327–28 (Tex. Civ. App.—Austin 1943, writ ref'd w.o.m.).

182. Eagle Life Ins. Co. v. Spencer, 591 S.W.2d 589, 591 (Tex. Civ. App.—Corpus Christi 1979, no writ).

defective because of the lack of any allegations which can be supplied from said exhibit."[183] As Texas courts have repeatedly recognized, this aspect of Rule 59 means that a pleading that is missing critical allegations or is ambiguous or unclear on the alleged liability theories may nevertheless be sufficient to provide fair notice to the opposing party when attached/incorporated exhibits cure any deficiency in the allegations.[184]

2. Using Rule 59 Exhibits in Rule 91a Litigation

Because missing or unclear allegations can be remedied by a Rule 59 exhibit, a pleading exhibit can save the pleading from dismissal under Rule 91a. For example, a poorly drafted breach of contract claim might initially appear to be baseless because allegations essential to the defendant's contract liability are absent from the pleading. But when that petition is considered in light of the contract attached as an exhibit, the claim is not baseless and should not be dismissed under Rule 91a because the liability allegations missing from the petition are supplied by the attachment.[185]

The benefits of Rule 59, in terms of avoiding dismissal of a cause of action as baseless, extend beyond relatively straightforward suits on a contract, promissory note, will, or other written instrument. For instance, one Texas court concluded that a demand letter under the Deceptive Trade Practices Act, which was attached to and incorporated into the plaintiff's petition, constituted part of the "claim sued on" for Rule 59 purposes; therefore, the contents of that letter had to be considered when determining the sufficiency of the pleading to provide fair notice of the plaintiff's damage claims to the

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183. *See* TEX. R. CIV. P. 59.

184. *E.g.*, Hous. Cmty. Coll. Sys. v. Schneider, 67 S.W.3d 241, 243 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); Hanger Gen. Contractors v. Greater Swenson Grove Baptist Church, 597 S.W.2d 32, 34 (Tex. Civ. App.—Austin 1980, no writ); *Eagle Life*, 591 S.W.2d at 591; *see also Asgrow Seed*, 420 S.W.2d at 440 (holding that in action to recover the purchase price of seeds, shipping instructions attached as exhibit to plaintiff's petition resolved any ambiguity in pleading of breach of contract claim).

185. *E.g.*, *Swenson Grove*, 597 S.W.2d at 34; *Eagle Life*, 591 S.W.2d at 591; Centennial Royalty Co. v. Byrd & Foster Drilling Co., 464 S.W.2d 420, 423 (Tex. Civ. App.—El Paso 1971, no writ); *Asgrow Seed*, 420 S.W.2d at 440.

defendant.[186] Another court concluded that a pre-suit notice letter under the Texas Tort Claims Act, which was attached to the plaintiff's petition and included police reports, satisfied the plaintiff's burden to allege facts sufficient to establish trial court jurisdiction over her personal injury claims against the defendants.[187]

Many statutory causes of action require a pre-suit notice or demand letter, such as suits under the Deceptive Trade Practices Act,[188] the Insurance Code,[189] the Tort Claims Act,[190] or the Medical Liability Act.[191] Other causes of action, although not expressly requiring a pre-suit notice or demand as a prerequisite to filing suit, include a notice/demand as an element of liability such as theft of services,[192] conversion,[193] and claims arising from sales and lease transactions under Texas' Uniform Commercial Code.[194] In addition, recovering attorney's fees as the successful claimant in a breach of contract action requires the claimant to plead and prove "presentment" of its claim to the opposing party, which is often accomplished through a pre-suit demand letter.[195] In all of these

186. Burke v. Union Pac. Res. Co., 138 S.W.3d 46, 67 (Tex. App.—Texarkana 2004, pet. denied).

187. City of Celina v. Blair, 171 S.W.3d 608, 612 n.5 (Tex. App.—Dallas 2005, no pet.).

188. TEX. BUS. & COMM. CODE ANN. § 17.505(a) (West 2013).

189. TEX. INS. CODE ANN. § 541.154 (West 2013).

190. TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (West 2013).

191. *Id.* § 74.051(1).

192. *See id.* § 134.005(a); TEX. PEN. CODE ANN. § 31.04(c) (West 2013).

193. *See* Nolte v. Flournoy, 348 S.W.3d 262, 269 (Tex. App.—Texarkana 2011, pet. denied) (citing cases).

194. *See* TEX. BUS. & COMM. CODE ANN. §§ 2.607(c)(1), 2A.516(c)(1) (West 2013).

195. *See* Ellis v. Waldrop, 656 S.W.2d 902, 905 (Tex. 1983); Busch v. Hudson & Keyse, LLC, 312 S.W.3d 294, 300 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 38.002(2) (West 2013). Although it might be a matter of semantics, the Rule 59 exhibit constituting the "claim sued on" in a breach of contract action could arguably be limited to the contract alone. A pre-suit demand, serving as a precondition to recovering attorney's fees, might be viewed as part of the relief available for successfully pursuing that claim rather than the claim itself. If viewed from that perspective, a demand letter might not qualify as an appropriate Rule 59 exhibit. On the other hand, "claim" is a much broader term than "cause of action" and could reasonably be viewed as encompassing both the cause of action and all relief available under that cause of action, making both the contract and the pre-suit demand letter proper

situations, plaintiff's counsel should *strongly* consider attaching and incorporating the demand/notice letter to the petition, particularly if that letter is not only detailed, but is also supported by exhibits. A comprehensive demand or notice letter (with exhibits) might well save a less detailed liability, causation, or damage allegation from being dismissed as baseless.[196]

Other Texas courts have concluded that an affidavit attached to a pleading was an appropriate Rule 59 exhibit and, therefore, had to be considered by the court when reviewing that pleading.[197] Thus, an incorporated affidavit and any exhibits attached to that affidavit might provide factual support or details missing from a pleading and demonstrate that a challenged cause of action has a basis in law and fact.

A caveat: To be used to explain or supplement allegations in a pleading, the attached or incorporated document must constitute "in whole or in part, the claim sued on."[198] For that reason, discovery responses are not proper Rule 59 exhibits and may not be used to construe a pleading. Discovery does not constitute part of the claim sued on.[199] So, if a litigant is concerned about a cause of

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Rule 59 exhibits.

196. *See* City of Celina v. Blair, 171 S.W.3d 608, 612 n.5 (Tex. App.—Dallas 2005, no pet.) ("Blair attached to her petition the notices of her claim that were sent to the two defendants. Each notice, in turn, attached the police report of the accident at issue in the claim. Thus, the police reports became part of Blair's pleadings for all purposes."); Burke v. Union Pac. Res. Co., 138 S.W.3d 46, 67 (Tex. App.—Texarkana 2004, pet. denied) (holding that plaintiff sufficiently pled for a recovery of special damages under DTPA based on DTPA demand letter attached to plaintiff's pleading). Although a Rule 91a proceeding is non-evidentiary, when exhibits attached to a notice/demand letter are construed as part of a petition under Rule 59—whether consisting of medical records, expert opinions, police reports or other documents—the plaintiff is actually providing the trial judge with the "evidence" (albeit in a roundabout way) that supports the cause of action challenged by the defendant.

197. State v. Life Partners, Inc., 243 S.W.3d 236, 240 (Tex. App.—Waco 2007, pet. denied) (holding that an affidavit attached and incorporated into a motion to transfer venue became part of the motion itself); Skepnek v. Mynatt, 8 S.W.3d 377, 381–82 (Tex. App.—El Paso 1999, pet. denied) (affidavit attached and incorporated into a special appearance motion became part of the motion).

198. TEX. R. CIV. P. 59.

199. Withem v. Underwood, No. 05-94-01310-CV, 1997 Tex. App. LEXIS 5978, at *7 (Tex. App.—Dallas Nov. 19, 1997, no pet.) (unpub. op.) (holding that discovery requests were improperly attached as exhibits to petition because

action included in a pleading being attacked as baseless and has appended exhibits to bolster the viability of that claim, those exhibits must qualify as part of the "claim sued on" before the trial judge may consider them when evaluating the pleading under Rule 91a.

Violating Rule 59 does not invalidate the entire pleading. Rather, the court will simply ignore materials not permitted as Rule 59 exhibits when deciding whether the challenged cause of action is baseless.[200]

It should be noted though that Rule 59 does not impose an obligation to attach or incorporate documents as exhibits to a pleading. The party seeking recovery on a contract, note, account, or any other written instrument does not have to attach or incorporate the documents serving as the basis for its claim.[201] Texas follows a "fair notice" standard for pleading.[202] So long as the material provisions of the written instrument at issue are alleged and the opposing party is able to ascertain the nature of the controversy, attaching or incorporating the instrument itself is not required.[203]

"discovery requests do not constitute, in whole or part, the claim sued upon"); Texas Elec. Serv. Co. v. Commercial Std. Ins. Co., 592 S.W.2d 677, 684 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (holding that attaching deposition to petition was improper); *see also* Hankston v. Equable Ascent Fin., LLC, 382 S.W.3d 631, 635 (Tex. App.—Beaumont 2012, no pet.) (explaining that including discovery requests in pleading undermines purpose of petition to provide fair notice of claim to opposing party).

200. *See* Driscoll v. Epley, 282 S.W.2d 731, 732–33 (Tex. Civ. App.—El Paso 1955, writ dism'd w.o.j.) (explaining that attaching documents not permitted by Rule 59 "does not vitiate or cause to be vitiated the entire petition").

201. *See* Unifund CCR Partners. v. Watson, 337 S.W.3d 922, 926 (Tex. App.—Amarillo 2011, no pet.) (concluding that the plaintiff's petition was sufficient when it stated that the defendant was the assignee of a credit card agreement even though the plaintiff did not attach documentation of the agreement); *see also* Twin City Bowling Lanes, Inc. v. C.I.T. Corp., 376 S.W.2d 94, 95–96 (Tex. Civ. App.—Fort Worth 1964, no writ); First Nat'l Life Ins. Co. v. Vititow, 323 S.W.2d 313, 315 (Tex. Civ. App.—Texarkana 1959, writ dism'd w.o.j.).

202. *See supra* Part III(B).

203. *See Hankston*, 382 S.W.3d at 635 (holding petition did not state breach of contract claim sufficient to support default judgment because, while the plaintiff was not required to attach the contract, his petition failed to provide "any identifying information about the underlying contract"); *Twin City Bowling*, 376 S.W.2d at 95–96 (concluding, in a suit to recover unpaid balance on a promissory note, a lender was not required to attach or incorporate the note into the petition

3. Potential Problem Areas with Pleading Exhibits and Rule 91a

What if the plaintiff's allegations are directly contradicted by the Rule 59 exhibit incorporated or attached to its petition? The plaintiff files a breach of contract action against a defendant but the contract appended to plaintiff's petition fails to establish the existence of an agreement between the plaintiff and the defendant.[204] The exhibit will control over any contrary or inconsistent allegations in the pleading.[205] While the trial judge should initially attempt to reconcile any inconsistency between the pleading and the Rule 59 exhibit in favor of the pleading party, the exhibit will control over the pleading if there is a direct conflict.[206] On the other hand, if the pleading, together with the Rule 59 exhibit, create an ambiguity as to the viability of a cause of action, that claim should not be dismissed as baseless.[207]

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but only include allegations "material and essential to a determination of the controversy"); *see also Unifund*, 337 S.W.3d at 926; *First Nat'l Life*, 323 S.W.2d at 315.

204. *See* Cecil v. Hydorn, 725 S.W.2d 781, 781–82 (Tex. App.—San Antonio 1987, no pet.) (although the plaintiff's petition alleged that he and the defendant entered into an employment agreement, exhibit attached to petition "showed no such agreement between them"); *see also Hankston*, 382 S.W.3d at 635 (attachment to petition did not establish existence of contract between parties).

205. *E.g.*, *Hankston*, 382 S.W.3d at 635; *Cecil*, 725 S.W.2d at 781–82; Paul v. Hous. Oil Co., 211 S.W.2d 345, 353 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.); Davis v. Nichols, 124 S.W.2d 881, 884 (Tex. Civ. App.—Dallas 1939, no writ).

206. *E.g.*, *Cecil*, 725 S.W.2d at 781–82; Moore v. Beaumont, 195 S.W.2d 968, 975 (Tex. Civ. App.—Beaumont 1946), *aff'd*, 202 S.W.2d 448 (Tex. 1947); *Davis*, 124 S.W.2d at 884. This same rule applies when a federal district judge is deciding whether to dismiss a claim under Federal Rule 12(b)(6). "It is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 32 (1st Cir. 2000) (quoting N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 454 (7th Cir. 1998)).

207. *See* TEX. R. CIV. P. 91a.1, 91a.6 (requiring that allegations of cause of action be taken as true together with inferences reasonably drawn from those allegations). Federal courts are required to resolve any ambiguities in documents serving as the basis for the pleader's claim in the pleader's favor when deciding whether to dismiss that claim under Rule 12(b)(6). *See, e.g.*, Int'l Audio Text Network, Inc. v. AT&T Co., 62 F.3d 69, 72 (2d Cir. 1995).

What if the plaintiff's allegations regarding the contract, promissory note, or other writing at issue are directly contrary to the terms of the document allegedly serving as the basis for the plaintiff's claims, but the plaintiff fails to attach or incorporate that document into its petition? Is the defendant entitled to attach the document to its pleading as a Rule 59 exhibit to establish that the plaintiff's claim is baseless? There is no clear answer to these questions under Rule 91a's language. Rule 91a appears to require the trial court to focus strictly on the allegations of the party pleading the cause of action and not the allegations and exhibits of the party opposing that cause of action.[208] Moreover, dismissing a cause of action based on an exhibit provided to the trial court by the party opposing that cause of action appears to more closely resemble a traditional summary judgment motion based on evidence conclusively disproving the plaintiff's claim rather than a Rule 91a motion[209]—albeit bypassing the deadlines, procedures, and protections afforded by the summary judgment rule.[210] On the other hand, Rule 91a does not expressly limit the trial court to only considering Rule 59 exhibits relied on by the pleader but refers more generically to "any pleading exhibits permitted" by that rule.[211] And Rule 59 allows documents to be incorporated not just into the petition but also for "the matter set up in defense."[212]

Federal courts have faced this situation when dealing with motions to dismiss under Rule 12(b)(6) but federal practice appears so dissimilar to Rule 91a.6's language that federal case law may be of little help. Some federal courts have concluded that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims

208. *See* TEX. R. CIV. P. 91a.6.

209. *See* Citizens First Nat'l Bank v. Cinco Exploration Co., 540 S.W.2d 292, 294 (Tex. 1976) ("It is well established that a defendant moving for a summary judgment assumes the burden of showing as a matter of law that the plaintiff has no cause of action against him.").

210. TEX. R. CIV. P. 166a; *see also* Hudak v. Campbell, 232 S.W.3d 930, 931 (Tex. App.—Dallas 2007, no pet.) ("The record before us does not indicate any of the procedural safeguards or levels and burdens of proof associated with motions for summary judgment were applied by the trial court to the Motion to Dismiss.").

211. TEX. R. CIV. P. 91a.

212. TEX. R. CIV. P. 59.

are based on the document. Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied."[213] Rule 12(b)(6), however, has been viewed as providing the district court with "discretion" to consider materials outside the challenged pleading and attachments to that pleading under some circumstances[214]—discretion that does not exist under Rule 91a, which restricts the trial judge to deciding the motion to dismiss based "solely on the pleading . . . together with . . . exhibits permitted by Rule 59."[215] Moreover, a federal judge, when considering matters extrinsic to the challenged pleading, has the option under Rule 12(b)(6) to convert the motion to dismiss into a motion for summary judgment but is required to provide the parties with notice of the conversion and an opportunity to present additional materials.[216] This conversion option, with its notice and opportunity-to-be-heard protections, is not provided by Rule 91a.

Is the defendant entitled to rely on an exhibit attached to the plaintiff's petition to establish that an alleged cause of action is baseless because it is barred by an affirmative defense? For instance, if the invoices attached to the plaintiff's petition seeking recovery on a sworn account establish that the plaintiff's action is barred by the

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213. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993) (citations omitted); *accord* Miller v. Clinton Cnty., 544 F.3d 542, 550 n.3 (3d Cir. 2008); Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997).

214. Davis v. HSBC Bank, 691 F.3d 1152, 1159 (9th Cir. 2012); *see also* Occupy Columbia v. Haley, 738 F.3d 107, 116 (4th Cir. 2013) ("There is no uniform rule among the circuits with respect to whether an affidavit . . . may be considered by a district court in resolving a Rule 12(b)(6) or Rule 12(c) motion."); Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (recognizing that the district court may consider documents attached to the motion to dismiss "so long as they are integral to the complaint and authentic").

215. TEX. R. CIV. P. 91a.6. Rule 12(b)(6) simply provides that a party may present by motion the defense of "failure to state a claim upon which relief can be granted" while Rule 91a is significantly more detailed. *Compare* FED. R. CIV. P. 12(b)(6) *with* TEX. R. CIV. P. 91a.

216. Greater Balt. Ctr. for Pregnancy Concerns v. Mayor, 721 F.3d 264, 281 (4th Cir. 2013); SBRMCOA, LLC v. Bayside Resort, Inc., 707 F.3d 267, 272 (3d Cir. 2013); Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 283 n.7 (5th Cir. 1993). *See generally* 2 MOORE'S FEDERAL PRACTICE § 12.34[3] (3d ed. 2013).

four-year statute of limitations, the defendant is entitled to summary judgment based on the plaintiff's pleadings and its own plea of limitations.[217] Whether the defendant would be entitled to pursue a Rule 91a motion in that situation—and invoke the rule's loser-pays provision which would be unavailable to a defendant pursuing summary judgment—is problematic. Rule 91a seemingly restricts the trial court's attention to the language of the plaintiff's petition, together with appended Rule 59 exhibits, without regard to allegations and affirmative defenses appearing in the defendant's answer.[218] By concluding that a cause of action was baseless because it was time-barred, however, the trial court would necessarily be looking outside the pleading of the challenged cause of action and relying on the opposing party's pleading of an affirmative defense. On the other hand, the challenged cause of action in this situation is arguably baseless on the face of the petition, i.e., the Rule 59 exhibits attached to that petition establish that the plaintiff's claim has no basis in law because the allegations, even if taken as true, do not entitle the plaintiff to the relief sought.[219]

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217. Siegel v. McGavock Drilling Co., 530 S.W.2d 894, 895–96 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

218. TEX. R. CIV. P. 91a.6 (providing that the court "must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59"). *But see* GoDaddy.Com, LLC v. Toups, 2014 Tex. App. LEXIS 3891, at *3–6 (Tex. App.—Beaumont April 10, 2014, pet. filed) ("Just as a motion to dismiss for failure to state a claim under Rule 12(b)(6) is a proper vehicle to assert a claim of immunity under the federal rules, a motion to dismiss under Rule 91a is a proper vehicle to assert an affirmative defense of immunity under section 230 [of the Communications Decency Act] in the state court.")

219. *See* TEX. R. CIV. P. 91a.1. In federal court litigation under Rule 12(b)(6), the district judge would be entitled to dismiss based on limitations under these circumstances. *See* Cedars-Sinai Med. Ctr. v. Shalala, 177 F.3d 1126, 1128–29 (9th Cir. 1999); 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 1998) ("A complaint showing that the governing statute of limitations has run on the plaintiff's claim for relief is the most common situation in which the affirmative defense appears on the face of the pleading and provides a basis for a motion to dismiss under Rule 12(b)."); *see also* Miller v. BAC Home Loans Servicing, L.P., 726 F.3d 717, 726 (5th Cir. 2013) (holding that statute of fraud defense appearing on the face of the plaintiff's complaint was properly raised by the motion to dismiss under Rule 12(b)(6)).

One last scenario likely to occur in Rule 91a litigation does not involve documents used as pleading exhibits but a close relative of that practice. Is the trial court entitled to take judicial notice of records and other materials when deciding a Rule 91a motion as federal courts routinely do under the federal dismissal rule, Rule 12(b)(6)?[220] The answer to that question should be "no."

Rule 91a.6 is titled in part, "No Evidence Considered," and flatly prohibits the court from considering evidence when ruling on the motion to dismiss . . . and judicial notice is one form of evidence.[221] As the supreme court has stated: "Judicial notice . . . is a matter of evidence."[222] Indeed, the principles governing judicial notice appear in the Texas Rules of Evidence.[223] And a leading treatise on Texas evidence describes judicial notice as an "evidentiary process."[224] Accordingly, although federal practice allows the district judge to judicially notice documents and other materials when deciding a motion to dismiss based on an alleged failure to state a claim, a state court judge should be prohibited from doing so when deciding a motion filed under Rule 91a.

IV. THE MOTION AND RESPONSE: FORM AND CONTENTS

A. The Motion

Rule 91a.2 is titled, "Contents of Motion."[225] Under Rule 91a.2, the motion to dismiss must: (1) state that it is being made pursuant to Rule 91a; (2) identify each cause of action being challenged as baseless; and (3) state "specifically the reasons" why

220. *See, e.g.*, Funk v. Stryker Corp., 631 F.3d 777, 783 (5th Cir. 2011); Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2009); General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080–81 (7th Cir. 1997); Lovelace v. Software Spectrum, Inc., 78 F.3d 1015, 1017–18 (5th Cir. 1996).

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

222. Burtis v. Butler Bros., 226 S.W.2d 825, 830 (Tex. 1950); *accord* Paradigm Oil, Inc. v. Retamco, 330 S.W.3d 342, 358 (Tex. App.—San Antonio 2010), *rev'd on other grounds*, 372 S.W.3d 177 (Tex. 2012).

223. TEX. R. EVID. 201.

224. DAVID A. SCHLEUTER & JONATHAN SCHLEUTER, TEXAS RULES OF EVIDENCE MANUAL 113 (9th ed. 2012).

225. TEX. R. CIV. P. 91a.2.

each challenged cause of action has "no basis in law, no basis in fact or both."[226]

The first point is easy to satisfy. The motion to dismiss must merely state something along the lines of: "Defendant has filed this motion to dismiss under Rule 91a of the Texas Rules of Civil Procedure."[227]

The second point requires the movant to specifically identify each cause of action being challenged as baseless. This means that a motion to dismiss globally claiming that all of the plaintiff's claims are baseless or simply accusing the plaintiff of filing a frivolous lawsuit does not comply with Rule 91a's specificity requirements.[228] A dismissal order based on this type of motion should be error.[229] The level of specificity required in the motion when identifying challenged causes of action will likely depend on the nature of the pleading being challenged. For instance, if the plaintiff has alleged several statutory violations/negligence per se theories of liability along with common law negligence theories, it might be advisable for the movant to separately challenge each alleged statute-based cause of action as well as separately challenge the common law

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226. *Id.*

227. *See In re* Greyhound Lines, Inc., No. 05-13-01646-CV, 2014 Tex. App. LEXIS 2042, at *6 n.1 (Tex. App.—Dallas Feb. 21, 2014, no pet.) (orig. proceeding) (mem. op.) (refusing to decide whether designation of responsible third party satisfied standards under Rule 91a because mandamus record did not reflect that party opposing designation filed a motion to dismiss or that trial judge's ruling was based on Rule 91a).

228. *See* TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS: PRACTICE, PROCEDURE & REVIEW §§ 3.05, 5.03[2][b] (3d ed. 2013) (discussing cases holding that motions for summary judgment that do nothing more than broadly announce that movant is entitled to judgment or that non-movant lacks viable cause of action present "no grounds" under Rule 166a and, as a matter of law, are insufficient to support judgment for movant).

229. While granting an overly broad motion to dismiss which fails to specifically identify any cause of action as allegedly baseless should be erroneous, it is less clear whether the non-movant must object to that defective motion in the trial court or may complain about that defect for the first time on appeal. In an analogous context, courts of appeals have split on whether an impermissibly overbroad no-evidence motion for summary judgment suffers from a waivable defect in form or a non-waivable defect in substance that can be raised on appeal without first objecting in the trial court. *See id.* § 5.03[2][b] (citing cases); *see also* TEX. R. APP. P. 33.1(a) (detailing preservation of error requirements for appellate review).

negligence claim. Whereas in a simple car wreck case alleging excessive speed and improper lookout, a single challenge to the plaintiff's common law negligence cause of action might be appropriate.[230]

The third point—the reasons why a challenged cause of action is baseless—is the most important part of the motion to dismiss. The movant should clearly and concisely state the reasons why each challenged cause of action is baseless as a matter of law, baseless as a matter of fact, or baseless as a matter of both law and fact. Some case law arguably entitles the movant to raise in the appellate court any reason why a cause of action is "baseless" even if that theory was not raised in the court below.[231] Other cases could be viewed as restricting the movant to only the reasons included in its motion to dismiss and precluding the movant from raising new reasons, not included in its motion, for the first time on appeal.[232] Until the Texas Supreme Court decides the level of specificity

230. *See* STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES, ch. 5.1 cmt. (2012) (addressing distinctions for liability purposes between different types of negligence per se standards and between common law negligence and negligence per se).

231. *See, e.g.*, Ahmed v. Mallory, No. 03-10-00405-CV, 2011 Tex. App. LEXIS 5670, at *7 (Tex. App.—Austin July 21, 2011, no pet.) (mem. op.) ("[T]he trial court's judgment may be affirmed on any legal theory supported by the record . . . ."); Tucker v. Graham, 878 S.W.2d 681, 683 (Tex. App.—Eastland 1994, no writ) ("[A] judgment must be affirmed on any legal theory supported by the record."); Worford v. Stamper, 801 S.W.2d 108, 109 (Tex. 1990) (stating that the trial court's judgment will be affirmed on any legal theory tried and supported by evidence); *In re* Estate of Jones, 197 S.W.3d 894, 901 (Tex. App.—Beaumont 2006, pet. denied) ("A reviewing court must uphold a correct trial court judgment on any legal theory properly before the trial court."); Point Lookout W., Inc. v. Whorton, 742 S.W.2d 277, 279 (Tex. 1987) (confirming that absent findings of fact and conclusions of law, trial court's judgment may be affirmed on any legal theory raised by evidence).

232. *See, e.g.*, Victoria Gardens of Frisco v. Walrath, 257 S.W.3d 284, 290 (Tex. App.—Dallas 2008, pet. denied) ("We will not affirm the trial court's order based on a legal theory not presented to the trial court."); Barber Lumber & Mfg. Co. v. Reeves, 40 S.W.2d 248, 249 (Tex. Civ. App.—Beaumont 1931, no writ) ("[A]ppellee is confined to the issues made by his pleadings, and we cannot affirm the judgment upon a theory . . . not raised by the pleadings."); *see also* Shih v. Tamisiea, 306 S.W.3d 939, 946 (Tex. App.—Dallas 2010, no pet.) ("We cannot consider this argument, however, because it was not raised below and an appellate court can affirm a summary judgment only on the grounds expressly set out in the motion.").

required by Rule 91a as a predicate for raising arguments on appeal, the movant should err on the side of detail in its motion.

In addition to the first three points, raising other matters in the motion to dismiss might be advisable. For example, if the plaintiff attempts to state a cause of action by relying on an attachment that does not qualify as a proper pleading exhibit under Rule 59, the movant should object.[233] Absent a timely objection by the movant and a ruling by the trial court, an appellate court might conclude that any impropriety in the plaintiff's use of the exhibit to bolster its cause of action was waived by the movant.[234]

The movant cannot, however, include arguments in its motion that are based on evidence to support its argument that a challenged cause of action is baseless. Under Rule 91a, the trial judge is barred from considering evidence on the merits of the cause(s) of action at issue and must decide the motion "based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59."[235]

Although the trial court is prohibited from considering evidence on the merits of the challenged cause of action, the court *must* consider evidence when deciding on the amount of attorney's fees and costs to award the "prevailing party" on the motion to dismiss.[236] Consequently, the movant should always include a request for an award of attorney's fees and costs in its motion to dismiss. Although the nature of the trial court's hearing on fees and costs to be awarded to the prevailing party under Rule 91a is not yet clear,[237] the movant should consider: (1) attaching proof on fees and costs to its motion to dismiss and being prepared to supplement that evidence, as needed, at the hearing; (2) being prepared to present evidence on fees and costs at the hearing; or (3) including a request in the motion to dismiss to set a subsequent hearing on fees and costs after the trial court decides the merits of the motion.[238]

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233. *See supra* Part III(E); *infra* Part VI(A)(3).

234. *See* TEX. R. APP. P. 33.1(a); *see also infra* notes 246–251 and accompanying text (discussing Rule 33.1(a), appellate preservation of error requirements and waiver of appellate review).

235. TEX. R. CIV. P. 91a.6; *see also infra* Part VI(A)(3).

236. TEX. R. CIV. P. 91a.7; *see also infra* Part VI(D).

237. *See infra* Part VI(D)(2).

238. The proof on attorney's fees should also include fees to be incurred in the event of a successful defense of the dismissal order on appeal so that the trial

One last aspect of motions to dismiss under Rule 91a warrants mention. Can a party use a Rule 91a motion to challenge an affirmative defense? Rule 91a.2, "Contents of Motion," focuses solely on a motion challenging an allegedly "baseless cause of action," as does all of Rule 91a.[239] In its title, nine sections and Comment, Rule 91a refers only to "causes of action" or a "cause of action." The rule and its comment do not mention defenses and nothing in the legislative history of the statutes requiring the Texas Supreme Court to adopt dismissal and loser-pays rules indicates that a party has a right to file a motion to dismiss challenging an affirmative defense as baseless.[240] Federal courts are split on the applicability of a motion to dismiss under federal Rule 12(b)(6) to defensive allegations; however, among other things, the federal dismissal rule applies to a "claim,"[241] a term which could be interpreted as encompassing both offensive and defensive pleadings while a "cause of action" is, by definition, a claim for affirmative relief.[242] Consequently, whether an affirmative defense may be challenged by motion and dismissed as baseless under Rule 91a is not clear.[243]

B. The Response

Rule 91a is silent on the contents of the non-movant's response. Rule 91a.4 addresses only the time for filing a response,

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court may make a conditional award of fees for appellate services. *See, e.g.*, Int'l Sec. Life Ins. Co. v. Spray, 468 S.W.2d 347, 349 (Tex. 1971); McCalla v. Ski River Dev., Inc., 239 S.W.3d 374, 382 (Tex. App.—Waco 2007, no pet.); Tully v. Citibank, 173 S.W.3d 212, 219 (Tex. App.—Texarkana 2005, no pet.); Moore v. Bank Midwest, N.A., 39 S.W.3d 395, 406 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

239. TEX. R. CIV. P. 91a.

240. *See supra* Part III(A); *see also infra* Part VI(D)(1).

241. *See* Kyle Deak & Jennifer M. Hall, *Beware of Affirmative Defenses: A Trap for the Unwary*, DRI TODAY (April 15, 2013) http://dritoday.org/feature.aspx?id=538; William M. Janssen, *The Odd State of Twiqbal Plausibility in Pleading Affirmative Defenses*, 70 WASH. & LEE L. REV. 1573 (2013); Stephen Mayer, Note, *An Implausible Standard for Affirmative Defenses*, 112 MICH. L. REV. 275 (2013).

242. *Compare* FED. R. CIV. P. 12(b)(6) *with* TEX. R. CIV. P. 91a.

243. *See* 2 MCDONALD & CARLSON, *supra* note 42, § 9:27.55 (commenting that it is unclear whether Rule 91a may be used to dismiss affirmative defenses).

merely requiring a response (if any) to be filed no later than seven days before the date of the hearing on the motion.[244]

Although filing a response to a Rule 91a motion is optional, the non-movant should *strongly* consider filing a response because without a response on file, the non-movant potentially limits the arguments that it can raise on appeal to attack a dismissal order. Rule 33.1(a) of the Texas Rules of Appellate Procedure governs preservation of error.[245] Under Rule 33.1(a), to preserve a complaint for appellate review, the appealing party must have raised its complaint in the trial court and the court must have ruled or refused to rule on that complaint.[246] Stated differently, unless a party timely raises its request, motion, or objection, and obtains a ruling from the trial court, that party has waived its right to complain on appeal about the trial court's ruling.[247] So, while Rule 91a does not require the non-movant to file a response, the non-movant's failure to respond could result in waiving meritorious arguments that, if raised in the trial court, could have been relied on by the non-movant to overturn the dismissal order on appeal.

On the other hand, a motion to dismiss should not be granted by the trial court or upheld on appeal solely because the non-movant failed to file a response. To illustrate, when the movant has filed a traditional motion for summary judgment, a summary judgment cannot be rendered based on the "default" of the opposing party.[248] The non-movant is not required to file a response to defeat a traditional motion for summary judgment because deficiencies in the movant's legal theories or proof might defeat the movant's right to judgment as a matter of law or the movant might otherwise have failed to conclusively establish its defense or cause of action.[249]

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

245. TEX. R. APP. P. 33.1(a); *see In re* Toyota Motor Sales, U.S.A., Inc., 407 S.W.3d 746, 760 (Tex. 2013) (remarking that Rule 33.1(a) details requirements for "preservation of appellate complaints").

246. TEX. R. APP. P. 33.1(a).

247. *See id.*; *see also* Ford Motor Co. v. Castillo, 279 S.W.3d 656, 662 (Tex. 2009); Approach Res. I, L.P. v. Clayton, 360 S.W.3d 632, 642 (Tex. App.—El Paso 2012, no pet.).

248. Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 222–23 (Tex. 1999).

249. *Id.*; *see also* City of Hous. v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979); Warwick Towers Council of Co-Owners *ex rel.* St. Paul Fire & Marine Ins. Co. v. Park Warwick, L.P., 298 S.W.3d 436, 442 (Tex. App.—

Thus, a summary judgment may be denied—even though the non-movant never filed a response—because the motion is not in the proper form with proper supporting proof as required by Rule 166a(c).[250] Stated another way: "If no response is filed, there is not an automatic waiver of appellate review."[251]

In the same vein, a motion to dismiss should not be granted by "default"; that is, the movant shouldn't win simply because the non-movant didn't file a response as permitted (but not required) by Rule 91a. Rather, the motion to dismiss may be properly denied without the non-movant filing a response because that motion might be meritless on its face. The movant's proffered "reasons" why a challenged cause of action is baseless might be contrary to, or misstate, Texas law, or the movant may have mischaracterized causes of action raised by the non-movant.[252]

Houston [14th Dist.] 2009, no pet.).

250. Wasson v. Stracener, 786 S.W.2d 414, 416 n.1 (Tex. App.—Texarkana 1990, writ denied).

251. Hammond v. Katy Indep. Sch. Dist., 821 S.W.2d 174, 176 (Tex. App.—Houston [14th Dist.] 1991, no writ).

252. Although the summary judgment rule more clearly defines the nature of the burden imposed on the movant and allows the motion to be supported with evidence, the movant under Rule 91a, to some extent, is in an analogous position to the movant seeking a traditional summary judgment under Rule 166a(c). Under both Rule 166a(c) and Rule 91a, the movant is only entitled to prevail if its motion is meritorious as a matter of law and if the movant fails to satisfy that burden, its motion should be denied even if the non-movant did not file a response. *See infra* notes 253–254 and accompanying text (explaining why the trial court should not rule for movant under Rule 166a(c) because non-movant failed to file response, i.e., the movant should not win by "default"); *see also infra* Part VII(E)(1). For that reason, the mere filing of a traditional summary judgment motion does not shift the burden to the non-movant to file a response to avoid losing, nor should simply filing a Rule 91a motion shift the burden. *Id.* In marked contrast, the non-movant who fails to file a response to a no-evidence motion for summary judgment filed under Rule 166a(i) not only can but should lose by "default." Rule 166a(i) *expressly* shifts the burden to the non-movant to respond and "the court must grant the motion" if the non-movant does not respond or files a response failing to raise a fact issue. TEX. R. CIV. P. 166a(i); *see* PATTON, *supra* note 228, § 5.05[1] (analyzing case law regarding necessity for non-movant to respond to no-evidence motion for summary judgment); *see also* Imkie v. Methodist Hosp., 326 S.W.3d 339, 343 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (explaining that, in the absence of a timely response to a no-evidence motion for summary judgment, a trial court must grant the motion); Michael v. Dyke, 41 S.W.3d 746, 751 (Tex. App.—Corpus Christi 2001, no pet.).

As previously mentioned, however, in the absence of a response on file, the non-movant potentially limits its available appellate arguments for reversing the dismissal order. While the non-movant should be able to attack the validity of the grounds for dismissal appearing on the face of the motion to dismiss even without filing a response,[253] the non-movant will be precluded from raising additional arguments on appeal that could have been raised in the trial court but were not.[254] For instance, a non-movant who contends that dismissal under Rule 91a violates its constitutional right to trial by jury would have to raise that argument in a timely-filed response; otherwise, this constitutional complaint will be waived and cannot be considered by an appellate court when reviewing the validity of the dismissal order.[255]

In terms of content, a response to a motion to dismiss under Rule 91a should specifically identify every conceivable reason why the challenged cause of action is not baseless. If the motion alleges that a cause of action has no basis in law, then the response should identify and brief the law establishing the validity of the non-movant's liability theory and discuss why the movant's reasons for challenging that theory are incorrect.[256] If the motion alleges that a cause of action has no basis in fact, then the response will need to

253. For example, even without filing a response, a non-movant should be able to argue on appeal that a motion to dismiss is meritless on its face when that motion asserts that Texas does not recognize a particular cause of action but, in fact, Texas courts have recognized that cause of action is meritless. *See* Davis v. Norris, 352 S.W.3d 715, 721 (Tex. App.—Texarkana 2011, pet. denied) (non-movant did not "forfeit" right to argue on appeal that movant had failed to conclusively establish its right to summary judgment by not including argument in response).

254. *See* Rizkallah v. Conner, 952 S.W.2d 580, 582–83 (Tex. App.—Houston [1st Dist.] 1997, no writ) (holding that lack of response by non-movant "does not supply by default the summary judgment proof necessary to establish the movant's right to summary judgment" but non-movant "is limited on appeal to arguing the legal sufficiency of the grounds presented by movant"); *see also* TEX. R. APP. P. 33.1(a) (setting out preservation of error requirements for appellate review).

255. *See* Riojas v. Phillips Props., Inc., 828 S.W.2d 18, 22 (Tex. App.—Corpus Christi 1991, writ denied) ("Constitutional challenges not expressly presented to the trial court by written motion, answer or other response will not be considered by the appellate courts as grounds for reversal.").

256. *See* TEX. R. CIV. P. 91a.1, 91a.2; *see also supra* Part III(C).

explain why a reasonable person could believe the facts alleged.[257] To the extent that the response is more detailed (or persuasive) than the pleading containing the challenged cause of action, the non-movant should amend its pleading to ensure that all factual and legal theories supporting that cause of action appear in its pleading.[258] The trial court should decide the sufficiency of the challenged pleading by looking at the pleading, not by looking at the response.[259]

In addition to directly contesting the movant's contention that a cause of action is baseless, the response should request the trial court to award the non-movant all attorney's fees and costs incurred by the non-movant relating to the challenged cause(s) of action if the court denies the motion to dismiss.[260] When supported by the record, the response should also (1) object to the motion as untimely, i.e., filed more than sixty days after the filing of the first pleading containing the challenged cause of action or less than twenty-one days before the date of the hearing on the motion;[261] (2) object that the motion violates Rule 91a.3's specificity requirements by failing to specifically identify the challenged cause of action or provide reasons why a cause of action has no basis in law, no basis in fact or both;[262] or (3) object or otherwise complain that the motion misstates or mischaracterizes causes of action or factual allegations in the pleading.

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257. *See* TEX. R. CIV. P. 91a.1, 91.a.2; *see also supra* Part III(D).

258. *Cf.* Hittner, Schwarzer, Tashima & Wagstaffe, 2 FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 9:223 (5th Cir. ed. 2014) (recognizing that federal courts divided on the proper treatment of an amended pleading contradicting an earlier pleading under federal dismissal rule, Rule 12(b)(6)).

259. *See* TEX. R. CIV. P. 91a.6. In motion to dismiss practice under federal Rule 12(b)(6), the court does not consider additional facts and theories included in the non-movant's response to the motion because the court's focus is on the complaint. *See* 2 MOORE'S FEDERAL PRACTICE, § 12.34[2] (3d ed. 2013) (citing cases). In identical fashion, the trial court's focus under Rule 91a should be on the pleading containing the challenged cause of action, not papers filed opposing the motion.

260. *See supra* notes 237–240 and accompanying text (suggesting approaches for movant to use when requesting attorney's fees and costs as "prevailing party" in Rule 91a litigation).

261. *See infra* Part V(B).

262. TEX. R. CIV. P. 91a.2; *see also supra* Part IV(A).

Finally, one way to respond to the filing of a motion to dismiss under Rule 91a is to not respond to the merits of the motion at all. Do not file a response. Either nonsuit or amend the cause of action challenged by the motion. The non-movant is free to nonsuit or amend its challenged cause of action any time up to at least three days before the date of the hearing.[263]

In fact, Rule 91a does not limit the number of nonsuits or amended causes of action that a non-movant may file. And the plaintiff's right to take a nonsuit is unqualified and absolute as long as the defendant has not made a claim for affirmative relief.[264] There are many reasons why a plaintiff would, for tactical reasons, prefer to litigate the viability of a cause of action later rather than sooner, such as insufficient information, counsel's workload, upcoming judicial elections, and so on. Assuming statute of limitations is not a problem, the plaintiff could nonsuit her entire lawsuit and refile later after having had additional time to develop her legal and factual theories of liability.[265] If the motion to dismiss challenges some but not all of the claims alleged, then the challenged causes of action could be dropped without having to worry about the statute of limitations because the still-pending lawsuit will keep it from running. Then, the plaintiff might be able to conduct discovery in the ongoing lawsuit that bolsters the factual and legal underpinnings of the previously challenged claims, placing her in a stronger position to deal with a Rule 91a motion after amending her pleading to reassert those claims.

V. TIMING CONSIDERATIONS AND DEADLINES UNDER RULE 91a

A. Due Order of Pleading and Due Order of Hearing Requirements

Rule 91a.8 specifically addresses the effect of filing a motion

263. TEX. R. CIV. P. 91a.5(a); *see also infra* Part V(C)(2).

264. *See, e.g.*, *In re* Greater Hous. Orthopaedic Specialists, Inc., 295 S.W.3d 323, 326 (Tex. 2009); BHP Petrol. Co. v. Millard, 800 S.W.2d 838, 840 (Tex. 1990); *see also* Villafani v. Trejo, 251 S.W.3d 466, 468–69 (Tex. 2008).

265. *See* Aetna Cas. & Sur. Co. v. Specia, 849 S.W.2d 805, 806 (Tex. 1993) ("Subject to certain conditions, a plaintiff who takes a nonsuit is not precluded from filing a subsequent suit seeking the same relief.").

to dismiss on venue and personal jurisdiction:

> [T]his rule is not an exception to the pleading requirements of [Texas Rules of Civil Procedure] 86 and 120a, but a party does not, by filing a motion to dismiss pursuant to this rule or obtaining a ruling on it, waive a special appearance or a motion to transfer venue. By filing a motion to dismiss, a party submits to the Court's jurisdiction only in proceedings on the motion and is bound by the court's ruling, including an award of attorney fees and costs against the party.[266]

As will be explained, Rule 91a.8's impact on "due order of pleading" in Texas practice is unclear while its impact on "due order of hearing" practice is both clear and significant.

Under Texas' due-order-of-pleading requirements, if a party intends to challenge personal jurisdiction, it must do so by filing a special appearance under Rule 120a "prior to motion to transfer venue or any other plea, pleading or motion."[267] If a party wants to contest venue, it must file a motion to transfer venue under Rule 86 after the special appearance (assuming a party is also contesting personal jurisdiction) and before any other pleading.[268] Pleas, allegations, and motions unrelated to the special appearance and the motion to transfer venue, however, may be included in the same pleading or in a later-filed pleading without waiving jurisdiction or venue.[269] Failing to comply with these due-order-of-pleading

266. TEX. R. CIV. P. 91a.8.

267. TEX. R. CIV. P. 120a(1); *see also* Exito Elecs., Co., Ltd. v. Trejo, 142 S.W.3d 302, 305 (Tex. 2004); First Oil PLC v. ATP Oil & Gas Corp., 264 S.W.3d 767, 776–77 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

268. TEX. R. CIV. P. 86(1); *see also* Gordon v. Jones, 196 S.W.3d 376, 384 (Tex. App.—Houston [1st Dist.] 2006, no pet.); McGrede v. Coursey, 131 S.W.3d 189, 196 (Tex. App.—San Antonio 2004, no pet.).

269. TEX. R. CIV. P. 86 (objection to improper venue waived if not made by written motion prior to or concurrently with any other plea, pleading, or motion other than special appearance); TEX. R. CIV. P. 120a(1); *see also Exito*, 142 S.W.3d at 305; *First Oil*, 264 S.W.3d at 776–77.

requirements results in the waiver of any objection to personal jurisdiction and venue.[270]

It is unclear whether Rule 91a changes due-order-of-pleading in Texas because the rule appears to be internally inconsistent. On one hand, Rule 91a.8 begins: "This rule is not an exception to the pleading requirements of Rules 86 and 120a . . . ."[271] If Rule 91a "is not an exception" to due-order-of-pleading under Rules 86 and 120a, then filing a motion to dismiss before filing a special appearance and motion to transfer venue should waive any objection to personal jurisdiction and venue. On the other hand, that same sentence concludes, ". . . but a party does not, by *filing* a motion to dismiss . . . waive a special appearance or a motion to transfer venue."[272] If *filing* a motion to dismiss does not waive a special appearance or motion to transfer venue, then a Rule 91a motion may be filed before filing those pleadings which, in turn, means that Rule 91a is, indeed, an "exception" to due-order-of-pleading requirements.

Not surprisingly, commentators have offered precisely opposite opinions on the impact of Rule 91a on jurisdiction and venue. Some say Rule 91a creates an exception to due-order-of-pleading[273] while others believe that it does not.[274]

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270. TEX. R. CIV. P. 120a(1) ("Every appearance, prior to judgment, not in compliance with this rule is a general appearance."); *see also* Grynberg v. M-I L.L.C., 398 S.W.3d 864, 876 (Tex. App.—Corpus Christi 2012, pet. filed).

271. TEX. R. CIV. P. 91a.8.

272. *Id.* (emphasis added).

273. *See* John Jones, *New Motion to Dismiss Exception to Due-Order-of-Pleadings Rule in Texas Effective March 1, 2013*, JRJONESLAW BLOG (Feb. 18, 2013), http://jrjoneslaw.wordpress.com/2013/02/18/new-motion-to-dismiss-exception-due-order-of-pleadings-rule-in-texas-effective-march-1-2013; Wilson Elser Moskowitz Edelman Dicker LLP, *New Amendments and Additions to the Texas Rules of Civil Procedure*, MARTINDALE – HUBBELL (Dec. 5, 2012), *available at* http://www.martindale.com/litigation-law/article_Wilson-Elser-Moskowitz-Edelman-Dicker_1636446.htm (discussing the Texas Supreme Court's adoption of new rules creating a right to seek early dismissal and mandating expedited handling of cases in which less than $100,000 is sought in monetary relief).

274. *See* Chamberlain & Parker, *Rule 91a Motions to Dismiss*, *in* ULTIMATE MOTIONS PRACTICE 5 (State Bar Tex. 2013); Escobedo, *Expedited Trials and the New Dismissal Rule*, *in* TEXAS MINORITY COUNSEL PROGRAM 5 (State Bar Tex. 2013); *see also* 2 MCDONALD & CARLSON, *supra* note 125, § 9:27.60 ("[I]t *appears* a party must comply with the due order of pleadings . . . .") (emphasis

Until the Texas Supreme Court addresses the effect of Rule 91a.8, the safer course for counsel is to assume that the rule does not create an exception to due-order-of-pleading requirements.[275] File your special appearance motion and motion to transfer venue before filing a Rule 91a motion to dismiss or include all three motions in a single pleading with the motion to dismiss asserted subject to the challenges to personal jurisdiction and venue.[276]

Rule 91a *definitely* changes due-order-of-hearing requirements, flatly stating that obtaining a ruling on a motion to dismiss does not waive a special appearance or motion to transfer venue.[277] This is a major change.

Prior to the adoption of Rule 91a, a special appearance had to be heard and determined before any other matter was decided, including a motion to transfer venue.[278] If a party requested any affirmative relief from the trial court inconsistent with its jurisdictional challenge, that party violated due-order-of-hearing requirements, entered a general appearance and waived its special

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added).

275. Rule 120a was not amended when Rule 91a was adopted and continues to state that "every appearance, prior to judgment, not in compliance with this rule is a general appearance." TEX. R. CIV. P. 120a(a). Nor was Rule 86(1)'s due-order-of-pleading and waiver language revised with the advent of Rule 91a. *See* TEX. R. CIV. P. 86(1) (detailing the requirements for filing a motion to transfer venue, including the requirement that an objection based on improper venue be made in writing before or at the same time as any other pleading or motion). *But see In re* Alcon S'holder Litig., 387 S.W.3d 121, 124 (Tex. 2010) ("Rule 13 [authorizing transfer motions in multidistrict litigation] impliedly requires that Rule 120a's due-order-of-hearing requirement give way.").

276. *See* Bristol v. Placid Oil Co., 74 S.W.3d 156, 159–60 (Tex. App.—Amarillo 2002, no pet.) (holding that the defendant did not waive venue by filing motion for summary judgment subject to motion to transfer venue); General Motors Corp. v. Castañeda, 980 S.W.2d 777, 783 (Tex. App.—San Antonio 1998, pet. denied) (holding that the defendant did not waive venue because answers and motions were subject to venue motion).

277. TEX. R. CIV. P. 91a.8.

278. *See* TEX. R. CIV. P. 120a(2) (stating any motion to challenge jurisdiction provided by 120a shall be heard before a motion to transfer venue); *see also* Exito Elecs. Co. v. Trejo, 142 S.W.3d 302, 304–05 (Tex. 2004) ("The plain language of Rule 120a requires only that a special appearance be filed before any other plea, pleading, or motion.").

appearance.[279] To illustrate, one court of appeals concluded that the defendant waived its special appearance by filing a motion to dismiss the plaintiff's claims on the grounds that the Texas Penal Code did not authorize private causes of action.[280]

Under Rule 91a, however, the movant does not waive a special appearance or motion to transfer venue by "obtaining a ruling" on its motion to dismiss.[281] The movant submits to the jurisdiction of the trial court only in proceedings on the motion, including being bound by the court's ruling on fees and costs.[282]

Although not explicitly stated by Rule 91a.8, hearings directly related to the Rule 91a motion should not violate due-order-of-hearing requirements so as to waive personal jurisdiction or venue objections. Asking for a continuance of the hearing on the Rule 91a motion,[283] or requesting a stay of discovery or expedited discovery[284] pending the hearing, should not qualify as general appearances waiving a party's right to pursue its special appearance or motion to transfer venue. In contrast, asking for affirmative relief unrelated to personal jurisdiction, venue and Rule 91a issues would waive the special appearance and motion to transfer.[285]

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279. *See, e.g., Exito*, 142 S.W.3d at 304–05; Dawson-Austin v. Austin, 968 S.W.2d 319, 321–22 (Tex. 1998); Trenz v. Peter Paul Petrol. Co., 388 S.W.3d 796, 800–04 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *cf. In re* Alcon, 387 S.W.3d at 124 ("Rule 13 [authorizing pretrial judges in multidistrict litigation to decide questions of jurisdiction] impliedly requires that Rule 120a's due-order-of-hearing requirement give way.").

280. Klingenschmitt v. Weinstein, 342 S.W.3d 132, 133–35 (Tex. App.—Dallas 2011, no pet.).

281. TEX. R. CIV. P. 91a.8.

282. *Id.*

283. *See Dawson-Austin*, 968 S.W.2d at 321–22 (party did not waive special appearance when trial court granted its motion to continue hearing on special appearance).

284. *See* Exito Elecs. Co. v. Trejo, 142 S.W.3d 302, 306–08 (trial court's discovery rulings related to jurisdictional challenge do not waive special appearance); First Oil PLC v. ATP Oil & Gas Corp., 264 S.W.3d 767, 777 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) ("Rulings Related to Special Appearance Do Not Waive Special Appearance").

285. Trenz v. Peter Paul Petrol. Co., 388 S.W.3d 796, 800–04 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (holding that the defendant failed to comply with due-order-of-pleading requirements and waived pending special appearance by obtaining hearings on motion to dismiss, motion for summary judgment and motion for continuance of summary judgment hearing); Shapolsky v. Brewton, 56

B. The Movant's Deadlines

1. The Motion to Dismiss

The movant under Rule 91a initially faces two filing deadlines. One deadline is tied to the first time the allegedly baseless claim appears in a pleading while the second is tied to the date of the hearing.

The motion to dismiss "must be filed within 60 days" after the movant is served with the first pleading containing the challenged cause of action.[286] Rule 91a does not address what happens if a litigant files its motion to dismiss after the expiration of the sixty-day deadline.[287] Presumably, a litigant waives its right to dismiss a claim as baseless by failing to timely file its Rule 91a motion unless the trial court grants leave to file the untimely pleading or enlarges the rule's sixty-day time period.[288]

The "within" aspect of the sixty-day deadline presents an interesting (albeit somewhat geeky) question, if only because inevitably some lawyers will wait until the last possible moment before filing a motion to dismiss.[289] Does "within 60 days" mean up to and including the sixtieth day after the allegedly baseless claim was first pled, or does it mean up to but not including the sixtieth day? Texas courts construing other rules and statutes have concluded a deadline requiring a filing "within 60 days" of a

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S.W.3d 120, 140 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (holding that the defendant made general appearance and waived special appearance by requesting injunctive relief and sanctions not related to special appearance or jurisdictional issues).

286. TEX. R. CIV. P. 91a.3(a). If it is unclear what causes of action are included in a vague or inartfully crafted pleading, the party contemplating filing a Rule 91a motion should file special exceptions under Rule 91.

287. TEX. R. CIV. P. 91a.

288. *See infra* Part V(E).

289. With the advent of e-filing, "last minute" literally means the very last minute for timely filing a document. Under new Rule 21(f)(5), effective January 1, 2014, an electronically filed document is considered timely filed if electronically filed "at any time before midnight." TEX. R. CIV. P. 21(f)(5). It seems likely that there are a fair number of legal secretaries and paralegals who are seriously underwhelmed at the prospect of midnight filing deadlines. As an added bonus to law firm staff, the court's time zone controls, so a pleading filed at 12:59am in Houston or Dallas is timely in El Paso. *See id.*

designated event means that a filing on the sixtieth day is timely.[290] Therefore, a Rule 91a motion filed on Day 60 should be timely filed.

The motion to dismiss "must be . . . filed at least 21 days" before the hearing on the motion.[291] Rule 91a.3's requirement for the motion to be on file for at least twenty-one days before the hearing is identical to the deadline imposed by the summary judgment rule.[292] Rule 166a(c) states "the motion . . . shall be filed . . . at least twenty-one days before the time specified for hearing."[293] Because these two rules impose an identical filing deadline on the movant, computing the twenty-one-day period under Rule 91a should be no different than under 166a(c). Under Rule 166a(c), the day of filing service is not included in the minimum twenty-one-day period, but the date of the hearing is.[294] The hearing on a Rule 91a motion could thus be properly set as early as the twenty-first day after filing.[295]

There is, however, one difference between Rule 91a's twenty-one-day language and Rule 166a's. Rule 91a requires only that the motion to dismiss be filed at least twenty-one days before the hearing.[296] It says nothing about the timing of service of that motion on the non-movant.[297] In contrast, Rule 166a requires the motion for summary judgment to be "filed and *served*" at least twenty-one days prior to the hearing.[298] A summary judgment motion filed outside twenty-one days but served inside twenty-one days on the non-movant is objectionable.[299] That contemporaneous service

290. TEX. R. Civ. P. 4; *e.g.*, Angelina Cnty. v. McFarland, 374 S.W.3d 417, 421 (Tex. 1964); Myers v. State, 527 S.W.2d 307, 308 (Tex. Crim. App. 1975); Jain v. Cambridge Petrol. Grp., Inc., 395 S.W.3d 394, 396 (Tex. App.—Dallas 2013, no pet.)

291. TEX. R. CIV. P. 91a.3(b); *see also* TEX. R. CIV. P. 5 (providing an enlargement of time for filing by mail).

292. *Compare* TEX. R. CIV. P. 91a.3, *with* TEX. R. CIV. P. 166a.

293. TEX. R. CIV. P. 166a(c).

294. Lewis v. Blake, 876 S.W.2d 314, 315–16 (Tex. 1994).

295. *Id.*

296. TEX. R. CIV. P. 91a(3)(b).

297. *Id.*

298. TEX. R. CIV. P. 166a(c) (emphasis added).

299. *See* Texas Dep't of Aging & Disability Servs. v. Mersch, 418 S.W.3d 736, 738–39, 742 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding that summary judgment response filed electronically before deadline but served electronically after deadline violated Rule 166a).

requirement is not expressly incorporated into Rule 91a's twenty-one-day deadline,[300] so a late-served motion to dismiss is not per se objectionable under Rule 91a.[301]

2. Amendment or Withdrawal of the Motion to Dismiss

Rule 91a does not directly place any restrictions on the movant's right to amend its motion to dismiss other than requiring the withdrawal of the motion to be filed at least three days before the hearing.[302] Presumably, the movant is free to amend its motion at any time up to three days before the hearing.

If the non-movant timely amends the challenged cause of action before the hearing, the movant has the option of withdrawing its motion to dismiss, amending the motion, or going forward and having the court hear its original motion.[303] If the movant amends its motion in response to the amended cause of action, that amendment "restarts the time periods in this rule."[304] Consequently, an amended motion to dismiss by a defendant in response to an amended petition by the plaintiff restarts the forty-five-day deadline for a ruling, the twenty-one-day time period for a hearing, and all time periods tied to the date of the hearing such as the fourteen-day notice-of-hearing requirement, the seven-day response deadline, and the three-day deadlines for nonsuits, amended causes of action, and amended motions.

Rule 91a.5 only provides that the time periods restart when an amended motion is filed in response to an amended cause of

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300. Rule 21 states that when a motion is filed, a copy of that motion shall be served on all other parties "at the same time." *See* TEX. R. CIV. P. 21(a). A motion to dismiss filed outside twenty-one days but served inside twenty-one days therefore does not technically violate Rule 91a but does violate Rule 21. *See* TEX. R. CIV. P. 21 (implicitly requiring service of the motion to dismiss at the time of filing).

301. TEX. R. CIV. P. 91a.

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

303. *See* TEX. R. CIV. P. 91a.5(b). Although not expressly stated in Rule 91a, the movant appears to have three options when served with an amendment of the challenged cause of action: (1) withdraw its motion; (2) amend its motion; or (3) go forward with the hearing.

304. *See* TEX. R. CIV. P. 91a.5(d).

action.[305] The rule is silent on what happens to time periods under other circumstances. What happens if the movant files an amended motion to dismiss ten days before the hearing on its original motion even though the non-movant has not amended the challenged cause of action? Is the movant entitled to have its amended motion heard on the date set for its original motion, or do Rule 91a's time periods restart? The answer to this question almost has to be "no." An amended motion should restart the Rule 91a timetable. All of Rule 91a's timing provisions are keyed to the filing of, and the hearing on, "the motion."[306] If "the motion" is an amended motion, the date of filing of that amended motion should determine the deadline for a ruling and the earliest permissible hearing date. The date of the hearing on the amended motion, in turn, should determine the time periods of a response, nonsuit, withdrawal, and amendments.[307]

If the amended motion to dismiss consists of only *de minimis*, non-substantive changes to the original motion, a trial court should have the discretion to go forward based on the timetable for the original motion.[308] An amended motion that substantively differs from the original motion, particularly an amendment filed near the hearing date, should restart Rule 91a's time periods.[309]

The movant is also allowed to withdraw its motion to dismiss so long as that withdrawal is filed "at least 3 days before the date of hearing . . . ."[310] This three-day deadline means that if the hearing on

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305. TEX. R. CIV. P. 91a.5.

306. *See* TEX. R. CIV. P. 91a.3–5.

307. *See* Gibson v. Park Cities Ford, Ltd., 174 S.W.3d 930, 932 (Tex. App.—Dallas 2005, no pet.) ("An amended motion for summary judgment super[s]edes and supplants the previous motion, which may no longer be considered.").

308. *See infra* Part V(E); *see also* Cocke v. Meridian Sav. Ass'n, 778 S.W.2d 516, 518 (Tex. App.—Corpus Christi 1989, no writ) (trial court did not abuse discretion by accepting movant's additional materials ten days before hearing and three days before due date for response when non-movant failed to show any resulting harm).

309. *See infra* note 342 and accompanying text (discussing treatment of reply by movant raising new grounds for dismissal as amended motion to dismiss restarting Rule 91a's deadlines).

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

the Rule 91a motion is set for a Monday, the withdrawal must be filed no later than the preceding Wednesday.[311]

The trial judge cannot rule on your motion if you timely withdraw it. If you're justifiably concerned about your client losing the motion to dismiss, becoming the "loser" under Rule 91a's loser-pays mandate,[312] and being saddled with the other side's fees and costs, withdraw the motion, or if the client insists on going forward, make sure that you've gone the full-disclosure-in-writing route with the client.[313] And don't miss the three-day deadline for withdrawing the motion.[314] If the withdrawal is untimely, the trial court must rule on the motion.[315]

C. The Non-Movant's Deadlines

1. The Response

Rule 91a.4 provides that "[a]ny response to the motion must be filed no later than seven days before the date of the hearing."[316] Consequently, although the non-movant is not required to file a

311. TEX. R. Civ. P. 4; *see also* Sosa v. Cent. Power & Light, 909 S.W.2d 893, 895 (Tex. 1995).

312. *See infra* Part VI(D).

313. "Lawyers' professional liability insurance may cover damages under Rule 91a if the client asserts a claim for legal malpractice. Rule 91a differs from Rule 13 in that the damages awards under Rule 91a are not sanctions. The client would have to show that the lawyer failed to properly advise the client of the likelihood of the assessment of costs or fees, or show that the case could have been pled in a way to avoid invocation of the rule." Jett Hanna, *March 2013 Changes in the Texas Rules of Civil Procedure*, TEX. LAW. INS. EXCH. NEWSL. (2013), *available at* http://www.tlie.org/newsletter/articles/view/199.

314. The American Bar Association's Standing Committee on Lawyers' Professional Liability found that calendar and deadline-related errors are the leading cause of legal malpractice claims. *See* David E. Pennington, *Are You at Risk? The Biggest Malpractice Claim Risks and How to Avoid Them*, 36 L. PRAC. 4, 29 (2010); *see also* Coyt Randal Johnston & Robert L. Tobey, *Legal Malpractice Update*, 46 THE ADVOC. (TEXAS) 1, 1 (2010) ("[O]ver 26% of all claims are related to 'failure-to-act-on-time' problems: these errors result from procrastination, failure to know deadlines, failure to calendar, failure to react to calendar, etc. Fully one fourth of all claims could be eliminated just by knowing and following the rules and law on timing matters.").

315. TEX. R. CIV. P. 91a.5(c).

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

response to the motion to dismiss,[317] a response, if filed, is subject to a seven-day filing deadline.

The seven-day deadline in Rule 91a.4 is identical to the filing deadline for a response under the summary judgment rule. Rule 166a(c) provides that "the adverse party, not later than seven days prior to the day of hearing may file . . . [a] written response."[318] Texas case law construing the seven-day response deadline in summary judgment litigation should therefore apply to Rule 91a litigation.

When calculating the deadline for a response to a motion for summary judgment, there need not be a full seven days between the filing of the response and the date of the hearing.[319] It is well-established that a response to a motion for summary judgment that is filed on the seventh day before a hearing is timely.[320] Accordingly, a response to a Rule 91a motion filed on the Monday before a Monday hearing would be timely.[321] Rule 4,[322] which governs the impact of holidays on filing deadlines, is applicable to summary judgment responses, which means that a Rule 91a response filed six days before the hearing, when the seventh day is a holiday, would be timely.[323]

Rule 91a only imposes a deadline for filing the response but not for serving the response.[324] This differs from Rule 166a(c),

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317. *See supra* notes 308–311 and accompanying text (explaining the importance of filing response to a Rule 91a motion).

318. TEX. R. CIV. P. 166a(c).

319. *Id.*

320. *E.g.*, K-Six T.V., Inc. v. Santiago, 75 S.W.3d 91, 96 (Tex. App.—San Antonio 2002, no pet.); Geiselman v. Cramer Fin. Grp., 965 S.W.2d 532, 535 (Tex. App.—Houston [14th Dist.] 1993, no writ); Wright v. Lewis, 777 S.W.2d 520, 521 (Tex. App.—Corpus Christi 1989, writ denied); City of Coppell v. Gen. Homes Corp., 763 S.W.2d 448, 451 (Tex. App.—Dallas 1988, writ denied).

321. Volvo Petrol., Inc. v. Getty Oil Co., 717 S.W.2d 134, 137–38 (Tex. App.—Houston [14th] 1986) (response to summary judgment filed on Monday preceding Monday hearing held timely), *disapproved on other grounds*, 909 S.W.2d 893 (Tex. 1995); *see also Geiselman*, 965 S.W.2d at 535 (summary judgment response filed by mail on Tuesday before Tuesday hearing was timely).

322. TEX. R. CIV. P. 4.

323. *See* Merch. Ctr., Inc. v. WNS, Inc., 85 S.W.3d 389, 394 (Tex. App.—Texarkana 2002, no pet.); Hammonds v. Thomas, 770 S.W.2d 1, 2 (Tex. App.—Texarkana 1989, no writ).

324. TEX. R. CIV. P. 91a.

which creates a seven-day deadline for filing and serving both the summary judgment response and motion.[325]

2. Nonsuit or Amendment of the Challenged Cause of Action

If the non-movant files a nonsuit of the challenged cause of action "at least 3 days before the date of hearing," the court is prohibited from ruling on the motion to dismiss.[326] This is the flip side of the dilemma faced by movant's counsel when deciding whether or not to withdraw a borderline or not-so-borderline motion to dismiss.[327] As counsel for the non-movant, if you're justifiably concerned about your client losing the Rule 91a motion, being designated as the "loser" under Rule 91a's loser-pays provision, and being hit with the movant's fees and costs, nonsuit the challenged cause of action, or if the client insists on going forward, make sure you've fully disclosed these risks to your client in writing.[328] Do not miss the three-day deadline for nonsuiting.[329] If the nonsuit is untimely, the trial court "must rule" on the motion.[330]

Instead of nonsuiting, the non-movant also has the option of amending the challenged cause of action so long as the amended pleading is filed "at least 3 days before the date of hearing."[331] As is the case with an untimely nonsuit, the trial judge, when deciding the

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325. *Compare* TEX. R. CIV. P. 91a.4, *with* TEX. R. CIV. P. 166a(c); *see supra* note 300 and accompanying text (remarking that Rule 91a does not expressly require service contemporaneously with filing of a motion or response although contemporaneous service is required by Rule 21); *see also* Texas Dep't of Aging & Disability Servs. v. Mersch, 418 S.W.3d 736, at 738–39, 742 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding that, although summary judgment response was timely filed electronically but untimely served electronically on opposing party, trial court nevertheless abused its discretion by striking response).

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

327. *See supra* Part V(B)(2).

328. *See supra* note 313 (quoting newsletter from legal malpractice insurance carrier concerning insurance coverage of claims arising from an adverse ruling on a Rule 91a motion).

329. *See supra* note 314 (quoting commentary regarding calendar and deadline-related errors as the leading cause of legal malpractice lawsuits).

330. TEX. R. CIV. P. 91a.5(c).

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

merits of the motion to dismiss, cannot consider a late amendment by the non-movant.[332]

Again, a nonsuit or amended pleading by the non-movant is timely if filed at least three days before the hearing.[333] This three-day deadline means that if the hearing on the Rule 91a motion is set for a Monday, the withdrawal must be filed no later than the preceding Wednesday.[334]

D. Replies and Sur-Replies

Rule 91a does not refer to a reply by the movant to the response of the non-movant, much less establish a deadline for filing a reply. Like Rule 91a, Rule 166a doesn't mention a reply by the movant to the non-movant's response,[335] but replies by movants are commonplace in summary judgment litigation. Texas cases have allowed movants to file summary judgment replies up to the date of the hearing[336] and even permitted parties to submit materials after the hearing.[337] But it is well settled under Rule 166a that the non-movant cannot use its "reply" to add new grounds or theories or to cure defects in its motion for summary judgment.[338]

Based on summary judgment case law, the movant challenging a cause of action as baseless under Rule 91a should be

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332. TEX. R. CIV. P. 91a.5(c).

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

334. TEX. R. CIV. P. 4; *see* Sosa v. Cent. Power & Light, 909 S.W.2d 893, 894–95 (Tex. 1995) (holding that, when counting days per Rule 4, the day of filing is not counted, but the day of deadline is counted).

335. All Metals Fabricating, Inc. v. Foster Gen. Contracting, Inc., 338 S.W.3d 615, 622 (Tex. App.—Dallas 2011, no pet.); Martin v. Estates of Russell Creek Homeowners Ass'n, 251 S.W.3d 899, 903 n.2 (Tex. App.—Dallas 2008, no pet.).

336. *See, e.g.*, Garcia v. Garza, 311 S.W.3d 28, 36 (Tex. App.—San Antonio 2010, pet. denied); Bradford Partners II, L.P. v. Fahning, 231 S.W.3d 513, 521–22 (Tex. App.—Dallas 2007, no pet.); Reynolds v. Murphy, 188 S.W.3d 252, 259 (Tex. App.—Fort Worth 2006, pet. denied); Cmty. Initiatives, Inc. v. Chase Bank, 153 S.W.3d 270, 280 (Tex. App.—El Paso 2004, no pet.); Knapp v. Eppright, 783 S.W.2d 293, 296 (Tex. App.—Houston [14th Dist.] 1989, no writ).

337. *See* Republic Bankers Life Ins. Co. v. Wood, 792 S.W.2d 768, 774–75 (Tex. App.—Forth Worth 1990, writ denied).

338. *See, e.g.*, *All Metals*, 338 S.W.3d at 622; *Garcia*, 311 S.W.3d at 36; *Community Initiatives*, 153 S.W.3d at 280; Callaghan Ranch, Ltd. v. Killam, 53 S.W.3d 1, 4 (Tex. App.—San Antonio 2000, pet. denied).

allowed to file a reply to the non-movant's response. If the reply amounts to an amended motion raising new grounds for dismissal, however, that reply should be either ignored by the trial court or treated as an amended motion under Rule 91a.5, which restarts time periods under the rule.[339]

In many instances, the movant should file a reply to rebut arguments raised by the non-movant or raise objections. Deciding to hold off on raising additional arguments until the hearing before the trial judge, as a tactical or sandbagging maneuver, will not generally be a good idea. First, a movant is probably not entitled to raise any arguments orally at the hearing on the motion to dismiss not already included in its written submissions.[340] Second, the parties might not even receive an oral hearing because the trial judge has the right to decide whether the challenged cause of action is baseless based on the written submissions alone without hearing oral presentations from counsel.[341]

As is also true in summary judgment litigation, the non-movant under Rule 91a should be free to reply to the movant's reply (i.e., file a sur-reply).[342] This may well elicit a sur-sur-reply from movant and so on, which will go on until the trial court either decides the Rule 91a motion or loses patience—whichever comes first.[343]

If faced with a "last minute" reply or sur-reply that significantly bolsters the opposing party's Rule 91a arguments, counsel should consider seeking an agreement to reschedule the

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339. *See* TEX. R. CIV. P. 91a.5(d); *supra* notes 304–315 and accompanying text (impact of an amended motion on timetable under Rule 91a); *see also* Sams v. N.L. Indus., Inc., 735 S.W.2d 486, 488 (Tex. App.—Houston [1st Dist.] 1987, no writ) (deciding that, by including two additional grounds in its reply, movant "filed what is essentially a new motion for summary judgment" entitling non-movant to "mandatory 21-day notice period prior to the hearing").

340. *See infra* Part VI(A)(3).

341. *See infra* Part VI(A)(1).

342. *See* Envtl. Procedures, Inc. v. Guidry, 282 S.W.3d 602, 615 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

343. *See* McKenzie v. City of Chicago., No. 97 C 284, 1999 U.S. Dist. LEXIS 9084, at *2–3 (N.D. Ill. May 28, 1999) ("[W]e refuse to further prolong this paper-war by soliciting additional rounds of briefing"); Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1200–01 (W.D. N.C. 1989) ("[I]n the battle of manpower, the volume of paper which a modern law firm can produce is often greater than a busy district judge can read and evaluate with care . . . .").

hearing[344] or a continuance[345] to obtain additional time to prepare arguments or cure defects in the challenged motion or response. Without a record that includes both a motion for continuance (denied) and a complaint (overruled) regarding the eleventh-hour reply, any argument about harm allegedly resulting from the trial judge having considered that reply will be waived for purposes of appellate review.[346]

E. The Trial Court's Discretion to Allow Untimely Filings

As previously mentioned, Rule 91a's twenty-one-day deadline for the motion to dismiss and the seven-day deadline for the response track the summary judgment deadlines under Rule 166a.[347] The summary judgment rule also provides that the movant may file its motion less than twenty-one days before the hearing and the non-movant may file its response less than seven days before the hearing "on leave of court."[348] Stated another way, the trial court has the discretion in summary judgment litigation to consider a late-filed motion or response.[349]

Rule 91a does not contain language comparable to Rule 166a's "on leave of court" phrasing.[350] The dismissal rule merely provides deadlines for filing the motion and response and is silent on the trial judge's authority to consider untimely filings.

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344. *See* TEX. R. CIV. P. 91a.5(c) ("Except by agreement of the parties, the court must rule on a motion . . . .").

345. *See* TEX. R. CIV. P. 251 (setting out requirements for application for continuance).

346. Knapp v. Eppright, 783 S.W.2d 293, 296 (Tex. App.—Houston [14th Dist.] 1989, no writ) (holding that the non-movant waived any error in trial court's consideration of movant's reply filed three days before summary judgment hearing when record did not reflect any objection to consideration of reply by trial court); *see also* Durbin v. Culberson Cnty., 132 S.W.3d 650, 656 (Tex. App.—El Paso 2004, no pet.); Alaniz v. Hoyt, 105 S.W.3d 330, 339 (Tex. App.—Corpus Christi 2003, no pet.); Daniell v. Citizens Bank, 754 S.W.2d 407, 409 (Tex. App.—Corpus Christi 1988, no writ).

347. *Compare* TEX. R. CIV. P. 91a, *with* TEX. R. CIV. P. 166a.

348. TEX. R. CIV. P. 166a(c).

349. *See* Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 685–87 (Tex. 2002).

350. TEX. R. CIV. P. 91a, 166a.

The trial court should nevertheless have the discretion to allow the movant to file a motion to dismiss after the expiration of its sixty-day or twenty-one-day deadline or grant leave to a non-movant to file its response less than seven days before the hearing. Under Rule 5, the trial court has the authority to: (1) enlarge the time allowed for any act required by the Texas Rules of Civil Procedure "for cause shown" if requested before the expiration of the deadline in question and (2) to permit an act to be done after the expiration of any period specified by those rules on a showing of "good cause."[351] Moreover, the Texas Supreme Court has repeatedly expressed its strong preference for lawsuits to be decided on their merits rather than by technical (especially hypertechnical) application of procedural rules.[352]

Consequently, the trial court should have the discretion to consider an untimely motion or response under Rule 91a.[353] On appeal, the trial court's ruling granting or denying permission to file a late motion or response will be subject to an abuse of discretion

351. TEX. R. CIV. P. 5; *see also Carpenter*, 98 S.W.3d at 685–86. The only exception to the trial court's power to extend deadlines or allow late filings under Rule 5 involves procedures relating to new trials. *Id.*

352. *See In re* K.C.B., 252 S.W.3d 514, 515 (Tex. 2008) (justice not served when case ripe for determination decided based on procedural technicality); Crown Life Ins. Co. v. Estate of Gonzalez, 820 S.W.2d 121, 121 (Tex. 1991) (appellate rules should be construed so that cases "turn on substance rather than procedural technicality"); *see also* Rodriguez v. NBC Bank, 5 S.W.3d 756, 763 n.4 (Tex. App.—San Antonio 1999, no pet.) ("NationsBank's argument is also inconsistent with the supreme court's express goal of reaching the merits of a cause of action, instead of dismissing actions on procedural technicalities."); *see also* TEX. R. CIV. P. 1 ("[T]hese rules shall be given a liberal construction . . . to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.").

353. *See In re* Doe, 19 S.W.3d 249, 253 (Tex. 2000).

standard of review.[354] "A trial court abuses its discretion when it acts without reference to any guiding rules or principles."[355]

If you represent a party and you know you are going miss, or have already missed, your deadline for filing a motion to dismiss or a response, file a sworn motion for leave detailing the reasons why the deadline was or will be missed and explaining why additional time is required to prepare the pleading. Then, obtain a written order granting leave to file the untimely pleading or otherwise develop a record establishing that the trial court accepted and considered your untimely filing.[356] If you represent the movant and file a late motion to dismiss and do not obtain leave, you run the risk that the trial judge will deny your motion based solely on the ground that it is untimely and will never reach the merits of your motion. If you represent the non-movant and file a late response and do not obtain leave or otherwise establish that the trial court considered your untimely response, you run the risk that your response will be treated exactly like it would in a summary judgment setting—as a "nullity," with the presumption invoked on appeal that the trial court did not consider your untimely response.[357]

Conversely, if your opponent is late under Rule 91a, then you need to consider objecting to the untimely filing. If you represent the non-movant and the movant has challenged one of your causes of

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354. *See id.*; *Carpenter*, 98 S.W.3d at 686; *see also* Texas Dep't of Aging & Disability Servs. v. Mersch, 418 S.W.3d 736, 739 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("We review a trial court's order to strike a late-served summary-judgment response as we would review a trial court's ruling on a motion for leave to file one—for an abuse of discretion."). *See generally* W. Wendell Hall et al., *Hall's Standards of Review in Texas*, 42 ST. MARY'S L.J. 3, 16–27 (2010) (analyzing categories of trial court rulings subject to abuse of discretion standard of review and application of standard by appellate courts).

355. *Carpenter*, 98 S.W.3d at 686–87 (holding that the trial court did not abuse discretion by denying leave to file late-filed summary judgment response).

356. *See* Castleberry v. N.H. Ins. Co., 367 S.W.3d 505, 507 (Tex. App.—Texarkana 2012, pet. denied) (appellate record did not reflect whether trial court granted or denied leave to file late response); *see also* Johnston & Tobey, *supra* note 314, at 7 (2010) ("Fully one fourth of all [legal malpractice] claims could be eliminated just by knowing and following the rules and law on timing matters.").

357. *E.g.*, E.B.S. Enters., Inc. v. City of El Paso, 347 S.W.3d 404, 413 (Tex. App.—El Paso 2011, pet. denied); Neimes v. Ta, 985 S.W.2d 132, 138 (Tex. App.—San Antonio 1998, pet. dism'd); INA of Tex. v. Bryant, 686 S.W.2d 614, 615 (Tex. 1985).

action by a Rule 91a motion filed more than sixty days after that claim first appeared in your pleadings or filed its motion less than twenty-one days before the hearing, consider objecting to the motion and asking for it to be denied as untimely or, in the alternative, filing a motion for continuance of the hearing on the motion to dismiss and supply the trial court with sworn proof detailing why additional time is needed to respond to the motion.[358] If you represent the movant and the non-movant's response violates the seven-day deadline, decide whether you have a viable argument for requesting the trial court to strike or refuse to consider that late-filed response.[359]

In contrast to its silence on the trial judge's right to consider a late motion or response, Rule 91a specifically deals with an untimely nonsuit, an amended cause of action, or a withdrawal of a motion. The trial court cannot consider an untimely nonsuit or amendment and must rule on the motion to dismiss if the withdrawal is late.[360] More specifically, under Rule 91a.5(a)–(c), except by agreement of the parties, the trial judge is required to rule on the motion to dismiss unless at least three days before the hearing: (1) the non-movant filed a non-suit of the challenged cause of action; (2) the movant withdrew its motion; or (3) the non-movant amended the challenged cause of action and in response, the movant either withdrew its motion or filed an amended motion before the hearing.[361]

In theory, a trial judge should have the discretion to grant leave to a party to file an untimely nonsuit or amendment, e.g., a nonsuit or amendment filed within three days of the hearing on the

358. *See* Cocke v. Meridian Sav. Ass'n, 778 S.W.2d 516, 518 (Tex. App.—Corpus Christi 1989, no writ) (holding that the trial court did not abuse its discretion by denying a motion for continuance of a non-movant served with additional summary judgment proof ten days before hearing); *see* TEX. R. CIV. P. 251 (providing that a continuance will be granted only upon a showing of "sufficient cause supported by affidavit, or by consent of the parties, or by operation of law").

359. *See* Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 686–87 (Tex. 2002) (trial court did not abuse discretion by denying leave to file late-filed summary judgment response); Texas Dep't of Aging & Disability Servs. v. Mersch, 418 S.W.3d 736, at 737, 742 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (trial court abused discretion in striking summary judgment response as untimely); *Castleberry*, 367 S.W.3d at 507 (trial judge would not have abused discretion by denying leave to file untimely response).

360. TEX. R. CIV. P. 91a.5(a), (b), (d).

361. *Id.*

Rule 91a motion.[362] In reality, actually obtaining leave could be a different story. A non-movant that doesn't nonsuit or amend its challenged cause of action until one or two days before a hearing that has been docketed for at least two weeks might have a difficult time persuading a trial judge that it has good cause for its last minute and late decision.

VI. DISPOSITION OF THE RULE 91a MOTION TO DISMISS

A. Conduct of the Hearing

Rule 91a.6 specifically addresses four aspects of the trial court's hearing on the motion to dismiss: (1) the trial court has the option either to conduct an oral hearing or to decide the motion based on the written submissions alone; (2) the parties are entitled to at least fourteen days' notice of the hearing; (3) the trial court cannot consider any evidence at the hearing other than proof on attorney's fees and costs; and (4) the trial court must rule on the motion "based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59."[363]

1. Ruling Based on Oral Hearing vs. on Submission

When providing that the trial judge "may but is not required to, conduct an oral hearing on the motion,"[364] Rule 91a.6 tracks summary judgment practice.[365] Texas courts have uniformly concluded that litigants do not have a right to an oral hearing on a motion for summary judgment.[366] In other words, Texas does not

362. *See In re* K.C.B., 251 S.W.3d 514, 515 (Tex. 2008) (stating that "justice is not served" when cases are decided on a "procedural technicality" that can be easily corrected); Crown Life Ins. Co. v. Estate of Gonzalez, 820 S.W.2d 121, 121 (Tex. 1991) (emphasizing that the Texas Rules of Appellate Procedure should be construed liberally to encourage adjudication based on substance, not procedure); TEX. R. CIV. P. 1; TEX. R. CIV. P. 5.

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

364. *Id.*

365. *Id.*

366. *See* Martin v. Martin, Martin & Richards, Inc., 989 S.W.2d 357, 359 (Tex. 1998) (holding that oral hearings on motions for summary judgment are not

require a trial court to provide a party with its "day in court" even on a potentially dispositive pre-trial motion.[367] Rather, whether to allow the parties and their counsel an oral hearing on a summary judgment motion is viewed as a matter within the trial judge's discretion,[368] which would seem to be the same discretion that a trial judge has under Rule 91a.

Every accepted justification for allowing the trial court to decide a summary judgment motion based on the written submissions alone, without hearing oral presentations from counsel, applies with equal force to a Rule 91a motion:

- A hearing on a motion for summary judgment is purely one of law, as is a hearing on a Rule 91a motion.[369]
- Trial courts decide the merits of a summary judgment motion based on the written submissions, just as they do with a Rule 91a motion.[370]
- No evidence on the merits may be introduced at a hearing on a summary judgment motion or at a hearing on a motion to dismiss an allegedly baseless claim.[371]

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mandatory); Gordon v. Ward, 822 S.W.2d 90, 92 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (recognizing that oral hearings on motions for summary judgment are discretionary); Dillard v. Patel, 809 S.W.2d 509, 512 (Tex. App.—San Antonio 1991, writ denied) (explaining that the summary judgment rule itself does not extend to counsel a right to present oral argument).

367. *See Martin*, 989 S.W.2d at 359 ("[N]ot every hearing called for under every rule of civil procedure necessarily requires an oral hearing."); Thomas v. Graham Mortg. Corp., 408 S.W.3d 581, 595 (Tex. App.—Austin 2013, pet. denied) (due process does not require an oral hearing on a summary judgment motion); *see also* Adamo v. State Farm Lloyds Co., 864 S.W.2d 491, 491 (Tex. 1993) (Doggett, J., dissenting to denial of application for writ of error).

368. Adamo v. State Farm Lloyds Co., 853 S.W.2d 673, 677 (Tex. App.—Houston [14th Dist.] 1993, writ denied); Givens v. Midland Mortg. Co., 393 S.W.3d 876, 884 (Tex. App.—Dallas 2012, no pet.).

369. *Compare* Martin v. Cohen, 804 S.W.2d 201, 203 (Tex. App.—Houston [14th Dist.] 1991, no writ) (characterizing summary judgment hearing as only involving issues of law), *with infra* Part VII(E)(1) (discussing how proper Rule 91a motion should only raise pure questions of law).

370. *Compare Martin*, 804 S.W.2d at 203 (stressing that the court must decide the motion based on pleadings, discovery responses, stipulations, and sworn affidavits), *with infra* Part VII(E)(1).

371. *Compare Martin & Richards*, 989 S.W.2d at 359 (holding that oral

- Summary judgment litigation "is decidedly a textual affair rather than a matter of oral advocacy,"[372] as is Rule 91a practice.

Some litigants and counsel may be shocked and angry when their lawsuit is dismissed as baseless not long after filing suit and before they ever have a chance to appear in court. But if summary judgment cases and decisions involving other rules and statutes requiring a "hearing" are any indication (and there's no reason they shouldn't be), a party attempting to challenge an adverse ruling on a Rule 91a motion by complaining that he was wrongfully deprived of an oral hearing is highly unlikely to prevail on appeal.[373]

2. Notice of the Hearing

If the trial court decides to rule on the motion to dismiss without providing the parties with an oral hearing, however, the court will need to notify the parties of the submission date.[374] The filing deadlines for the motion, response, non-suit and withdrawal of the motion are all specifically tied to "the date of the hearing."[375] Unless the parties receive notice of the hearing date, they will be unaware that they have an approaching filing deadline under Rule 91a, and they will not be able to determine the actual deadlines.

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hearings on summary judgments are not necessary because oral testimony cannot be adduced in support of or against the motion), *with* TEX R. CIV. P. 91a.6 (prohibiting trial court from considering evidence when deciding motion to dismiss).

372. Mohamed v. Exxon Corp., 796 S.W.2d 751, 758 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *see also* TEX. R. CIV. P. 91a.6 (requiring trial court to rule on motion to dismiss based solely on pleadings).

373. *See Martin & Richards*, 989 S.W.2d at 359 (concluding that trial court did not err in failing to provide parties with oral hearing on motion for summary judgment); *Martin*, 804 S.W.2d at 203 (concluding that trial judge did not err by refusing to hold oral hearing on summary judgment motion); *see also* Enriquez v. Livingston, 400 S.W.3d 610, 613 (Tex. App.—Austin 2013, pet. denied) (upholding dismissal of inmate's suit without oral hearing and stating "Texas courts have held in numerous situations that an oral hearing was not required even though the applicable rule or statute called for a 'hearing.'").

374. Under Rule 91a, "'hearing' . . . includes both submission and an oral hearing." TEX. R. CIV. P. 91a cmt. 2013.

375. *See* TEX. R. CIV. P. 91a.3, 91a.4, 91a.5.

This notice issue—arising when the trial court decides a motion without an oral hearing—has also been addressed in summary judgment litigation. Notably, both Rule 166a (the summary judgment rule) and Rule 91a require the non-movant's response to be filed seven days before the hearing.[376] In summary judgment practice—which should be no different than Rule 91a practice—the non-movant must receive notice of the submission date so that he will know when his response is due.[377]

The lack of proper notice of the hearing/submission date on a Rule 91a motion could affect the validity of an order granting the motion to dismiss. A complete lack of notice to the non-movant of the Rule 91a hearing would almost certainly be viewed as a violation of the non-movant's due process rights to notice and an opportunity to be heard in a meaningful time and in a meaningful manner.[378] Consequently, if the non-movant is not provided any notice of the hearing or submission date, an order dismissing its claims as baseless stands a strong chance of being overturned through a motion for new trial or on appeal.[379]

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376. *Compare* TEX. R. CIV. P. 91a.4 *with* TEX. R. CIV. P. 166a(c); *see also supra* Part V(B).

377. *See Martin & Richards*, 989 S.W.2d at 359 ("[A]n oral hearing is not mandatory" but notice of the submission date is required because without notice, "the respondent cannot know when the response is due.").

378. *See* Thomas v. Graham Mortg. Corp., 408 S.W.3d 581, 595 (Tex. App.—Austin 2013, pet. denied) ("Due process does not require an oral hearing on a motion for summary judgment, but notice of hearing or submission of the motion is required."); Valdez v. Robertson, 352 S.W.3d 832, 834 (Tex. App.—San Antonio 2011, no pet.) ("The failure to give sufficient notice [of a hearing on a motion for summary judgment] deprives a party of his due process rights and warrants reversal."); Tanksley v. CitiCapital Comm. Corp., 145 S.W.3d 760, 763–64 (Tex. App.—Dallas 2004, pet. denied) (sustaining appellant's contention that summary-judgment process "circumvent[ed] his constitutional right to a jury trial" when no evidence showed appellant was served with motion for summary judgment or notice of hearing); *see also* Tex. Integrated Conveyor Sys. v. Innovative Conveyor Concepts, 300 S.W.3d 348, 363–64 (Tex. App.—Dallas 2009, pet. denied) (citing "no notice" cases).

379. True "no-notice" summary judgments are consistently reversed on appeal. *See Valdez*, 352 S.W.3d at 834 (reversing summary judgment because non-movant received insufficient notice of the summary judgment motion and the hearing on that motion); *Tex. Integrated*, 300 S.W.3d at 363–64 (citing cases); Rozsa v. Jenkinson, 754 S.W.2d 507, 509 (Tex. App.—San Antonio 1988, no writ); *see also* Etheredge v. Hidden Valley Air Park Ass'n, 169 S.W.3d 378, 383

In contrast to a "no notice" scenario, however, a complaint that the non-movant received "insufficient" notice (less than the fourteen days required by Rule 91a) will generally be unlikely to qualify as a due process violation and rarely warrant setting aside a dismissal order. In that situation, the non-movant will need to move for a continuance of the Rule 91a hearing and develop a record establishing that receiving less than fourteen days' notice of the hearing deprived her of an adequate opportunity to respond to the motion to dismiss.[380]

A complaint about a violation of Rule 91a's fourteen-day notice mandate must be preserved for appeal. Not even a true "no notice" dismissal would be per se reversible. Whether a litigant is complaining about having received no notice of the hearing on the Rule 91a motion or insufficient notice, that complaint must have

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(Tex. App.—Fort Worth 2005, pet. denied) (reversing summary judgment because non-movant received neither actual nor constructive notice of hearing); Lester v. Capital Indus., Inc., 153 S.W.3d 93, 96 (Tex. App.—San Antonio 2004, no pet.) (holding that lack of notice that summary-judgment motion was filed and set for hearing "was both injurious and prejudicial because [the non-movant's] attorney could not file a response").

380. *Compare* Williams v. City of Angleton, 724 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (reversing summary judgment because non-movant received insufficient notice of hearing date), *disapproved on other grounds*, Lewis v. Blake, 876 S.W.2d 314 (Tex. 1994), *with Martin & Richards*, 989 S.W.2d at 359 (trial court erred by granting summary judgment without notice to non-movant but error was harmless because court, after receiving non-movant's response on the merits, reconfirmed its ruling), *and In re* Valdez, 406 S.W.3d 228, 231 (Tex. App.—San Antonio 2013, pet. denied) ("Generally, a trial court errs when it fails to give notice of the submission date for a motion for summary judgment . . . [h]owever, failure to give the required notice may be harmless when the trial court fully considers the nonmovant's response."), *and* Cunningham v. Zurich Am. Ins. Co., 352 S.W.3d 519, 531–32 (Tex. App.—Fort Worth 2011, pet. denied) (affirming summary judgment and stating: "Cunningham does not dispute that he received actual notice of the hearing, and he has not shown that he was harmed by receiving only eighteen days' notice instead of twenty-one or by the trial court's failure to grant him a continuance based on receiving less than twenty-one days' notice."), *and* Givens v. Midland Mortg. Co., 393 S.W.3d 876, 884 (Tex. App.—Dallas 2012, no pet.) (rejecting complaint about insufficient notice of summary judgment hearing because after counsel for non-movant did not appear at scheduled hearing, trial court declined to hear argument from movant's counsel and instead considered motion by submission).

been first raised in the trial court; otherwise, it has been waived and not preserved for appeal.[381]

3. Evidence, Objections and Argument at the Hearing

Rule 91a.6 additionally states: "Except as required by 91a.7 [attorney's fees and costs], the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59."[382] This limitation on matters properly considered by the trial court at the hearing on a Rule 91a motion seems straightforward. The only materials to be discussed at the hearing consist of the challenged pleading, a Rule 59 exhibit, proof on attorney's fees or costs, or a Rule 91a motion, response, or reply; attorneys should discuss, and judges should consider, nothing else.

But how should courts and parties handle objections to evidence? Suppose the opposing party is relying on an exhibit not permitted by Rule 59 or an exhibit that is otherwise defective? Is the other party entitled to object (verbally) for the first time at the hearing? Again resorting to the summary judgment analogy, oral objections or legal arguments raised in open court and not already included in a timely-filed written submission are not permitted at the summary judgment hearing and preserve nothing for appellate review.[383] Nor should they be permitted at a Rule 91a hearing,

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381. *See* Balderas v. Saenz, No. 04-11-00873-CV, 2013 Tex. App. LEXIS 787, at *7 (Tex. App.—San Antonio Jan. 30, 2013, pet. denied) (mem. op.); *see also* French v. Brown, 424 S.W.2d 893, 895 (Tex. 1997); TEX. R. APP. P. 33.1(a) (as prerequisite for appellate review, record must establish that party raised complaint in trial court and court ruled on complaint).

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

383. *See, e.g.*, City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 677 (Tex. 1979); Protocol Techs., Inc. v. J.B. Grand Canyon Dairy, L.P., 406 S.W.3d 609, 613 (Tex. App.—Eastland 2013, no pet.); El Paso Assocs., Ltd. v. J.R. Thurman & Co., 786 S.W.2d 17, 19 (Tex. App.—El Paso 1990, no writ); *see also Balderas*, 2013 Tex. App. LEXIS 787, at *7 ("An oral hearsay objection to a summary judgment affidavit is a nullity. The trial court errs by sustaining an oral objection, and the appellate court will consider the affidavit as if no objection had been made."); Lann v. Callahan, No. 04-05-00718-CV, 2006 Tex. App. LEXIS 5263, at *3 (Tex. App.—San Antonio June 21, 2006, no pet.) (mem. op.) (holding trial court did not err in sustaining objections to appellant's attempts to "orally

which likewise must be decided by the trial judge based solely on the parties' written submissions.[384]

Finally, even though a hearing on a Rule 91a motion is non-evidentiary and parties should be precluded from raising arguments and objections not already included in written submissions, it will often be advisable for counsel to ask for the hearing to be conducted on the record. A ruling by the trial judge from the bench sustaining timely, written objections or granting leave to file an untimely response or amendment or a stipulation by the parties made in open court—not otherwise reduced to writing—could preserve that issue for appellate review if there is a reporter's record for the Rule 91a hearing.[385] There is, however, some case law discouraging the use of a court reporter at summary judgment hearings, which, admittedly, are akin to Rule 91a hearings.[386] This reasoning has been viewed

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testify regarding factual evidence that was not properly submitted in a response to the summary judgment motions").

384. *See* TEX. R. CIV. P. 91a.6; *see also supra* notes 366–373 and accompanying text (explaining justifications for allowing trial judge to decide motions for summary judgment under Rule 166a and motions to dismiss under Rule 91a without providing oral hearing to parties and counsel).

385. *See* Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 568 (Tex. 2001) (relying on party's summary judgment filings and argument at hearing when holding that party judicially admitted date of acceleration of note); Pipkin v. Kroger Tex., LP, 383 S.W.3d 655, 662 (Tex. App.—San Antonio 2012, pet. denied) (reporter's record reflected that trial judge granted leave to party to file untimely affidavit); Envtl. Procedures, Inc. v. Guidry, 282 S.W.3d 602, 620 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (permission to file late response may be shown by "oral ruling contained in the reporter's record of the summary-judgment hearing"); *In re* Estate of Brown, 140 S.W.3d 436, 438 n.2 (Tex. App.—Beaumont 2004, no pet.) (appellate court may rely on reporter's record of summary judgment hearing to determine whether trial judge made oral ruling on objection so as to preserve issue for review); Aguilar v. LVDVD, L.C., 70 S.W.3d 915, 917–18 (Tex. App.—El Paso 2002) (denying motion to strike supplementation of record) (although presenting oral testimony or raising new legal arguments at summary judgment hearing is not permitted, reporter's record may be appropriate because record may reflect trial court's ruling on party's objections, dispensing with need for written order on objections); *see also* TEX. R. APP. P. 33.1(a) (preserving error for appeal requires record showing that objection, motion, or request was presented to and ruled on by trial judge).

386. *See* Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 291 n.141 (Tex. 2004) ("In their brief on the merits, the residents assert the trial court erred in denying them a court reporter for the summary judgment hearings. But creating a reporter's record is 'a practice neither necessary nor appropriate to the purposes of

(quite correctly) as a holdover from prior jurisprudence banning the recording of summary judgment hearings because Rule 166a barred oral testimony at the hearing.[387] With the relaxation of hypertechnical rules on preservation of error,[388] a reporter's record at a Rule 166a or Rule 91a hearing should be proper to preserve issues for appeal that are not required to be in the parties' written submissions.[389] In any event, a trial court would not commit reversible error by refusing to record a Rule 91a hearing unless the complaining party can establish how it was harmed by the lack of a record.[390]

B. Form of the Ruling on the Motion to Dismiss

1. In General

Aside from requiring that the motion to dismiss be granted or denied within forty-five days of filing, Rule 91a does not address the form or substance of the trial court's ruling on the motion. As a practical matter, an order granting a motion, or a judgment based on

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such a hearing.'") (quoting McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 343 n.7 (Tex. 1993)); *see also* Ritchey v. Pinnell, 324 S.W.3d 815, 817 n.3 (Tex. App.—Texarkana 2010, no pet.).

387. *See Brown*, 140 S.W.3d at 438 n.2; *Aguilar*, 70 S.W.3d at 917–18.

388. The Texas Rules of Appellate Procedure were renumbered and substantially revised in 1997, including adopting Rule 33.1, a new rule governing preservation of error. *See* Verburgt v. Dorner, 959 S.W.2d 615, 615 n.1 (Tex. 1997). Courts have since recognized that Rule 33.1 "relaxed" the former requirement of express written rulings in many situations and allows complaints to be preserved for appeal so long as the record establishes that the trial judge ruled on the motion, objection or other issue either expressly or implicitly. *See* Wren v. G.A.T.X. Logistics, Inc., 73 S.W.3d 489, 497 (Tex. App.—Fort Worth 2002, no pet.); Columbia Rio Grande Reg'l Hosp. v. Stover, 17 S.W.3d 387, 395 (Tex. App.—Corpus Christi 2000, no pet.).

389. *E.g.*, *Brown*, 140 S.W.3d at 438 n.2; *Aguilar*, 70 S.W.3d at 917–18; *see also* Pipkin v. Kroger Tex., LP, 383 S.W.3d 655, 662 (Tex. App.—San Antonio 2012, pet. denied); Envtl. Procedures, Inc. v. Guidry, 282 S.W.3d 602, 620 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

390. *See* Strachan v. FIA Card Servs., No. 14-09-01004-CV, 2011 Tex. App. LEXIS 1652, at *10 (Tex. App.—Houston [14th Dist.] Mar. 8, 2011, pet. denied) (mem. op.) (party must object to court reporter's failure to record a hearing and establish that the absence of a record was harmful); *see also* Smith v. Sun-Belt Aviation, Ltd., 625 S.W.2d 22, 22–23 (Tex. App.—San Antonio 1981, writ dism'd).

granting a motion, is not ordinarily required to be in any particular form[391] unless subject to requirements imposed by a rule or statute.[392]

For purposes of complying with Rule 91a.3(c)'s forty-five-day deadline, the ruling could be as simple as the trial judge announcing from the bench: "Defendant's Motion to Dismiss is granted." A letter from the trial court advising the parties' counsel of its ruling should also suffice. Even a docket entry should technically satisfy Rule 91a.3(c)'s deadline for a timely ruling.[393]

2. The Importance of a Written Ruling

For a variety of practical and substantive reasons, though, counsel should obtain a written order deciding the motion to dismiss. Trial judges retire, lose elections, pass away, or stay on the bench and have little or zero recollection of one ruling on one motion out of thousands heard or have difficulty interpreting a shorthand reference on a docket sheet or recalling the thought process leading to a long-ago letter. More importantly, oral rulings, [394] letters,[395] and docket entries[396] are not appealable. The trial court's decision on the Rule

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391. *See* Lehmann v. Har-Con Corp., 39 S.W.3d 191, 195 (Tex. 2001) ("law does not require that a final judgment be in any particular form"); *Ex Parte* Hernandez, 827 S.W.2d 858, 858 (Tex. 1992) ("Although the form of the order is not important, the substance is.").

392. *See, e.g.*, TEX. R. CIV. P. 683 (setting out requirements for form and scope of injunctions and restraining orders).

393. *See In re* Bill Heard Chevrolet, Ltd., 209 S.W.3d 311, 315–16 (Tex. App.—Houston [1st Dist.] 2006) (orig. proceeding) (although docket entries, particularly unsigned entries, are viewed as unreliable and insufficient to constitute judgment or decree, they may establish date trial court orally ruled).

394. To be appealable, an oral ruling must be reduced to a signed written order. *See infra* Parts VI(B)(3),VII(A)–(B); *see also* Pierce v. Benefit Trust Life Ins. Co., 784 S.W.2d 516, 517 (Tex. App.—Amarillo 1990, no writ) (holding that appellate court could not hear appeal based on counsel's representation that the judge had "orally granted" take-nothing judgment).

395. Mattox v. Cnty. Comm'rs Court, 389 S.W.3d 464, 469 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) ("A letter is not the proper method for a trial court to apprise the parties of the grounds or reasons for the trial court's summary-judgment rulings.").

396. *See In re* Covito-Nelson, 278 S.W.3d 773, 775 (Tex. 2009) (trial court's oral pronouncement and docket entry granting new trial was not substitute for written order required by Rule 329b); Kirven v. Hamilton, No. 05-11-00627-

91a motion should therefore be memorialized in a signed, written order to avoid disputes about the nature of that ruling at a later date and to lay the foundation for appellate review.

At a minimum, that order should: (1) identify all pleadings, motions, and responses or replies considered by the trial court; (2) grant or deny the motion; (3) rule on any objections; (4) grant or deny any requests for leave to file late-filed materials; and (5) if granting the motion, specifically identify each cause of action dismissed as baseless.[397] An order of this nature should avoid subsequent controversy over the character of the trial court's ruling because that order will control over any statements made by the court at the hearing or in a letter or docket entry.[398]

An order granting or denying a Rule 91a motion should not need to explain why the trial court concluded that a challenged cause of action was or was not baseless.[399] But if the Rule 91a motion challenges a cause of action as baseless for multiple independent reasons and the trial court grants that motion in a written order without identifying the basis for its ruling, that order must be upheld on appeal if any of the reasons raised by the movant are

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CV, 2012 Tex. App. LEXIS 3624, at *1–2 (Tex. App.—Dallas May 8, 2012, no pet.) (mem. op.) ("Docket sheet entries reflecting the trial court's rulings do not invoke our jurisdiction."); *see also Bill Heard Chevrolet*, 209 S.W.3d at 315–16.

397. *See infra* Part VI(B)(4) (discussing whether a dismissal should be *with* or *without* prejudice).

398. *Mattox*, 389 S.W.3d at 469 (refusing to consider trial judge's letter to counsel when reviewing validity of summary judgment); Kalyanaram v. Burck, 225 S.W.3d 291, 303 (Tex. App.—El Paso 2006, no pet.) ("Docket sheet entries such as this cannot be used to overrule or contradict a written order of the trial court."); Richardson v. Johnson & Higgins of Tex., Inc., 905 S.W.2d 9, 11 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (reviewing summary judgment based on language of final judgment rather than trial judge's comments at hearing).

399. *See, e.g.*, Four Points Bus., Inc. v. Rojas, No. 01-12-00413-CV, 2013 Tex. App. LEXIS 10834, at *6 (Tex. App.—Houston [1st Dist.] Aug. 27, 2013, no pet.) (mem. op.) (judgment not required to explicitly and clearly identify claims on which party prevailed); Reynolds v. Murphy, 188 S.W.3d 252, 258–59 (Tex. App.—Fort Worth 2006, pet. denied) ("We find no authority . . . requiring a trial court to specify the grounds upon which it grants summary judgment."); Retzlaff v. Tex. Dep't of Crim. Justice, 94 S.W.3d 650, 654 (Tex. App.—El Paso 2002, no pet.) (rejecting appellant's complaint that trial court was required to state grounds for dismissal of inmate's suit under Chapter 14 of Texas Civil Practice and Remedies Code).

meritorious.[400] Consequently, it can be advantageous for the movant to press the trial judge to sign a broadly-worded order that can be sustained on any theory raised in the motion while the non-movant should try to have the judge detail its reasons for granting the motion to limit the issues presented on appeal.[401]

3. Finality of Judgment Concerns

As discussed elsewhere, a written order granting a Rule 91a motion should qualify as a final, appealable judgment if disposing of all issues and parties.[402] Finality of judgments is a complex and often confusing area of Texas law. When the judgment arises from a conventional trial on the merits, there is a presumption that the judgment is final.[403] In contrast, if the judgment arises from a summary judgment, a default judgment, *or* a Rule 91a ruling, there is no presumption of finality.[404] When your goal is to draft a final, appealable judgment based on the trial court's decision on a Rule 91a motion, be aware that you are dealing with a technical (if not hypertechnical) area. If concerned about finality issues, the first thing you should do is read (or re-read) *Lehmann v. Har-Con Corporation*,[405] the leading decision on finality of judgments in

400. *See* Hendee v. Dewhurst, 228 S.W.3d 354, 367 (Tex. App.—Austin 2007, pet. denied) ("Because the district court did not specify its grounds for dismissal, we may affirm on any meritorious ground on which the court could have relied."); *see also* Merriman v. XTO Energy, Inc. 407 S.W.3d 244, 248 (Tex. 2013) ("When the trial court does not specify the grounds for its ruling, a summary judgment must be affirmed if any of the grounds on which judgment is sought are meritorious."); Bossier Chrysler Dodge II, Inc. v. Rauschenberg, 201 S.W.3d 787, 802 (Tex. App.—Waco 2006), *rev'd in part on other grounds*, 238 S.W.3d 376 (Tex. 2007) (deciding that, when the defendant does not object to broad-form negligence submission, the appellate court must uphold jury's liability finding if evidence supports any liability theory raised by pleadings and covered by that submission).

401. *See* Gardner v. Abbott, 414 S.W.3d 369, 380 (Tex. App.—Austin 2013, no pet.) (observing that while the non-movant "might prefer" narrowly-drafted summary judgment, the movant may still raise other grounds included in motion to support judgment on appeal).

402. *See infra* Part VII(A).

403. Vaughn v. Drennon, 324 S.W.3d 560, 561 (Tex. 2010); *see also* Ne. Ind. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 897–98 (Tex. 1966).

404. Lehmann v. Har-Con Corp., 39 S.W.3d 191, 199–200 (Tex. 2001).

405. *Id.*

litigation not involving a conventional trial on the merits. Under *Lehmann*, an order granting a Rule 91a motion to dismiss will not be final unless "it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties."[406] One commonly used method for satisfying *Lehmann*'s finality test is to insert language along the following lines at the end of the judgment: "This judgment is intended to dispose of all issues and parties and is a final, appealable judgment."[407]

Without language establishing the trial court's "clear and unequivocal" intention to render a final judgment disposing of all issues and parties, you run the risk that your judgment will actually be a non-final, non-appealable interlocutory order; that is, the litigation will not be over in the trial court even though you and your client think it is. To illustrate, an order granting a motion that successfully challenges all of the plaintiff's claims but merely recites that "Defendant's Motion to Dismiss under Rule 91a is granted"—without additional language disposing of all of those claims and resolving the lawsuit—is nothing more than an interlocutory order granting a motion that does not qualify as a final, appealable judgment.[408]

4. Dismissal: Without Prejudice vs. With Prejudice and With Leave to Amend vs. Without Leave to Amend

Although Rule 91a.3(c) requires the trial court to grant or deny the motion to dismiss within forty-five days, the rule does not state whether, when granting the motion, the court should dismiss *without* prejudice or *with* prejudice.[409] Rule 91a is also silent on

406. *Id.* at 205.

407. *See, e.g.*, *id.* at 206; Childers v. Advanced Found. Repair, L.P., 193 S.W.3d 897, 897 (Tex. 2006); Harrison v. Watson, No. 12-09-00271-CV, 2010 Tex. App. LEXIS 8716, at *3 n.4 (Tex. App.—Tyler Oct. 29, 2010, no pet.) (mem. op.).

408. Disco Mach. of Liberal Co. v. Payton, 900 S.W.2d 71, 73–74 (Tex. App.—Amarillo 1995, no writ) (holding that an order granting the plaintiff's motion for summary judgment and denying the defendant's motion for summary judgment, without more, did not resolve the lawsuit and was not appealable judgment).

409. *See* 2 MCDONALD & CARLSON, *supra* note 125 § 9:27.65 (explaining

whether the trial court has the discretion to order dismissal but grant leave to the non-movant to amend its pleading to attempt to cure the alleged defects in its challenged cause of action. Whether the non-movant's cause of action is dismissed *without* prejudice and with leave to amend, as opposed to *with* prejudice and without leave to amend, makes a major difference.

Generally speaking, a dismissal without prejudice is not an adjudication on the merits.[410] A dismissal without prejudice does not have res judicata or collateral estoppel impact and, consequently, the dismissed claims may be raised and litigated again at a later date.[411]

A final judgment dismissing with prejudice is an adjudication on the merits no different than if the case had been fully tried and decided.[412] An order dismissing a case with prejudice ordinarily has full res judicata and collateral estoppel effect.[413]

Accordingly, a final judgment granting a Rule 91a motion and dismissing with prejudice all of the non-movant's causes of action would bar the non-movant from relitigating those claims at a later date. A judgment dismissing without prejudice would not bar relitigation.

In contrast to a final judgment, an interlocutory order that dismisses with prejudice some, but not all, of the non-movant's causes of action would not have a res judicata effect and would not legally preclude the non-movant from relitigating the dismissed

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that whether dismissal under Rule 91a is with, or without, prejudice depends on legislative intent).

410. Sahagon v. Ibarra, 90 S.W.3d 860, 863 (Tex. App.—San Antonio 2002, no pet.); McConnell v. Att'y Gen. of Tex., 878 S.W.2d 281, 282–83 (Tex. App.—Corpus Christi 1994, no writ).

411. *Sahagon*, 90 S.W.3d at 863; *McConnell*, 878 S.W.2d at 282–83.

412. Mossler v. Shields, 818 S.W.2d 752, 753 (Tex. 1991); Rodriguez v. Icon Benefit Adm'rs., 269 S.W.3d 172, 176 (Tex. App.—Amarillo 2008, pet. denied).

413. Razo v. Vargas, 355 S.W.3d 866, 876 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (collecting cases); *cf. Rodriguez*, 269 S.W.3d at 176–77 (recognizing that unwarranted dismissal with prejudice that did not actually address merits of the plaintiff's claims was not entitled to res judicata effect). A dismissal with prejudice has the same effect as a take-nothing judgment. *See infra* note 430.

claims at a later date.[414] But practically speaking, it would likely be a different story. A trial judge who dismisses a claim with prejudice under Rule 91a has probably already concluded that the non-movant's pleading problems cannot be cured by amendment and, absent a change in the substantive law, may well be inclined to view his initial ruling as effectively precluding the non-movant from later relitigating the viability of the challenged cause of action.[415]

So, can the trial judge grant a Rule 91a motion, dismiss without prejudice, but also grant leave to the non-movant to amend its pleadings? All Rule 91a.3(c) requires is that the judge grant or deny the motion to dismiss within the forty-five-day time limit.[416] Nothing in the rule prohibits the trial court from granting the Rule 91a motion within the forty-five-day time period while simultaneously dismissing the challenged claim without prejudice and providing the non-movant with an opportunity to amend.

In a variety of contexts, courts have concluded that a dismissal on the pleadings without prejudice is appropriate and that the plaintiff should be given an opportunity to replead when the pleading deficiencies are potentially curable.[417] In contrast, if the pleading deficiencies are viewed as incurable, a dismissal with

414. Mower v. Boyer, 811 S.W.2d 560, 562 (Tex. 1991) (noting that interlocutory partial summary judgments are not entitled to res judicata or collateral estoppel effect).

415. *See* Martin v. First Rep. Bank, Ft. Worth, N.S., 799 S.W.2d 482, 488–89 (Tex. App.—Fort Worth 1990, writ denied) (stating that issues decided by interlocutory summary judgment are final and cannot be further litigated unless trial court sets its ruling aside).

416. *See supra* Part IV(B)(1); *see also infra* Part VII(D)(1).

417. *E.g.*, Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226–27 (Tex. 2004) (explaining that, if the pleadings are not sufficient to affirmatively establish the trial court's subject matter jurisdiction but the pleading deficiency appears curable, the plaintiff should be afforded opportunity to amend); Decker v. Dunbar, 200 S.W.3d 807, 812–13 (Tex. App.—Texarkana 2006, pet. denied) (reasoning that a dismissal based on a prisoner's failure to allege harm involved "remediable defect" and so should have been done "without prejudice"); Lentworth v. Trahan, 981 S.W.2d 720, 722–23 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (reforming trial court's dismissal of prisoner's suit to "without prejudice" while stating: "We are not prepared to say that appellant has no other possible cause of action against appellees arising out of same facts.").

prejudice without providing the plaintiff a chance to amend is viewed as appropriate.[418]

As previously discussed, case law dealing with "no cause of action" summary judgments could be viewed as closely resembling the litigation of baseless causes of action under Rule 91a.[419] Ordinarily, the defendant must specially except before filing a motion for summary judgment asserting that the plaintiff's pleading fails to state a cause of action so that the plaintiff is provided an opportunity to amend its allegedly deficient pleadings.[420] This means that, in most instances, a trial court may not grant a "no cause of action" summary judgment without first allowing the plaintiff a chance to plead a viable cause of action.[421] But there is an exception to this general rule requiring that the plaintiff be given an opportunity to amend. If "the petition affirmatively demonstrates

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418. *See Miranda*, 133 S.W.3d at 227 (holding that a plaintiff is not entitled to opportunity to amend if its petition affirmatively negates existence of subject matter jurisdiction); Univ. of Tex. M.D. Anderson Cancer Ctr. v. King, 329 S.W.3d 876, 880–81 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (rendering judgment dismissing with prejudice because the plaintiff could not cure lack of viable cause of action under Texas Tort Claims Act "by pleading more detailed facts"); Hamilton v. Williams, 298 S.W.3d 334, 340 (Tex. App.—Fort Worth 2009, pet. denied) ("Finally, when we review a trial court's dismissal with prejudice under chapter fourteen, we consider whether the inmate could remedy the error through a more specific pleading."); Nabelek v. Dist. Att'y of Harris Cnty., 290 S.W.3d 222, 233 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (inmate's suit was properly dismissed with prejudice because his claims had no arguable basis in law and were frivolous); *see also* Tex. Dep't of Transp. v. Beckner, 74 S.W.3d 98, 104 (Tex. App.—Waco 2002, no pet.) ("[P]laintiff has 'pled himself out of court' only when the defective allegations cannot be cured by amendment.").

419. *See supra* Part III(C)(2)(b).

420. Friesenhahn v. Ryan, 960 S.W.2d 656, 659 (Tex. 1998); Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 10 (Tex. 1974); *see also* White v. Bayless, 32 S.W.3d 271, 273 (Tex. App.—San Antonio 2000, pet. denied) (holding that the special exceptions procedure, not summary judgment, is proper means to test adequacy of the pleadings and generally the court must give the plaintiff opportunity to state viable claim before granting "no cause of action" summary judgment).

421. *See Friesenhahn*, 960 S.W.2d at 659 (upholding the court of appeals' reversal of summary judgment granted without providing the plaintiff an opportunity to amend); *Herring*, 513 S.W.2d at 10 ("[O]nly after a party has been given an opportunity to amend after special exceptions have been sustained may the case be dismissed for failure to state a cause of action.").

that no cause of action exists or that plaintiff's recovery is barred" then the plaintiff need not be given an opportunity to amend.[422] Stated another way: "One type of incurable pleading defect is the lack of a cause of action."[423]

Consequently, appellate courts have affirmed "no cause of action" summary judgments without the plaintiff being provided with an opportunity to amend under a variety of circumstances, such as when: the plaintiff relied on a theory of common law indemnity non-existent under settled Texas law;[424] the plaintiff's damage claims were premised on private causes of action under the Texas Penal Code, though the Code does not create private causes of action;[425] the plaintiff's fraud cause of action was based on unquestionably privileged communications made in the course of the litigation;[426] the plaintiff's breach of fiduciary duty claim was predicated on allegations affirmatively negating the existence of a fiduciary duty;[427] the plaintiff's claims, on their face, consisted of impermissible collateral attacks on a prior judgment;[428] and plaintiff's wrongful termination claim arising from an employment-at-will relationship did not state a cause of action recognized in Texas.[429]

These "no cause of action" summary judgment cases should provide guidance on when the trial court, on granting a Rule 91a

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422. Peek v. Equip. Serv. Co. of San Antonio, 779 S.W.2d 802, 805 (Tex. 1989).

423. Delgado v. Combs, No. 07-11-00273-CV, 2012 Tex. App. LEXIS 8610, at *7 (Tex. App.—Amarillo Oct. 15, 2012, no pet.) (mem. op.).

424. *See* Equitable Recovery, L.P. v. Health Ins. Brokers of Tex., L.P., 235 S.W.3d 376, 388 (Tex. App.—Dallas 2007, pet. dism'd) (affirming summary judgment while stating that allowing the plaintiff to amend "petition would be futile on this record").

425. *Delgado*, 2012 Tex. App. LEXIS 8610, at *3–10.

426. Settle v. George, No. 02-11-00444-CV, 2012 Tex. App. LEXIS 5831, at *4–6 (Tex. App.—Fort Worth July 19, 2012, no pet.) (mem. op.) (holding that the plaintiffs waived any error arising from court granting summary judgment on pleadings without providing them with opportunity to amend by not raising that argument in trial court).

427. *Id.*

428. Toles v. Toles, 113 S.W.3d 899, 914 (Tex. App.—Dallas 2003, no pet.).

429. Currey v. Lone Star Steel Co., 676 S.W.2d 205, 212–13 (Tex. App.—Fort Worth 1984, no writ).

motion, may dismiss with prejudice without providing the plaintiff with an opportunity to amend.[430] In contrast, if the pleading deficiency is curable, then the dismissal should be without prejudice and, if requested by the plaintiff, with leave to amend.[431] To illustrate, while the plaintiff's failure to allege all elements of a theory of liability in its petition might mean that its cause of action is baseless, omitting an element of a cause of action is a remediable defect so that the dismissal under Rule 91a should be without prejudice and with leave to amend.[432]

5. Limited Discovery vs. No Discovery

One issue bound to arise under Rule 91a is whether the non-movant has a right to discovery before the motion to dismiss is heard. Some statutes automatically stay discovery upon the filing of a motion to dismiss.[433] Rule 91a does not mention discovery, much

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430. When the trial court grants a motion for summary judgment based on the plaintiff's failure to state a cause of action, the court generally renders a take-nothing judgment. *See, e.g.*, *Settle*, 2012 Tex. App. LEXIS 5831, at *12–15. In contrast, when the trial court grants a Rule 91a motion because the plaintiff's petition affirmatively negates the existence of a viable cause of action or conclusively establishes that its claims are barred, the court may enter an order of dismissal with prejudice. *See supra* notes 419–429 and accompanying text. As a practical matter, however, "there is no difference between a dismissal with prejudice and a take-nothing judgment, and the terms frequently are used interchangeably." Daniels v. Empty Eye, Inc., 368 S.W.3d 743, 754 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *see also* Martin v. Dosohs I, Ltd., 2 S.W.3d 350, 354–55 (Tex. App.—San Antonio 1999, pet. denied) ("[T]he reviewing court may treat a pretrial dismissal with prejudice as a summary judgment because such dismissal has the same effect as entry of a take-nothing judgment").

431. *See* Lazarides v. Farris, 367 S.W.3d 788, 797–98 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (remanding to provide the plaintiff an opportunity to amend to state claim that city official had acted ultra vires because petition did not affirmatively negate viability of that claim).

432. *See* Ramirez v. Lyford Consol. Indep. Sch. Dist., 900 S.W.2d 902, 906 (Tex. App.—Corpus Christi 1995, no pet.) (omitting element of cause of action does not affirmatively negate existence of viable cause of action but is merely pleading defect subject to amendment); *see also* Decker v. Dunbar, 200 S.W.3d 807, 812–13 (Tex. App.—Texarkana 2006, pet. denied) (dismissal of inmate's claim with prejudice improper because absence of allegation of harm caused by defendant's alleged misconduct was "remediable defect").

433. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(d) (West 2013) (on

less include an automatic stay. Generally, though, the trial court has the discretion to stay discovery[434] so long as its ruling is not arbitrary, unreasonable, or without reference to any guiding rules or principles.[435]

When the movant challenges a cause of action as having no basis in law, however, discovery often will not even be an issue because the viability of the plaintiff's claim will not rest on factual allegations but solely involve questions of law. For instance, no discovery would be needed to determine whether the plaintiff has a valid insurance coverage claim when the facts are undisputed and the language of the insurance policy is unambiguous.[436] Nor would discovery come into play if a cause of action, although recognized in other jurisdictions, is challenged as legally baseless because it has not and should not be recognized in Texas.[437]

When a cause of action is challenged as having no basis in fact, pre-dismissal discovery issues become less clear. Whether the

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filing of motion to dismiss inmate's in forma pauperis suit, "court shall suspend discovery relating to the claim pending the hearing"); Hurd v. Tex. Dep't of Criminal Justice, No. 12-11-00174-CV, 2012 Tex. App. LEXIS 1838, at *9 (Tex. App.—Tyler Mar. 7, 2012, pet. denied) (explaining that, under § 14.003(d), a trial court "has no discretion and must suspend discovery" when motion to dismiss filed); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (West 2013) (providing that motion to dismiss automatically stays discovery under Texas Citizens Participation Act); Combined Law Enforcement Ass'ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 Tex. App. LEXIS 1098, at *28–30 (Tex. App.—Austin Jan. 31, 2014, no pet.) (mem. op.) (concluding automatic discovery stay under Texas Citizens Participations Act did not violate open-courts provision of Texas Constitution).

434. *See* Ramon v. Teacher Ret. Sys. of Tex., No. 01-09-00684, 2010 Tex. App. LEXIS 2316, at *17 (Tex. App.—Houston [1st Dist] Apr. 1, 2010, pet. denied) (mem.op.); *see also* Simmons v. Texoma Med. Ctr., 329 S.W.3d 163, 173 (Tex. App.—El Paso 2010, no pet.) (holding that trial court did not abuse discretion by refusing to compel discovery because partial discovery stay applicable to healthcare liability claims was in effect).

435. *See Simmons*, 329 S.W.3d at 173. *See generally* Hall et. al., *supra* note 354, at 16–19.

436. *See infra* note 564 and accompanying text (trial court's construction of unambiguous written instrument raises question of law).

437. *See, e.g.*, Boyles v. Kerr, 855 S.W.2d 593, 596 (Tex. 1993) (declining to recognize general duty not to negligently inflict emotional distress); *see also supra* note 112 (discussing applicability of Rule 91a.1's "no basis in law" test to causes of action not recognized as viable in Texas).

non-movant is entitled to pre-dismissal discovery in that situation could depend on the pleading standard ultimately adopted in Texas for determining whether a cause of action has no basis in fact. If the standard is that the court cannot discount allegations as unbelievable unless they fall into the "little green men" category,[438] then a persuasive argument can be made that the plaintiff should not be entitled to pursue discovery (and inflict discovery costs on the defendant) to develop its phantasmagorical theories.

If the Texas dismissal standard turns out to be some variant of the federal "plausibility" test,[439] then the plaintiff's right to pre-dismissal discovery becomes a far more complex issue. Federal courts have struggled with this issue, particularly in litigation where virtually all information needed for the plaintiff to draft a plausible complaint is controlled exclusively by the defendant and is unlikely to come to light without granting the plaintiff at least limited discovery opportunities. Some federal appellate courts have concluded that a plaintiff is not entitled to discovery before having to respond to a motion to dismiss under Rule 12(b)(6) while others have permitted limited discovery.[440] As one writer observed when describing the current state of federal law on pre-dismissal discovery: "It seems that as with much of the [plausibility] assessment process, whether a court will permit motion-specific discovery is anybody's guess."[441]

At least until the Texas Supreme Court says otherwise, the movant should consider requesting a stay of discovery[442] relating to the challenged cause of action pending the hearing on the Rule 91a motion while the non-movant should attempt to pursue discovery to the extent necessary to substantiate its challenged claims. If the trial court permits discovery, there will be looming time constraints because Rule 91a.3(c) requires the court to rule on the motion to dismiss within forty-five days of its filing.[443] If the due date for

438. *See supra* notes 168–170 and accompanying text.

439. *See supra* Part III(D).

440. *See* 2 HITTNER ET. AL., *supra* note 258, §§ 9:232.1–10 (citing cases).

441. McKnew, *supra* note 151, at 40.

442. The requested stay would likely take the form of a request for a protective order under Rule 192.6. *See* TEX. R. CIV. P. 192.6 (providing that a party from whom discovery is sought or a person affected by a discovery request may move for a protective order under certain circumstances).

443. TEX. R. CIV. P. 91a.3(c); *see also infra* Part VII(D)(1).

responding to discovery falls close to or after the hearing, the parties may need to postpone the hearing by agreement[444] or agree to expedited discovery. Absent an agreement, the trial court may need to order expedited discovery. If it is not feasible to complete discovery before the expiration of the forty-five-day deadline for a ruling, a court denying the motion to dismiss based on the current state of the pleadings may consider dismissing without prejudice and granting the non-movant leave to amend the challenged pleading after receipt of requested discovery.[445]

C. Findings of Fact and Conclusions of Law

Findings of fact and conclusions of law should not be appropriate after the trial court decides the merits of Rule 91a motion.[446]

Rule 91a is a non-evidentiary procedure in which the trial court bases its decision on the pleadings and applicable law.[447] A Rule 91a motion should never involve contested fact issues and findings of fact should never be appropriate. If the Rule 91a motion involves a battle over allegedly conflicting evidence then the parties are using the wrong procedure. That type of dispute must be resolved by a plea to jurisdiction, summary judgment, or some other evidentiary proceeding such as a jury trial or bench trial.

Conclusions of law should also be inappropriate in Rule 91 litigation. As the Texas Supreme Court stated when reaffirming that findings and conclusions are inappropriate in summary judgment cases, "if summary judgment is proper, there are no facts to find, and the legal conclusions have already been stated in the motion and response."[448] In identical fashion, the legal conclusions serving as

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444. *See* TEX. R. CIV. P. 91a.3(c) ("Except by agreement of the parties, the court must rule on the motion," unless motion withdrawn or challenged cause of action nonsuited).

445. *See supra* Part VI(B)(4).

446. *See supra* Part III(C)–(D).

447. TEX. R. CIV. P. 91a.6; *see also supra* Part VI(A)(3); *see infra* Part VII(E)(1).

448. IKB Indus. (Nigeria), Ltd. v. Pro-Line Corp. 938 S.W.2d 440, 441 (Tex. 1997); *see also* Gardner v. Abbott, 414 S.W.3d 369, 380–81 (Tex. App.—Austin 2013, no pet.) (explaining why trial courts are not required to state grounds supporting summary judgment or file findings of fact and conclusions of law).

the basis for the trial court's grant or denial of the Rule 91a motion should be stated in the motion and response.

Moreover, the supreme court has stressed that findings of fact and conclusions of law should not be requested by the parties, made by the trial judge, or considered by the appellate court in cases involving "dismissal based on the pleadings."[449] Since the trial judge's decision on the merits of a Rule 91a motion involves "dismissal based on the pleadings," findings of fact and conclusions of law should likewise not be requested, made, or considered under the dismissal rule.

D. "Loser-Pays"

1. The "Loser-Pays" Statute and Rule 91a.7

In his State of the State address in February 2011, Governor Perry called for the creation of a "loser-pays" system and early dismissal procedures to combat the danger posed to the Texas economy by "frivolous lawsuits."[450] After loser-pays legislation was introduced in both the House and Senate, the Governor stated via press release:

> "The costs associated with frivolous lawsuits can grind almost any business to a halt, as owners are forced to deal with mounting legal fees and court costs even if they've done nothing wrong," Gov. Perry said. "Implementing loser pays lawsuit reforms will expedite legitimate legal claims, crack down on junk lawsuits and stimulate Texas jobs and economic opportunity relieving Texans of the burdens created by frivolous and drawn-out lawsuits."[451]

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449. *See IKB Indus.*, 938 S.W.2d at 442.

450. Press Release, Office of the Governor Rick Perry, Gov. Perry: We Must Reform, Streamline State Government (February 8, 2011), http://governor.state.tx.us/news/press-release/15674.

451. Press Release, Office of the Governor Rick Perry, Gov. Perry: Lawsuit Reforms will Expedite Justice for Legitimate Claims and Help Strengthen Texas' Economic Climate (March 14, 2011), http://governor.state.tx.us/news/press-release/15822.

In early May 2011, Governor Perry designated HB 274, which included loser-pays and other tort reform provisions, as an "emergency" item for the State, taking precedence over all other pending legislation.[452]

As originally introduced, the 2011 tort reform legislation would have created a true loser-pays system where the loser of a lawsuit, including the loser's contingent fee attorney, could be subject to liability for the winning party's attorney's fees and court costs.[453] After substantial controversy and much criticism,[454]

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452. *See* Marilyn Tennissen, *"Loser Pays" Bill Passes Texas House in Emergency Saturday Session*, SOUTHEAST TEX. REC. (May 9, 2011), *available at* http://setexasrecord.com/news/235348-loser-pays-bill-passes-texas-house-in-emergency-saturday-session; Christy Hoppe, *Loser Pay Bill Dubbed an Emergency by Perry*, TRAILBLAZERS BLOG (May 6, 2011), http://trailblazersblog.dallasnews.com/2011/05/loser-pay-bill-dubbed-an-emerg.html/; *see also Editorial: Legislature Loses Its Way With "Loser Pays" Blow-Up*, DALLAS MORNING NEWS, May 9, 2011 ("Gov. Rick Perry recently added loser-pays legislation to his list of 'emergency items.' Enormous and urgent questions still loom about the state's budget, a structural deficit, growing population and inflation demands, and funding cuts to everything from schools to nursing homes. But bills discouraging lawsuits against businesses or requiring sonograms before abortions have been deemed emergencies rising to the top of lawmakers' to-do lists. Saturday's drama suggests that these less-than-pressing 'emergencies' are becoming a divisive distraction."), *available at* http://www.dallasnews.com/opinion/editorials/20110509-editorial-legislature-loses-its-way-with-lower-pays-blow-up.ece.

453. H.B. 274, 82nd Leg., R.S. (Tex. 2011); *see* Michael Cowen, *Loser (Very Rarely) Pays*, SOAKING UP SOME CLE: A SOUTH TEXAS LITIGATION SEMINAR 2012 (Cowen Law Group ed., 2012), May 17–18, 2012, ch. 18, § IV ("In 2011, another broad 'tort reform' bill, H.B. 274, was proposed. This bill originally contained a draconian 'Loser Pays' provision."); Gilstrap, *supra* note 99 ("As introduced, HB 274 contained far reaching--indeed draconian--provisions concerning attorney's fees."); *see also* Jefferson & Gibson, *supra* note 33, at Ch. 2, p. 1.

454. *See, e.g.*, Editorial, *Tort Reform's About Money More Than Fairness*, FORT WORTH STAR-TELEGRAM, May 19, 2011, at A ("But proposals to change Texas' civil justice system aren't ever mainly about fairness and right. They're about money: Who's making it, who's spending it and who's giving it to which candidates. . . . Thus, Gov. Rick Perry continues promoting the fallacy that Texas runs amok in frivolous suits and unhinged juries, thereby needing emergency legislation to remain business-friendly."), www.texaswatch.org/2011/05/tort-reforms-about-money-more-than-fairness/; Editorial, *Senators Should Kill "Loser Pays,"* SAN ANTONIO EXPRESS-NEWS, May 18, 2011) ("But under the bill that passed the Texas House last week, some lawsuit winners might have to

however, the loser-pays provision ultimately included in the 2011 Omnibus Tort Reform Bill (HB 274/SB13), and signed into law on May 30, 2011,[455] was limited to motions to dismiss.[456] Section 30.021 of the Civil Practice and Remedies Code, the statutory basis for Rule 91a.7, provides:

> 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 supreme court under Section 22.004(g), Government Code, the court shall award costs and reasonable and necessary attorney's fees to the prevailing party. This section

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pay their opponent's legal costs. That's not loser pays. . . . This is bad policy all the way around. It's a perversion of loser pays. The Senate will do Texans a great favor by stopping this legislation dead in its tracks."), http://www.mysanantonio.com/opinion/editorials/article/Senators-should-kill-loser-pays-1385438.php; Editorial, *Tort Deform: House Bill 274 Further Stacks the Legal Deck in Favor of Big-Money Defendants*, HOUS. CHRON., May 15, 2011 ("It's hard to believe this legislation was designated by Gov. Rick Perry as an 'emergency' to facilitate its already inevitable passage by the House GOP super majority. . . . Perhaps the only emergency was the Governor's need to placate his backers at Texans for Lawsuit Reform, a major contributor to GOP state legislators."), http://www.chron.com/opinion/editorials/article/Tort-deform-House-Bill-274-further-stacks-the-1380239.php; *see also* Tex. H.B. 274 Analysis, *supra* note 29 (summarizing positions of opponents and supporters of bill).

455. *See* Press Release, Office of the Governor Rick Perry, *Gov. Perry: Loser Pays Lets Employers Spend Less Time in the Courtroom, More Time Creating Jobs* (May 30, 2011), http://governor.state.tx.us/news/press-release/16203; Vicky Garza, *Perry Signs Tort Reform Bill Into Law*, AUSTIN BUS. J. (May 31, 2011), http://www.bizjournals.com/austin/news/2011/05/31/perry-signs-tort-reform-bill.html.; Angela Morris, *Lawmakers Share Thoughts Before Signing Ceremony for Loser-Pays Bill*, TEX PARTE BLOG (May 31, 2011), http://texaslawyer.typepad.com/texas_lawyer_blog/2011/05/lawmakers-share-thoughts-before-signing-ceremoney-for-loser-pays-bill.html.

456. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 30.021 (West 2013); *see also* Jefferson & Gibson, *supra* note 33, at Ch. 2, p. 1 n.1; *Closing the Lottery*, THE ECONOMIST (Dec. 10, 2011) ("The Texas bill awards legal costs only for suits 'that have no basis in law or in fact' and are dismissed before any evidence is gathered. Most competent lawyers can write a complaint that clears this bar. Even the Texas trial-lawyers' association eventually endorsed Mr. Perry's law."), http://www.economist.com/node/21541423; Carter Wood, *In Texas, It's Not "Loser Pays," But It's Still Pretty Good*, POINT OF LAW, (May 10, 2011), http://pointoflaw.com/archives/2011/05/in-texas-its-no.php.

> does not apply to actions by or against the state, other governmental entities, or public officials acting in their official capacity or under color of law.[457]

In response to that statutory directive, the Texas Supreme Court adopted Rule 91a.7 which states:

> **Award of Costs and Attorney Fees Required.** Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. The court must consider evidence regarding costs and fees in determining the award.[458]

Seems simple and straightforward doesn't it? No exceptions. No proof of improper motive required. The trial court simply orders the "loser" to pay the "winner" under Rule 91a.7. Nothing too complicated about that. This, apparently, is the view of then-Justice, now-Chief Justice Nathan Hecht, the member of the Texas Supreme Court charged with oversight of revisions and amendments to the rules of procedure:[459] "Whether the motion is granted or denied, the winning party gets attorney fees. So, if you file a motion and lose, the other side gets attorney fees."[460]

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457. TEX. CIV. PRAC. & REM. CODE ANN. § 30.021 (West 2013).

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

459. Supreme Court of Texas, Liaison Assignments (Feb. 1, 2013), *available at* http://www.supreme.courts.state.tx.us/Advisories/Liaison_Assignments_022013.pdf. The official Texas Supreme Court website states: "Throughout his service on the Court, Chief Justice Hecht has overseen revisions to the rules of administration, practice, and procedure in Texas courts. . . ." *Chief Justice Nathan L. Hecht*, THE SUPREME COURT OF TEXAS (Feb. 19, 2014), http://www.supreme.courts.state.tx.us/court/justice_nhecht.asp; *see also supra* note 100 (noting Justice Hecht's appointment by Gov. Perry to replace retiring Chief Justice Wallace Jefferson).

460. *See* Morris *supra* note 455. For close to two decades, the Texas Supreme Court has been perceived as favoring insurance companies, banks, health care providers and other corporate and institutional defendants at the expense of injured parties and the jury system. *See, e.g.*, Jack Ayres, *Judicial Nullification of*

Well . . . in reality . . . the cryptic two-sentence statutory origin of loser-pays and Rule 91a.7's largely identical and equally cryptic two sentences leave open a host of questions.

2. Unsettled Aspects of "Loser-Pays" Under Rule 91a.7

First, how does the trial court decide who is the "winner" and who is the "loser?" In many cases, identifying the prevailing party should be easy. The movant files a motion to dismiss challenging

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the Right to Trial by Jury by "Evolving" Standards of Appellate Review, 60 BAYLOR L. REV. 337, 382–445 (2008); David Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 5–7, 44–46 (2007); Michael Shore & Judy Shore, *Personal Torts*, 58 SMU L. REV. 1045, 1045–46, 1075 (2005); Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1, 4–135, 141–42 (1988); *see also* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 33 (Tex. 1994) (Doggett, J., concurring) (criticizing court for having "replaced protection of insureds with protection of insurers, leaving the insurance industry largely free to do as it pleases"), *superseded by statute*, Act of April 6, 1995, ch. 19, 1995 Tex. Gen. Laws 110, *as recognized in* U-Haul Int'l, Inc. v. Waldrip, 380 S.W.3d 118, 140 (Tex. 2012); TEXAS WATCH FOUNDATION", THUMBS ON THE SCALE: A RETROSPECTIVE OF THE TEXAS SUPREME COURT 2000-2010 1 (Court Watch ed., 2012), *available at* http://www.texaswatch.org/wordpress/wp-content/uploads/2012/01/Thumbs-on-the-Scale_CtWatch_Jan2012_Final.pdf ("Rather than operating in fidelity with the law to bring about justice, the Texas Supreme Court has marched in lock-step to consistently and overwhelmingly reward corporate defendants and the government at the expense of Texas families."). To the extent, however, that Rule 91a is used to discourage or evade meritorious lawsuits by Texas consumers and other plaintiffs with limited financial resources, that result really shouldn't be laid at the Texas Supreme Court's feet this time around. It was the Legislature and Governor Perry who insisted that adding motions to dismiss and loser-pays to Texas law was imperative to deal with the supposed onslaught of frivolous and abusive lawsuits—albeit with much encouragement from tort reform advocates such as Texans for Lawsuit Reform. *See supra* notes 452–455 and accompanying text (newspaper editorials regarding proposed loser-pays and other tort reform aspects of HB 274); *see also* Jefferson & Gibson, *supra* note 33, at 2–3 (commenting although the supreme court often accused of having "pro-business and highly conservative" ideology, inspiring some members of bar to suspect that procedural rule changes reflect court's secret agenda, the court was ordered by Texas Legislature to adopt rules pursuant to HB 274). "The bottom line is that the legislature has played a major role in directing many substantive rule changes that the supreme court has ultimately passed – including the dismissal rule . . . ." Jefferson & Gibson, *supra* note 33, at 2–3 (discussing legislative oversight of supreme court's rule-making authority).

one cause of action. The trial court grants the motion and dismisses the non-movant's challenged cause of action as baseless. The movant won. The non-movant lost. The trial court orders the non-movant to pay to the movant all fees and expenses incurred in successfully pursuing its motion.[461]

But what about the mixed-result case? For years, Texas courts have struggled in a variety of contexts with identifying who, precisely, "prevailed" in a particular lawsuit so as to be entitled to attorney's fees.[462] What if the party filing the motion to dismiss challenges five causes of action and the trial court dismisses three, allowing two of the challenged causes of action to go forward? Did the movant prevail by going three for five so as to be entitled to costs and fees? Now flip that scenario. What if the movant successfully dismissed only two of the five challenged causes of action? Is the non-movant now the prevailing party because it went three for five? And if you are the three-for-five (60%) winner, does that mean you are entitled to only 60% of your incurred fees and costs? What if the party filing the motion to dismiss challenges four causes of action and the trial court dismisses two, allowing two of the challenged causes of action to go forward? Is there a prevailing party in this 50-50 scenario? What if the non-movant's surviving two causes of action provide for the statutory recovery of additional damages and

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

462. *See* Epps v. Fowler, 351 S.W.3d 862, 864–71 (Tex. 2011); Intercont'l Grp. P'ship v. KB Home Lone Star, L.P., 295 S.W.3d 650, 652 (Tex. 2009). Numerous statutes entitle the prevailing party to recover its attorney's fees and expenses. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.034(a)(1) (West 2013) (providing suit for possession of real property); *Id.* § 134.005(b) (Theft Liability Act). Other statutes allow the court to award attorney's fees to a party that "substantially prevails." *See* TEX. GOV'T CODE ANN. § 552.323(b) (West 2013) (Public Information Act). Still other statutes, most notably the Declaratory Judgments Act, vest the trial judge with broad discretion to award attorney's fees. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2013) (authorizing the court to award attorney's fees "as are equitable and just"); *see also In re* Estate of Friesenhahn, 185 S.W.3d 16, 21 (Tex. App.—San Antonio 2005, pet. denied) (recognizing that "in declaratory judgment action, trial court can award attorney's fees to the winner, the loser, or to neither").

attorney's fees but the two that were dismissed did not?[463] Is the non-movant slightly more of a "winner" than the movant in this type of 50-50 scenario?[464] Here's the point. What the Legislature evidently viewed as a black and white situation—one party wins and the other loses—will, at times, be anything but.[465] For that reason, a trial court should have the discretion under Rule 91a to assess fees and costs based on its evaluation of the relative success achieved by the movant and the non-movant.[466]

Second, when does the "winner" get paid? Rule 91a.7 is silent on the timing of payment of fees and costs to the prevailing

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463. *Compare* Tex. Civ. Prac. & Rem. Code §134.005 (under the Theft Liability Act, a plaintiff may recover compensatory damages, additional damages up to $1,000 and attorney's fees) *with* Wiese v. Pro Am Servs., 317 S.W.3d 857, 861 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("attorney's fees generally are not recoverable for conversion claims").

464. Texas State Bd. of Veterinary Med. Examiners v. Giggleman, 408 S.W.3d 696, 703–04 (Tex. App.—Austin 2013, no pet.) ("Following the reasoning of federal jurisprudence, the Texas Supreme Court has held that a plaintiff does not 'prevail' for purposes of qualifying for attorney's fees unless it obtains (1) judicially sanctioned 'relief on the merits' of its claim that (2) 'materially alters the legal relationship between the parties.") (quoting Intercontinental Group Psp. v. KB Home Lone Star, L.P., 295 S.W.3d 650, 653-54 (Tex. 2009)).

465. 2 MCDONALD & CARLSON, *supra* note 125 § 9:27.55 (discussing how it is unclear under Rule 91a who the prevailing party is when some but not all claims dismissed).

466. *See* Brown v. Kleerekoper, No. 01-11-00972-CV, 2013 Tex. App. LEXIS 2122, at *12–14 (Tex. App.—Houston [1st Dist.] Mar. 5, 2013, pet. filed) (mem. op.) (upholding trial court's decision that the defendant was prevailing party and entitled to recover attorney's fees under Theft Liability Act (TLA) when the plaintiff recovered on $20 TLA claim and $242 contract claim but the defendant recovered on $7,747 TLA claim); Flagship Hotel, Ltd. v. City of Galveston, 117 S.W.3d 552, 564–65 (Tex. App.—Texarkana 2003, pet. denied) (holding that, where each party prevailed on various breach of contract claims in the suit, the "prevailing party" for purpose of fee award was the party who prevailed on main issue, was awarded damages and was "vindicated by the trial court's judgment"); City of Amarillo v. Glick, 991 S.W.2d 14, 17 (Tex. App.—Amarillo 1997, pet. dism'd) (holding that police officers appealing Civil Service Commission decision entitled to fee award under Texas Local Government Code § 143.015(c) as prevailing parties because officers were "vindicated by the judgment," which set aside Commission's decision, even though officers did not receive all relief sought); *see also* Transcont'l Ins. Co. v. Crump, 330 S.W.3d 211, 231–32 (Tex. 2010) (concluding that reasonable and necessary fees in worker's compensation case is question for the fact finder with trial court to award fees "only for those issues on which the claimant prevails").

party. Do fees and costs have to be paid within a certain time period (a reasonable time perhaps) after being awarded, or may the trial court allow the non-prevailing party to delay payment until the litigation is over?[467] On the one hand, deciding when fees and costs should be paid would appear to be a discretionary case management decision by the trial judge.[468] On the other hand, § 30.021's legislative history suggests that the Legislature intended for prevailing parties to be paid sooner rather than later because, in their view, this would deter abuse and frivolous lawsuits.[469]

Third, is the trial court required to conduct an oral hearing on the prevailing party's claim for attorney's fees and costs? Once again, Rule 91a.7 is silent on an issue that will inevitably arise. Rule 91a.7 states only that the trial court is required to award fees and costs to the prevailing party and must consider evidence when doing so.[470] As discussed elsewhere in this Article, Texas courts are generally not required to provide parties with a formal hearing if the court's ruling will be based on the parties' written submissions as opposed to oral testimony[471]. . . which brings us to another open question.

What type of evidence may the trial court rely on when awarding fees and costs? Rule 91a.7 provides that "the court must consider evidence regarding costs and fees" when deciding the award.[472] But is the court entitled to consider an affidavit from an

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467. *See* Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991) (trial court's order that monetary "sanction is payable only at a date that coincides with or follows entry of a final order terminating the litigation" not reviewable by mandamus).

468. *See In re* Doe, 19 S.W.3d 249, 253 (Tex. 2000) ("The abuse of discretion standard [of appellate review] is typically applied to procedural or other trial management determinations.").

469. *See supra* notes 455–457 and accompanying text; *see also* Tex. H.B. 274 Analysis, *supra* note 29 (summarizing arguments of supporters of loser-pays and other 2011 proposed tort reform measures), *available at* http://www.hro.house.state.tx.us/pdf/ba82R/HB0274.PDF

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

471. *See supra* Part VI(A)(1) (explaining that under Texas law generally and Rule 91a.6 specifically, trial court has option whether to conduct oral hearing on motion or reach decision based on written submissions alone).

472. TEX. R. CIV. P. 91a.7. The Texas Supreme Court has written extensively on the nature and quantum of proof needed to uphold an award of attorney's fees. *See* El Apple I, Ltd. v. Olivas, 370 S.W.3d 757, 761–65 (Tex.

attorney, a client, or an expert as evidence to determine an award of fees? Generally speaking, absent authorization in a statute or rule,[473] affidavit testimony constitutes inadmissible hearsay unless it falls within an exception to the hearsay rule or is being used as impeachment.[474] Conversely, may the trial court simply decline to hear live testimony and require the parties to submit proof on fees and costs in affidavit and documentary form? Although Rule 91a.7 is silent on whether fees and costs may be proven or disproven by affidavit and whether oral testimony is required or optional, this once again seems like a discretionary case management decision for the trial judge.[475]

Finally, and this is potentially a supremely important question for contingent fee attorneys: What does "incurred" mean? Under Rule 91a.7, the prevailing party is limited to an award of "all costs and reasonable and necessary attorney fees *incurred* with respect to the challenged cause of action."[476] In several decisions, the Texas Supreme Court has focused on the meaning of "incurred"

2012) (discussing billing records or other documentation needed to support awards for attorney's fees and paralegal services under lodestar method); Garcia v. Gomez, 319 S.W.3d 638, 641–42 (Tex. 2010) (addressing probative value of uncontroverted testimony by counsel on issue of attorney's fees); Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 313–14 (Tex. 2006) (discussing prevailing party's obligation to "segregate recoverable from unrecoverable fees"); Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818–19 (Tex. 1997) (concluding that Disciplinary Rule 1.04(b) provides non-exclusive list of factors to be considered when evaluating reasonableness and necessity of attorney's fees); *see also* Scott A. Brister, *Proof of Attorney's Fees in Texas*, 24 ST. MARY'S L.J. 313 (1993).

473. *See, e.g.*, TEX. R. CIV. P. 120a(3) (requiring the court to determine special appearance from affidavits and other materials filed by parties); TEX. R. CIV. P. 166a (allowing movant to file supporting affidavits and non-movant to file opposing affidavits); TEX. R. CIV. P. 215.6 (providing that motions and responses relating to discovery sanctions may include affidavits as exhibits).

474. *See* Anthony Pools v. Charles & David, Inc., 797 S.W.2d 666, 676 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *see also* Austin v. Flink, 454 S.W.2d 389, 390 (Tex. 1970) ("The affidavit was, of course, hearsay evidence.").

475. *In re* Doe, 19 S.W.3d 249, 253 (Tex. 2000); *see also Olivas*, 370 S.W.3d at 761 (discussing cases allowing affidavit testimony as proof supporting awards of attorney's fees).

476. TEX. R. CIV. P. 91a.7 (emphasis added).

as it relates to an award of attorney's fees.[477] According to the court, (1) "'incurred . . . act[s] to limit the amount of attorney's fees the trial court may award'"[478] and (2) "'[a] fee is incurred when one becomes liable for it.'"[479] Based on this reasoning, the Texas Supreme Court has held that a party representing himself pro se did "not incur attorney's fees as that term is used in its ordinary meaning because he did not at any time become liable for attorney's fees."[480] Other courts have similarly concluded that if a party did not owe his attorney payment for legal services performed on his behalf, then he did not "incur" and was not entitled to recover attorney's fees.[481] In other contexts—most notably the much-litigated statute limiting medical expenses recoverable in personal injury actions to only those "paid or incurred"[482]—the word "incurred" has likewise been construed as requiring the claimant to have paid or be obligated to pay the expenses in question.[483]

If "incurred" under Rule 91a.7 means fees actually owed (or

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477. *See* Jackson v. State Office of Admin. Hearings, 351 S.W.3d 290, 299 (Tex. 2011); *Garcia* v. 319 S.W.3d at 642; Aviles v. Aguirre, 292 S.W.3d 648, 649 (Tex. 2009).

478. *Jackson*, 351 S.W.3d at 299 (alteration in original) (quoting *Garcia* v, 319 S.W.3d at 642).

479. *See id.* (alteration in original) (quoting *Aviles*, 292 S.W.3d at 649).

480. *See id.*

481. *See* Simmons v. Kuzmich, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.) (holding that the plaintiff "did not incur attorney's fees" and no evidence supported award of fees because the plaintiff was represented by own law firm and admitted that firm was not "billing for time spent representing him"); Keever v. Finlan, 988 S.W.2d 300, 306–08 (Tex. App.—Dallas 1999, pet. dism'd) (stating that the trial court did not abuse its discretion by failing to award claimant attorney's fees because, despite testimony by claimant's counsel and expert about reasonableness and necessity of $75,000 in legal fees for services expended on claimant's behalf, there was no proof that claimant was obligated to pay or had paid any attorney's fees). *But see* AMX Enters., L.L.P. v. Master Realty Corp., 283 S.W.3d 506, 520 (Tex. App.—Fort Worth 2009, no pet.) (predating supreme court holdings in *Jackson*, *Garcia* and *Aviles*) (disagreeing with *Simmons*, decided by another panel of the same court, and stating that proof of fees "actually incurred" is not required to recover attorney's fees).

482. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2013); *see* Randy Wilson, *Paid or Incurred: An Enigma Shrouded in a Puzzle*, 71 TEX. B.J. 812, 813 (2008) ("This single sentence has thrown Texas tort law into chaos as lawyers and courts struggle to apply it.").

483. *See* Haygood v. De Escobedo, 356 S.W.3d 390, 398 (Tex. 2011).

paid) by a contingent fee client to his attorney as a result of that attorney having to litigate a Rule 91a motion, most clients will not have "incurred" or paid any fees under the typical contingent fee contract. Whatever time, effort, and services the contingent fee lawyer expended in connection with the Rule 91a motion would already be covered by the percentage of recovery that the attorney is entitled to recover under the contingent fee agreement—absent language in the attorney-client contract clearly covering services performed and fees recovered in Rule 91a litigation.[484] This result, although perhaps consistent with the accepted definition of "incurred" would be inconsistent with Governor Perry and the legislative majority's stated objective of establishing a true loser-pays system for motions to dismiss.[485]

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484. *See* Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 451 (Tex. 2011) ("Only reasonable clarity is required, not perfection; not every dispute over the contract's meaning must be resolved against the lawyer. But the object is that the client be informed, and thus whether the lawyer has been reasonably clear must be determined from the client's perspective."); Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 94 (Tex. 2001) ("When a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment."). While the customary contingent fee contract might not address payment for legal services in connection with successfully defeating a motion to dismiss, that contract should address any expenses incurred. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.04(d), *reprinted* in TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A (West 2013) (requiring that contingent fee contracts state whether litigation expenses will be deducted from recovery and whether such expenses are to be deducted before or after contingent fee calculated).

485. *See supra* Part VI(D)(1). Although, it is probably safe to assume that protecting contingent-fee plaintiffs lawyers and their clients from having to expend time and money defending themselves against meritless motions to dismiss filed by defendants was not exactly the top priority of the Governor, the GOP-dominated legislature, and their backers in 2011. *See* Nathan Koppel, *Rick Perry: Trial Lawyer Enemy No. 1?*, WALL ST. J. L. BLOG) (Aug. 22, 2011, 3:30 PM), http://blogs.wsj.com/law/2011/08/22/rick-perry-trial-lawyer-enemy-no-1/; *see also* Alexander Burns, *Trial Lawyers Prep for War on Rick Perry*, TEXANS FOR LAWSUIT REFORM (Aug. 22, 2011), http://www.tortreform.com/news/trial-lawyers-prep-war-rick-perry ("America's trial lawyers are getting ready to make the case against one of their biggest targets in years: Texas Gov. Rick Perry. Among litigators, there is no presidential candidate who inspires the same level of hatred – and fear – as Perry, an avowed opponent of the plaintiff's bar who has presided over several rounds of tort reform as governor.").

VII. APPELLATE REVIEW IN RULE 91a LITIGATION

A. Appeals from Final Judgments on the Merits

Rule 91a does not expressly provide for appellate review of an order granting or denying a motion to dismiss. Still, as will be discussed below, an order deciding the merits of a Rule 91a motion should be treated no differently than any other final judgment or interlocutory ruling for purposes of determining the availability of appellate review.

A written order granting a Rule 91a motion to dismiss, finally disposing of all issues and parties, should qualify as a final appealable judgment.[486] Stated another way, an order that grants the defendant's Rule 91a motion and dismisses all of the plaintiff's causes of action, while leaving no issues or parties unresolved, should be appealable[487] and governed by the appellate timetables applicable to final judgments.[488]

To be appealable as a final judgment, however, an order granting a Rule 91a motion and disposing of all issues and parties must be memorialized in a written order signed by the trial judge.[489]

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486. Lehmann v. Har-Con Corp., 39 S.W.3d 191, 195 (Tex. 2001); *see also* Ford v. Exxon Mobil Chem. Co., 235 S.W.3d 615, 617 (Tex. 2007).

487. *See Lehmann*, 39 S.W.3d at 205 ("[L]anguage . . . that the case is dismissed, shows finality if there are no other claims by other parties . . . ."); Small v. Specialty Contractors, Inc., 310 S.W.3d 639, 643–44 (Tex. App.—Dallas 2010, no pet.) (holding that an order dismissing case without prejudice was final for purposes of appeal) ("By dismissing this case when 'there [were] no other claims by other parties' that had not been compelled to arbitration, and stating unequivocally that the 'judgment is final . . . and disposes of this case in its entirety,' the trial court left nothing pending. The order therefore became final for purposes of appeal.") (alterations in original) (quoting *Lehmann*, 39 S.W.3d at 205); Estate of Bolton v. Coats, 608 S.W.2d 722, 724–25 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) ("[J]udgment of dismissal is final for the purposes of an appeal . . . .").

488. *See* TEX. R. APP. P. 25 ("Perfecting Appeal"); TEX. R. APP. P. 26 ("Time to Perfect Appeal"); TEX. R. APP. P. 28 ("Accelerated, Agreed, and Permissive Appeals in Civil Cases"); TEX. R. APP. P. 34 ("Appellate Record"); TEX. R. APP. P. 35 ("Time to File Record; Responsibility for Filing Record").

489. *See* Goff v. Tuchscherer, 627 S.W.2d 397, 398 (Tex. 1982) ("The time from which one counts days for the appellate steps is that day on which the judge reduces to writing the judgment, decision or order that is the official, formal and authentic adjudication of the court upon the respective rights and claims of the

A signed written order is an indispensable prerequisite to a final, appealable judgment.[490] Accordingly, the trial court's ruling on a Rule 91a motion as announced from the bench, even if detailed and unequivocal, will not qualify as a final judgment[491] and will not start the appellate timetable.[492] Nor will a letter from the trial court announcing its ruling on a Rule 91a motion[493] or a docket entry reflecting that ruling[494] be treated as a final, appealable judgment.

If the trial court's written ruling on the Rule 91a motion only partially disposes of the case, then that ruling is an interlocutory order not appealable as a final judgment.[495] Subsequent orders by

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parties."); Panatrol Corp. v. Emerson Elec. Co., 147 S.W.3d 518, 520 (Tex. App.—San Antonio 2004) (denying motion to dismiss) ("Appellate timetables are calculated from the signing of a final judgment in a case."); *see also* TEX. R. CIV. P. 306.1; TEX. R. APP. P. 26.1. *See generally supra* Part VI(B)(3).

490. Farmer v. Ben E. Keith Co., 907 S.W.2d 495, 496 (Tex. 1995); *see also supra* Part VI(B)(2).

491. *See* Lopez v. Foremost Paving, Inc., 671 S.W.2d 614, 617–19 (Tex. App.—San Antonio 1984) (denying motions to dismiss and granting extension of time to file appeal bond).

492. TEX. R. APP. P. 25 ("Perfecting Appeal"); TEX. R. APP. P. 26 ("Time to Perfect Appeal"); TEX. R. APP. P. 28 ("Accelerated, Agreed, and Permissive Appeals in Civil Cases"); TEX. R. APP. P. 34 ("Appellate Record"); TEX. R. APP. P. 35 ("Time to File Record; Responsibility for Filing Record").

493. *Goff*, 627 S.W.2d at 398–99 ("Letters to counsel are not the kind of documents that constitute a judgment, decision or order from which an appeal may be taken."); W. Import Motors, Inc. v. Mechinus, 739 S.W.2d 125, 126–27 (Tex. App.—San Antonio 1987, no writ).

494. *See, e.g.*, *In re* Burlington Coat Factory Warehouse of McAllen, Inc., 167 S.W.3d 827, 831 (Tex. 2005) ("[D]ocket entry does not constitute a written order."); Presley v. McConnell-Presley, 214 S.W.3d 491, 492 (Tex. App.—Dallas 2006, no pet.) ("[A] docket entry does not constitute a final judgment."); Grant v. Am. Nat'l Ins. Co., 808 S.W.2d 181, 183, 184 (Tex. App.—Houston [14th Dist.] 1991, no writ) (docket notation did not qualify as final judgment); Gainesville Oil & Gas Co. v. Farm Credit Bank, 795 S.W.2d 826, 828 n.2 (Tex. App.—Texarkana 1990, no writ) ("The docket entry is a memorandum made for the court's judge's and staff's information and forms no part of the judgment actually entered.").

495. *See* Lehmann v. Har-Con Corp., 39 S.W.3d 191, 192, 205 (Tex. 2001) (order resolving claims by only one plaintiff against one defendant in multi-plaintiff or multi-defendant case not final judgment); *see also* City of Corpus Christi v. Pub. Util. Comm'n, 572 S.W.2d 290, 297 (Tex. 1978) (explaining that an "interlocutory order is by definition an order made pending the cause, before a final disposition on the merits"); *Gainesville Oil*, 795 S.W.2d at 828 ("A summary judgment is interlocutory when, without an appropriate order of severance, it fails to dispose of all parties and issues."); *see also supra* Part VI(B)(3).

the trial court, however, may transform that interlocutory Rule 91a order into a final, appealable judgment. As the Texas Supreme Court has stated: "When a judgment is interlocutory because unadjudicated parties or claims remain before the court, and when one moves to have such unadjudicated claims or parties removed by severance, dismissal, or nonsuit, the appellate timetable runs from the signing of a judgment or order disposing of those claims or parties."[496] Thus, a written order in a multi-defendant case dismissing all claims of the plaintiff against one defendant under Rule 91a, followed by an order completely severing the litigation between those two parties into a separate cause number, will result in an appealable final judgment with appellate deadlines running from the date of the written order of severance.[497]

Lastly, an order denying (as opposed to granting) a Rule 91a motion in its entirety cannot qualify as an appealable final judgment nor can it be transformed into a final judgment by subsequent orders. More specifically, if the defendant moves to dismiss all of the plaintiff's causes of action as baseless and the trial judge denies that motion in toto, those claims have not been resolved in plaintiff's favor and against the defendant. The judge has merely made an interlocutory ruling allowing those claims to survive dismissal at the pleading stage of the case. To invoke appellate review of this type of interlocutory order, the defendant would be limited to a statutory, interlocutory appellate remedy, or mandamus review.[498]

B. Appeals from Interlocutory Orders on the Merits

"Appellate courts have jurisdiction to consider immediate appeals of interlocutory orders only if a statute explicitly provides such jurisdiction."[499] There appear to be at least three statutory avenues for interlocutory appeals in Rule 91a litigation.

An interlocutory order granting or denying a Rule 91a motion

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496. Farmer v. Ben E. Keith Co., 907 S.W.2d 495, 496 (Tex. 1995).

497. Park Place Hosp. v. Milo, 909 S.W.2d 508, 510 (Tex. 1995); *Farmer*, 907 S.W.2d at 496.

498. *See infra* Part VII(B)–(C).

499. Tex. A&M Univ. Sys. v. Koseoglu, 233 S.W.3d 835, 840 (Tex. 2007); *see also* N.Y. Underwriter's Ins. Co. v. Sanchez, 799 S.W.2d 677, 678–79 (Tex. 1990); *In re* T.L.S., 143 S.W.3d 284, 287 (Tex. App.—Waco 2004, no pet.) ("No appeal may be taken from an interlocutory order unless authorized by law.").

should be appealable if the requirements for a permissive appeal under § 51.014(d) of the Texas Civil Practice and Remedies Code are satisfied. Consequently, an order granting or denying a Rule 91a motion, not otherwise appealable, may be appealed if the trial court concludes by written order that (1) the order involves a controlling question of law as to which there is substantial ground for difference of opinion and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.[500] Under § 51.014(d), the plaintiff, the defendant, or both parties jointly are entitled to request the trial court to permit an appeal of a Rule 91a order or the court may authorize an interlocutory appeal on its own initiative.[501] Attempting to invoke § 51.014(d) could be a sound strategy if the trial judge has dismissed or refused to dismiss a cause of action and that interlocutory ruling will have a major impact on the case by greatly expanding or restricting discovery or otherwise significantly affecting the course of the litigation or by eliminating any realistic possibility of settlement, making a full-blown trial and lengthy appeal inevitable.

An interlocutory order on a Rule 91a motion might also be appealable if it involves jurisdictional issues. The Texas Supreme Court has concluded that the denial of a governmental unit's motion for summary judgment challenging the trial court's subject matter jurisdiction is appealable under § 51.014(a)(8) of the Remedies Code even though that section refers only to appeals from an order granting or denying a "plea" to jurisdiction.[502] The court concluded that "the Legislature provided for an interlocutory appeal when a trial court denies a governmental unit's challenge to subject matter

500. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (West 2013); TEX. R. APP. P. 28.2; *see, e.g.*, Church of Jesus Christ of Latter-Day Saints v. Doe, 2013 Tex. App. LEXIS 12543, at *2–8 (Tex. App.—Corpus Christi Oct. 10, 2013, no pet.) (mem. op.); Double Diamond Del., Inc. v. Walkinshaw, No. 05-12-00140-CV, 2013 Tex. App. LEXIS 12447, at *3–6 (Tex. App.—Dallas Oct. 7, 2013, no pet.) (mem. op.); Mid-Continent Cas. Co. v. Krolczyk, 408 S.W.3d 896, 900–01 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

501. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (West 2013).

502. Thomas v. Long, 207 S.W.3d 334, 338–40 (Tex. 2006); *see also* San Jacinto Cnty. v. Nunn, 203 S.W.3d 905, 907 (Tex. App.—Beaumont 2006, pet. denied).

jurisdiction, irrespective of the procedural vehicle used."[503] The court later reached the identical result when upholding a party's right to an interlocutory appeal of an immunity issue under § 51.04(a)(5), concluding that an order denying an assertion of immunity is appealable "regardless of the procedural vehicle used."[504] So, if the "procedural vehicle used" to challenge jurisdiction or assert immunity is a Rule 91a motion, the resulting order should be appealable.[505]

C. *Mandamus Review of the Merits*

While the availability of appellate review for Rule 91a orders qualifying as appealable final judgments or appealable interlocutory orders seems relatively clear cut, the viability of review via the "extraordinary remedy" of mandamus is . . . well . . . not so.[506] In *Prudential*, the leading case on currently-prevailing mandamus standards, the Texas Supreme Court initially cautioned, as it had done many times before: "Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and

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503. *Thomas*, 207 S.W.3d at 339; *see also San Jacinto Cnty.*, 203 S.W.3d at 907.

504. Austin State Hosp. v. Graham, 347 S.W.3d 298, 301 (Tex. 2011).

505. *See* City of Austin v. Liberty Mut. Ins., 2014 Tex. App. LEXIS 5306 (Tex. App. - Austin May 16, 2014, no pet.) (denial of Rule 91a motion challenging trial court's subject matter jurisdiction subject to interlocutory review under §51.014(a)(8)).

506. "Mandamus is an 'extraordinary remedy, not issued as a matter of right, but at the discretion of the court.'" *In re* Reece, 341 S.W.3d 360, 374 (Tex. 2011), (quoting *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 138 (Tex. 2004)); *accord* Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993). A detailed analysis of mandamus law and procedure is beyond the scope of this Article, which primarily focuses on the potential of that remedy in Rule 91a litigation. For comprehensive treatments of this still evolving and often confusing area, see Douglas S. Lang et. al., *Mandamus Decisions of the Texas Supreme Court*, 64 SMU L. REV. 393 (2011); Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker Down the Road of No Return"*, 39 ST. MARY'S L.J. 3 (2007); William E. Barker, Comment, *The Only Guarantee Is There Are No Guarantees: The Texas Supreme Court's Inability to Establish a Mandamus Standard*, 44 HOUS. L. REV. 703 (2007).

to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation."[507] But the court then disavowed relying on "rigid rules" to determine the propriety of mandamus relief and instead adopted a "practical and prudential" approach while emphasizing the "flexibility" of the remedy.[508] Ultimately, the *Prudential* court opted for a balancing test for determining whether the complaining party has an adequate remedy by appeal after final judgment or is entitled to immediate relief by mandamus: The adequacy of the appellate remedy is assessed by "balancing the benefits of mandamus review against the detriments."[509] The court's adoption of a somewhat amorphous balancing test,[510] accompanied by its seemingly increased willingness to inject itself into day-to-day case management by trial judges has been perceived as creating uncertainty, as well as transforming mandamus review of interlocutory orders from something extraordinary into something routine and ordinary.[511] In any event, until courts begin to apply this "flexible," cost-benefit

507. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004).

508. *Id.*

509. *In re* Global Santa Fe Corp., 275 S.W.3d 477, 483 (Tex. 2008); *see Prudential Ins.*, 148 S.W.3d at 136; *see also In re* State, 355 S.W.3d 611, 614 (Tex. 2011).

510. *See In re* Gulf Exploration, LLC, 289 S.W.3d 836, 842 (Tex. 2009) ("There is no definitive list of when an appeal will be 'adequate,' as it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding.").

511. *See Prudential Ins.*, 148 S.W.3d at 143 (Phillips, C.J., dissenting) (criticizing the majority's balancing approach as "inject[ing] even greater uncertainty into an already difficult and frequently subjective process"); *see also In re* Nestle USA, 387 S.W.3d 610, 626 (Tex. 2012) (Willett, J., dissenting) ("All in all, because I believe the Court has disregarded settled doctrines to remake the mandamus remedy into something more ordinary than extraordinary, I respectfully dissent."); *In re* McAllen Med. Ctr., Inc., 275 S.W.3d 458, 470 (Tex. 2008) (Wainwright, J., dissenting) ("A whole new world in mandamus practice, hinted by opinions in the last few years, is here."); *In re* Platinum Energy Solutions, Inc., 420 S.W.3d 342, *358 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (Frost, J., dissenting) ("[T]he majority's new rule will result in this court granting 'extraordinary' relief in very ordinary circumstances."); *see also In re* Helix Energy Solutions Grp., Inc., No. 14–13–00238–CV, 2013 Tex. App. LEXIS 12225, at *23 (Tex. App.—Houston [14th Dist.] Sept. 30, 2013, orig. proceeding) ("Presuming for the sake of argument that this statement of law [mandamus as an extraordinary remedy] is still valid . . . ."); *see also* Flint, *supra* note 506.

balancing test to interlocutory orders granting or denying Rule 91a motions, practitioners will not know to what extent, if any, an adverse ruling is reviewable by mandamus.

Before *Prudential*, one primary justification used by appellate courts for denying mandamus relief was this maxim: The expense and delay of a trial does not, in itself, make the appellate remedy inadequate so as to entitle the complaining party to mandamus review of an interlocutory ruling.[512] Although *Prudential* undercut the force of this maxim,[513] courts of appeals still frequently employ it to justify rejecting requests for mandamus relief.[514] So . . . despite *Prudential*'s expansion of the remedy, a litigant trying to inspire appellate-court interest in its mandamus petition will likely need to drum up a better argument than: "The trial judge should have dismissed plaintiff's negligence cause of action as baseless and you should mandamus the judge because now we're going to have to waste a ton of money and time defending a claim that we really, really think is really, really frivolous." Fortunately for litigators, though, the Texas Supreme Court has employed a variety of catchy phrases to justify mandamus relief that might prove useful for a party hoping to evade having its mandamus petition disregarded as just one more complaint about the expense and delay of trial. Mandamus relief might be warranted if the party complaining about the trial court's ruling on a Rule 91a motion can establish that the

512. Canadian Helicopters, Ltd. v. Wittig, 876 S.W.2d 304, 306 (Tex. 1994), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West 2013), *as stated in In re* AIV Ins. Co., 148 S.W.3d 109, 119 (Tex. 2009); Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

513. In *Prudential*, the Texas Supreme Court granted mandamus relief because the public and parties' time and money would be "utterly wasted." *Prudential Ins.*, 148 S.W.3d at 136. The court stated: "Thus, we wrote in *Walker v. Packer* that 'an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.' While this is certainly true, the word 'merely' carries heavy freight." *Id.*

514. *See, e.g.*, Frontera Generation Ltd. P'ship. v. Mission Pipeline Co., 400 S.W.3d 102, 114 (Tex. App.—Corpus Christi 2012, orig. proceeding); *In re* Morley & Morley, P.C., No. 14-08-01062-CV, 2008 Tex. App. LEXIS 8991, at *5 (Tex. App.—Houston [14th Dist.] Nov. 25, 2008, orig. proceeding) (mem. op.); *In re* Roliard, No. 12-07-00089-CV, 2007 Tex. App. LEXIS 2564, at *3–4 (Tex. App.—Tyler Mar. 30, 2007, orig. proceeding) (mem. op.); *see also In re* Unitec Elevator Servs. Co., 178 S.W.3d 53, 64 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding).

circumstances are "extraordinary"[515] or "exceptional";[516] if mandamus will "safeguard 'important substantive and procedural rights from impairment or loss'";[517] if mandamus relief would "allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments";[518] or if a trial would result in the public and the parties' time and money being "utterly wasted,"[519] a "meaningless" trial,[520] or an "irreversible waste" of judicial and public resources.[521]

D. Mandamus Review Not Involving the Merits

1. Mandamus Review of Trial Court's Failure to Timely Rule

Rule 91a.3(c), "Time for Motion and Ruling," provides: "A motion to dismiss *must* be . . . granted or denied within 45 days after the motion is filed."[522] The word "must" is generally construed as mandatory and creating a duty or obligation.[523] Rule 91a, however, does not contain specific consequences for non-compliance with the forty-five-day deadline.

Texas courts have recognized that when a trial judge has a mandatory duty to rule on a pending motion, but fails or refuses to rule, an appellate court may compel the judge to rule.[524] The

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515. *In re* United Servs. Auto. Ass'n, 307 S.W.3d 299, 313–14 (Tex. 2010); CSR, Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996); *see also In re* Delcor, USA, Inc., No. 14-13-00095-CV, 2013 Tex. App. LEXIS 1371, at *1 (Tex. App.—Houston [14th Dist.] Feb. 12, 2013, orig. proceeding) (mem. op.).

516. *In re* Columbia Med. Ctr. of Las Colinas, 290 S.W.3d 204, 207–09 (Tex. 2009); *In re* Masonite Corp., 997 S.W.2d 194, 198–99 (Tex. 1999).

517. *In re* Global Santa Fe Corp., 275 S.W.3d 477, 483 (Tex. 2008) (quoting *Prudential Ins. Co. of Am.*, 148 S.W.3d at 135–36).

518. *Id.*

519. *Prudential Ins. Co. of Am.*, 148 S.W.3d at 135–36.

520. *See In re* J.M., 373 S.W.3d 725, 728 (Tex. App.—San Antonio 2012, orig. proceeding); *see also Prudential Ins.*, 148 S.W.3d at 137.

521. *See In re* State, 355 S.W.3d 611, 615 (Tex. 2011); *In re* Masonite Corp., 997 S.W.2d 194, 196 (Tex. 1999).

522. TEX. R. CIV. P. 91a.3(c) (emphasis added).

523. *See In re* Lopez, 372 S.W.3d 174, 176 (Tex. 2012) (citing Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001)).

524. *E.g.*, *In re* Kleven, 100 S.W.3d 643, 644 (Tex. App.—Texarkana 2003, orig. proceeding); *In re* Mission Consol. Indep. Sch. Dist., 990 S.W.2d 459, 460–

appellate court will require the trial judge to perform the ministerial act of reaching a decision on a pending matter.[525] But . . . the appellate court can only tell the trial judge to consider and decide the pending motion, not how to rule.[526]

Because Rule 91a evidently imposes a mandatory duty on the trial court to rule on a pending motion to dismiss within 45 days of filing and the movant lacks an adequate appellate remedy to challenge the court's failure/refusal to rule,[527] this "non-ruling" should be reviewable by mandamus.[528] When the trial court has violated Rule 91a's forty-five-day deadline and a litigant believes that it is in its best interests to ask the appellate court to force the lower court to rule by mandamus,[529] that litigant (the relator) will

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61 (Tex. App.—Corpus Christi 1999, orig. proceeding); Grant v. Wood, 916 S.W.2d 42, 45–46 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding); *see also* Zalta v. Tennant, 789 S.W.2d 432, 433 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) ("Mandamus relief is available when the record shows, as a matter of law, that a judge is legally bound to make a *final* ruling in the case and has refused to do so.").

525. *See In re* Coleman, No. 06–13–00038–CV, 2013 Tex. App. LEXIS 5368, at *2–3 (Tex. App.—Texarkana May 1, 2013, orig. proceeding); *see also In re* Bonds, 57 S.W.3d 456, 457 (Tex. App.—San Antonio 2001, no pet.) (orig. proceeding) ("When a motion is properly filed and pending before a trial court, the act of giving consideration to and ruling upon that motion is a ministerial act, and mandamus may issue to compel the trial judge to act.").

526. *In re* Hearn, 137 S.W.3d 681, 685 (Tex. App.—San Antonio 2004, orig. proceeding); *see* Eli Lilly & Co. v. Marshall, 829 S.W.2d 157, 158 (Tex. 1992) (compelling trial judge by mandamus to conduct hearing on motion to seal records under Rule 76a but expressing "no opinion on any aspect of the merits of the relators' motion").

527. If a litigant never receives a ruling on its motion to dismiss then the appellate remedy is necessarily inadequate because there will never be a ruling to appeal. *See In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 134–37 (Tex. 2004); *see also supra* Part VII(C) (suggesting arguments regarding inadequacy of appellate remedies for party seeking to invoke mandamus review of merits of order granting or denying Rule 91a motion).

528. Escobedo, *supra* note 274 ("Should the trial court not timely rule on the motion [filed under Rule 91a], the movant may need to move for mandamus relief.").

529. Although, forcing a trial judge to rule by telling his judicial colleagues upstairs that he doesn't know what he is doing or that he is too lazy to do his job or doesn't care about doing his job—which is how a judge or two might be inclined to personalize this type of mandamus—could well result in the party filing the mandamus action having an up-close and personal encounter with the old adage:

need to establish that the trial court (1) had a legal duty to rule on the motion to dismiss, i.e., Rule 91a.3(c), (2) was asked to rule on the motion, and (3) failed to rule.[530]

One key aspect of a successful mandamus involving a trial judge not timely ruling on a motion seems obvious, but is nonetheless sometimes overlooked by counsel. The trial judge doesn't have a mandatory duty to rule on your motion unless she knows that you filed a motion. Merely filing a Rule 91a motion with the district clerk will not impute knowledge of the pending motion to the trial judge. The mandamus record must establish that the trial judge was aware of the motion,[531] and once aware, had sufficient time to rule on the motion before the expiration of the forty-five-day deadline. So, if counsel unjustifiably delays in alerting the judge to the existence of a pending Rule 91a motion, which contributes to her failure to rule before forty-five days (particularly in a complex case), that could seriously decrease the likelihood of obtaining mandamus relief.

In a similar vein, an unjustifiable delay before seeking relief in the appellate court can reduce the chances of obtaining mandamus relief in Rule 91a litigation. "Although mandamus is not an equitable remedy, its issuance is controlled largely by equitable principles. One such principle is that 'equity aids the diligent and not those who slumber on their rights.' Thus, delaying the filing of a petition for mandamus relief may waive the right to mandamus

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"Careful what you wish for – you might just get it." *See* Stewarts v. United States, No. 10-700-DRH, 2011 U.S. Dist. LEXIS 49951, at *19 (S.D. Ill. May 10, 2011) ("The Court reminds movant of the adage to be careful what you wish for, it just might come true."); Rodriguez v. Scribner, No. CIV S-04-0725 LKK DAD P, 2008 U.S. Dist. LEXIS 29391, at *65 (E.D. Cal. Apr. 9, 2008) ("[T]he judge warned petitioner, there's an ancient Chinese proverb goes something like, 'be careful what you wish for, you may get it.'") (some internal quotation marks omitted).

530. In re *Coleman*, 2013 Tex. App. LEXIS 5368, at *2–3.

531. *See Hearn*, 137 S.W.3d at 685 ("Merely filing the matter with the district clerk is not sufficient to impute knowledge of the pending pleading to the trial court."); *see also* In re *Coleman*, 2013 Tex. App. LEXIS 5368, at *2–3 (citing cases). In other words: 1 file-stamped copy of a Rule 91a Motion + 45 days without a ruling ≠ winning mandamus.

unless the relator can justify the delay."[532] So, waiting to file your mandamus petition until nine months after the court should have ruled on your motion to dismiss and the parties have expended time and expense on discovery relating to the allegedly baseless cause of action could jeopardize your chances for obtaining relief. On the other hand, an unreasonable delay in seeking mandamus relief *without more* will generally be insufficient to justify the denial of relief. "To invoke the equitable doctrine of laches [in opposition to a mandamus petition], the moving party ordinarily must show an unreasonable delay by the opposing party in asserting it rights, and also the moving party's good faith and detrimental change in position because of the delay."[533]

Suppose the trial court has clearly violated the forty-five-day deadline and you win your mandamus, what exactly do you win? You receive an order from the court of appeals compelling the trial judge to rule on the Rule 91a motion by a designated date or an opinion advising the judge that absent a ruling within X number of days, a writ of mandamus will be issued directing him to rule on the pending motion.[534] But you don't win on the merits of the motion. The appellate court will not tell the trial judge how to decide the

532. *In re* Int'l Profit Assocs., Inc., 274 S.W.3d 672, 676 (Tex. 2009); *see In re* Users Servs., Inc., 22 S.W.3d 331, 337 (Tex. 1999); Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex. 1993).

533. *In re* Laibe Corp., 307 S.W.3d 314, 318 (Tex. 2010) (internal citations omitted); *see also In re* Coronado Energy E&P Co., 341 S.W.3d 479, 483 (Tex. App.—San Antonio 2011, orig. proceeding) ("In determining if a relator's delay prevents the issuance of the writ, courts have analogized to the doctrine of laches. A party asserting the defense of laches must show: (1) unreasonable delay by the other party in asserting its rights, and (2) harm resulting to the party as a result of the delay.").

534. *E.g., In re* Salazar, 134 S.W.3d 357, 358–59 (Tex. App. —Waco 2003, orig. proceeding); *In re* Kleven, 100 S.W.3d 643, 644 (Tex. App.—Texarkana 2003, orig. proceeding); *In re* Mission Consol. Indep. Sch. Dist., 990 S.W.2d 459, 460 (Tex. App.—Corpus Christi 1999, orig. proceeding); Grant v. Wood, 916 S.W.2d 42, 46 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding).

motion nor will it decide, on its own, if the challenged claims are baseless.[535]

Finally, the trial court's failure to comply with the forty-five-day deadline, even if remarkably egregious, should not be treated as jurisdictional and should not result in dismissal. In analogous situations, such as statutes imposing strict timing requirements for hearing dates, Texas courts have consistently concluded that the trial court's violation of a mandatory obligation to conduct a hearing by a statutory deadline provides a basis for mandamus relief but is not jurisdictional and is not a basis for dismissal.[536] Courts have similarly concluded that an order signed after the expiration of a mandatory statutory deadline for ruling is not void for lack of jurisdiction but is a valid order.[537] This same result should occur when a trial judge grants or denies a motion to dismiss more than forty-five days after the motion was filed; the order is late but valid.

2. Mandamus Review of "Loser-Pays" Issues

Rule 91a.7 provides that the trial court "must award" the party prevailing on the dismissal motion "all" of its costs and reasonable and necessary attorney's fees incurred with respect to the challenged causes of action.[538] As just discussed, the word, "must"

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535. *See Hearn*, 137 S.W.3d at 685 (Tex. App.—San Antonio 2004, orig. proceeding); *In re* Bonds, 57 S.W.3d 456, 457 (Tex. App.—San Antonio 2001, orig. proceeding); *see also* Eli Lilly & Co. v. Marshall, 829 S.W.2d 157, 158 (Tex. 1992) (compelling trial judge by mandamus to conduct hearing on motion to seal records under Rule 76a but expressing "no opinion on any aspect of the merits of the relators' motion").

536. *In re* E.D.L, 105 S.W.3d 679, 686–88 (Tex. App.—Fort Worth 2003, pet. denied) (citing cases).

537. *See In re* J.A.C., 362 S.W.3d 756, 760–61 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding) (concluding that, although the Texas Family Code states that court "shall" sign confirmation order within 30-day period, the later-signed confirmation order was validly entered and not void); *see also In re* Office of the Attorney General., 264 S.W.3d 800, 808 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding) ("If the required judicial action is not done within the statutorily mandated period, an affected party may seek mandamus relief to compel the trial judge to take that action; however, the trial court does not lose subject-matter jurisdiction to act.").

538. TEX. R. CIV. P. 91a.7; *see also supra* Part VI(D).

is generally viewed as mandatory and imposing a legal duty.[539] Moreover, the legislative history for "loser-pays" makes it clear that the legislature intended for the trial court's decision on whether the prevailing party should recover its fees and costs to be a ministerial act, not a discretionary judgment call.[540] The trial court has no choice other than to make the "loser" pay the "winner." Because the plain meaning of Rule 91a.7 and the legislative history establish that the trial judge has a legal duty to award fees and costs to the prevailing party, a judge's failure to do so in an interlocutory order would seemingly qualify as reviewable and correctible by mandamus.[541]

There is, though, an argument against allowing mandamus relief in this situation. As previously discussed, the remedy of an ordinary appeal is not rendered inadequate merely because it would entail more delay or expense than obtaining relief by mandamus.[542] And the only harm to a party with a valid complaint about a trial court's violation of the loser-pays mandate will usually consist of delay, i.e., the difference between being paid when the case is in the trial court or being paid after appeal.[543] In addition and as also mentioned earlier, the supreme court has adopted a balancing approach which weighs the benefits against the detriments of allowing cases to be interrupted by mandamus actions as opposed to requiring the complaining party to wait until appeal to obtain relief.[544] While this balancing test is case-specific,[545] it would seem

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539. *See supra* Part VII(D)(1); *see also* Bocquet v. Herring, 972 S.W.2d 19, 20 (Tex. 1998) ("Statutes providing that a party 'may recover,' 'shall be awarded,' or 'is entitled to' attorney fees are not discretionary.").

540. *See supra* notes 450–460 and accompanying text. Other than creating a "loser-pays" mandate, however, the Legislature provided no guidance for identifying who is the "loser" and who is the "winner" when the results are mixed at the Rule 91a hearing. Rule 91a likewise provides no insights on how to allocate fees and costs in a mixed-results case. *See supra* notes 462–485 and accompanying text.

541. *See supra* Part VII(D)(1). In contrast to an interlocutory ruling, a trial judge's violation of Rule 91a's loser-pays mandate, incorporated into a final judgment, would be reviewable by appeal rather than mandamus. Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1992).

542. *See supra* Part VII(C)–(D).

543. *See In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004); Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

544. *See supra* notes 506–536 accompanying text; *see also In re* Gulf

that interrupting a case to require appellate court intervention every time a trial judge fails to award fees and costs as required by Rule 91a would unduly interfere with trial court proceedings, distract appellate court attention to issues unimportant to the case at hand and the law in general, and add needless expense and delay to civil litigation, which, according to *Prudential*, is exactly what a mandamus proceeding is *not* supposed to do.[546]

But assuming mandamus is a viable remedy when a trial court awards zero ($0.00) fees and costs to the prevailing party, an appellate court would usually only be empowered to direct the lower court to issue an award of fees and costs in some amount, but not compel the court to award a specific amount.[547] There are two reasons for this limitation. First, when granting mandamus relief, the appellate court may only order the trial court to issue a ruling, not to rule in a certain way.[548] Second, it is settled that "an appellate court may not deal with disputed areas of fact in a mandamus proceeding."[549] This second principle is particularly applicable in a Rule 91a setting when the trial court is presented with conflicting evidence on fees and costs requiring the weighing of evidence and perhaps evaluating the credibility of witnesses.[550]

Exploration, LLC, 289 S.W.3d 836, 842 (Tex. 2009) ("There is no definitive list of when an appeal will be 'adequate,' as it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding."); *Prudential Ins.*, 148 S.W.3d at 134–36.

545. *See* In re *Gulf Exploration*, 289 S.W.3d at 842.

546. *See Prudential Ins.*, 148 S.W.3d at 136. Conceivably, the "loser" could be so strapped for cash that forcing her to pay fees and costs shortly after losing the Rule 91a motion would effectively terminate her ability to continue the litigation. This scenario, although probably difficult to establish of record, might tip the *Prudential* balancing test in favor of the mandamus remedy. *Cf.* Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991) (adopting a procedure whereby the sanctioned party has adequate remedy by appeal when district judge orders that monetary "sanction is payable only at a date that coincides with or follows entry of a final order terminating the litigation") (internal quotation marks omitted) (citing Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 882–83 (5th Cir. 1988)).

547. *In re* Hearn, 137 S.W.3d 681, 685 (Tex. App.—San Antonio 2004, orig. proceeding); *In re* Bonds, 57 S.W.3d 456, 457 (Tex. App.—San Antonio 2001, orig. proceeding).

548. *Hearn*, 137 S.W.3d at 685; *Bonds*, 57 S.W.3d at 457.

549. West v. Solito, 563 S.W.2d 240, 245 (Tex. 1978); *accord In re* Alford Chevrolet–Geo, 997 S.W.2d 173, 179 (Tex. 1999).

550. *West*, 563 S.W.2d at 245; *accord In re* Angelini, 186 S.W.3d 558, 560

On the other hand, factual issues that are undisputed or conclusively established may be appropriately addressed by mandamus[551]—a principle that could apply to an award of fees and costs under Rule 91a. The Texas Supreme Court has held that an appellate court may determine the amount of an award of attorney's fees as a matter of law if the prevailing party's evidence on fees is probative and not controverted by its opponent.[552] Thus, in the face of competent, uncontradicted proof, an appellate court would be entitled to determine the amount of fees to award the prevailing party in a mandamus action arising from Rule 91a litigation.[553]

E. Standard of Appellate Review of An Order Granting or Denying a Rule 91a Motion

1. A Proper Rule 91a Motion Should Only Raise Questions of Law

Since the trial court is prohibited from considering evidence when deciding a Rule 91a motion and solely applies the rule's definitions of no basis in fact or law[554] to a pleading in light of Texas law applicable to the challenged cause of action, the court's decision on the motion should be viewed as involving a pure question of law.

A ruling on the merits of a Rule 91a motion does not involve a discretionary judgment call because "a trial court has no discretion

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(Tex. 2006); Brady v. Fourteenth Court of Appeals, 795 S.W.2d 713–14 (Tex. 1990); *see also* Dall. Morning News, Inc. v. Fifth Court of Appeals, 842 S.W.2d 655, 660 (Tex. 1992) (holding that disputed issues of fact may preclude mandamus relief); Davenport v. Garcia, 834 S.W.2d 4, 23 (Tex. 1992) ("These affidavits create a fact issue which this court may not address on mandamus."). This second principle would also bar mandamus review of a complaint that an award of fees and costs, when based on conflicting evidence, is inadequate or excessive.

551. *See In re* Am. Home Prods. Corp., 985 S.W.2d 68, 71 (Tex. 1998) (granting mandamus relief in counsel disqualification case based on undisputed facts); *In re* Ethyl Corp., 975 S.W.2d 606, 617 (Tex. 1998) ("The ultimate question . . . is whether the undisputed facts and circumstance of this case require a separate trial . . . .").

552. *See* Garcia v. Gomez, 319 S.W.3d 638, 641 (Tex. 2010); Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 881 (Tex. 1990).

553. *See id.*

554. *See* TEX. R. CIV. P. 91a.1.

in applying the law . . . or determining what the law is."[555] So the abuse of discretion standard of review should be inapplicable.[556]

A ruling on a Rule 91a motion also does not involve weighing contested evidence or assessing witness credibility. If a trial court finds itself being asked to assess the probative value of conflicting evidence or decide which witness is more believable, it should become immediately apparent that the parties are attempting to resolve all or part of their dispute through the wrong procedural vehicle because Rule 91a is a non-evidentiary, non-testimonial procedure.[557] So, legal and factual sufficiency standards, applicable to litigation resolved by a finder-of-fact, should be inapplicable as well.[558]

Again, the trial court is deciding whether a cause of action is baseless and should be dismissed by applying Rule 91a's language to a written pleading in light of applicable law—a purely legal inquiry.[559] Even in cases involving exhibits incorporated into pleadings as permitted by Rule 59,[560] a Rule 91a motion should only raise questions of law (other than the amount of fees and costs recoverable by the prevailing party). The interpretation by the trial judge of an unambiguous contract, lease, deed, or other written instrument involves only an issue of law.[561] Deciding whether a contract or other writing is ambiguous is also a question of law for

555. *In re* Frank Kent Motor Co., 361 S.W.3d 628, 630–31 (Tex. 2012) (quoting *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 135 (Tex. 2004)).

556. *See In re* Doe, 19 S.W.3d 249, 253 (Tex. 2000); *see also Frank Kent*, 361 S.W.3d at 630; *Prudential Ins.*, 148 S.W.3d at 135; Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

557. *See* TEX. R. CIV. P. 91a.6.

558. *See Doe*, 19 S.W.3d at 253; *see also* City of Keller v. Wilson, 168 S.W.3d 802, 808, 810 (Tex. 2005).

559. *Frank Kent*, 361 S.W.3d at 631 ("A trial court has no discretion in applying the law to the facts or determining what the law is."); *see also In re* Canales, 52 S.W.3d 698, 701 (Tex. 2001) ("Interpretation of a statute is a question of law over which a trial judge has no discretion.").

560. *See supra* Part III(E).

561. MCI Telecomms. Corp. v. Texas Utils. Elec. Co., 995 S.W.2d 647, 651 (Tex. 1999); *see also, e.g.*, Tawes v. Barnes, 340 S.W.3d 419, 425 (Tex. 2011) (unambiguous contract); Anadarko Petrol. Corp. v. Thompson, 94 S.W.3d 550, 553 (Tex. 2002) (unambiguous lease); Luckel v. White, 819 S.W.2d 459, 461–62 (Tex. 1991) (unambiguous deed).

the court.[562] Consequently, when a trial court decides that a written instrument, incorporated or referenced into a pleading, is unambiguous and then construes that instrument in aid or explanation of the pleading to determine the viability of a cause of action, those rulings involve pure questions of law.

On the other hand, if the trial court determines that the language of an incorporated or referenced Rule 59 exhibit is ambiguous and that exhibit is the sole or primary basis for the cause of action alleged, that ambiguity may raise a fact issue precluding the court from resolving the Rule 91a motion as a matter of law. If, for example, the contract attached by the plaintiff to its petition in a breach of contract action is susceptible to two or more reasonable interpretations (i.e., it is ambiguous), it will be up to the trier-of-fact to resolve that ambiguity by determining the true intent of the parties through a jury or bench trial likely involving conflicting extrinsic evidence involving that intent.[563]

2. Questions of Law Are Subject to De Novo Appellate Review

As just discussed, a ruling on the merits of a Rule 91a motion to dismiss should only raise questions of law. Questions of law are *always* reviewed de novo on appeal. The standard governing appellate review of a ruling on the merits of a Rule 91a motion should therefore be de novo.[564]

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562. Milner v. Milner, 361 S.W.3d 615, 619 (Tex. 2012); *see* State Farm Lloyds v. Page, 315 S.W.3d 525, 527 (Tex. 2010) ("Whether a particular provision or the interaction among multiple provisions creates an ambiguity [in an insurance policy] is a question of law.").

563. *See* J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003) ("[I]f the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent."); Coker v. Coker, 650 S.W.2d 391, 394–95 (Tex. 1983) ("Therefore, this agreement is ambiguous and the trial court erred in granting summary judgment. The trier of fact must resolve the ambiguity by determining the true intent of the parties."); *see also* White v. Moore, 760 S.W.2d 242, 244 (Tex. 1988) ("We hold that summary judgment was improper because the terms of Mattie's will are ambiguous."); *supra* note 207 (discussing impact of ambiguous Rule 59 exhibit on ruling on merits of Rule 91a motion to dismiss).

564. Bland et. al., *supra* note 69, at 7 ("[I]nquiry [under Rule 91a] appropriately is treated as a question of law to which a *de novo* standard of review

For Rule 91a purposes, de novo review means that the appellate court will examine the record and consider "anew" the validity of the allegedly baseless cause of action, including the grounds and arguments in the motion and any response or reply.[565] The appellate court will not defer to the lower court's decision on the legal, non-evidentiary and non-discretionary issue of whether the non-movant's claims have no basis in law or fact.[566] De novo review in Rule 91a cases should essentially be identical to de novo appellate review in summary judgment appeals, which likewise involve only questions of law:

> Legal conclusions of a trial court are always reviewable on appeal. Trial court findings on the law are given no particular deference. Rather, as the final arbiter of the law, the appellate court has the power and the duty to independently evaluate the legal determinations of the trial court.[567]

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would apply."); *accord* 2 MCDONALD & CARLSON, *supra* note 125 § 9:27.70; *see also In re* Humphreys, 880 S.W.2d 402, 404 (Tex. 1994); *see* Morris v. Aguilar, 369 S.W.3d 168, 171 n.4 (Tex. 2012) ("Construction of statutes and rules are questions of law, which we review de novo."); Tawes v. Barnes, 340 S.W.3d 419, 425 (Tex. 2011) ("The construction of an unambiguous contract is a question of law for the court, which we may consider under a de novo standard of review."). The only two reported appellate decisions to construe Rule 91a (as of the date of publication of this Article) have concluded that the trial court's ruling on a Rule 91a motion is a question of law subject to de novo review. *See* City of Austin v. Liberty Mut. Ins., 2014 Tex. App. LEXIS 5306 (Tex. App.—Austin May 16, 2014, no pet.); GoDaddy.Com, LLC v. Toups, 2014 Tex. App. LEXIS 3891 *3 (Tex. App.—Beaumont April 10, 2014, pet. filed).

565. TCA Bldg. Co. v. Entech, Inc., 86 S.W.3d 667, 671 (Tex. App.—Austin 2002, no pet.) ("We review the record and determine anew all issues raised by the grounds asserted in the respective motions for summary judgment."); *see also supra* Parts IV, V(D).

566. Quick v. City of Austin, 7 S.W.3d 109, 116 (Tex. 1998) (explaining that questions reviewed de novo are reviewed without deference to the trial court's decision); Cooke v. Morrison, 404 S.W.3d 100, 111 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("In conducting a de novo review, we exercise our own judgment and give no deference to the trial court's decision.").

567. Pulido v. Dennis, 888 S.W.2d 518, 520 (Tex. App.—El Paso 1994, no writ); *accord* Gonzales v. Am. Postal Workers Union, 948 S.W.2d 794, 797 (Tex. App.—San Antonio 1997, writ denied); *see also* Mobil Prod. Tex. & New Mex., Inc. v. Cantor, 93 S.W.3d 916, 918 (Tex. App.—Corpus Christi 2002, no pet.)

Indeed, a summary judgment based on the plaintiff's failure to state a cause of action, which is also referred to as a "no cause of action" summary judgment and closely resembles an order granting a Rule 91a motion,[568] requires the court to review the pleadings de novo, taking all allegations as true, which is essentially identical to Rule 91a's requirements.[569]

In addition to summary judgments, other types of litigation resolved on the pleadings illustrate that the de novo standard of appellate review applies to a Rule 91a appeal. When a trial court has dismissed a plaintiff's suit for failing to state a claim in its petition in response to special exceptions, the standard of review is de novo.[570] The standard of review for determining whether the plaintiff has alleged facts that affirmatively demonstrate that the trial court has subject matter jurisdiction is likewise de novo.[571] And, when reviewing dismissals of inmate lawsuits under Chapter 14 of the Civil Practice and Remedies Code, the appellate court conducts a de novo review to determine whether the plaintiff's claims, as alleged in his petition, have "no basis in law" so that dismissal is warranted.[572]

In sum, de novo appellate review places the appellate justices

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("Because the correctness of a summary judgment is a question of law, we review the trial court's decision *de novo*.").

568. Reliance on case law dealing with "no cause of action" summary judgments as a guide for properly construing Rule 91a is discussed at *supra* notes 70–74 and 84–95

569. *See* Natividad v. Alexsis, Inc., 875 S.W.2d 695, 699 (Tex. 1994); *see also supra* notes 71–76 and 84–87 (summary judgment and special exception procedures require trial court to accept challenged allegations as true).

570. Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 405 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); *see also* Gatten v. McCarley, 391 S.W.3d 669, 673 (Tex. App.—Dallas 2013, no pet.).

571. Frost Nat'l Bank v. Hernandez, 315 S.W.3d 494, 502 (Tex. 2010); Texas Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004); Kilburn v. Fort Bend Cnty. Drainage Dist., 411 S.W.3d 33, 36 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see also* City of Austin v. Liberty Mut. Ins., 2014 Tex. App. LEXIS 5306 (Tex. App.—Austin May 16, 2014, no pet.) (reviewing denial of Rule 91a motion challenging trial court's subject matter jurisdiction under de novo standard of review).

572. *See* Hamilton v. Pechacek, 319 S.W.3d 801, 809 (Tex. App.—Fort Worth 2010, no pet.); *see also* Burnett v. Sharp, 328 S.W.3d 594, 598–99 (Tex. App.—Houston [14th Dist.] 2010, no pet.); Nabelek v. Dist. Att'y of Harris Cnty., 290 S.W.3d 222, 228 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

in the shoes of the trial judge.[573] This makes perfect sense in the Rule 91a scenario because every judge or justice involved is looking at the identical "paper record" when deciding whether a particular cause of action alleged is baseless and should be dismissed or whether it is not baseless and should survive dismissal on the pleadings.[574]

VIII. CUMULATIVE REMEDIES UNDER RULE 91a

Rule 91a.9, "Dismissal Procedure Cumulative," states: "This rule is in addition to, and does not supersede or affect, other procedures that authorize dismissal."[575] To be clear, though, Rule 91a is not truly cumulative of any already existing procedure.

Prior to adopting Rule 91a, Texas did not have a procedure in place authorizing the trial court to grant a party's motion and dismiss a cause of action as meritless early in the lawsuit based on the pleadings alone.[576] Rather, Texas courts rejected the use of a

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573. *See* Dystar Textilfarben GmbH & Co Deutschland KG v. C.H. Patrick Co., 464 F.3d 1356, 1359 (Fed. Cir. 2006) (explaining that de novo review "requires us to step into the shoes of the trial judge").

574. EDWARD J. BRUNET, JOHN T. PARRY & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 11:1 (2014) ("Use of a de novo standard appears logical because the appellate court will be able to review the same paper record seen by the trial court.").

575. TEX. R. CIV. P. 91a.9.

576. *See, e.g.*, Roberts v. Titus Cnty. Mem'l Hosp., 159 S.W.3d 764, 768 (Tex. App.—Texarkana 2005, pet. denied) ("[T]he motion was intended as a federal 12(b)(6) motion seeking dismissal for failure to state a cause of action, which is not a viable claim for relief in Texas state courts."); Downing v. Brown, 925 S.W.2d 316, 319 (Tex. App.—Amarillo) *aff'd in part and rev'd in part on other grounds*, 935 S.W.2d 112 (Tex. 1996) ("Appellees have apparently confused Texas summary judgment practice with a judgment on the pleadings permitted by Rule 12 of the Federal Rules of Civil Procedure. The proper method to challenge a plaintiff's failure to state a claim in Texas courts is by special exception."); Centennial Ins. Co. v. Commercial Union Ins. Co., 803 S.W.2d 479, 483 (Tex. App.—Houston [14th Dist.] 1991, no pet.) ("Although FED. R. CIV. P. 12(b)(6) provides for a motion to dismiss for failure to state a claim upon which relief can be granted, the Texas Rules of Civil Procedure do not contain any analogous provision. Under the Texas Rules of Civil Procedure, the proper way for a defendant to urge that a plaintiff has failed to plead a cause of action is by special exception."). As these cases and the cases cited in the next footnote illustrate, a defendant seeking to dismiss a plaintiff's petition as failing to state a cause of

"motion to dismiss" as a plea in bar or as a state counterpart to the federal dismissal rule, Rule 12(b)(6).[577] A "motion to dismiss" asking the court to dismiss all or part of a lawsuit as allegedly failing to state a cause of action was viewed as "the functional equivalent of a general demurrer" expressly prohibited by Rule 90 of the Texas Rules of Civil Procedure.[578] When encountering a "motion to dismiss," Texas courts generally disregarded the pleading as attempting to invoke a procedure unrecognized in Texas or reviewed the merits of the order granting the "motion" under standards governing motions for summary judgment.[579]

Although Texas did not have a broad-based, motion-to-dismiss procedure for challenging meritless claims before the advent of Rule 91a, a variety of statutes included and still include dismissal mechanisms designed for use in particular types of litigation.[580]

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action in the pre-Rule 91a era generally had to do so by filing special exceptions under Rule 91. Generally speaking, a trial court cannot dismiss a lawsuit when sustaining special exceptions but must give the plaintiff an opportunity to amend. Only if the plaintiff has refused to amend or still failed to state a cause of action after amending is the court entitled to dismiss. *See id.*; *supra* note 78–79 and accompanying text; *see also supra* notes 416–418 and accompanying text (discussing limited circumstances when trial court may dismiss when sustaining special exceptions without providing opportunity to amend).

577. *See, e.g.*, Tex. Underground, Inc. v. Tex. Workforce Comm'n, 335 S.W.3d 670, 675–76 (Tex. App.—Dallas 2011, no pet.); Rodriguez v. U.S. Sec. Assocs., Inc., 162 S.W.3d 868, 872–74 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Roberts*, 159 S.W.3d at 769; Fort Bend Cnty. v. Wilson, 825 S.W.2d 251, 253 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Centennial Ins.*, 803 S.W.2d at 483.

578. *Centennial Ins.*, 803 S.W.2d at 482; *accord* Tex.-Ohio Gas, Inc. v. Mecom, 28 S.W.3d 129, 141–42 (Tex. App.—Texarkana 2000, no pet.); *Wilson*, 825 S.W.2d at 253; *see also* TEX. R. CIV. P. 90 ("General demurrers shall not be used. Every defect . . . not specifically pointed out by exception in writing . . . shall be deemed to have been waived."); Insurors Indem. & Ins. Co. v. Brown, 172 S.W.2d 174, 176 (Tex. Civ. App.—Beaumont 1943, writ ref'd) ("[T]he new Texas Rules of Civil Procedure abolish the general demurrer . . . .").

579. *E.g.*, *Texas Underground*, 335 S.W.3d at 675–76; *Rodriguez*, 162 S.W.3d at 872–74; *Roberts*, 159 S.W.3d at 769; *Wilson*, 825 S.W.2d at 253; *Centennial Ins.*, 803 S.W.2d at 483. *But see* Martin v. Dosohs I, Ltd., 2 S.W.3d 350, 354–55 (Tex. App.—San Antonio 1999, pet. denied) (recognizing "an exception to the general rule that dismissal of a suit is improper in a pretrial hearing").

580. *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 13.001 (West 2013) (lawsuits filed in forma pauperis); *id.* § 14.003 (inmate lawsuits); *id.* § 27.003

Under Rule 91a's cumulative remedies provision,[581] a defendant would be free to first seek relief under Rule 91a and, if unsuccessful, to then seek dismissal under any other applicable dismissal procedure. Or, the defendant could pursue dismissal under the statutory procedure and, if unsuccessful, request relief under Rule 91a. Indeed, if a defendant has a strong argument for dismissing a plaintiff's lawsuit as baseless, it might be advisable to pursue relief under Rule 91a first due to its loser-pays mandate[582] because not all statutory dismissal procedures provide for the prevailing party to recover attorney's fees and costs. If lacking access to a statutory dismissal mechanism and disinclined to risk loser-pays, a defendant can always rely on special exceptions or a motion for summary judgment to attempt to establish that the plaintiff's cause of action is meritless as a matter of law.[583]

IX. TACTICAL AND PRACTICAL CONSIDERATIONS

The 300-pound tactical elephant in the room when someone is contemplating whether to file a motion to dismiss under Rule 91a is, not surprisingly, loser-pays.[584] The movant has to weigh the

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(Texas Citizens Participation Act); *id.* § 74.351 (health care liability claims); *id.* § 90.007 (suits involving asbestos and silica); *id.* § 150.002 (actions against architects, engineers, and surveyors); *see also* Bland et. al., *supra* note 69 at 2–3 (surveying dismissal mechanisms existing before adoption of Rule 91a).

581. *See* TEX. R. CIV. P. 91a.9.

582. *See supra* Part VI(D).

583. *See infra* notes 588–594 and accompanying text (discussing tactical and practical considerations involved when using special exceptions or motions for summary judgment rather than Rule 91a); 2 MCDONALD & CARLSON, *supra* note 125, § 9:27.15 ("Special exceptions remain a viable option for challenging the sufficiency of an opponent's pleadings, without mandated cost shifting to the prevailing party."); *see also supra* Part III(B)(2) (suggesting that case law regarding use of special exceptions and "no cause of action" summary judgments should provide guidance for construing Rule 91a); *supra* notes 419–430 and accompanying text (discussing propriety of granting "no cause of action" summary judgment without providing the plaintiff with opportunity to amend); *supra* notes 567–569 and accompanying text (analogizing appellate review of ruling on merits of Rule 91a motion to review of order granting summary judgment on pleadings).

584. *See supra* Part VI(D). In addition to this section, tactical and practical considerations for the movant are discussed throughout this Article. *See supra* Part IV(A) (contents and form of motion to dismiss); *supra* notes 302–315 and

potential advantages of prevailing on the merits of its motion to dismiss and being reimbursed by the non-movant for its attorney's fees and expenses versus having to reimburse the non-movant for its fees and costs if the motion is denied. And not only does a losing movant have to pay attorney's fees and costs to the winning non-movant, but the movant will have to eat its own fees and expenses expended in pursuing an unsuccessful motion.[585] Depending on the complexity of the litigation and the nature and number of causes of action targeted by the motion to dismiss, the unsuccessful movant's liability for attorney's fees and costs could range from staggering[586] to relatively insignificant.[587]

Because of loser-pays' potential downsides, a party might be inclined to bypass Rule 91a and instead challenge a cause of action through special exceptions or a motion for summary judgment.[588] By opting to go the special exceptions or summary judgment route, however, that party is likely looking at a longer road, possibly a

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accompanying text (withdrawing or amending motion); *supra* notes 312–346 and accompanying text (filing reply to non-movant's response); *supra* Part V(E) (requesting leave to file untimely motion and objecting to late-filed response); notes 385–390 and accompanying text (requesting record at hearing on motion to dismiss); *supra* Part VI(B)(2) and accompanying text (form and content of written ruling); *supra* notes 522–537 and accompanying text (suggesting approaches for obtaining mandamus review and discussing mandamus review of trial judge's failure to timely rule); *supra* notes 574–583 and accompanying text (pros and cons of using other procedures to challenge cause of action as meritless).

585. Losing on the merits of the motion to dismiss, paying the other side's attorney's fees and expenses, and eating your own fees and costs, would fall in the double if not triple whammy category. *Double Whammy Definition,* MERRIAM WEBSTER DICTIONARY ONLINE, http://Merriam-Webster.com/dictionary/double%20whammy (last visited March 20, 2014) ("A situation that is bad in two different ways.").

586. Imagine an acrimonious, complex commercial dispute between two Fortune 500 companies represented by armies of billable-hour partners, associates and paralegals from multiple mega-firms battling over whether the other side's claims and counterclaims exist under Texas law or whether any reasonable person could possibly believe the other side's story.

587. Now imagine a motion to dismiss, filed by a solo practitioner representing an uninsured individual client, that challenges the single cause of action asserted by the defendant, also represented by a solo practitioner but on a contingent fee basis.

588. *See supra* Part III(C)(2); *see also supra* Part VIII (addressing special exceptions, motions for summary judgment and statutory dismissal mechanisms as alternatives to Rule 91a motion to dismiss).

much longer road, before booting the challenged cause(s) of action out of the lawsuit. Under Rule 91a.3(c), the trial court is required to grant or deny the motion to dismiss within forty-five days of its filing.[589] While in theory a case could be dismissed on special exceptions or resolved by summary judgment relatively quickly, those procedures do not impose deadlines for a ruling and, as experienced litigators are aware, you can often spend a *long* time waiting for a trial judge to rule on a potentially dispositive motion. Moreover, while the parties are battling over special exceptions and summary judgment issues, discovery is ongoing and attorney's fees and expenses are accruing—a situation which could have been avoided by filing a motion to dismiss under Rule 91a, requesting a stay of discovery,[590] and receiving a favorable ruling forty-five days or less after filing the motion to dismiss.

A jurisdiction or a venue challenge is another factor in play for a party considering the pros and cons of bypassing Rule 91a for other remedies. Obtaining a ruling on a motion to dismiss under Rule 91a does not waive jurisdiction or venue.[591] In contrast, by obtaining a ruling on a special exception or motion for summary judgment, a party waives its special appearance and motion to transfer venue.[592] So, a party actively contesting jurisdiction or venue will not be in a position to use special exceptions or a motion for summary judgment. Instead, it will have to choose between risking an adverse loser-pays result by filing a Rule 91a motion or litigating jurisdiction or venue without first challenging the merits of the plaintiff's allegations. But if that party pursues and prevails on a Rule 91a motion and the plaintiff's lawsuit is dismissed, it will have avoided expending time, effort and attorney's fees (including the cost and hassle of discovery) on litigating jurisdiction or venue.

Another factor to assess when deciding whether to challenge a questionable claim by the less expeditious process of special exceptions or summary judgment procedures, as opposed to Rule 91a, has nothing to do with loser-pays, jurisdiction, or venue. Are you really sure that you want to ask the trial judge to dismiss all or part of the other side's case shortly after it was filed? Some trial

589. TEX. R. CIV. P. 91a.3(c); *see also supra* Part VII(D)(1).
590. *See supra* Part VI(B)(5).
591. *See* TEX. R. CIV. P. 91a.8; *see also supra* Part V(A).
592. *See supra* Part V(A).

judges, particularly those unaccustomed to Rule 91a's fast-track approach, might be reluctant to dismiss a plaintiff's lawsuit less than a month after it was filed.[593] Indeed, there are trial judges out there who are exceedingly hesitant to grant summary judgments even after cases have been pending for months or even years.[594]

So, assume a trial judge with this reluctant or hesitant outlook denies your motion to dismiss early on in the case. Will that judge, when later hearing your clearly meritorious motion for summary judgment attacking causes of action previously challenged under Rule 91a, but this time based on evidence developed in discovery, be inclined to treat your summary judgment motion (albeit erroneously) as rehashing the same issues raised in your motion to dismiss and deny your summary judgment motion as well? Consequently, depending on the trial judge, counsel might need to assess the potential impact that having a motion to dismiss denied early in the litigation could have on later motions.

One other practical concern if you're contemplating filing a motion to dismiss involves a variant of the be-careful-what-you-wish-for rule.[595] If you win at the pleading stage and the plaintiff's lawsuit is dismissed and an appeal ensues, your client will incur the cost of defending the dismissal order on appeal and an even greater expense, as well as significant delay, if that dismissal order is reversed[596] with the appellate court sending the case back to the trial court to essentially start over from square one. So, think about whether your client would be better off bypassing Rule 91a and

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593. Let's say the plaintiff's lawsuit was filed on and the defendant accepts service on Day 1. Defense counsel files a motion to dismiss under Rule 91a on Day 3. The motion to dismiss is then set twenty-one days later (on Day 24). *See supra* Part V(B). The trial court then grants the motion from the bench at the hearing. The plaintiff's lawsuit has gone from alive to dead in twenty-four days.

594. *See* BRUNET, PARRY & REDISH, *supra* note 574, § 10:3 (recognizing reluctance of judges to grant summary judgment out of concern over being reversed or violating parties' rights). This type of judge might even be antagonistic when asked to make a dispositive and potentially appealable ruling at the outset of the litigation. *Id.*

595. *See supra* note 529 (arguing that filing a mandamus action to force the trial judge to rule on your pending motion to dismiss may well produce a ruling—just not the ruling you had hoped for).

596. *See supra* Part VI(D). Under a loser-pays system, the loser on the appeal of a Rule 91a order should be required to pay the winner's attorney's fees and costs relating to the challenged cause of action. *See supra* note 541.

trying to dispose of the case at the summary judgment stage after you've developed (hopefully) an evidentiary record establishing that the plaintiff's case is meritless as a matter of law. That, in turn, might provide you with a more defensible appeal than in the Rule 91a setting or dissuade the plaintiff from appealing at all.

The above concerns aside, there is no question that the potential upsides to successfully pursuing a motion to dismiss under Rule 91a are many. The prevailing movant recovers its attorney's fees and costs; has narrowed the issues in controversy, if not resolved the litigation entirely; has limited or eliminated its discovery obligations; and has either enhanced the chances of a favorable settlement or eliminated any need to consider a settlement.[597] Filing a motion to dismiss, even with the expectation the motion will be withdrawn before the hearing to avoid the loser-pays risk, could easily produce strategic benefits. The plaintiff might nonsuit the challenged cause of action in response to the motion, which would narrow the issues in dispute and reduce the movant's discovery obligations without the movant actually risking an unfavorable loser-pays outcome. A strong motion to dismiss might also provide an incentive for the plaintiff to approach settlement with a realistic mindset that otherwise might not have existed.[598]

Practical and tactical considerations for the non-movant in Rule 91a litigation mostly involve the loser-pays issue.[599] The overriding question for a non-movant when faced with a motion to

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597. *See* HITTNER ET. AL., *supra* note 258, § 9:181.

598. *See* BRUNET, PARRY & REDISH, *supra* note 574, § 10:2. On the other hand, one possible disadvantage for the movant filing a strong motion is the risk of "educating" the plaintiff. *See* HITTNER ET. AL., *supra* note 258, § 9:182. The motion may "cause plaintiff to rethink the case and come up with a stronger claim. In such cases, your motion [to dismiss] will have backfired because you end up having to defend a more difficult case." *Id.*

599. In addition to this section, tactical and practical considerations for the non-movant are discussed throughout this Article. *See supra* Part IV(B) (contents, form and importance of response to motion to dismiss); *supra* Part V(C)(2) and accompanying text (nonsuit or withdrawal of challenged cause of action); *supra* notes 391–393 and accompanying text (filing sur-reply to movant's reply); *supra* Part V(E) (requesting leave to file untimely response or objecting to late-filed motion); *supra* notes 385–390 and accompanying text (requesting record for hearing on motion to dismiss); *supra* Part VI(B)(2) and accompanying text (form and content of written ruling); *supra* Part VII(C)–(D) and accompanying text (suggested approaches for obtaining mandamus relief).

dismiss is: How likely is my client to be the prevailing party when the trial judge rules on this motion? Stated another way: What is my client's chance of winning and compelling the movant to pay all of my attorney's fees and expenses versus losing and my client having to pay the other side's fees and expenses, as well as all fees and expenses incurred in unsuccessfully litigating the motion?[600] Based on the answers to these questions, the non-movant could stand on its pleadings, amend the challenged cause of action, or nonsuit the cause of action.[601]

Lastly, some considerations are equally applicable to both sides in Rule 91a litigation. What is the likely predisposition of the trial judge who will hear the motion to dismiss?[602] Is this the type of judge who will grant a dispositive motion very early in the case?[603] Or, is this a judge who not only is unlikely to grant the motion to dismiss, but may even be antagonized by the fact that the motion was filed, so that pursuing a Rule 91a motion might be counterproductive for the movant and beneficial for the non-movant?[604] Both sides also have to consider the impact that litigating the Rule 91a motion will have on settlement. Will a persuasive motion make the plaintiff more realistic about the dollar value of the case and will a forceful

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600. *See supra* Part VI(D). Hopefully, the non-movant's counsel thought about these questions long before being served with the Rule 91a motion. These are the questions the attorney should have considered when drafting the client's pleading before ever filing it. One practical ramification of the adoption of Rule 91a should be that attorneys will spend more time and effort on factual and legal allegations in their pleadings and move away from a scattershot, kitchen-sink approach. *See* Campos v. Inv. Mgmt. Props., 917 S.W.2d 351, 357 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring) ("The practice of 'let's just throw as much mud as we can up on the wall and see if any of it sticks' must be discouraged.").

601. *See supra* Parts IV(B), V(C)(2).

602. In some counties, though, such as Bexar County, unless the case has been assigned to a particular judge due to its designation as complex litigation, the parties will not know the identity of the judge who will hear the motion to dismiss until they show up on the date of the hearing and are assigned to that judge. *See In re* Garza, 981 S.W.2d 438 (Tex. App.—San Antonio 1998, orig. proceeding).

603. *See* BRUNET, PARRY & REDISH, *supra* note 574, § 10:3 ("[B]efore filing a motion for summary judgment, it is important to know the attitude of the judge who will be deciding the motion.").

604. *See id.*; *see also supra* note 594 (discussing risk of antagonizing judge by filing Rule 91a motion early in case).

response elicit a similar reaction from the defendant?[605] Indeed, a movant might file an aggressive motion to dismiss and the non-movant might file an equally aggressive response as settlement tactics, with neither side having any intention of ever having the motion heard and risking an adverse loser-pays outcome.[606]

X. CONCLUSION

Rule 91a represents the first time since 1941[607] that Texas has had a broadly applicable procedure[608] authorizing the trial court to dismiss all or part of a lawsuit early in the litigation based on the pleadings alone. The eventual impact of Rule 91a will likely be determined by the answers to two questions.

First, will Rule 91a's loser-pays mandate deter attorneys and their clients from filing motions to dismiss?[609] For many litigants – particularly those of limited means – the potential downside of filing and losing a Rule 91a motion to dismiss will be financially unacceptable.[610] Second, when deciding whether a cause of action has no basis in fact, will Texas courts adopt a dismissal standard resembling the federal "plausibility" test, the "little green men" standard or some other approach?[611] The more closely the Texas standard under Rule 91a approaches the nebulous "plausibility" test, which vests the trial court with discretion unavailable under a "little

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605. *See* BRUNET, PARRY & REDISH, *supra* note 574, § 10:3 (discussing how counsel must carefully consider the impact of motions for summary judgment on potential settlement negotiations).

606. *See supra* Part V(B)(2), (C)(2).

607. *See supra* notes 576–579 and accompanying text.

608. Rule 91a does not apply to cases brought under the Family Code or Chapter 14 of the Texas Civil Practice and Remedies Code (suits filed by inmates). TEX. R. CIV. P. 91a.1

609. *See supra* notes 450–483, 587–590 and accompanying text.

610. But even for a litigant operating on a low budget, it may be tactically advantageous to file but later withdraw a Rule 91a motion to dismiss. *See supra* notes 601–603 and accompanying text.

611. *See supra* notes 113–170 and accompanying text; *see also* GoDaddy.Com, LLC v. Toups, 2014 Tex. App. LEXIS 3891, at *3–6 (Tex. App.—Beaumont April 10, 2014, pet. filed) (finding case law interpreting Federal Rule 12(b)(6) to be "instructive" and testing the sufficiency of plaintiff's allegations challenged by Rule 91a motion to dismiss under federal plausibility standards).

green men" standard, the more likely defendants will be inclined to litigate a motion to dismiss and risk an adverse loser-pays outcome—particularly in venues perceived as defense-oriented.[612]

But regardless of how these two questions are ultimately answered, the adoption of Rule 91a should have an immediate impact in at least one respect. The threat of Rule 91a's loser-pays mandate should discourage attorneys from using a kitchen-sink approach to pleading causes of action.

612. Regardless of how "no basis in fact" is eventually construed, however, it is highly likely that numerous appellate decisions involving Rule 91a will arise from motions to dismiss filed by governmental entities because: (1) a governmental entity, unlike all defendants other than some public officials, is not subject to Rule 91a's loser-pays provision and is free to litigate and lose a Rule 91a motion without risking liability for its opponent's attorney's fees and costs, and (2) depending on the issue raised by the governmental entity's motion to dismiss, that entity may have the right to pursue an immediate interlocutory appeal of an adverse ruling unlike other defendants who will usually be precluded from seeking appellate relief until after rendition of a final judgment. *See* TEX. R. CIV. P. 91a.1 (providing that Rule 91a's provision regarding awarding costs and fees does not apply to an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law); *supra* notes 500–502 and accompanying text (discussing interlocutory appellate remedies available to governmental entities).

The First-Filed 'Rule' and Moving to Dismiss Duplicative Federal Litigation

Sandra L. Potter*

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* The author is an associate attorney in the Denver, Colorado office of Steese, Evans & Frankel, P.C. She wishes to thank Charles W. Steese for suggesting the topic of this Article many years ago and his long-standing support while it came to fruition.

I. INTRODUCTION

The "first-to-file" or "first-filed" rule is a judicial doctrine developed to address the possibilities of duplicative federal litigation.[1] Duplicative federal litigation—defined here as cases involving substantially the same parties and issues[2] and filed in separate federal district courts—easily arises when two parties can bring claims against each other in more than one jurisdiction. A frequent example is that a copyright or patent holder may allege infringement in any federal district court in which the defendant is found; meanwhile, the would-be defendant can bring a declaratory judgment action against the holder in any federal district court having personal jurisdiction over the holder.[3] Patent litigation in particular has proved fertile ground for duplicative federal court actions, resulting in a well-developed body of case law addressing

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1. At least one substantive area of the law has also codified the rule: the False Claims Act, 31 U.S.C. § 3730(b)(5) (2012). Courts rely on first-filed case law for applying the codification. *See, e.g.*, United States *ex rel.* Palmieri v. Alpharma, Inc., 928 F. Supp. 2d 840, 846–47 (D. Md. 2013) (citing United States *ex rel.* Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 650 (D.C. Cir. 1994)).

2. Cases which share common questions of fact but have different operative facts, or different parties, present different problems which are frequently addressed by 28 U.S.C. § 1407, the statute relating to multidistrict litigation. Such cases are outside the scope of this article. To determine whether the first-filed rule is at issue, several courts look for whether there is "substantial overlap" in the two actions. *See, e.g.*, Cadle Co. v. Whataburger of Alice, Inc., 174 F.3d 599, 603 (5th Cir. 1999); Bank of Am., N.A. v. Sorensen, No. 2:12–CV–1026 TS, 2013 WL 5295677, at *2 (D. Utah Sept. 19, 2013); Black Diamond Equip., Ltd. v. Genuine Guide Gear, 71 U.S.P.Q.2d (BNA) 1532, No. 2:03CV01041, 2004 WL 741428, at *1 (D. Utah Mar. 12, 2004) (citing Save Power Ltd. v. Syntek Fin. Corp., 121 F.3d 947, 950 (5th Cir. 1997)). Other courts appear to apply effectively the same standard, referring to whether the issues in the cases are "substantially similar." Herer v. Ah Ha Publ'g., LLC, 927 F. Supp. 2d 1080, 1089 (D. Or. 2013).

3. *See* 28 U.S.C. § 1400(a) (2012) (addressing venue for actions relating to copyrights, mask works, or designs); 28 U.S.C. § 1400(b) (2012) (discussing venue for patent infringement). For an excellent treatment of the historical development of the first-filed rule and its application in patent infringement cases, see Michael A. Cicero, *First-to-File and Choice-of-Forum Roots Run Too Deep for* Micron *to Curb Most Races to the Courthouse*, 90 J. PAT. & TRADEMARK OFF. SOC'Y 547, 549–50 (2008) (explaining that even after *Micron*, "the existence of litigation filed first elsewhere should still weigh significantly as an 'interest of justice' factor in the overall analysis.").

first-filed arguments.[4] Thus, several of the cases cited in this Article arise in patent litigation.[5]

The long-standing first-filed rule is that, in general (but with significant exceptions), the first party to file its complaint determines which court will hear the parties' claims. Of course, the party who loses on the first-filed doctrine can still turn to 28 U.S.C. § 1404(a) to seek a transfer to a more convenient venue—but the most advantageous jurisdiction for one party is not always the most

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4. *See, e.g.*, Micron Tech., Inc. v. MOSAID Techs., Inc., 518 F.3d 897, 86 U.S.P.Q.2d (BNA) 1038 (Fed. Cir. 2008) (reversing dismissal for lack of subject matter jurisdiction of first-filed declaratory judgment action, based on lower standard for subject matter jurisdiction of declaratory judgment actions set in MedImmune Inc. v. Genentech, Inc., 549 U.S. 118 (2007)).

5. Superficially, there is variation in whether regional or Federal Circuit law applies for the first-filed issue for patent cases. Many courts discuss regional circuit law first and Federal Circuit law second. *See, e.g.*, EMC Corp. v. Parallel Iron LLC, 914 F. Supp. 2d 125, 127–28, 129 (D. Mass. 2012) (quoting Genentech, Inc. v. GlaxoSmithKline, LLC, No. 5:10-CV-04255-JF/PVT, 2010 WL 4923954 (N.D. Cal. Dec. 1, 2010)); E-Z-EM, Inc. v. Mallinckrodt, Inc., No. 2-09-CV-124, 2010 WL 1378820, at *1 n.1 (E.D. Tex. Feb. 26, 2010) (noting some confusion among district courts and citing the Federal Circuit as applying regional law to venue issues); Travel Tags, Inc. v. UV Color, Inc., 690 F. Supp. 2d 785, 792–93 (D. Minn. 2010); Multimedia Patent Trust v. Tandberg, Inc., No. 09-CV-1377H(CAB), 2009 WL 3805302, at *2–3 (S.D. Cal. Nov. 12, 2009); StemCells, Inc. v. Neuralstem, Inc., No. C08-2364CW, 2008 WL 2622831, at *2–4 (N.D. Cal. July 1, 2008). Other courts see this as an issue for Federal Circuit law. *See, e.g.*, Nexans Inc. v. Belden Inc., Civ. No. 12–1491–SLR, 2013 WL 4017080, at *2 (D. Del. Aug. 6, 2013) (citing Lab. Corp. of Am. Holdings v. Chiron Corp., 384 F.3d 1326, 1330 (Fed. Cir. 2004)) (applying Federal Circuit precedent to first-filed issue, as an issue important to "national uniformity in patent practice"); Cellectis S.A. v. Precision Biosciences, Inc., 881 F. Supp. 2d 609, 612 (D. Del. 2012) (citing primarily *Micron* and secondarily precedents within the Third Circuit); Sanofi–Aventis Deutschland GmbH v. Novo Nordisk, Inc., 614 F. Supp. 2d 772, 775 (E.D. Tex. 2009) (relying on *Micron* for there being no absolute requirement that the court of the first-filed action determine the first-filed issue); Berry Floor USA, Inc. v. Faus Grp., Inc., No. 08-CV-0044, 2008 WL 4610313, at *2 (E.D. Wis. Oct. 15, 2008) (stating that appropriate venue for patent law cases is determined by the case law of the Federal Circuit but not reaching whether *Micron* states another standard). In substance, there appears to be little difference between the Federal Circuit and regional law on this issue. *Micron*'s instruction to weigh convenience has always been integral to the first-filed rule under regional law. *See, e.g.*, *E-Z-EM*, 2010 WL 1378820, at *1 n.1 (noting that a court's first-filed analysis would be the same under either Federal Circuit or regional law).

convenient venue for all parties and witnesses. The first-filed rule—permitting a stay, dismissal, or transfer—also recognizes that would-be defendants should not be allowed to engage in inequitable conduct simply to rob the plaintiff of control over its claims. Duplicative cases appear to be increasingly frequent.[6]

This Article addresses three practical concerns to federal courts and parties facing duplicative litigation: first, the extent of the "first-filed" rule and the common equitable factors that lead courts to find exceptions to it; second, the procedural underpinnings for motions raising the first-filed rule; and third, whether the motion raising the first-filed rule must be filed in the first court instead of allowing the second court to make the determination.

II. THE FIRST-FILED DOCTRINE GOVERNS THE ANALYSIS OF DUPLICATIVE FEDERAL LITIGATION

Generally, to resolve which of two duplicative cases should proceed, federal courts follow the first-filed doctrine.[7] This doctrine

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6. This Article addresses duplicative cases filed in federal courts. When duplicative cases are not both filed in federal courts, other principles apply. *See, e.g.*, AmSouth Bank v. Dale, 386 F.3d 763, 791 n.8 (6th Cir. 2004) (noting that the first-filed rule is inapplicable when the other case is pending in state court); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (discussing the abstention doctrine for duplicative federal and state cases). For extensive analysis regarding other duplicative litigation (state, federal, and international), see James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769 (1999). When the other case is before an administrative agency, there are additional considerations of statutory forum limitations, *see, e.g.*, 47 U.S.C. § 207 (2011) (barring pursuit of damages under the Communications Act of 1934 in multiple forums), and the doctrine of primary jurisdiction. As to parallel state and federal cases, see, for example, Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing A Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000). For more on parallel international and federal cases, see Margarita Trevino de Coale, *Stay, Dismiss, Enjoin, or Abstain?, A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT'L L.J. 79 (1999) and Gaspard Curioni, *Interest Balancing and International Abstention*, 93 B.U. L. REV. 621, 622–23 (2013). The first-filed rule does apply to duplicative litigation between a federal district court and the Court of International Trade. *See, e.g.*, Furniture Brands Int'l, Inc. v. U.S. Int'l Trade Comm'n, 804 F. Supp. 2d 1, 4–6 (D.D.C. 2011).

7. It appears that the majority position takes the date of filing as the commencement, as opposed to the date of service: "Though there is some authority

prefers the first-filed case unless special circumstances are present.[8] Several procedures are available to raise the first-filed rule. The most frequently reported are (1) motions to dismiss pursuant to Rule 12 or inherent powers,[9] (2) motions to stay, (3) motions to transfer venue under 28 U.S.C. § 1404(a),[10] or (4) motions to enjoin the other

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for Plaintiffs' assertion that service rather than filing establishes priority under the first-filed rule, most courts consider the act of filing to be the determinative event." Fed. Cartridge Co. v. Remington Arms Co., 2003 U.S. Dist. LEXIS 23482, at *5–6 (D. Minn. Dec. 31, 2003) (citing Hospah Coal Co. v. Chaco Energy Co., 673 F.2d 1161, 1163 (10th Cir. 1982)). *But see Berry Floor*, 2008 WL 4610313, at *5 ("This court, confronted with conflicting case law on whether it should look to the time it took possession of the case, or the time the non-relating-back amended complaint was filed, finds that the rationale for looking to the time of possession is more logical."); Red Wing Shoe v. B-JAYS USA, Inc., No. Civ. 02-257DWFAJB, 2002 WL 1398538, at *2 (D. Minn. Jun. 26, 2002) (using service date as priority criterion). In cases that originate in a state court but are later removed to federal court, "the state rule controls the question of commencement." Country Home Prods. v. Schiller-Pfeiffer, Inc., 350 F. Supp. 2d 561, 570 (D. Vt. 2004) (citing Med-Tec IA, Inc. v. Nomos Corp., 76 F. Supp. 2d 962, 968 (N.D. Iowa 1999); *see also Herer*, 927 F. Supp. 2d at 1088–89 (finding that the time of filing was when state court action was filed, not the time of removal). For a discussion of how the "relation back" rule of amended pleadings can apply in this context, see No Cost Conference, Inc. v. Windstream Commc'ns, Inc., 940 F. Supp. 2d 1285, 1306–07 (S.D. Cal. 2013) (explaining how the relation-back doctrine applies in the context of the first-filed rule).

8. *See, e.g.*, N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102, 112 (2d Cir. 2010) (finding that because special circumstances were inapplicable, the district court did not abuse its discretion when applying the first-filed rule); Orthmann v. Apple River Campground, Inc. 765 F.2d 119, 121 (8th Cir. 1985) ("In the absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case." (citing Merrill Lynch, Pierce, Fenner, and Smith v. Haydu, 675 F.2d 1169, 1174 (11th Cir. 1982))).

9. Generally the dismissal should be without prejudice. *See, e.g.*, Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1160–61 (5th Cir. 1992).

10. West Gulf Mar. Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 724, 729 n.1 (5th Cir. 1985) ("In addition to outright dismissal, it sometimes may be appropriate to transfer the action or to stay it."); EEOC v. Univ. of Pa., 850 F.2d 969, 977 n.4 (3d Cir. 1988) (stating that the court was "puzzled" by the party's failure to seek transfer or stay of the inequitably first-filed case), *aff'd, expressly not reaching this issue*, 493 U.S. 182, 187 n.1 (1990); 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1352 (3d ed. 2006) [hereinafter WRIGHT & MILLER] (explaining that transfers under Section 1404(a) can be granted under circumstances that do not warrant dismissal under Rule 12(b)(3)).

party from proceeding with the case in the other district.[11] Typically, defendants file a single motion encompassing two or three of these types of relief: a motion to dismiss or, in the alternative, to stay or transfer.[12]

A. *The First-Filed Doctrine Is Flexible*

The first-filed doctrine is based on principles of comity between federal courts, judicial economy, equitable principles, and efficiency for parties.[13] Courts do not adhere to the first-filed doctrine pedantically. The Supreme Court had remarked that "between federal district courts, . . . though no precise rule has evolved, the general principle is to avoid duplicative litigation."[14] As the Eighth Circuit stated, "The purpose of this rule is to promote efficient use of judicial resources. The rule is not intended to be rigid, mechanical, or inflexible, but should be applied in a manner serving sound judicial administration."[15]

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11. Small v. Wageman, 291 F.2d 734, 735 (1st Cir. 1961) (discussing a motion for preliminary injunction); Data Gen. Corp. v. Sw. Research Inst., 1988 U.S. Dist. LEXIS 4832, at *10–11 (D. Mass. May 16, 1988) (plaintiff in the second-filed case unsuccessfully moved for a preliminary injunction against the defendant proceeding with the first-filed case). In *Smith v. SEC*, 129 F.3d 356, 361 (6th Cir. 1997), the lower court had entered injunctions against the other case, which the Sixth Circuit reversed, primarily because the two cases were not the same.

12. *See, e.g.*, Travel Tags, Inc. v. UV Color, Inc., 690 F. Supp. 2d 785, 789–90 (D. Minn. 2010); *Tandberg*, 2009 WL 3805302, at *1; *Berry Floor*, 2008 WL 4610313, at *1.

13. *See, e.g.*, *EEOC v. Univ. of Pa.*, 850 F.2d at 971–72 ("The first-filed rule encourages sound judicial administration and promotes comity among federal courts of equal rank."); *cf.* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183–84, (1952) (stating that resolution of concurrent jurisdiction made possible under the Federal Declaratory Judgments Act is an equitable determination within the trial court's discretion); Wash. Metro Area Transit Auth. v. Ragonese, 617 F.2d 828, 830 (D.C. Cir. 1980) ("[W]here two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first.").

14. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

15. Orthmann v. Apple River Campground, 765 F.2d 119, 121 (8th Cir. 1985); *accord* Smart v. Sunshine Potato Flakes, 307 F.3d 684, 687 (8th Cir. 2002) ("'[F]irst-filed' is not a 'rule.' It is a factor that typically determines, 'in the

Because the first-filed rule is not rigid, the trial court must exercise discretion in applying it:

> Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.[16]

As the Eighth Circuit explained, "This makes evident that the district court must consider the factual circumstances in each case before applying this rule."[17] Accordingly, federal courts do not always find that the first-filed complaint should proceed.

B. Equitable Considerations Lead Courts to Frequently Apply Exceptions to the First-Filed Doctrine

The exceptions to the first-filed doctrine typically arise in circumstances similar to those considered on motions to transfer

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absence of compelling circumstances,' which of two concurrent federal court actions should proceed to judgment."); U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487, 488–89 (8th Cir. 1990) (noting that "'in the absence of compelling circumstances' . . . the first-filed rule should apply." (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169, 1174 (11th Cir. 1982)); New York v. Heckler, 719 F.2d 1191, 1198 (2d Cir. 1983) ("In these days of crowded dockets, federal courts have a particular responsibility to avoid duplicative litigation.");Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res., 196 F. Supp. 2d 21, 29 (D.D.C. 2002) (citing Columbia Plaza Corp. v. Sec. Nat'l Bank, 525 F.2d 620, 627 (D.C. Cir. 1975) for the proposition that the doctrine cannot be applied mechanically due to equitable considerations).

16. Small v. Wageman, 291 F.2d 734, 736 (1st Cir. 1961) (quoting *Kerotest,* 342 U.S. at 183–84); *accord* Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982); *EEOC v. Univ. of Pa.*, 850 F.2d at 972 ("[The first-filed rule] is not a mandate directing wooden application of the rule without regard to rare or extraordinary circumstances, inequitable conduct, bad faith, or forum shopping. District courts have always had discretion to retain jurisdiction given appropriate circumstances justifying departure from the first-filed rule.").

17. Boatmen's First Nat'l Bank v. Kan. Pub. Emps. Ret. Sys., 57 F.3d 638, 641 (8th Cir. 1995).

venue under 28 U.S.C. § 1404(a).[18] Section 1404(a) provides for transfer of venue "for the convenience of parties and witnesses, in the interest of justice" to "any other district or division where it might have been brought."[19] Consideration of § 1404(a) factors is consistent with the directive that the first-filed rule "yields to the interests of justice."[20] The "interests of justice" allow consideration of judicial economy and inequitable conduct leading to the filing of the first complaint. Hence, in determining whether to depart from the first-filed rule, courts consider the order in which the courts obtained jurisdiction, judicial economy, inequitable conduct in the first filing, and the balance of convenience to the parties and witnesses.[21]

The second-filed case should proceed when it is substantially further advanced than the first-filed, favored due to inequitable conduct in the filing of the first-filed case, or more convenient to the parties. These three factors are addressed in turn.

First, courts frequently find that judicial economy favors allowing the second case to proceed if the second-filed case has advanced into the facts or required substantial judicial resources. Courts are reluctant to negate the work of sister courts:

> The purpose of the comity principle is of paramount importance. The doctrine is designed to avoid placing

18. N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102, 112 (2d Cir. 2010).

19. 28 U.S.C. § 1404(a) (2012).

20. Terra Int'l, Inc. v. Miss. Chem. Corp., 922 F. Supp. 1334, 1347–50 (N.D. Iowa 1996), *aff'd* 119 F.3d 688 (8th Cir. 1997); *see also* Ellicott Mach. Corp. v. Modern Welding Co., Inc., 502 F.2d 178, 180 n.2 (4th Cir. 1974) (noting an exception to first-filed rule when the balance of convenience favors the second-filed case).

21. *See* Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc., 626 F.3d 973, 978 (7th Cir. 2010) (noting the factors include "docket congestion and likely speed to trial in the transferor and potential transferee forums, each court's relative familiarity with the relevant law, the respective desirability of resolving controversies in each locale, and the relationship of each community to the controversy." (citations omitted)); Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 11 (1st Cir. 1987) ("Factors to be considered by the district court . . . include the convenience of the parties and witnesses, the order in which jurisdiction was obtained by the district court, the availability of documents, and the possibilities of consolidation.").

> an unnecessary burden on the federal judiciary, and to avoid the embarrassment of conflicting judgments. Comity works most efficiently where previously-filed litigation is brought promptly to the attention of the district court, and the court defers. In the present case, the litigation in the D.C. Circuit has already progressed to a judgment on the merits, an appeal, and a remand. While judicial economy would have been best served by the district court in D.C. deferring to the Central District of California at the outset, we cannot now say that efficiency demands that we remand to the district court below.[22]

Second, inequitable conduct in the filing of the first suit strongly favors allowing the second-filed case to proceed. For instance, the first-filed rule does not apply when, in the enforcement context, the litigant filed its complaint to avoid local precedent instead of complying with an enforcement subpoena.[23] The first-filed rule also does not apply when a race to the courthouse deprives the true plaintiff of its forum.[24] A race to the courthouse can be inequitable in several ways. The most frequent examples involve a party who receives a demand letter and (1) immediately files its own suit instead of responding to the letter; (2) misleads the plaintiff into believing it is negotiating in good faith to resolve the dispute while filing its own action; or (3) files a declaratory judgment action to rob the true plaintiff of its choice of forum.[25] According to the Second

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22. Church of Scientology v. U.S. Dep't of Army, 611 F.2d 738, 750 (9th Cir. 1979) (citation omitted); *see also* Orthmann v. Apple River Campground, 765 F.2d 119, 121 (8th Cir. 1985) (holding that federal comity doctrine is best served by dismissal of the first-filed case in the Eighth Circuit in favor of further developed Seventh Circuit action); Boston & Maine Corp. v. United Transp. Union, 110 F.R.D. 322, 332–33 (D. Mass. 1986) (permitting transfer of the case to the District of Maine because that court had already heard information about the case).

23. EEOC v. Univ. of Pa., 850 F.2d 969, 978 (3d Cir. 1988).

24. *See, e.g.*, Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 217–19 (2d Cir. 1978), *rev'd on other grounds,* 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) (declining to apply the first-filed doctrine when suit for declaratory judgment was filed in anticipation of later suit).

25. Nw. Airlines, Inc. v. Am. Airlines, Inc., 989 F.2d 1002, 1006–07 (8th Cir. 1993) (stating that there are two factors that "send up red flags that there may be compelling circumstances" that warrant dismissal of the first filed case: notice of

Circuit, a declaratory judgment action triggered by a notice letter "may be a factor in the decision to allow the later filed action to proceed to judgment in the plaintiffs' chosen forum."[26] Moreover, "where the two actions were filed within a short span of time, the court may afford a diminished degree of deference to the forum of the first filing."[27]

Indeed, a defendant's attempt to control the forum is the most common circumstance favoring a second-filed case. In *Veryfine Products, Inc. v. Phlo Corporation*, the Court stated that transfer may be appropriate when one party wins a race to the courthouse by (i) "jumping the gun and filing a declaratory judgment action in a forum that has little relation to the dispute;" (ii) "misleading his opponent into staying his hand in anticipation of negotiation;" or (iii) "by reacting to notice of imminent filing by literally sprinting to the courthouse the same day."[28]

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possible suit and a complaint seeking declaratory relief); *accord* Ven-Fuel, Inc. v. Dep't of the Treasury, 673 F.2d 1194, 1195 (11th Cir. 1982) (finding an exception to the first-filed rule when first complaint is made "in apparent anticipation of imminent judicial proceedings" by opposing party); Citigroup Inc. v. City Holding Co., 97 F. Supp. 2d 549, 557 (S.D.N.Y. 2000) ("An improper anticipatory filing is one made under the apparent threat of a presumed adversary filing the mirror image of that suit in another court" (citations and quotations omitted)); *see also* U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487, 489 (8th Cir. 1990) (noting that party against whom first-filed declaratory judgment action was filed, whose second-filed action sought damages, "could be considered the 'true plaintiff'"); Aetna Cas. & Sur. Co. v. Quarles, 92 F.2d 321, 324 (4th Cir. 1937) (stating that the court should decline jurisdiction over declaratory judgment actions filed "for the purpose of anticipating the trial of an issue in a court of co-ordinate jurisdiction"); MidAmerican Energy Co. v. Coastal Gas Mktg. Co., 33 F. Supp. 2d 787, 793 (N.D. Iowa 1998) (holding that the circumstances were "sufficiently compelling to overcome the 'mechanical' application of the first-filed rule" because the first-filed action was for declaratory judgment, filed after notice of irresolvable dispute and found to be anticipatory); Davox Corp. v. Digital Sys. Int'l, Inc., 846 F. Supp. 144, 148 (D. Mass. 1993) (holding that the defendant should not be able to take advantage of plaintiff's attempt to resolve dispute before filing lawsuit).

26. *Factors*, 579 F.2d at 219.

27. Raytheon Co. v. Nat'l Union Fire Ins. Co., 306 F. Supp. 2d 346, 352 (S.D.N.Y. 2004) (ruling on motion to compel arbitration instead of deferring to first-filed case where only filed a few days apart); *accord* Z-Line Designs, Inc. v. Bell'O Int'l LLC, 218 F.R.D. 663, 667 (N.D. Cal. 2003).

28. Veryfine Prods., Inc. v. Phlo Corp., 124 F. Supp. 2d 16, 22 (D. Mass. 2000).

As *Veryfine* suggests, the fact that the first-filed action seeks declaratory judgment is not determinative. To the extent *Veryfine* holds that a declaratory action for patent noninfringement raises suspicion of inequitable conduct per se, it has been impliedly overruled by *MedImmune Inc. v. Genentech Inc.*[29] The crucial question regarding the first-filed action is whether the manner in which it was filed was inequitable.[30] In sum, courts recognize that while declaratory judgment actions are authorized, they are also subject to inequitable abuse.

Third, the "balance of convenience" exception to the first-filed doctrine rests on the factors analyzed for motions to transfer venue: "docket congestion and likely speed to trial in the transferor and potential transferee forums, each court's relative familiarity with the relevant law, the respective desirability of resolving controversies in each locale, and the relationship of each community

29. 549 U.S. 118, 131–35 (2007) (providing standard for stating a claim for declaratory judgment).

30. *See* Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res., 196 F. Supp. 2d 21, 30 (D.D.C. 2002) ("[D]efendants here cannot simply rely on the first-filed rule. The suit in Kansas has all the makings of a preemptive strike—it was filed *seven hours* after Thayer rejected defendants' final settlement offer of $5 million and served notice of an intent to sue.").

to the controversy."[31] It is the moving party's burden to show greater convenience in the other jurisdiction.[32]

In sum, courts clearly recognize several indicia of unfairness or inequity as exceptions to the first-filed rule. Although it is referred to as the "first-filed rule," it is instead an equitable doctrine.

III. ARE MOTIONS TO DISMISS UNDER RULE 12(B) BASED ON THE FIRST-FILED RULE?

Because motions to dismiss allow for determination of the case without the investment of time and resources that are required to answer a complaint,[33] they suit the goals of judicial economy and

31. Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc., 626 F.3d 973, 978 (7th Cir. 2010) (citations omitted); *see also* Micron Tech., Inc. v. MOSAID Techs., Inc., 518 F.3d 897, 903–05, 86 U.S.P.Q.2d (BNA) 1038 (Fed. Cir. 2008) (discussing convenience factors at length); Brower v. Flint Ink Corp., 865 F. Supp. 564, 567–68 (N.D. Iowa 1994) (observing that "balance of convenience" factors are analogous to § 1404(a) venue analysis); 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL § 111.13 (3d ed. 1997) [hereinafter MOORE'S FEDERAL PRAC.]; *accord* MidAmerican Energy Co v. Coastal Gas Mktg. Co., 33 F. Supp. 2d 787, 791 (N.D. Iowa 1998) (analyzing factors such as whether the forum to which transfer is sought is one where action might have been brought, convenience of parties and witnesses, location of documentary evidence, and place in which conduct occurred); Monsanto Tech. v. Syngenta Crop Protection, Inc., 212 F. Supp. 2d 1101, 1104 (E.D. Mo. 2002) (holding that in addition to convenience of the parties and witnesses, the order in which jurisdiction was obtained, and the availability of documents, the court should also consider the possibility of consolidation); Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 11 (1st Cir. 1987) (listing factors including possibility of consolidation).

32. Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 46 (D. Mass. 1997) (denying request to transfer venue to first-filed forum because convenience weighed equally for both courts and defendant did not meet its burden to prove first filed forum superior).

33. Answering the complaint also triggers the deadline for filing counterclaims. FED. R. CIV. P. 13(a), (b). In duplicative litigation, answering the second complaint and filing counterclaims may be less time intensive than in other circumstances. A pending motion to dismiss can also be good cause for a motion to stay disclosures and discovery—which are not automatically stayed by a Rule 12 motion unless the case is subject to the Private Securities Litigation Reform Act. However, much depends on (a) the strength of the particular motion to

efficiency promoted by the first-filed rule. However, none of Rule 12's seven enumerated pre-answer motions directly address dismissal for duplicative litigation per se.[34] Motions to dismiss based on the first-filed rule could arguably fit into three of the enumerated categories: Rule 12(b)(1) lack of subject matter jurisdiction, Rule 12(b)(3) improper venue, and Rule 12(b)(6) failure to state a claim. This section of the article addresses two questions: Have courts applied Rule 12(b) to motions to dismiss based on the first-filed rule? If not, should they?

A. Frequently, Federal Court Opinions Do Not Specify Whether Rule 12(b) Applies to Motions to Dismiss Based on the First-Filed Rule

Federal courts determining first-filed issues commonly do not define the source of authority for such motions with express precision. Typically, "judges do not base their power to entertain this type of motion on any specific rule or statute, but . . . speak only of their desire to promote judicial efficiency and to avoid conflicting opinions."[35]

There are actually two related issues here. First, courts usually do not enunciate the substantive underpinnings for dismissing duplicative litigation: equitable doctrines, comity toward sister courts, or the court's inherent powers to regulate dockets and

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dismiss and (b) whether discovery in the duplicative action would be a waste of resources. *See, e.g.*, Turner Broad. Sys., Inc. v. Tracinda Corp., 175 F.R.D. 554, 555–56 (D. Nev. 1997) ("[A] pending Motion to Dismiss is not ordinarily a situation that in and of itself would warrant a stay of discovery. Common examples of such situations, however, occur when jurisdiction, venue, or immunity are preliminary issues."); Hong Leong Fin. Ltd. (Singapore) v. Pinnacle Performance Ltd., 85 Fed. R. Serv. 3d 1099, 1102 (S.D.N.Y. 2013) (discussing standards for staying discovery based on pending motion to dismiss); Esperson v. Trugreen LP, No. 10-2130-STA, 2010 WL 2640520, at *4 (W.D. Tenn. June 29, 2010) (finding that pending motion to transfer was insufficient to justify stay of discovery, citing standard for stays in general, Ind. State Police Pension Trust v. Chrysler, LLC, 556 U.S. 960, 961 (2009)); Benge v. Eli Lilly & Co., 553 F. Supp. 2d 1049, 1050 (N.D. Ind. 2008); Grossbard v. Secs. Am. Fin. Corp., No. 8:09CV350, 2010 WL 702271, at *1–2 (D. Neb. Feb. 23, 2010) (pending motion to consolidate in multi-district litigation proceeding was insufficient to support stay of disclosures and discovery).

34. FED. R. CIV. P. 12(b)(1)–(7).

35. 5C WRIGHT & MILLER, *supra* note 10, § 1360 (citing cases).

administer justice. Second, courts also do not usually specify the proper procedural vehicle for these motions.[36] Are they within Rule 12(b), and if so, which provision?[37]

Many courts simply state that the first-filed rule is a matter of "discretion."[38] Because Rule 12(b) dismissals are generally reviewed de novo for legal error whereas first-filed rule dismissals are reviewed for abuse of discretion, these courts may be implying that the first-filed rule is not subject to Rule 12(b). However, this remains unclear because, even in Rule 12(b) decisions, some aspects of district courts' decisions are reviewed for abuse of discretion. For example, district courts have discretion regarding how they will hear evidence for Rule 12(b) motions that go beyond the allegations.[39]

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36. *See, e.g.*, Upchurch v. Piper Aircraft Corp., 736 F.2d 439, 440 (8th Cir. 1984) (affirming dismissal without stating source of authority); Micron Tech., Inc. v. MOSAID Techs., Inc., 518 F.3d 897, 900 (Fed. Cir. 2008) (discussing motion to dismiss for lack of subject matter jurisdiction, implying a motion under Rule 12(b)(1)); MidAtlantic Int'l, Inc. v. AGC Flat Glass N. Am., Inc., 497 F. App'x 279, 280–81 (4th Cir. 2012) (noting the motion to dismiss was based on the first-filed rule and that the *Colorado River* abstention argument was made under Rule 12(b) without analysis of whether Rule 12(b) applies to either doctrine); Elite Physicians Servs., LLC v. Citicorp Credit Servs., Inc. (USA), No. 1:06-CV-86, 2007 WL 1100481, at *2–3 (E.D. Tenn. Apr. 11, 2007) (appearing to assume that the defendant's first-filed issue was not a proper Rule 12(b)(6) argument without deciding the question, likely reflecting lack of clarity from the parties); EMC Corp. v. Parallel Iron, LLC, 914 F. Supp. 2d 125, 127–28 (D. Mass. 2012) (analyzing motion to dismiss, or in the alternative, to transfer based on first-filed doctrine, by reference to its judicial development, without specifying whether Rule 12 applies).

37. Federal Rule of Civil Procedure 82 provides in relevant part that "[t]hese rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts." When this article refers to Rule 12(b) as a possible source of authority for motions to dismiss duplicative litigation, this means *procedural* authority. The *substantive* authority must lie elsewhere—in equitable principles or courts' inherent powers.

38. *See, e.g.*, Wallerstein v. Dole Fresh Vegetables, Inc., No. 13-cv-01284-YGR, 2013 WL 5271291, at *2 (N.D. Cal. Sep. 13, 2013) ("A federal district court has discretion to dismiss, stay, or transfer a case to another district court under the first-filed rule . . . .") (citing Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 94–95 (9th Cir. 1982)); Cadle Co. v. Whataburger of Alice, 174 F.3d 599, 603 (5th Cir. 1999).

39. Hancock v. Am. Tel. & Tel. Co., Inc., 701 F.3d 1248, 1260–61 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 2009 (2013).

B. Among the Federal District Courts that Specify the Underpinnings for Such Motions, No Consensus Appears

No consensus exists among federal district courts regarding the proper basis for first-filed motions to dismiss. Many courts refer to these motions as being brought under Rules 12(b)(1) or 12(b)(3) and do not question the propriety of doing so.[40]

On the other hand, without any clear dividing lines between circuits, other courts expressly reject Rule 12(b) as a procedural basis to dismiss duplicative litigation.[41] These courts would agree

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40. *See, e.g.*, O2COOL, LLC v. Discovery Commc'ns, LLC, No. 12 C 3204, 2013 WL 157703, at *1 (N.D. Ill. Jan. 15, 2013) (motion under Rule 12(b)(3), improper venue); Ervin v. Kelly, No. C10-5145BHS, 2010 WL 2985675, at *1 (W.D. Wash. July 23, 2010) (motion under Rule 12(b)(1), lack of subject matter jurisdiction); E-Z-EM, Inc. v. Mallinckrodt, Inc., No. 2-09-cv-124, 2010 WL 1378820, at *1 n.1 (E.D. Tex. Feb. 26, 2010) (motion under Rule 12(b)(3)); Animal Health Int'l, Inc. v. Livingston Enters., Inc., No. 12-cv-00369-LTB, 2012 WL 1439243, at *2 (D. Colo. Apr. 26, 2012) (motion under Rule 12(b)(3)); *cf.* Cent. States Indus. Supply, Inc. v. McCullough, 218 F. Supp. 2d 1073, 1080 (N.D. Iowa 2002) (considering motion to dismiss duplicative litigation based on, *inter alia,* Rule 12(b)(3); the court did not expressly reject that as a basis for the motion, but found venue proper under the venue statute); Port Auth. of N.Y. & N.J. v. Kraft Power Corp., No. 11 CV 5624(HB), 2012 WL 832562, at *1 (S.D.N.Y. Mar. 13, 2012) (holding that defendant should have based its motion on abstention instead of the first-filed rule, but not taking issue with the defendant having styled the first-filed rule as a basis for a Rule 12(b)(3) motion). For actions under the False Claims Act, one provision of which codifies the first-filed rule, it is clear that the rule is a matter within Rule 12(b)(1)'s lack of subject matter jurisdiction. *See, e.g.*, *In re* Natural Gas Royalties Qui Tam Litig. (CO2 Appeals), 566 F.3d 956, 960–61 (10th Cir. 2009) (jurisdictional bar); United States *ex rel.* Palmieri v. Alpharma, Inc., 928 F. Supp. 2d 840 (D. Md. 2013).

41. *See, e.g.*, Reed Concrete Constr., Inc. v. Millie, LLC, C.A., No. 8:12–3117-HMH, 2013 WL 80487, at *2 (D.S.C. Jan. 7, 2013) (rejecting argument that the first filed action deprived the second court of subject matter jurisdiction under Rule 12(b)(1)); Fujitsu Ltd. v. Nanya Tech. Corp., No. C 06-6613 CW, 2007 WL 484789, at *5 (N.D. Cal. Feb. 9, 2007) (considering first-filed rule motion not as a 12(b) motion but as a preliminary motion filed before the answer); Ins. Co. of N. Am. v. Int'l Ins. Co., No. 95-10203-RCL, 1995 WL 599104, at *2 (D. Mass. Sept. 7, 1995) (holding that Rule 12(b)(3) does not apply to motion to dismiss based on duplicative litigation); Private Med. Care Found., Inc. v. Califano, 451 F. Supp. 450, 452 (W.D. Okla. 1977) ("Defendants' Motion, insofar as it seeks dismissal of this action, is denied for the reason that it does not assert any of the defenses enumerated in Rule 12(b)."); *cf.,* AGCS Marine Ins. Co. v. Am. Truck & Trailer

with arguments that Rule 12(b) does not apply to motions to dismiss a case based on parallel litigation.[42] Probably reflecting the defendant's arguments, many courts also discuss the first-filed issue separately from Rule 12(b) arguments without analyzing whether the first-filed issue is itself a Rule 12(b) argument.[43]

Finally, courts in the Seventh Circuit expressly refer to inherent powers as the substantive source of authority for motions to dismiss duplicative litigation, but do not expressly address whether Rule 12(b) is the applicable procedure.[44] In reviewing an injunction against a second-filed action, the Seventh Circuit analyzed courts' substantive authority to prevent duplicative litigation:

> Despite the absence of a clear source of authority for enjoining a second, nonharassing lawsuit (albeit one identical to the first), there is overwhelming case authority that the first court has power, independently of the equitable doctrine that bars vexatious litigation, to enjoin the defendant from bringing a separate suit against the plaintiff in another court, thereby forcing the defendant either to litigate his claim as a counterclaim or to abandon it. . . . . The power is viewed as an outgrowth of the equitable doctrine. There is also talk in the older cases about "protecting" jurisdiction, but *jurisdiction* is not threatened by a parallel proceeding in another court.

Body Co., No. CIV S-12-1044 KJM JFM, 2013 WL 211196, at *2 (E.D. Cal. Jan. 9, 2013) (finding that motion based on first-filed rule is not within Rule 12(b)(6); the court did not reach whether such a motion is within Rules 12(b)(1) or 12(b)(3)).

42. George, *supra* note 6, at 797.

43. *See, e.g.*, Merial Ltd. v. Ceva Animal Health LLC, 3:12-CV-154 CDL, 2013 WL 4763737, at *1–8 (M.D. Ga. Sep. 4, 2013) (discussing defendants' Rule 12(b) dismissal arguments and first-filed rule separately); Oliver & Tate Enters., Inc. v. Founds. Worldwide, Inc., CV 13-01683-RGK SHX, 2013 WL 4446827, at *4–5 (C.D. Cal. June 18, 2013) (same); Chriswell v. Big Score Entm't, LLC, 11 C 00861, 2013 WL 315743, at *1 (N.D. Ill. Jan. 28, 2013) (considering defendant's 12(b)(6) and first-filed arguments as different theories underlying the motion to dismiss).

44. *See, e.g.*, Trippe Mfg. Co. v. Am. Power Conservation Corp., 46 F.3d 624, 629 (7th Cir. 1995) ("Federal district courts have the inherent power to administer their dockets so as to conserve scarce resources.").

> The real basis for the power, it seems to us, is practical. A court—some court—should have the power to prevent the duplication of litigation even though neither party is acting abusively; this is implicit in the very concept of a *compulsory* counterclaim. It might as well be the first court. It is not a traditional equitable power that the courts are exercising in these cases but a new power asserted in order to facilitate the economical management of complex litigation.[45]

The defendant in that case did not frame the issue as a Rule 12 motion, and the court did not address whether it could have decided it as a Rule 12 motion. The only Rule 12 discussion in the case was unrelated to the first-filed rule.[46]

A few courts have also analyzed the analogous issue of whether a § 1404 motion to transfer venue is subject to Rule 12(g)'s consolidation requirement or Rule 12(h)'s waiver provision regarding Rule 12(b)(1)-(5) defenses.[47] Again, they reach opposite conclusions.[48] For instance, when a defendant moved to dismiss for lack of personal jurisdiction under Rule 12(b)(3) subsequent to moving for § 1404(a) change of venue, the Southern District of New York held that he had waived his Rule 12(b)(3) rights by asserting § 1404(a) on the same facts because the facts were apparent to him at

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45. Asset Allocation & Mgmt. Co. v. W. Emp'rs Ins. Co., 892 F.2d 566, 572 (7th Cir. 1989) (emphasis in original) (citations omitted).

46. *Id.* at 574–75; *see also* Copello v. Boehringer Ingelheim Pharm. Inc., 812 F. Supp. 2d 886, 889 (N.D. Ill. 2011) (quoting *Trippe*); Barrington Grp., Ltd. v. Genesys Software Sys., Inc., 239 F. Supp. 2d 870, 874 (E.D. Wis. 2003) (same).

47. Elderberry of Weber City, LLC v. Living Ctrs.–Se., Inc., No. 6:12-CV-00052, 2013 WL 1164835, at *3 (W.D. Va. Mar. 20, 2013); Dwyer v. Bicoy, No. 08-cv-01195, 2008 WL 5381485, at *3–4 (D. Colo. Dec. 22, 2008)); Red Wing Shoe Co., Inc. v. B–JAYS USA, Inc., No. 07-257 DWFAJB, 2002 WL 1398538, at *2 (D. Minn. June 26, 2002) (stating that a "motion to transfer venue for the convenience of parties or witnesses or in the interests of justice, brought pursuant to 28 U.S .C. § 1404(a), is not a motion under Rule 12(b)(3) of the Federal Rules of Civil Procedure, so the waiver provision of Rule 12(h) is inapplicable."); James v. Norfolk & W. Ry. Co., 430 F. Supp. 1317, 1319 n. 1 (S.D. Ohio 1976); Sanghdal v. Litton, 69 F.R.D. 641, 642–43 (S.D.N.Y. 1976).

48. *Elderberry of Weber City,* 2013 WL 1164835, at *3 (discussing case split).

the commencement of the suit.[49] By contrast, as observed by the Western District of Virginia, the District of Colorado and the District of Minnesota have both ruled that motions to transfer venue pursuant to § 1404(a) are distinguishable from Rule 12(b)(3) motions to dismiss and therefore were not subject to Rule 12(g).[50] Examining these cases, the Western District of Virginia ruled that "a motion to transfer venue is so similar to a motion to dismiss for improper venue that Rule 12(g)'s consolidation requirement applies," reasoning that "[t]o hold otherwise would subvert the purpose of the consolidation rule."[51]

Overall, the variety of opinions among district courts suggests that if the question of procedural authority for motions to dismiss based on the first-filed rule were to reach the circuit courts, they would likely disagree.

C. *The Applicable Procedure for Motions to Dismiss Duplicative Litigation is Significant Because of Evidentiary Standards and Motions for Entry of Default*

In addition to the procedural question noted above regarding Rule 12(g) consolidation, there are other good reasons for defendants (and courts) to distinguish between Rule 12(b) and inherent powers for the first-filed doctrine: (1) greater clarity regarding the evidentiary standard, i.e., the types of facts outside the complaint the court can consider; and (2) greater clarity regarding whether a pre-answer motion to dismiss based on duplicative litigation suffices to extend the time to answer.

First, recognizing motions to dismiss under the first-filed doctrine as Rule 12(b)(1) or 12(b)(3) motions would likely yield greater clarity regarding evidentiary standards. Rules 12(b)(1) and 12(b)(3) have well-developed case law regarding the consideration of facts outside the complaint (when the challenge is more than a facial attack based on the allegations) and regarding courts'

49. *Sanghdal*, 69 F.R.D. at 642–43.

50. *Elderberry of Weber City,* 2013 WL 1164835, at *3 (discussing *Dwyer*, 2008 WL 5381485, at *3–4; *Red Wing*, 2002 WL 1398538, at *2).

51. *Id.* at *9.

discretion in how they will hear that evidence.[52] For example, Rule 12(d) prohibits consideration of facts outside of the complaint as to only Rule 12(b)(6) motions to dismiss for failure to state a claim.[53] Thus, if a motion to dismiss duplicative litigation is not brought under Rule 12(b)(6), the limitation is inapplicable and any relevant facts outside of the complaint can be considered.[54] At present, courts do not always arrive at this conclusion.[55]

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52. *See, e.g.*, Bahamas Sales Assoc., LLC v. Byers, 701 F.3d 1335, 1338 n.1 (11th Cir. 2012) (using third amended counterclaim to discern facts); Hancock v. Am. Tel. & Tel. Co., Inc., 701 F.3d 1248, 1260–61 (10th Cir. 2012) *cert. denied*, 133 S. Ct. 2009 (2013) (describing rules for when a district court may consider facts outside a complaint).

53. Rule 12(d) requires converting a Rule 12(b)(6) or 12(c) motion to summary judgment and allowing the parties "a reasonable opportunity to present all the material that is pertinent to the motion" if "matters outside the pleadings are presented to and not excluded by the court." FED. R. CIV. P. 12(d).

54. There are well-developed exceptions to Rule 12(d) for facts subject to judicial notice, publicly filed documents, and documents that are integral to the complaint, do not contradict its allegations, and are not subject to disputes of authenticity or accuracy. Little Gem Life Sci., LLC v. Orphan Med., Inc., 537 F.3d 913, 916 (8th Cir. 2008) (noting that on Rule 12(b)(6) motions, courts "may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." (quoting Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir.1999)); Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406, 425–26 (2d Cir. 2008) (noting the exception for "matters of which judicial notice may be taken"); *Marcus v. AT & T Corp.*, 938 F. Supp. 1158, 1164–65 (S.D.N.Y. 1996) *aff'd*, 138 F.3d 46 (2d Cir. 1998) (considering filed tariffs without converting motion to dismiss to summary judgment); *Chamberlain v. City of White Plains*, -- F. Supp. 2d --, 12-CV-5142 CS, 2013 WL 6477334 (S.D.N.Y. Dec. 10, 2013) (noting the exception for "integral" documents with no dispute of authenticity or accuracy). Accordingly, the evidentiary distinction of Rule 12(b)(6) from other sections of Rule 12(b) should not be overstated. In the context of duplicative litigation, the first or second-filed complaint is generally a public record and therefore should be subject to judicial notice. However, most of the other facts relevant to the first-filed rule and its exceptions are unlikely to fall within the exceptions to Rule 12(d). In addition, some circuits impose limitations on how courts can use such documents on motions to dismiss. *Little Gem*, 537 F.3d at 916 (citing Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1276 (11th Cir. 1999); Lovelace v. Software Spectrum, Inc., 78 F.3d 1015, 1018 (5th Cir. 1996); Kramer v. Time Warner Inc., 937 F.2d 767, 773–74 (2d Cir. 1991)).

55. *Compare* Eternal Asia Supply Chain Mgmt. (USA) Corp. v. EQD Corp., No. 12 Civ. 0058(JPO), 2012 WL 6186504, at *1, nn.1–3 (S.D.N.Y. Dec. 12, 2012) (analyzing the first-filed issue using Rule 12(b)(6) standards regarding evidence on a motion to dismiss asserting first-filed rule and lack of personal

Second, greater clarity regarding whether Rule 12 applies could also be useful to make plain from the language of Rule 12 that motions for entry of default judgment are baseless when the defendant has filed a motion to dismiss based on the first-filed rule. Rule 12(a) provides that the time in which to file an answer is tolled by filing a motion to dismiss *under Rule 12(b)*.[56] It does not expressly extend the time to answer based on other types of motions, such as motions to dismiss, stay or transfer based on the first-filed rule; motions to compel arbitration; or motions to transfer based on a forum selection clause. Inherent powers, by nature, are less defined than the Federal Rules of Civil Procedure; as a result, some plaintiffs argue that these motions do not qualify for a Rule 12(a)(4) extension of the time to answer.[57] Such arguments appear to be both inefficient and inconsistent with the standard for entering a default.[58] Nevertheless, such motions for entry of default judgment are filed because the precise language of Rules 12(a)(4) and (b)(1) to (b)(7) appears to give merit to this line of thought.

Case law research shows that, for purposes of extending the time to answer, federal courts do not draw a distinction between motions to dismiss that are procedurally authorized by Rule 12(b) and those that are procedurally authorized by inherent powers. As Wright and Miller explain, "Federal courts . . . traditionally have entertained certain *pre-answer* motions that are not expressly provided for by the rules or by statute."[59] These motions include those "closely related to the management of the lawsuit and might be characterized in general terms as involving matters of judicial administration . . . [such as] motions to stay and motions to dismiss

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jurisdiction, but noting that facts subject to judicial notice were permitted), *with* AGCS Marine Ins. Co. v. Am. Truck & Trailer Body Co., No. CIV S-12-1044 KJM JFM, 2013 WL 211196, at *2 (E.D. Cal. Jan. 9, 2013) (determining that Rule 12(d)'s limitation was inapplicable because first-filed issue was not under Rule 12(b)(6)).

56. FED. R. CIV. P. 12(a)(4).

57. *See, e.g.*, Custom Hardware Eng'g & Consulting, Inc., v. Storage Tech. Corp., Civ. 02-1632-ERW, ECF 7, 13, 32 (E.D. Mo. 2003).

58. FED. R. CIV. P. 55 ("failed to plead *or otherwise defend*") (emphasis added).

59. 5C WRIGHT & MILLER, *supra* note 10, § 1360 (emphasis added) (discussing several types of motions to dismiss that federal courts recognize despite not being enumerated in Rule 12(b)).

because another action is pending."[60] The inherent power of a court to regulate actions pending before it provides the authority to hear these pre-answer motions.[61] For instance, the Eighth Circuit held in *International Association of Entrepreneurs of America v. Angoff*, "While pre-answer motions are ostensibly enumerated in [Rule] 12(b), district courts have the discretion to recognize additional pre-answer motions, including motions to stay cases within federal jurisdiction when a parallel state action is pending."[62] In *Sorensen*, the California federal district court noted that the defendant brought a motion to *stay* under Rule 12(b), and apparently did not seek in the alternative to dismiss.[63] Instead of staying the case before it, the court found that the defendant should pursue its motion to dismiss in the other action and did not analyze whether a motion to dismiss based on the first-filed rule comes within the ambit of Rule 12(b).[64] Similarly, in *Intravascular Research Ltd.*, the Delaware federal district court expressly states:

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60. *Id.*

61. *See id.* (collecting cases permitting such motions).

62. 58 F.3d 1266, 1271 (8th Cir. 1995) (citing Brillhart v. Excess Ins. Co. of Amer., 316 U.S. 491, 494–96, (1942)); *see also* Warren Bros. Co. v. Cardi Corp., 471 F.2d 1304, 1307–09 (1st Cir. 1973) (finding that party had properly raised arbitration clause by pre-answer motion to stay, not within Rule 12(b) but within court's inherent powers); Fujitsu Ltd. v. Nanya Tech. Corp., No. C 06-6613 CW, 2007 WL 484789, at *5 (N.D. Cal. Feb. 9, 2007) (holding that motion to stay, dismiss or transfer based on first filed rule was sufficient to extend the time to answer, despite not being an enumerated basis for dismissal under Rule 12(b)); 5B WRIGHT & MILLER, *supra* note 10, § 1349 ("Although the seven motions specifically enumerated in Rule 12(b) theoretically are the only motions that can be made prior to service of the responsive pleading, in reality the preliminary-motion practice in the federal courts has a much broader compass . . . . If properly employed . . . this flexibility will promote speedier pretrial procedures . . . helping to insure that justice is done between the parties."); *cf.* Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (discussing courts' authority to stay proceeding); Armendariz v. Ace Cash Express, No. 3:13-CV-00590-BR, 2013 WL 3791438, at *3–4 (D. Or. July 19, 2013) (considering pre-answer motion to stay or dismiss to compel arbitration); G.T.G. Constr. Co., Inc. v. Goel Servs., Inc., No. 12-1129(JEB), 2012 WL 3860590, at *2 (D.D.C. Sept. 5, 2012) (explaining that federal courts often consider motions to stay in "an effort to maximize the effective utilization of judicial resources and to minimize the possibility of conflicts between different courts" (quoting 5C WRIGHT & MILLER, *supra* note 10, § 1360)).

63. Sorensen v. Head USA, Inc., No. 06cv1434 BTM (CAB), 2006 WL 6584166, at *1 (S.D. Cal. Oct. 13, 2006).

64. *Id.*

> The Court may, and will, exercise its discretion to consider Endosonics' pre-answer motions not enumerated in Fed.R.Civ.P. 12(b), even though Endosonics has not yet filed an answer to the Complaint . . . . Historically, motions to stay have been recognized as tolling the time period for answering a complaint because pre-answer consideration of these motions have been found to maximize the effective utilization of judicial resources.[65]

Yet, few opinions note whether the moving party elected to answer the complaint despite moving to dismiss. In the few instances of reported cases ruling on motions for entry of default judgment in these circumstances, the court denied the motions.[66] Based on these cases, it appears the substantive outcome on this issue would not change if first-filed rule motions were expressly considered within Rule 12(b)(1) or 12(b)(3). Nor would there be significant controversy if a proposal were made to amend Rule 12(a)(4) to expand the list of motions that toll the time to answer.

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65. Intravascular Research Ltd. v. Endosonics Corp., 994 F. Supp. 564, 567 n.3 (D. Del. 1998) (citing 5A WRIGHT & MILLER, *supra* note 10, § 1360; *Angoff*, 58 F.3d at 1271; Smith v. Pay-Fone Sys., Inc., 627 F. Supp. 121, 122 (N.D. Ga. 1985)).

66. *See* P.S.I. Nordic Track, Inc. v. Great Tan, Inc., 686 F. Supp. 738 (D. Minn. 1987) (appearing to decide based on inherent powers to dismiss, without stating definitively whether Rule 12 applied); *Sorensen*, 2006 WL 6584166, at *1; *Fujitsu*, 2007 WL 484789, at *5 ("While Nanya USA failed to file a responsive pleading, its motion to stay was a timely and proper filing. Nanya USA is not ignoring this lawsuit and . . . an entry of default is not appropriate."); *see also* Cent. States Indus. Supply, Inc. v. McCullough, 218 F. Supp. 2d 1073, 1079–80 (N.D. Iowa 2002) (denying a defendant's motion to dismiss in the second-filed case after it did not answer without discussing whether the motion tolled the time to answer).

D. Rules 12(b)(1) and 12(b)(6) Are Broad Enough to Encompass Motions Based on the First-Filed Rule

A motion to dismiss based on duplicative litigation accords with the purposes of Rule 12[67] and a liberal construction of Rule 12(b)(1) motions for "lack of jurisdiction over the subject matter," Rule 12(b)(3) motions for "improper venue," and, perhaps, Rule 12(b)(6) motions for failure to state a claim for which relief can be granted.[68]

1. Rule 12(b)(1) Lack of Subject Matter Jurisdiction May Encompass Dismissal of Duplicative Litigation

According to Wright and Miller, "[T]he scope of Rule 12(b)(1) is flexible, often serving as a procedural vehicle for raising various residual defenses . . . challenging the federal court's ability to proceed with the action."[69] Courts have frequently recognized that lack of subject matter jurisdiction extends to such matters as the abstention doctrine (duplicative or overlapping state court actions).[70] For instance, in *Applera Corp. v. Illumina, Inc.*, the party moved to dismiss under Rule 12(b)(1) asserting that a pending state court action on patent license agreements deprived the court of jurisdiction over patent infringement claims.[71] While the court found it had not been deprived of jurisdiction, the court did not dispute the propriety of filing the motion under Rule 12(b)(1).[72] There is no principled difference between a Rule 12(b)(1) motion based on abstention, and

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67. 5B WRIGHT & MILLER, *supra* note 10, § 1342 ("The objective of Federal Rule 12 is to expedite and simplify the pretrial phase of federal litigation while at the same time promoting the just disposition of civil cases."); *id.* § 1349 ("[T]he rationale underlying the recognition of these seven exceptions [in Rule 12(b)] to the basic policy of the federal rules against dilatory or preliminary motions is that motions on the grounds enumerated in Rule 12(b) are likely to produce an overall savings in time and resources as well as avoid delay in the disposition of cases, thereby benefiting both the parties and the courts.").

68. FED. R. CIV. P. 12(b)(1), (3), (6).

69. 5B WRIGHT & MILLER, *supra* note 10, § 1350.

70. *Id.* (collecting cases).

71. 282 F. Supp. 2d 1120, 1123 (N.D. Cal. 2003).

72. *Id.*

such a motion based on duplicative federal litigation.[73] Accordingly, courts could also allow Rule 12(b)(1) motions on the basis of the first-filed rule.

2. Rule 12(b)(6) Failure to State a Claim Should Encompass Dismissal of Duplicative Litigation, and Rule 12(b)(3) Should Not

An analogous issue—forum selection clauses as a basis for seeking Rule 12 dismissal—shows that Rule 12(b)(3) is inapplicable for dismissing duplicative litigation, and that Rule 12(b)(6) should apply. By the rule's language, Rule 12(b)(3) improper venue may seem more apt for dismissal of duplicative litigation than Rule 12(b)(1) lack of subject matter jurisdiction; however, the recent reasoning of the U.S. Supreme Court in *Atlantic Marine Construction Co.* regarding the federal venue statutes shows the Court would reject such a construction of Rule 12(b)(3).[74] Prior to *Atlantic Marine*, the theory had merit because the language of Rule 12(b)(3) does not expressly limit the rule to a failure to comply with venue statutes.[75]

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73. For instance, courts have no difficulty considering matters outside the pleadings (which will generally be necessary to show that duplicative litigation is pending, as the second-filing plaintiff is unlikely to attach the first-filed complaint to its own) on Rule 12(b) motions asserting lack of jurisdiction. *See, e.g.*, Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990) (differentiating Rules 12(b)(6) and 12(b)(1)); Snyder v. Garb, 988 F. Supp. 868, 869 (E.D. Pa. 1997) (noting that when a party attacks the factual allegations of jurisdiction, courts are not limited in their review to the allegations of the complaint), *aff'd* 159 F.3d 1353 (3d Cir. 1998), *cert. den'd* 525 U.S. 965 (1998); Espinosa v. DeVasto, 818 F. Supp. 438, 440 (D. Mass. 1993) (considering outside materials in a jurisdictional motion).

74. Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 134 S. Ct. 568, 577 (2013).

75. The history of Rule 12(b)(3) is not illuminating on this issue. Rule 12(b)(3) derives from Former Equity Rule 29, which did not specify the particular grounds available for a motion to dismiss: "Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer . . . ." 5B WRIGHT & MILLER, *supra* note 10, § 1341 n.2. Rule 12(b)(3)'s adoption in 1937, FED. R. CIV. P. historical note (2013), predates the 1948 introduction of § 1406, which provides for dismissal when a case is filed in "the

The federal venue statutes do not address the problem of duplicative cases, except with respect to cases involving the accidental death of 75 or more persons[76] or multidistrict litigation.[77] The venue statutes take for granted that only one action is filed by the same parties about the same claims. Section 1391 is the general venue statute "except as otherwise provided by law," which means that other sources of law may control.[78] The inherent powers of federal district courts to manage their dockets and handle complex litigation, at least when articulated in written opinions, are "law," albeit not codified in a statute. In theory both Rule 12(b)(3) and courts' inherent powers could apply together to authorize motions to dismiss duplicative litigation.

Venue arguments are generally based on the venue statutes, but courts have increasingly addressed motions to dismiss based on contractual venue clauses:

> Objections to venue typically stem from a failure to adhere to the requirements specified in the general venue statute . . . or some other statutory venue provision. In recent years, however, there have been what appears to be an increasing number of venue motions based on the enforcement of forum-selection clauses in contracts.[79]

Cases regarding dismissal for enforcement of forum selection clauses are important here because motions to dismiss based on forum selection clauses and those based on duplicative litigation

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wrong division or district" or for transfer "in the interest of justice . . . to any district . . . in which it could have been brought." 28 U.S.C. § 1406(a) (2012); *see also* June 25, 1948, Ch. 646, 62 Stat. 937 (adopting what would be codified as § 1406). Section 1406 is limited to cases brought in a venue not permitted by venue statutes. *Atlantic Marine,* 134 S. Ct. at 577. The statute does not itself define "the wrong division or district."

76. 28 U.S.C. § 1391(g) (2012) (providing venue for cases subject to 28 U.S.C. § 1369).

77. 28 U.S.C. § 1407 (2012).

78. 28 U.S.C.A. § 1391(a)(1) (West, Westlaw through P.L. 113-74 (excluding P.L. 113-66, 113-67, and 113-73) approved 1-16-14) ("*Except as otherwise provided by law*—this section shall govern the venue of all civil actions brought in district courts of the United States . . . ." (emphasis added)).

79. 5B WRIGHT & MILLER, *supra* note 10, § 1352.

have in common that (a) neither is precisely enumerated in Rule 12(b) as grounds for dismissal, and (b) neither constitutes an express ground for improper venue in the language of venue statutes. Thus, both present the same need to analyze the scope of Rule 12(b)(3)'s "improper venue." Accordingly, the law regarding courts' source of authority to dismiss based on forum selection clauses should also illuminate the source of authority to dismiss duplicative litigation.

Perhaps not surprisingly, before the U.S. Supreme Court recently decided that motions to dismiss based on contractual forum selection clauses do not come within Rule 12(b)(3), the circuit courts were split concerning the appropriate vehicle for such motions.[80] A majority of circuit courts affirmed dismissal for improper venue under Rule 12(b)(3) based on contractual forum selection clauses, either without expressly questioning whether the rule applies or by expressly deciding that Rule 12(b)(3) authorizes such motions to dismiss. Specifically, the Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits formed a majority position that motions to dismiss based on contractual forum selection clauses should be brought under Rule 12(b)(3) for improper venue.[81] In the case that the U.S. Supreme Court later reversed in *Atlantic Marine*, the Fifth Circuit had taken the majority position that Rule 12(b)(3) applies,[82] but it also had narrowed that position by holding that forum selection

80. *Id.* at n.5; 14D WRIGHT & MILLER, *supra* note 10, § 3803.1 nn.72–73.

81. Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 365–66 (4th Cir. 2012); Auto. Mechs. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc., 502 F.3d 740, 746 (7th Cir. 2007) (noting it was "not entirely clear" whether such a motion should be under Rule 12(b)(3) or 12(b)(6), but that the court had followed the majority position finding Rule 12(b)(3) appropriate, (citing Cont'l Ins. Co. v. M/V ORSULA, 354 F.3d 603, 606–07 (7th Cir. 2003))); Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1137 (9th Cir. 2004); *see also* Bah. Sales Assoc., v. Byers, 701 F.3d 1335, 1338 n.1 (11th Cir. 2012) (citing Estate of Myhra v. Royal Caribbean Cruises, Ltd., 695 F.3d 1233, 1238 (11th Cir. 2012); Balen v. Holland Am. Line Inc., 583 F.3d 647, 652 (9th Cir. 2009) (noting that the district court ruled on the motion under Rule 12(b)(3)); K & V Scientific Co. v. Bayerische Motoren Werke Aktiengesellshaft (BMW), 314 F.3d 494, 497 (10th Cir. 2002) (noting that motions to dismiss in cases with contractual venue selection clauses are frequently analyzed under Rule 12(b)(3)); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1289–90 (11th Cir. 1998)).

82. Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898, 902 (5th Cir. 2005).

clauses that specify a single district were not subject to Rule 12(b)(3) dismissal; instead, they were enforced by § 1404 transfer.[83]

The First and Sixth Circuits have held that motions to dismiss based on contractual forum selection clauses should be brought instead under Rule 12(b)(6).[84] However, the Sixth Circuit apparently does not limit such motions to Rule 12(b)(6), as recently it also found *sua sponte* dismissal under the judicial doctrine of forum non conveniens was appropriate when the defendant's forum selection argument was brought (incorrectly in the Sixth Circuit's view of its precedent) under Rule 12(b)(3).[85] Similarly, the Third Circuit has ruled that dismissal under Rule 12(b)(6) is "permissible" based on a forum selection clause that required filing in another district.[86] However, the opinion notes the circuits' disagreement over which provision of Rule 12(b) should apply and does not attempt to decide that issue. Earlier Third Circuit cases also had not expressly focused on the issue of Rule 12(b)(3) versus 12(b)(6) for forum selection clauses, instead focusing on 28 U.S.C. § 1404 versus 28 U.S.C. § 1406 as authority for dismissal.[87] Because both §§ 1404 and 1406 are venue statutes, it appears that the Third Circuit assumes Rule 12(b)(3) applies, although the court also could have assumed that the judicial doctrine of forum non conveniens authorized the dismissal.[88]

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83. *In re* Atl. Marine Constr. Co., 701 F.3d 736, 739 (5th Cir. 2012), *rev'd*, 134 S. Ct. 568 (2013).

84. Findlay Truck Line, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund, 726 F.3d 738, 742 (6th Cir. 2013) (affirming dismissal under Rule 12(b)(6)); Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 15 (1st Cir. 2009); Langley v. Prudential Mortg. Capital Co., 546 F.3d 365, 366 (6th Cir. 2008) (per curiam).

85. Wong v. PartyGaming Ltd., 589 F.3d 821, 830 (6th Cir. 2009).

86. Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 289, 298–300 (3d Cir. 2001).

87. Jumara v. State Farm Ins. Co., 55 F.3d 873, 878 (3d Cir. 1995). The dissenting opinion of Justice Garth in *Jumara* expressly refers to Rule 12(b)(3). *Id.* at 884 n.2 (Garth, J. dissenting).

88. The Federal Circuit considers the procedural mechanism for dismissing (or transferring) a case based on forum selection clauses to be a matter of regional law. *See, e.g.*, *In re* Broadcom Corp., 526 Fed. Appx. 960, 963 (Fed. Cir. 2013), *cert. granted*, 134 S. Ct. 809 (2013) (applying "the law of the regional circuit in which the district court sits . . .").

The Eighth Circuit and D.C. Circuit have not yet decided whether Rule 12(b)(3) or 12(b)(6) applies.[89] The Second Circuit meanwhile "refuse[s] to pigeon-hole [forum selection clause enforcement] claims into a particular clause of Rule 12(b)," and notes the possibility of "an alternative vehicle."[90] For this position, the Second Circuit relies on *M/S Bremen v. Zapata Off-Shore Co.* in which the Supreme Court did not specify whether its analysis of the enforceability of forum selection clauses applied to the motion to dismiss for lack of jurisdiction or for forum non conveniens.[91] The Second Circuit's unidentified "alternative vehicle" presumably would be the judicial doctrine of forum non conveniens, based on inherent powers.[92]

The Supreme Court has addressed the circuit split. In its December 2013 *Atlantic Marine* opinion, the Court clearly holds that Rule 12(b)(3) is inapplicable for enforcing forum selection clauses, unless the venue is wrong under "federal venue laws":

> Section 1406(a) and Rule 12(b)(3) allow dismissal only when venue is "wrong" or "improper." Whether venue is "wrong" or "improper" depends exclusively

89. Heartland Family Servs. v. Netsmart Techs., Inc., No. 8:13CV112, 2013 WL 4427179, at *2 (D. Neb. Aug. 19, 2013) (stating that Eighth Circuit has not yet decided the question) (citing Rainforest Cafe, Inc. v. EklecCo, LLC, 340 F.3d 544, 545 n.5 (8th Cir. 2003))); *cf.* Servewell Plumbing, LLC v. Fed. Ins. Co., 439 F.3d 786, 788–89 (8th Cir. 2006) (affirming dismissal for improper venue without discussing Rule 12(b)); M.B. Rests., Inc. v. CKE Rests., Inc., 183 F.3d 750, 752 (8th Cir. 1999) (same); L&L Constr. Assocs., Inc. v. Slattery Skanska, Inc., No. CIV. 05-1289, 2006 WL 1102814, at *2 (D.D.C. Mar. 31, 2006) (same); *see also* Marra v. Papandreou, 216 F.3d 1119, 1122–23 n.3 (D.C. Cir. 2000) (noting "there is some doubt concerning the appropriate procedural vehicle," but not resolving the question); Commerce Consultants Int'l, Inc. v. Vetrerie Riunite, S.p.A., 867 F.2d 697, 698–700 (D.C. Cir. 1989) (affirming district court's dismissal of case under Rule 12(b)(3) without analysis of Rule 12(b)(3)).

90. TradeComet.com LLC v. Google, Inc., 647 F.3d 472, 478–79 (2d Cir. 2011) (quoting Asoma Corp. v. SK Shipping Co., Ltd., 467 F.3d 817, 822 (2d Cir. 2006)).

91. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

92. *See, e.g.*,Liberty USA Corp. v. Buyer's Choice Ins. Agency LLC., 386 F. Supp. 2d 421, 423–24 (S.D.N.Y. 2005) (noting the lack of consensus regarding the procedural mechanism for this issue); Lurie v. Norwegian Cruise Lines, Ltd., 305 F. Supp. 2d 352, 356 (S.D.N.Y. 2004) (finding "inherent authority" to decline jurisdiction in order to enforce forum selection clauses).

> on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause.[93]

The Court recognizes that 28 U.S.C. § 1391 leaves a proviso for "except as otherwise provided by law," but, without analysis, construes that phrase as referring solely to cases where "a more specific venue provision" applies, such as § 1400, which identifies proper venue for copyright and patent suits.[94] The Court does not leave room for "federal venue laws" embodied in judicial doctrines:

> Petitioner's contrary view improperly conflates the special statutory term 'venue' and the word 'forum.' It is certainly true that, in some contexts, the word 'venue' is used synonymously with the term 'forum,' but § 1391 makes clear that venue in 'all civil actions' must be determined in accordance with the criteria outlined in that section. *That language cannot reasonably be read to allow judicial consideration of other, extrastatutory limitations on the forum in which a case may be brought* . . . . The structure of the federal venue provisions confirms that they alone define whether venue exists in a given forum.[95]

The Court's construction of the relationship between the federal venue statutes and Rule 12(b)(3) in *Atlantic Marine* makes plain that it would also reject Rule 12(b)(3) as a source of authority for dismissing duplicative litigation. However, *Atlantic* expressly leaves open the question of whether Rule 12(b)(6) applies to enforce forum selection clauses. The Court notes that "[a]n amicus before the Court argues that a defendant in a breach-of-contract action should be able to obtain dismissal under Rule 12(b)(6) if the plaintiff files suit in a district other than the one specified in a valid forum-

93. Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 134 S. Ct. 568, 577 (2013).

94. *Id.* at 577 n.2.

95. *Id.* at 577–78 (emphasis added).

selection clause."[96] The Court did not consider the argument because it was not at issue in the case. In a footnote to that text, the Court further distinguished Rule 12(b)(6) motions from § 1404(a) and forum non conveniens motions:

> We observe, moreover, that a motion under Rule 12(b)(6), unlike a motion under § 1404(a) or the *forum non conveniens* doctrine, may lead to a jury trial on venue if issues of material fact relating to the validity of the forum-selection clause arise. Even if Professor Sachs is ultimately correct, therefore, defendants would have sensible reasons to invoke § 1404(a) or the *forum non conveniens* doctrine in addition to Rule 12(b)(6).[97]

Hence, Rule 12(b)(6) remains a viable theory for dismissing duplicative litigation. This is particularly true in the First and Sixth Circuits, which have already embraced it with respect to forum selection clauses. Admittedly, Rule 12(b)(6) seems less apt for duplicative litigation than for forum selection clauses: when the parties have previously agreed on a forum for the plaintiffs' claims, one can understand the agreement as depriving the plaintiff of causes of action when brought elsewhere. Thus, in that context, the defense of failure to state a claim upon which relief may be granted under Rule 12(b)(6) is a reasonable approach. In contrast, duplicative litigation involves no such previous agreement. The better theory for Rule 12(b)(6) to apply to duplicative litigation probably lies instead in Rule 13(a), compulsive counterclaims.

3. Rule 12(b)(6)'s Application to Dismissal of Duplicative Litigation Is Consistent With Rule 13(a) for Compulsive Counterclaims

To the extent the second-filed action consists of claims that are compulsory counterclaims in the first-filed action, the second-filed action should constitute either a claim upon which relief cannot be granted or a claim filed in an improper venue. When the

96. *Id.* at 580.
97. *Id.* at 580 n.4.

duplicative case is a second-filed case that brings no additional claims unrelated to the first action, the claims in the second-filed case are compulsory counterclaims in the first-filed case pursuant to Rule 13(a).[98] The existence of a separate case is contrary to the purposes of Rule 13.[99]

Yet courts generally understand that, before Rule 13(a) can be enforced, there must be either a judgment in the first case (for claim preclusion) or an assertion of the first-filed rule. The Second Circuit states:

> Nothing in Rule 13 prevents the filing of a duplicative action instead of a compulsory counterclaim . . . . The filing of the second action, however, contravenes the purpose of Rule 13: "Ideally, once a court becomes aware that an action on its docket involves a claim that should be a compulsory counterclaim in another pending federal suit, it will stay its own proceeding."[100]

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98. Rule 13(a) provides: "A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction . . . ." FED. R. CIV. P. 13(a). The compulsory counterclaim rationale for a Rule 12(b)(6) motion would not apply when the duplicative case is the first-filed, because Rule 13(a) excepts claims that were "the subject of another pending action" when the action was commenced. *Id.*; 3 MOORE'S FEDERAL PRACTICE, *supra* note 31, § 13.16[A]; *see, e.g.*, Boston & Maine Corp. v. United Transp. Union, 110 F.R.D. 322, 329 (D. Mass. 1986) (denying motion to dismiss second-filed case based on Rule 13, because counterclaims were already in the first-filed case).

99. *Cf.* S. Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962) (explaining that purpose of Rule 13(a) is to avoid multiplicity of litigation).

100. Adam v. Jacobs, 950 F.2d 89, 93 (2d Cir. 1991) (quoting CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1418, at 142–43 (2d ed. 1990 & Supp. 1991)) (reviewing decision of second court on motion to stay); *see also* Asset Allocation & Mgmt. Co. v. W. Emp'rs Ins. Co., 892 F.2d 566, 571–72 (7th Cir. 1989) (explaining that inherent powers, not Rule 13(a), were the source of authority for enjoining second-filed action); Int'l Controls & Measurements Corp. v. Honeywell Int'l, Inc., No. 5:12–CV–1766 (LEK/ATB), 2013 WL 4805801, at *5 (N.D.N.Y. Sept. 9, 2013) (stating that "should the Court determine that Plaintiffs' claims are compulsory counterclaims, the Court, in the prudential interests of judicial administration" will analyze the

An exception is found in *Handy v. Shaw*, in which the district court used Rule 12(b)(6) to dismiss a duplicative case that brought compulsory counterclaims.[101] The appellate court found "[t]he district court's rationale would more correctly have been based on the parallel compulsory counterclaim rule applicable in Superior Court, D.C. Super. Ct. Civ. R. 13(a), inasmuch as the litigation began there."[102] However, the court found that the issue was one of abstention in favor of the state court, rather than an issue regarding compulsory counterclaims under Rule 13(a).

In sum, courts have construed Rules 12(b)(1) and 12(b)(6) broadly enough in related contexts for these rules to also encompass motions to dismiss duplicative litigation. Amending Rule 12(b) to add "duplicative litigation" (or the like) as an eighth enumerated basis (that would not be subject to Rule 12(d)'s evidentiary limitations) would add even greater clarity for the parties and courts.

IV. REGARDLESS OF WHETHER RULE 12(B) OR INHERENT POWERS APPLY, DOES IT MATTER WHETHER THE MOTION IS MADE IN THE FIRST- OR SECOND-FILED COURT?

When the defendant in the second-filed action brings its motion to dismiss, transfer, or stay that action as duplicative of its first-filed action, does the doctrine require the *second*-filed court to defer to the first-filed court for resolution of which case should proceed? The cases suggest a good deal of variation among the circuits, depending in part on whether the second-filed court wishes to retain the case, i.e., believes it should deny the motion altogether. There are many reported cases of the second-filed court retaining its case without awaiting a decision from the first-filed court.[103]

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case under the first-to-file rule, instead of barring the counterclaims under Rule 13(a)); *cf.* Computer Assocs. Int'l, Inc. v. Altai, Inc., 893 F.2d 26, 28–29 (2d Cir. 1990) (explaining that under first-filed rule, the first-filed court can enjoin the second case from proceeding if it consists of compulsory counterclaims).

101. Handy v. Shaw, Bransford, Veilleux & Roth, 325 F.3d 346, 350 n.3 (D.C. Cir. 2003).

102. *Id.*

103. *See, e.g.*, Reed Concrete Constr., Inc. v. Millie, LLC, C.A. No. 8:12–3117–HMH, 2013 WL 80487, at *3 (D.S.C. Jan. 7, 2013) (denying motion to

However, when the second-filed court is not convinced that it should retain the second-filed action, the cases show variation in whether the second-filed court can dismiss the second-filed action. The second-filed court can clearly stay or transfer the case for resolution of the issue by the first-filed court, but circuits differ on the circumstances that permit the second-filed court to dismiss its case before the first-filed court has ruled. Some courts have held, based on comity principles, that the second-filed court should stay or transfer the case to the first-filed court for resolution, rather than dismissing it because, generally, the court where the case is first-filed determines which case should proceed.[104] Other courts

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dismiss based on first-filed rule doctrine); Sorenson v. Big Lots Stores, Inc., 638 F. Supp. 2d 1219, 1220–21 (S.D. Cal. 2009) (retaining case); Schumacher Elec. Corp. v. Vector Prods., Inc., 286 F. Supp. 2d 953, 954–55 (N.D. Ill. 2003) (retaining case and denying motion to dismiss or transfer); *MidAmerican,* 33 F. Supp. 2d at 793 (retaining case).

104. Orthmann v. Apple River Campground, Inc., 765 F.2d 119 (8th Cir. 1985); *see also* Collegiate Licensing Co. v. Am. Cas. Co. of Reading, Pa., 713 F.3d 71, 78 (11th Cir. 2013) ("The first-filed rule not only determines which court may decide the merits of substantially similar cases, but also generally establishes which court may decide whether the second filed suit must be dismissed, stayed, or transferred and consolidated."); Cadle Co. v. Whataburger of Alice, Inc., 174 F.3d 599, 606 (5th Cir. 1999) (explaining that "[o]nce the likelihood of a substantial overlap between the two suits ha[s] been demonstrated, it [is] no longer up to the [second-filed court] to resolve the question of whether both should be allowed to proceed"; second-filed court should then transfer instead of dismissing); Selph v. Nelson, Reabe and Snyder, Inc., 966 F.2d 411, 413–14 (8th Cir. 1992) (holding that second-filed court should have stayed the action instead of dismissing); Cessna Aircraft Co. v. Brown, 348 F.2d 689, 692 (10th Cir. 1965) (explaining that second-filed court should stay the case while it is pending in the first court, not transfer, when personal jurisdiction was disputed in the first-filed case); Cherokee Nation v. Nash, No. 11–CV–648–TCK–TLW, 2013 WL 4537137, at *4 n. 3 (N.D. Okla. Aug. 19, 2013) ("The Tenth Circuit has stated that the first court to 'obtain jurisdiction' has priority.") (citing *Cessna Aircraft Co.*, 348 F.2d at 692); Advanced Pain Remedies, Inc. v. Advanced Targeting Sys., Inc., No. 1:12CV1375, 2013 WL 4039395, at *3 (M.D.N.C. Aug. 7, 2013) (staying case while court in first-filed action determined issue of personal jurisdiction); Jones v. Xerox Commercial Solutions, LLC, No. H–13–0650, 2013 WL 3245957, at *2 (S.D. Tex. June 26, 2013) (quoting *Cadle*); EMC Corp. v. Parallel Iron LLC, 914 F. Supp. 2d 125, 129–30 (D. Mass. 2012) (staying case pending venue determination by first-filed court); Berry Floor USA, Inc. v. Faus Grp., Inc., No. 08-CV-0044, 2008 WL 4610313, at *1 (E.D. Wis. Oct. 15, 2008) (reflecting that the court in second-filed action had stayed the case so the first-filed court could determine which case should proceed); Walker Grp., Inc. v. First Layer

recognize that, while it is preferred to let the first-filed court determine the issue, if the second-filed court hears the issue first and there are no special concerns of personal jurisdiction in the first court, the second court can dismiss the second action.[105]

Unless there are issues of personal jurisdiction in the first court, judicial economy is best served by allowing either the first- or second-filed court to determine whether to dismiss the case before it. In addition, the "law of the case" doctrine applies regardless of whether it is the first- or second-filed court that rules on a motion to dismiss; hence the other court, if subsequently asked to consider a motion to dismiss, transfer, stay, or enjoin, will not contradict the decision of the coordinate court.[106] Accordingly, it is better to allow

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Commc'ns, Inc., 333 F. Supp. 2d 456, 460–61 (M.D.N.C. 2004) ("[O]nce the determination has been made that another first-filed case should proceed at the expense of a later-filed case, it then falls to the court adjudicating the first filed case to determine the fate of the later case."); Nutrition & Fitness, Inc. v. Blue Stuff, Inc., 264 F. Supp. 2d 357, 359 (W.D.N.C. 2003) ("[T]he court in which the litigation was first filed must decide the question of where the case should be heard."); Boston & Maine Corp. v. United Transp. Union, 110 F.R.D. 322, 329 (D. Mass. 1986) (staying case pending venue determination by first-filed court).

105. *See, e.g.*, *Adam*, 950 F.2d 93 (recognizing that generally the first-filed court makes the determination but noting it is not mandatory before holding that the second-filed court did not abuse discretion in dismissing); First City Nat'l Bank & Trust Co. v. Simmons, 878 F.2d 76, 79–80 (2d Cir. 1989) (affirming dismissal of second action under first-filed rule); Upchurch v. Piper Aircraft Corp., 736 F.2d 439, 440 (8th Cir. 1984) (affirming second court's dismissal of action); Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982) (holding that second-filed court correctly dismissed case); Sanofi-Aventis Deutschland GmbH v. Novo Nordisk, Inc., 614 F. Supp. 2d 772, 775 (E.D. Tex. 2009) (noting that *Micron* "reject[ed] any categorical rule that the first-filed court is always the appropriate court to determine which case should proceed," but because of questions regarding personal jurisdiction in the first-filed suit, stayed the second-filed case instead of dismissing or transferring); Black Diamond Equip., Ltd. v. Genuine Guide Gear, No. 2:03CV01041, 2004 WL 741428, at *1–3, 71 U.S.P.Q.2d 1532 (D. Utah Mar. 12, 2004) (dismissing second-filed complaint in favor of first-filed case); Barrington Grp., Ltd. v. Genesys Software Sys., Inc., 239 F. Supp. 2d 870, 874 (E.D. Wis. 2003) (citing *Asset Allocation,* 892 F.2d at 573) (noting that the second-filed court can dismiss the case, but observing that where there are likely issues of personal jurisdiction or statute of limitations, the court should instead stay or transfer).

106. *See, e.g.*, Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) ("Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts.").

the second-filed court to dismiss the second-filed case absent special circumstances.

V. CONCLUSION

The first-filed doctrine is applied flexibly to take account of equitable circumstances, efficiency, and the interests of justice. Although courts frequently do not state the source of authority for dismissing based on a duplicative case, it is clear that federal courts consider such motions to dismiss (whether under Rule 12(b) or inherent powers) as tolling the time in which to file an answer. This approach is consistent with the purpose of Rule 12 to provide for efficient, speedy resolutions in the administration of justice, and with the principles of comity between federal courts.

"An Allemande Worthy of the 16th Century:" A Call to Abolish the *McDonnell Douglas* Framework and Adopt Judge Wood's Proposed Flexible Standard

Amanda Berg*

* J.D., 2014, The University of Texas School of Law; B.A., 2008, The University of Texas. I would like to thank the editors of Volume 33 for their support and dedication to the journal. I would also like to thank Professor Cary Franklin for her encouragement and guidance on this Note and throughout law school.

I. INTRODUCTION

Forty years ago, in *McDonnell Douglas v. Green*, the Supreme Court set forth the well-known tripartite burden-shifting framework that plaintiffs use to prove employment discrimination under Title VII of the Civil Rights Act of 1964 when only circumstantial evidence of discrimination is available. Created to ensure that a plaintiff had his day in court, despite the lack of direct evidence of discrimination by the employer, the framework has morphed into a set of rigid requirements that act as artificial barriers to plaintiffs, making them susceptible to dismissal on summary judgment and limiting their chance at a full trial.

Although the *McDonnell Douglas* framework has received much criticism from courts, scholars, and practitioners over the decades that it has been in force, a recent criticism from Judge Wood of the Seventh Circuit Court of Appeals has ignited new and vigorous debate over the utility of the *McDonnell Douglas* framework. In *Coleman v. Donahoe*, a case discussing inconsistencies in interpreting the "similarly situated" prong of the plaintiff's prima facie case, discussed in Part II.B, Judge Wood enumerated several criticisms of the *McDonnell Douglas* framework and called for its abolition, stating that the current framework is "an allemande worthy of the 16th century."[1] Judge Wood suggested replacing the rigid framework with a more flexible standard:

> "[i]n order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious

1. Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012).

> reason. Put differently, it seems to me that the time has come to collapse all these tests into one."[2]

This Note will explore (1) the varying and often rigid interpretations of the plaintiff's prima facie case and pretext analysis under the *McDonnell Douglas* framework; (2) the inconsistency in the courts' approach to applying the hierarchy of steps in the framework; (3) the criticisms of the *McDonnell Douglas* framework by courts, scholars, and practitioners; (4) arguments in favor of retaining the *McDonnell Douglas* framework; (5) the potential benefits of adopting Judge Wood's proposed test; and (6) whether or not adopting Judge Wood's proposed test would have any effect on the state of federal employment discrimination claims. Given the barriers to plaintiffs inherent in the *McDonnell Douglas* framework, pervasive criticism of the framework, and the potential benefits of adopting a flexible standard, the *McDonnell Douglas* framework should be abolished and replaced with Judge Wood's proposed test.

Before exploring the various problems of the current framework enumerated above, it is necessary to understand the background of Title VII, as well as the creation and evolution of the *McDonnell Douglas* burden-shifting framework.

II. BACKGROUND INFORMATION: TITLE VII AND THE CREATION AND EVOLUTION OF THE *MCDONNELL DOUGLAS* FRAMEWORK

Title VII was enacted to eliminate discrimination in employment based on race, color, sex, religion, and national origin.[3] The Supreme Court has recognized that the purpose of Title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[4] Congress purposefully used expansive language in Title VII to define the classes of persons and employment-related decisions covered by the Act in order to affect

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2. *Id.*

3. H.R. REP. NO. 88-914, at 8 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

4. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

the Act's broad remedial purposes.[5] Under Title VII, it is unlawful for an employer:

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[6]

Under Title VII, a plaintiff may bring an employment discrimination claim on the basis of either disparate treatment or disparate impact.[7] Disparate treatment by an employer occurs when an employer treats employees differently because of their race, color, religion, sex, or national origin.[8] A claim of discrimination based on disparate impact is established when a plaintiff establishes that facially neutral policies or practices disproportionately affect the members of the plaintiff's statutorily protected group.[9] The *McDonnell Douglas* framework applies to a plaintiff's claim of

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5. *See* Lutcher v. Musicians Local 47, 633 F.2d 880, 883–85 (1980) (characterizing Title VII as a "broad, remedial statute"); *see also* JOEL WM. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION 17, 37 (6th ed. 2007).

6. 2 U.S.C. § 2000e-2(a) (2012).

7. *See id.* § 2000e-2(k) (expounding on the burden of proof required to establish disparate impact); *id.* § 2000e-2(n)(explaining that an unlawful employment practice is established by demonstrating that race, color, religion, sex, or national origin was a motivating factor behind the employment practice).

8. FRIEDMAN, *supra* note 5, at 60.

9. *Griggs*, 401 U.S. at 430.

disparate treatment and is used when only circumstantial evidence is available.[10]

A. *The Creation of the* McDonnell Douglas *Burden-Shifting Framework*

Before the *McDonnell Douglas* burden-shifting framework was created by the Supreme Court in 1973, lower courts applied a more flexible standard that required plaintiffs to prove that an employer, by a preponderance of the evidence, had discriminated against them based on their membership in a statutorily protected group.[11] However, since employment discrimination plaintiffs "rarely . . . have access to direct evidence of intentional discrimination,"[12] plaintiffs needed an effective method of proving intentional discrimination with only circumstantial evidence. The Court recognized and addressed this problem in *McDonnell Douglas v. Green*, later noting that the tripartite burden-shifting framework was designed to assure that the plaintiff has her day in court, despite the unavailability of direct evidence.[13]

1. The Factual Background of *McDonnell Douglas v. Green* and Original Articulation of the Framework

Percy Green, a black resident of St. Louis, was employed by McDonnell Douglas, an aerospace and aircraft manufacturer, as a mechanic and laboratory technician from 1956 until August 1964 when he was laid off as part of a general reduction in the work

10. FRIEDMAN, *supra* note 5, at 68.

11. *See* Reid v. Memphis Publ'g Co., 468 F.2d 346, 348 (6th Cir. 1972) ("[T]he burden of proof is on the plaintiff to prove that he was not hired because of discrimination based upon race or religion. Discrimination must be proved by the plaintiff."); King v. Laborers Int'l Union, Union Local No. 818, 443 F.2d 273, 276 (6th Cir. 1971) ("The burden is upon the plaintiff. Before plaintiff can recover in this lawsuit he must show that this Union intentionally followed a practice or pattern of discrimination against him by reason of his race. Where the proof is upon a particular person, he must carry that proof by what is known as a preponderance of the evidence.").

12. Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987).

13. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

force.[14] Green, an activist in the civil rights movement, protested that his termination was racially motivated.[15] Green and other members of the Congress on Racial Equality protested by blocking the entrance to McDonnell Douglas with their cars and were subsequently arrested for obstructing traffic.[16] Several weeks later, McDonnell Douglas put out advertisements seeking qualified mechanics, Green's former position at McDonnell Douglas, to which Green responded by applying for reemployment with the company.[17] McDonnell Douglas rejected Green's application, citing his participation in the protest as the reason for refusing to re-hire him.[18]

The Supreme Court granted certiorari in order to clarify the standards governing consideration of a claim of employment discrimination.[19] The Court articulated the critical issue to be determined as concerning "the order and allocation of proof in a private, non-class action challenging employment discrimination,"[20] due to the "lack of harmony" in the lower courts' attempts to state the rules as to the burden of proof.[21] The Court then set forth the now well-recognized tripartite scheme, although its articulation was tailored to the factual situation of Green's claim—specifically, a claim of racial discrimination with "failure to hire" as the adverse employment action.[22] This particular articulation of the framework required that, first, the plaintiff claiming employment discrimination under Title VII bears the initial burden of establishing a prima facie case of racial discrimination. This requires the plaintiff to establish that 1) the plaintiff is a member of a racial minority, 2) the plaintiff applied and was qualified for a job for which the employer was

14. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973).
15. *Id.*
16. *Id.* at 794–95.
17. *Id.* at 796.
18. *Id.*
19. *Id.* at 798.
20. *Id.* at 800.
21. *Id.* at 801.
22. *See id.* at 802 (phrasing the elements of a prima facie case of racial discrimination with language specific to applying for a job and facing subsequent rejection).

seeking applicants, 3) despite his qualifications, the plaintiff was rejected, and 4) after being rejected, the position remained open and the employer continued to seek applications from persons having the plaintiff's qualifications.[23] The Court agreed with the Court of Appeals that Green had established a prima facie case of racial discrimination.[24]

If a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to articulate "some legitimate, nondiscriminatory reason for the employee's rejection."[25] The Court accepted McDonnell Douglas' refusal to rehire Green, on account of his participation in the protests against them, as sufficient to discharge their burden of proof at this stage and to meet Green's prima facie case of discrimination.[26] However, the Court recognized that ending the inquiry there could allow the employer to use the plaintiff's conduct as a pretext for discrimination prohibited by Title VII, and thus required that the plaintiff be given an opportunity to show that the employer's stated reason for rejecting the plaintiff was merely pretext—a false explanation put forward to cover up unlawful discrimination.[27] The Court then gave several examples of evidence that would show that the employer's stated reason was pretextual, including hiring white employees who had been involved in activities of comparable seriousness to the protests that the plaintiff had engaged in, the employer's treatment of the employee during his employment, and the employer's "general policy and practice with respect to minority employment," for which the employee could introduce statistics as evidence to show a general pattern of racial discrimination.[28]

B. The Evolution of the Framework

The *McDonnell Douglas* framework has evolved over time in response to the lower courts' confusion over the legal effect of the

23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 802–03.
27. *Id.* at 804.
28. *Id.* at 804–05.

plaintiff's establishment that the employer's proffered reason for its adverse action was pretextual, as well as in response to the need to adapt the language of the fourth prong of the prima facie case to reflect different adverse employment actions and factual situations. Because of this evolution, the formulation of the current framework looks differs from its original iteration in the *McDonnell Douglas* case.

1. Adapting the Fourth Prong to Different Adverse Employment Actions

The Court's iteration of the framework in the *McDonnell Douglas* case was necessarily restricted, as the challenged employment practice was the failure to hire Green based on his race.[29] The fourth prong of the prima facie case in *McDonnell Douglas* required the plaintiff to show that "after [the employee's] rejection, the position remained open and the employer continued to seek applicants from persons having the [plaintiff's] qualifications," reflecting the adverse employment action as the employer's failure to hire.[30] Recognizing that "the facts necessarily will vary in Title VII cases," the Court stated that the specification of the prima facie case could be altered to reflect the factual situation of the case at hand.[31] Although courts have created a variety of iterations to reflect the various adverse employment actions giving rise to a claim of discrimination,[32] the critical prima facie inquiry and underlying theme of the fourth prong is the presence of circumstances giving rise to an inference of unlawful discrimination.[33] One of the most

29. *Id.* at 801.

30. *Id.* at 802.

31. *Id.* at 802 n.13.

32. *See, e.g.*, Petts v. Rockledge Furniture, 534 F.3d 715, 725 (7th Cir. 2008) (stating that in a reduction in force claim, the fourth prong is whether the plaintiff's job duties were absorbed by other employees outside the protected class);Vaughn v. Watkins Motor Lines, Inc., 291 F.3d 900, 906–07 (6th Cir. 2002) (explaining that in a discharge claim, the fourth prong is whether the plaintiff was replaced by another person outside of the plaintiff's protected class).

33. Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1227 n.6 (10th Cir. 2000).

common iterations of the fourth prong, and the iteration that will be examined in this Note, is the requirement that the plaintiff show that another similarly situated individual who was not in the plaintiff's protected class was treated more favorably.[34]

2. Changing the Pretext Requirement from Pretext-Only to Pretext-Plus

In addition to the variations in the fourth prong of the prima facie case, there has been an evolution of the requirement that the plaintiff, after the employer articulates a "legitimate, nondiscriminatory" reason for its action, must show that the stated reason is "mere pretext." In *Texas Department of Community Affairs v. Burdine*, the Supreme Court, seeking to clarify the pretext stage of the framework, declared that the plaintiff could establish that the employer's explanation was a pretext for discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[35] After the decision in *Burdine*, lower courts were divided over the legal effect of the "indirect method" of establishing that the employer's proffered reason was pretextual. Some courts believed that a plaintiff who established that the employer's reason was false was entitled to judgment as a matter of law in its favor (the "pretext only" camp) while others construed the language to mean that the plaintiff needed to offer additional evidence that the employer's action was

34. There is some debate among the courts over whether the plaintiff must prove he was replaced with another person outside of his protected class, or whether the prima facie case can still be established even though the replacement was in the same protected class as the plaintiff. *Compare* Brown v. McLean, 159 F.3d 898, 905 (4th Cir. 1998) ("In order to make out a prima facie case of discriminatory termination, a plaintiff must ordinarily show that the position ultimately was filled by someone not a member of the protected class."), *with Kendrick*, 220 F.3d at 1229 ("[A] plaintiff alleging discriminatory discharge ordinarily need not show that a person outside of the protected class was hired to fill his former position in order to make out a prima facie case of discrimination.").

35. 450 U.S. 248, 256 (1981).

motivated by an unlawful reason to avoid judgment as a matter of law (the "pretext plus" camp).[36]

In *St. Mary's Honor Center v. Hicks*, the Supreme Court affirmed the "pretext-plus" stance, holding that employees are *not* entitled to a finding of intentional discrimination as a matter of law when the employee proves that the employer's proffered reason was "unworthy of credence."[37] Instead, the employee must show not only that the employer's reason was false, but also that discrimination was the real reason for termination.[38] The Court justified its rejection of the "pretext only" theory by noting that courts may not substitute the required finding that the employer lawfully discriminated for the "much different and much lesser finding that the employer's explanation of its action was not believable."[39] However, the plaintiff is not *required* to put on any additional evidence to avoid summary judgment, as the factfinder's disbelief of the reasons put forward by the defendant may, together with the elements of the prima facie case, suffice to show intentional discrimination.[40] The effect of *Reeves v. Sanderson Plumbing*, another Supreme Court case addressing the pretext analysis, will be discussed in Part III.C.[41]

C. *The Current Formulation of the Framework*

Under the current law, a plaintiff claiming employment discrimination under Title VII bears the initial burden of establishing a prima facie case of discrimination, which requires the plaintiff to establish that 1) she is a member of a protected class, 2) her job performance met the employer's legitimate expectations, 3) she suffered an adverse employment action, and 4) another similarly

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36. FRIEDMAN, *supra* note 5, at 73; Matthew R. Scott & Russell D. Chapman, Reeves v. Sanderson Plumbing Products*: The Emperor Has No Clothes—Pretext Plus Is Alive and Kicking*, 37 ST. MARY'S L.J. 179, 181–83 (2005).

37. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 514–15 (1993).

38. *Id.* at 515.

39. *Id.* at 514–15.

40. *Id.* at 511, 515.

41. *See infra* Part III.C.

situated individual who was not in the plaintiff's protected class was treated more favorably. If the plaintiff makes out her prima facie case, the burden then shifts to the defendant, who must articulate a "legitimate, nondiscriminatory" reason for its action. If the defendant does articulate a "legitimate, nondiscriminatory" reason for its action, the burden shifts back to the plaintiff, who must show that the stated reason was "mere pretext"—that the reason proffered by the employer was both false and the real reason for the employer's action was discrimination.

III. INCONSISTENCY IN THE INTERPRETATION OF THE ELEMENTS OF THE PLAINTIFF'S PRIMA FACIE CASE AND THE PRETEXT ANALYSIS

Despite the seemingly straightforward language of the *McDonnell Douglas* framework, there is wide variation in the courts' interpretations of both the elements of the prima facie case and of the pretext analysis. This uncertainty and confusion can be harmful to plaintiffs, as courts have often interpreted the language of the framework rigidly, resulting in the creation of artificial barriers to plaintiffs at the summary judgment stage.

A. Circuit Court Inconsistency in Interpreting the "Qualifications" Requirement

Another element of the plaintiff's prima facie case requires showing that the plaintiff's job performance met the employer's legitimate expectations.[42] However, courts have found the meaning of the "employer's legitimate expectations" to be ambiguous as to whether plaintiffs must establish that they were "performing satisfactorily"[43] or that they "merely satisfied the job's basic eligibility requirements to meet the 'qualifications' hurdle."[44] The Eighth Circuit[45] and the Second Circuit[46] have required that a

42. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 310 (1996).

43. FRIEDMAN, *supra* note 5, at 65.

44. Id.

45. *See* Arnold v. Nursing and Rehab. Ctr. at Good Shepherd, LLC, 471 F.3d 843, 846 (8th Cir. 2006) (holding that plaintiff merely had to show that she was

plaintiff only show that she "possesses the basic skills necessary for performance of [the] job"[47] and not that she was performing her job satisfactorily.[48]

However, the Seventh Circuit's interpretation of the "qualifications" requirement creates a much higher hurdle for the plaintiff in establishing a prima facie case. In *Coco v. Elmwood Care*, the plaintiff was a maintenance supervisor in a nursing home, who was required to "document all safety and other maintenance problems in weekly reports, take care of getting them fixed, and conduct fire and other safety drills."[49] The defendant-employer claimed that the plaintiff had been deficient in performing these tasks, and the plaintiff could not produce any evidence to prove otherwise.[50] The district court granted summary judgment for the defendant-employer and the Seventh Circuit affirmed, repeatedly stating that in order for a plaintiff to prove his prima facie case, he must prove that he was meeting his employer's bona fide expectations.[51]

Coco provides strong evidence that the rigid interpretation of the "qualifications" requirement creates an artificial barrier to the plaintiff. The court recognized that the employer's stated reasons for firing the plaintiff were not entirely credible, based on evidence that

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qualified, not that she was performing her job satisfactorily), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).

46. *See* Slattery v. Swiss Reinsuance Am. Corp., 248 F.3d 87, 92 (2d Cir. 2001) (clarifying that "basic skills necessary for performance" is the determinative standard).

47. Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001).

48. *Arnold*, 471 F.3d at 846.

49. 128 F.3d 1177, 1180 (7th Cir. 1997).

50. *Id.*

51. *Id.* at 1179–80; *see also* Graber v. Mad Brewer Inc., 773 F. Supp. 2d 765, 782–83 (N.D. Ind. 2011) (holding that plaintiff could not establish her prima facie case as required in the *McDonnell Douglas* framework because she could not prove that she was meeting Mad Brewer's legitimate expectations of keeping "proper inventory records, properly submit[ting] vendor invoices, timely submit[ting] payroll, correctly reconcil[ing] cash receipts and cash on hand, or record[ing] the necessary checkbook information" that were expected in her job as a general manager).

the plaintiff's "replacement was hired a day *before* [the plaintiff] was fired; and in firing [the plaintiff] the defendant failed to follow its internal procedures, which called for progressive discipline."[52] However, even in the face of this evidence, the court felt itself bound by the rigid requirements of the *McDonnell Douglas* framework, and admitted that "[s]uch evidence would be relevant if [the plaintiff] could show that he was performing up to his employer's legitimate expectations; but as he cannot, the question of the reason for his discharge does not arise."[53] It is clear that the court's strict adherence to the hierarchy of the steps of the *McDonnell Douglas* framework—specifically, requiring the plaintiff to prove his prima facie case before considering credible, relevant evidence of intentional discrimination—precluded the plaintiff from avoiding summary judgment for the defendant. It is illogical that the court is unable to consider evidence that goes to the ultimate question of an employment discrimination claim at the summary judgment stage—whether a rational jury could conclude that the defendant-employer discriminated against the plaintiff on the basis of her membership in a protected class—simply because the court feels bound to adhere to the rigid process of the *McDonnell Douglas* framework.

B. Circuit Court Inconsistency in Interpreting the "Similarly Situated" Requirement

A fundamental tool used in judicial analysis of employment discrimination claims is the use of a "comparator"—those persons who are "like the discrimination plaintiff but for the protected characteristic—to determine whether impermissible discrimination has occurred."[54] Comparators provide a useful lens through which courts can analyze discrimination because they allow the court to draw inferences: if there are two employees, who are "similar but for X characteristic, and the employer treats Employee X worse than Employee Not-X, we are generally comfortable inferring that X is

52. *Coco*, 128 F.3d at 1180.

53. *Id.*

54. Suzanne Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 744 (2011).

the basis, or cause, for the different treatment."[55] However, a judicial tool useful for drawing inferences has, in many courts, been elevated to a threshold requirement of the plaintiff's claim and is often seen as part of the definition of discrimination itself.[56] In her article, Professor Suzanne Goldberg identifies and discusses the overarching problems that stem from the use of comparators in discrimination law and their elevated status in the courts, specifically, the comparator demand as a barrier to the plaintiff's discrimination claim and the conceptual limits of the use of comparators as both over-inclusive and under-inclusive.[57] Additionally, the wide disparity in the courts' interpretation of the degree of similarity between the employee and the comparator necessary to be considered "similarly situated" is itself problematic for plaintiffs and the courts.

1. Barriers to Plaintiffs

Professor Goldberg argues that the comparator requirement acts as a barrier to plaintiffs both practically and conceptually: comparators are often hard to find, if not nonexistent, but even when a comparator does exist, it is often simply not relevant to the question of whether discrimination has occurred.[58]

The lack of available comparators can be attributed in part to lower courts' often stringent definitions of a suitable "similarly situated" comparator. Some courts require that the comparator be "nearly identical" in order to find the plaintiff and the comparator similarly situated.[59] Requiring a "nearly identical" comparator at

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55. *Id.*

56. *Id.* at 750 (citing Olmstead v. L.C. *ex rel* Zimring, 527 U.S. 581, 617 (1999) (Thomas, J., dissenting) ("Under Title VII, a finding of discrimination requires a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute.")).

57. *Id.* at 751, 722.

58. *Id.* at 751.

59. *See* Okoye v. Univ. of Tex. Hous. Health Sci. Ctr., 245 F.3d 507, 514 (5th Cir. 2001) ("[T]o establish disparate treatment a plaintiff must show that the employer gave preferential treatment to . . . [another] employee under 'nearly identical' circumstances; that is, that the misconduct for which [the plaintiff] was

any stage imposes an enormous burden on the plaintiff, but the burden is even greater when courts consider comparator evidence to be a threshold requirement of the plaintiff's prima facie case. In *Holifield v. Reno*, one court found that because the plaintiff failed to produce "sufficient affirmative evidence to establish that the non-minority employees with whom he compares his treatment were similarly situated in all aspects," he had not established a prima facie case.[60] Requiring a plaintiff to produce a "nearly identical" comparator for the prima facie case imposes an unnecessary and heavy burden on the plaintiff that can prevent the plaintiff from proceeding to the second and third stages of the *McDonnell Douglas* framework and restricts the court from considering the ultimate question of discrimination. This is particularly troubling in light of the Court's statement in *Burdine* that the plaintiff's burden of establishing a prima facie case is "not onerous."[61]

In addition to the stringent definition of "similarly situated" comparators that the courts have created, comparators can also be hard to find or nonexistent due the courts' skepticism of a small sample size of employees with the plaintiff's protected trait,[62] homogenous workplaces,[63] and cases where an employee is a "class of one"—where the employee holds a "unique position at a small office or [is] the only employee[] who [has] a specific set of job

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discharged was nearly identical to that engaged in by . . . [other] employee[s].") (internal quotation marks omitted) (citing Little v. Republic Ref. Co., Ltd., 924 F.2d 93, 97 (5th Cir. 1991) and Smith v. Wal-Mart Stores, 891 F.2d 1177, 1180 (5th Cir. 1990)); Perez v. Tex. Dep't of Criminal Justice, 395 F.3d 206, 213 (5th Cir. 2004) (discussing the court's previous cases in which the "nearly identical" standard was employed); Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992) ("[T]he 'comparables' [must be] similarly-situated *in all respects* . . . . [They] must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it."); Dickinson v. Springhill Hosps., Inc., 187 F. App'x 937, 939 (11th Cir. 2006) (requiring that the comparator be "nearly identical" to the plaintiff to establish the "similarly situated" prong).

60. 115 F.3d 1555, 1563 (11th Cir. 1997).

61. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–54 (1981)

62. Goldberg, *supra* note 54, at 756–57.

63. *Id.* at 759–61.

characteristics within a larger office."[64] While each of these additional reasons for the lack of comparators pose problems for plaintiffs, the "class of one" cases are especially troublesome when courts require evidence of comparators at the prima facie stage because this requirement necessarily precludes the plaintiff from establishing a prima facie case even if there is other evidence of discrimination.

2. Conceptual Limitations

Professor Goldberg also argues that the usefulness of comparators as an analytical tool is limited because comparator evidence is both over-inclusive and under-inclusive.[65] Comparator evidence may be over-inclusive because it does not necessarily provide "definitive insight into the employer's motives" nor does it "inevitably compel conclusions regarding whether an employer acted because of an employee's protected trait."[66] The use of comparators requires the court to make several assumptions and inferences in order to draw the conclusion that discriminatory intent can be gleaned from the employer's different treatment of the comparator. The underlying assumption that would allow the court to draw this conclusion is that any deviation from equal treatment between the employee and the comparator is more likely explained by discriminatory intent, rather than "arbitrariness or idiosyncrasy."[67] Accordingly, if this assumption does not hold true in every case (and surely it cannot), different treatment of the employee and the comparator will not necessarily be determinative of discrimination, even though many courts deem the different treatment of comparators as part of the very definition of discrimination.[68]

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64. Tricia M. Beckles, Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage If They Have No "Similarly Situated" Comparators?, 10 U. PA. J. BUS. & EMP. L. 459, 459 (2008).

65. Goldberg, *supra* note 54, at 772.

66. *Id.* at 776.

67. *Id.* at 773–74.

68. *Id.* at 750.

Additionally, comparator evidence may be under-inclusive, as the lack of comparators does not necessarily indicate an absence of discrimination.[69] No stretch of logic is required to see that discrimination on account of a protected characteristic may occur, despite the lack of evidence that the employer treated a similarly situated employee differently than the plaintiff. Using a hypothetical "class of one" discrimination claim, the court in *Abdu-Brisson v. Delta Airlines, Inc.* recognized that the lack of a comparator does not dictate a conclusion of no discrimination by the employer.[70] However, because many courts treat evidence of comparators as necessary to a finding of discrimination—as part of the plaintiff's prima facie case—a lack of comparator evidence may unnecessarily result in summary judgment for the employer if the court does not consciously consider that discrimination may still occur despite the lack of a comparator.

3. Variations in Substantive Definitions of the Comparator Requirements

Not all courts adhere to a stringent definition of what constitutes a "similarly situated" comparator. Among federal courts, there is wide variation in the degree of similarity between the employee and a comparator that is required to find them similarly situated.

The Sixth and the Tenth Circuits employ similar articulations of the "similarly situated" prong, requiring only that the plaintiff show that she and her comparator(s) were "similar in all relevant respects,"[71] while the First Circuit employs a "prudent person

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69. *Id.* at 777.

70. 239 F.3d 456, 467 (2d Cir. 2001) ("A simple example of such a case is where an employer has only one employee. If that employee were fired for a discriminatory reason, and no one was hired to replace him, he could never demonstrate disparate treatment because there is no point of comparison. Bearing in mind the flexible spirit of a plaintiff's *prima facie* requirement . . . it stands to reason that, in such a case, the plaintiff should be able to create an inference of discrimination by some other means." (internal citation omitted)).

71. Bobo v. United Parcel Serv., Inc., 665 F.3d 741, 751 (6th Cir. 2012); *see also* Magruder v. Runyon, 844 F. Supp. 696, 702 (10th Cir. 1995) ("[T]o be deemed 'similarly-situated,' the individuals with whom the plaintiff seeks to

standard."[72] The Seventh Circuit recently explicitly rejected a more stringent standard, noting that "[d]emanding nearly identical comparators can transform this evidentiary 'boost' into an insurmountable hurdle."[73]

Even if we disregard the harm to plaintiffs inherent in the use of comparator evidence and accept the use of comparators as a useful tool, the wide disparity between standards alone can be harmful to both plaintiffs and the courts, as it only engenders confusion and uncertainty in employment discrimination claims.

C. *The Problem with Pretext*

As discussed in Part I.B.2, there has been an evolution in the interpretation of the legal effect of the pretext stage of the *McDonnell Douglas* framework since its inception in 1973. In *St. Mary's v. Hicks* and *Reeves v. Sanderson Plumbing*, the Court sought to clarify the requirements of the pretext stage of the framework.[74] As previously noted, the Court in *Hicks* affirmed the "pretext-plus" stance, holding that employees are *not* entitled to a finding of intentional discrimination as a matter of law when the employee proves that the employer's proffered reason was "unworthy of credence."[75] Instead, the employee must show not only that the employer's reason was false, but also that discrimination was the real reason.[76] However, the factfinder's disbelief of the reasons put forward by the defendant may, together

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compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.").

72. Rathbun v. Autozone, Inc., 361 F.3d 62, 76 (1st Cir. 2004) (explaining that the prudent person standard requires an inquiry into "whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated").

73. Coleman v. Donahoe, 667 F.3d 835, 852 (7th Cir. 2012).

74. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Reeves v. Sanderson Prods., Inc., 530 U.S. 133 (2000).

75. *Hicks*, 509 U.S. at 515.

76. *Id.*

with the elements of the prima facie case, suffice to show intentional discrimination. In the wake of *Hicks*, the lower courts split over the interpretation of *Hicks*. Some courts interpreted *Hicks* to mean that the factfinder could always find intentional discrimination on the basis of the "combined evidence" (the plaintiff's prima facie case and the "disproof of the employer's stated explanation"), while other courts held that the "combined evidence" alone is never sufficient to resist summary judgment.[77] In *Reeves*, the Court affirmed the former view, holding that a plaintiff's "prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[78] However, the Court only added to the confusion by including the caveat that "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."[79]

Unsurprisingly, in light of the confusing language of *Reeves*, lower courts have interpreted *Reeves* inconsistently, but "inconsistency should be expected in view of the majority's statement that discrediting the defendant's reason for taking adverse action 'may' be proof of unlawful pretext, but will not always be sufficient proof of discrimination."[80] A survey of the circuit courts of appeals reveals that, following *Reeves*, the First, Fifth, Eighth, and Eleventh Circuits seem to favor and employ a "pretext plus" requirement, while the Second, Third, Fourth, Seventh, and Ninth Circuits appear to favor and employ a "pretext only" approach.[81] However, even *within* each circuit court, there is inconsistency in the

77. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2306–07 (1995); CATHY J. BEVERIDGE, EMPLOYMENT LITIGATION HANDBOOK 152 (2d ed. 2010).

78. *Reeves*, 530 U.S. at 148 (2000).

79. *Id.*

80. Steven H. Adelman, Penny Nathan Krahan & Michael J. Merrick, *Summary Judgment Standards Following* Reeves v. Sanderson Plumbing Products *and Its Progeny*, ALI-ABA CONTINUING LEGAL EDUCATION, 301, 317 (2005).

81. *Id.* at 304–17.

interpretation of *Reeves*, depending on the panel members, the facts, and the type of case.[82]

D. The Courts Improperly Focus on the Framework Instead of the Question of Discrimination

Although the circuit splits over the interpretation of the steps of the *McDonnell Douglas* framework and the resulting uncertainty present many problems for plaintiffs bringing employment discrimination claims, the overarching problem is that the rigidity of the framework improperly focuses the parties' and the courts' attention on a series of overly-specific inquiries that are at best tenuously related to the question of whether the employer discriminated against the employee in violation of Title VII. This focus places unnecessary and arbitrary barriers that waste much of the court's energy on questions unrelated to the ultimate inquiry of intentional employer discrimination.

IV. THE CIRCUIT COURTS' INCONSISTENCY IN APPLICATION OF THE STEPS

In addition to the inconsistent interpretations of the substantive requirements of the framework, courts also vary in how they proceed through the steps of the burden-shifting framework. As explored below, some courts skip certain steps altogether, others combine multiple steps into one, some consider the same evidence for multiple steps, and others strictly separate the evidence for each step of the framework. This inconsistency in the application of the test demonstrates that courts are in need of a more flexible standard in evaluating employment discrimination claims, and that some are already moving away from the current framework towards one much like Judge Wood's proposed test for evaluating employment discrimination claims.

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82. *Id.* at 317.

A. Combining the Steps

The second and the fourth prongs of the plaintiff's prima facie case, requiring the plaintiff to establish that the plaintiff was meeting the employer's legitimate expectations and that other similarly situated individuals who were not in the protected class were treated more favorably, are so deeply intertwined with the "ultimate question to be decided—whether the plaintiff was discriminated against," that courts often overlap the analysis of these respective prongs with the pretext analysis.[83]

In *Coleman v. Donahoe*, the Seventh Circuit directly addressed the question of whether evidence relating to the fourth prong (the "similarly-situated inquiry") could be both an element of the plaintiff's prima facie case and could also be used to satisfy the plaintiff's burden to show that the employer's proffered reason was pretextual.[84] The court answered affirmatively, stating that the "similarly-situated inquiry and the pretext analysis are not hermetically sealed off from one another" and that the "similarly-situated inquiry dovetails with the pretext question,"[85] noting that several other circuit courts agree.[86]

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83. Adam C. Wit, Coleman v. Donahoe: *Should McDonnell Douglas Framework Be Put to Rest?*, DAILY LAB. REP. (Mar. 12, 2012), http://www.littler.com/files/press/pdf/Wit-Coleman-v-Donahue-March-2012.pdf.

84. Coleman v. Donahoe, 667 F.3d 835, 841 (7th Cir. 2012).

85. *Id.* at 857–58.

86. *Id.* at 858–59 (citing the following cases as examples of other circuits that overlap analysis of the "similarly-situated inquiry" with the pretext analysis: Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1158 (9th Cir. 2010) ("The concept of 'similarly situated' employees may be relevant to both the first and third steps of the *McDonnell Douglas* framework."); Graham v. Long Island R.R., 230 F.3d 34, 43 (2d Cir. 2000) (same); EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1195 n.6 (10th Cir. 2000) ("while evidence that a defendant treated a plaintiff differently than similarly-situated employees is certainly *sufficient* to establish a prima facie case, it is '[e]specially relevant' to show pretext if the defendant proffers a legitimate, nondiscriminatory reason for the adverse employment action"); *see also* Rodgers v. U.S. Bank, N.A., 417 F.3d 845, 852–53 (8th Cir. 2005) (finding comparator evidence relevant to both the prima facie and pretext phases, but imposing a more "rigorous" standard at the pretext stage), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031, 1058 (8th Cir. 2011); Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 646 (3d Cir. 1998) (same)).

Courts also combine their analysis of the second prong (the "legitimate expectations" inquiry) with the pretext stage. In *Hague v. Thompson Distribution Co.*,[87] the court conceded that "[n]ormally a court should first determine if a plaintiff has established a prima facie case before subjecting the employer to the pretext inquiry" but "if the plaintiffs argue that they have performed satisfactorily and the employer is lying about the business expectations required for the position, the second prong and the pretext question seemingly merge because the issue is the same—whether the employer is lying."[88]

B. Skipping the Steps

At times, courts have chosen to skip entire steps of the *McDonnell Douglas* framework altogether. In *Donald v. Sybra*, the Sixth Circuit affirmed the district court's grant of summary judgment to the employer, even though the district court only *assumed* the plaintiff could establish her prima facie case and found that discussion of the plaintiff's prima facie case was not even necessary, as "[the plaintiff] failed to demonstrate that [the employer's] justification for her termination was pretextual."[89] Thus, the Sixth Circuit affirmed the district's court decision to skip over the first and second stages of the *McDonnell Douglas* framework entirely and to proceed directly to the question of pretext and the ultimate question of whether the employer discriminated against the plaintiff in violation of Title VII. Professor Malamud, whose influential article will be discussed further in Part IV.B, provides several examples of federal district court cases where the court assumed without deciding that a prima facie case had been made, and went on to decide that the plaintiff did not have sufficient pretext evidence to survive summary judgment.[90]

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87. 436 F.3d 816 (7th Cir. 2006).

88. *Id.* at 823.

89. 667 F.3d 757, 760 (6th Cir. 2012).

90. Malamud, *supra* note 77, at 2299 (citing the following cases as examples: Jackson v. Good Lad Co., No. 93-2362, 1994 WL 156930 (E.D. Pa. Apr. 28, 1994); MacFarland v. Corestates Bank, N.A., No. Civ. A. 92-6985, 1994 WL 70005 (E.D. Pa. Feb. 28, 1994); Panis v. Mission Hills Bank, N.A., Civ. A. No.

V. CIRCUIT COURTS, LEGAL SCHOLARS, AND PRACTITIONERS ACKNOWLEDGE THE SHORTCOMINGS OF THE FRAMEWORK

Judge Wood is not alone in her criticism of the *McDonnell Douglas* framework. Other courts, judges, legal scholars, and practitioners have been vocal in recognizing the flaws of the framework, and some, like Judge Wood, have called for the outright abolition of the test.

A. Criticism of the McDonnell Douglas Framework by the Circuit Courts

Judge Hartz of the Tenth Circuit wrote separately in *Wells v. Colorado Department of Transportation* for the express purpose of criticizing the *McDonnell Douglas* framework and calling for its abandonment. Judge Hartz's vigorous criticism of the *McDonnell Douglas* framework identified many of the problems discussed in this Note, namely that "rather than concentrating on what should be the focus of attention—whether the evidence supports a finding of unlawful discrimination—courts focus on the isolated components of the *McDonnell Douglas* framework, losing sight of the ultimate issue"[91] and that the "artificiality of the framework exacts a significant, unnecessary expense—in terms of both wasted judicial effort and greater opportunity for judicial error."[92] Judge Hartz's opinion explicitly calls for the abandonment of the *McDonnell Douglas* framework but, perhaps in recognition that outright abandonment of the test would be unlikely given that the framework is "deeply ingrained in the judiciary,"[93] alternatively asks that the Tenth Circuit "clear our minds of technical distractions"[94] and focus

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92-2391-EEO, 1994 WL 185984 (D. Kan. Apr. 5, 1994), *aff'd.*, No. 94-3132, 1995 WL 456215 (10th Cir. July 31, 1995)).

91. Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1224 (10th Cir. 2003) (Hartz, J., writing separately).

92. *Id.* at 1221.

93. *Id.*

94. *Id.* at 1228.

on the "ultimate question of discrimination *vel non*,"[95] even if the court must pay lip-service to the framework.[96]

B. Criticism of the McDonnell Douglas *Framework by Legal Scholars and Practitioners*

Both legal scholars and practitioners have called for the abolition of the *McDonnell Douglas* framework and its replacement with a simplified approach to assessing employment discrimination claims. Professor Malamud wrote an influential article arguing that, because *St. Mary's v. Hicks* was correctly decided, the *McDonnell Douglas* framework has been "reduced to nothing but an empty ritual" and thus, should be abandoned.[97] Professor Malamud argues that the *McDonnell Douglas* framework does little to shape pretrial decision-making or to aid the court's analysis of the facts because courts often effectively ignore the framework and collapse the stages of the inquiry or evaluate the stages out of the order set forth in the hierarchy.[98] However, she argues, where the *McDonnell Douglas* framework does shape pretrial decision-making, it is to the detriment of plaintiffs, as the framework "renders courts less able to recognize forms of discrimination that do not straightforwardly match the proof structure's template."[99]

Because the framework is not only devoid of utility but also at times harmful to plaintiffs, and more than "twenty years of fine tuning" has failed to produce a clear, workable standard,[100] merely tinkering with the *McDonnell Douglas* framework is not a satisfactory solution. Accordingly, Professor Malamud argues that

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95. *Id.*

96. *Id.* For another example of a circuit court's criticism of the *McDonnell Douglas* framework, see Good v. Univ. of Chi. Med. Ctr., 673 F.3d 670, 680 (7th Cir. 2012) ("[W]e recognize that the direct and indirect methods for proving and analyzing employment discrimination cases are subject to criticism. They have become too complex, too rigid, and too far removed from the statutory question of discriminatory causation.").

97. Malamud, *supra* note 77, at 2229, 2237.

98. *Id.* at 2279–80, 2301.

99. *Id.* at 2279–80.

100. *Id.* at 2313.

the only plausible solution is to abandon the *McDonnell Douglas* framework.[101] Doing so would "increase intellectual honesty, deter the creation of dangerous pseudo-uniform rules, and encourage a more subtle and creative understanding of discrimination in its many forms."[102]

Although Professor Malamud calls for abandoning the *McDonnell Douglas* framework, she also recognizes several potential drawbacks. Abandoning the framework could make it more difficult to litigate intentional discrimination claims, as the *McDonnell Douglas* framework has been seen as "necessary to smoke out evidence and to guide the factfinder in drawing inferences of discrimination from circumstantial evidence."[103] However, she argues that the use of the Federal Rules of Civil Procedure is sufficient to accomplish those purposes and that the *McDonnell Douglas* framework is "as likely to stand in the way of drawing inferences of discrimination as to encourage it."[104] Another potential drawback of abandoning the *McDonnell Douglas* framework is the loss of its symbolic meaning to employment discrimination plaintiffs and to society at large—there would no longer be any "preferential rules for individual discrimination cases," and the law would "evaluate these discrimination claims like any other civil claims, with no societal thumb on the scale."[105] However, she argues, there is little point in protecting these symbolic "preferential rules" for intentional discrimination cases if they are in fact empty.[106]

Professor Malamud, like Judge Wood, suggests that the framework be replaced with an "open-ended standard," namely, a traditional summary judgment approach, where the only question would be "the sufficiency of all the evidence to support a finding of intentional discrimination by a preponderance of the evidence."[107]

Many other legal scholars have put forth a wide variety of criticisms of the *McDonnell Douglas* framework. Professor Alfred

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101. *Id.*
102. *Id.* at 2320.
103. *Id.* at 2322.
104. *Id.* at 2322–23.
105. *Id.* at 2324.
106. *Id.*
107. *Id.* at 2318.

Blumrosen has criticized the *McDonnell Douglas* framework on the grounds that it is "out of step with the modern concepts of discovery, summary judgment, [and] the investigative power of the EEOC" and implicitly suggests that the framework should be abandoned by stating that the "doctrine's problems involve more than tinkering can correct."[108] Professor Kenneth Davis argues that the framework improperly focuses the attention of the factfinder on "issues that may have only peripheral relevance in many discrimination cases."[109] A simple but illuminating criticism by Professor John Valery White is that the framework does not provide any definition of discrimination, which results in allowing discrimination to be determined "in an 'ad-hoc' fashion by the fact-finder."[110] This same criticism is echoed by Professor Malamud in her article discussed above.[111] In the same vein, Professor Selmi argues that the Court's definition of discrimination is not of discriminatory intent, but of causation.[112] Legal practitioners have also criticized the *McDonnell Douglas* test for many of the same reasons articulated in the legal scholarship.[113]

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108. Alfred W. Blumrosen, *Society in Transition II:* Price Waterhouse *and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023, 1060 (1990).

109. Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 901 (2004).

110. John Valery White, The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law, 53 MERCER L. REV. 709, 720 (2002).

111. *See* Malamud, *supra* note 77, at 2230 (stating that "with the exception of some prominent sex discrimination cases, the Supreme Court has taught us little in the past twenty-five years.").

112. Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 289 (1997) ("What the Court means by intent is that an individual or group was treated differently because of race . . . . [T]he key question is whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states.").

113. *See, e.g.*, Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 377–81 (1997) (criticizing the *McDonnell Douglas* framework because 1) the prima facie elements are moving targets and mostly peripheral 2) the order of proof is unrealistic and courts rarely follow it and 3) the framework is too complicated to

VI. COUNTER-ANALYSIS: BENEFITS OF RETAINING THE *MCDONNELL DOUGLAS* FRAMEWORK

Although criticism of the *McDonnell Douglas* burden-shifting framework is pervasive, some have made arguments that the

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evaluate evidence); Jon Hyman, *Is It Time to Do Away with* McDonnell Douglas*?*, LEXISNEXIS LEGAL NEWSROOM LAB & EMP. L. (Jan. 18, 2012), http://www.lexisnexis.com/community/labor-employment-law/blogs/labor-employment-commentary/archive/2012/01/18/is-it-time-to-do-away-with-mcdonnell-douglas.aspx (questioning the utility of continuing to use the *McDonnell Douglas* framework in light of the 6th Circuit effectively ignoring the framework in Donald v. Sybra, Inc., 667 F.3d 757, 762 (6th Cir. 2012). "If courts skip the first two steps of the *McDonnell Douglas* test and go right to the heart of the matter—whether a rational jury could conclude that the employer took that adverse action on account of her protected class—does it make sense to continue the charade of pretending that *McDonnell Douglas* remains useful?"); Celeste E. Culberth & Leslie L. Lienemann, *Extricating Title VII from the Quagmire of* McDonnell Douglas*: The Plain Language Solution*, THE HENNEPIN LAWYER, http://hennepin.membershipsoftware.org/article_content.asp?edition=1&section=147&article=1700 ("Over the years, the courts have turned a doctrine intended to be an optional method of demonstrating discrimination into a rigid rule requiring a plaintiff to vault an ever-rising evidentiary bar by having to prove 'pretext' in order to get to trial. The result has been that plaintiffs lose their cases at summary judgment based on an evidentiary standard not rooted in the text, legislative history, or the purpose of the statute. Plaintiffs lose under a test deemed inappropriate for use as an instruction in a jury trial. Plaintiffs lose with no opportunity to have the credibility of the employers' recitation of its reasons questioned or challenged, while the plaintiffs' testimony is submitted to the court in the form of deposition cross-examination, with direct testimony by affidavit criticized as being 'self-serving.'"); Wit, *supra* note 83 (arguing that the second prong of the *McDonnell Douglas* framework—whether the employee was meeting the employer's legitimate expectations—is "so deeply linked to the employer's reason for taking adverse action, and the employee's argument about why she has been discriminated against, that assessing it . . . runs directly counter to the principles behind this initial stage of the plaintiff's burden of proof" and that the "'similarly situated' fourth prong is also too intertwined with the ultimate question to be decided—whether the plaintiff was discriminated against—to be easily included as part of the prima facie case . . ." but ultimately concluding that the *McDonnell Douglas* framework still serves a purpose and should be retained in truncated form).

framework is still useful and should be retained, despite its recognized shortcomings. Professor William R. Corbett, in response to Professor Malamud's call to abandon the *McDonnell Douglas* framework, argues that the framework remains a beneficial tool for courts to use. Professor Corbett argues that, in light of the holding in *St. Mary's v. Hicks* that courts are *not* precluded from holding that plaintiffs can survive challenges to the sufficiency of the evidence by proving pretext alone, the *McDonnell Douglas* framework is "still serving its original purpose of assisting plaintiffs who have only circumstantial evidence of discrimination."[114] Furthermore, as a policy matter, retaining the *McDonnell Douglas* framework is important because it "requires an employer to give a nondiscriminatory reason for its actions and focuses attention on a plaintiff's challenge of the reason and the implications of a successful challenge. It is important for employers to understand that the employment-at-will doctrine does not reign over the landscape of employment law unchecked."[115] Accordingly, Professor Corbett disagrees with Professor Malamud over the symbolic value of the *McDonnell Douglas* framework, arguing that "[the framework] is the symbolic flame, reminding employers, employees, attorneys, judges, juries, and lawmakers that the employment discrimination laws restrict the omnipresent and almost omnipotent doctrine of employment at will."[116]

Others argue that retaining the framework is beneficial because it requires the plaintiff to establish her prima facie case first, ensuring that the plaintiff meets certain threshold requirements before allowing them to move forward with their claim and that the plaintiff has a "cause of action worthy of analysis."[117]

Another reason given for retaining the *McDonnell Douglas* burden-shifting framework is its long history and precedential value. The combination of *stare decisis* and forty years of case law

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114. William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time to Jettison* McDonnell Douglas, 2 EMP. RTS. & EMP. POL'Y J. 361, 384 (1998).

115. *Id.* at 368.

116. *Id.* at 381.

117. Wit, *supra* note 83.

interpreting *McDonnell Douglas* is not something that can be taken lightly and, for some, provides a strong justification for retaining the framework.[118] However, it can be argued that the value of that case law is greatly diminished in light of the confusion the Court's decisions have engendered and the resulting inconsistency both in the lower courts' interpretation of the elements of the framework and the manner in which the steps are applied.

A strong counterargument to the critics of the *McDonnell Douglas* framework is the courts' expansion of the applicability of the framework. The Sixth Circuit recently affirmed the use of the *McDonnell Douglas* framework to decide the defendant's summary judgment motion in a Family and Medical Leave Act interference claim.[119] Similarly, the Ninth Circuit broadened the scope of the *McDonnell Douglas* framework by affirming that the framework applies to age discrimination claims under the Age Discrimination in Employment Act.[120] And in the First Circuit, it was recently held that the *McDonnell Douglas* framework applies to retaliation claims under the False Claims Act.[121]

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118. Ralph A. Morris & Alexis M. Dominguez, *Is* McDonnell Douglas *in for a Bumpy Ride?*, EMPLOYMENT LAW STRATEGIST (Aug. 2012), http://www.mayerbrown.com/files/News/9cb4238f-182c-4ec0-b78e-7ac43f188fcd/Presentation/NewsAttachment/9ecb8ba9-4038-41ee-bd77-7d1b94d7e455/Employment%20Law%20Strategist.pdf.

119. Donald v. Sybra, 667 F.3d 757, 762 (6th Cir. 2012). However, as noted previously, after affirming that the *McDonnell Douglas* framework applied to her FMLA interference claim, the Sixth Circuit effectively skipped the first two stages of the *McDonnell Douglas* framework by affirming the district court's grant of summary judgment to the employer, even though "[t]he district court noted that while there are "substantial questions" concerning whether [the plaintiff] established a prima facie case for FMLA interference . . . it was unnecessary to discuss those issues because [the plaintiff] failed to demonstrate that [the defendant's] justification for her termination was pretextual." *Id.* at 760.

120. Shelley v. Geren, 666 F.3d 599, 604 (9th Cir. 2012).

121. Harrington v. Aggregate Indus. Ne. Region, Inc., 668 F.3d 25, 30–31 (1st Cir. 2012) ("The *McDonnell Douglas* framework provides a principles mode for analyzing retaliatory intent.").

VII. THE BENEFITS OF ADOPTING JUDGE WOOD'S TEST

As discussed previously, Judge Wood called for the abolition of the *McDonnell Douglas* framework in her concurrence in *Coleman v. Donahoe*, citing many of the problems and criticisms articulated in this Note.[122] She argues that it is time to return flexibility to the pre-trial stage and proposes a new flexible standard that would collapse the three stages of the current framework into one, requiring the plaintiff to present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action, and that a rational jury could conclude that the employer took the adverse action on account of her protected class, not for any non-invidious reason.[123] There are substantial benefits to be gained by abolishing the *McDonnell Douglas* framework and adopting Judge Wood's flexible test: eliminating the judicially-constructed barriers to plaintiffs imposed by the current framework and focusing the court's inquiry on the ultimate question of discrimination.

A. A More Flexible Standard Would Eliminate Artificial Barriers to Plaintiffs

As discussed in Part II, there are many barriers to plaintiffs inherent in the *McDonnell Douglas* framework. These barriers include the sometimes stringent definition of "qualifications" required to meet the second prong, the requirement that comparators be "nearly identical" to satisfy the fourth prong, and many courts' adherence to the requirement that the plaintiff produce additional evidence of discrimination after establishing a prima facie case and proving that the employer's proffered reason was pretextual, despite the Supreme Court explicitly stating in *Reeves* that such additional evidence is not required.[124] The first two barriers inherent in the prima facie case subject the plaintiff to an unnecessarily high threshold requirement that is often completely unrelated to the

122. Coleman v. Donahoe, 667 F.3d 835, 862–63 (7th Cir. 2012).

123. *Id.* at 863.

124. *See supra* Parts III.A, III.B, and III.C; Reeves v. Sanderson Prods., Inc., 530 U.S. 133, 148 (2000).

ultimate question of discrimination and can prematurely prevent the plaintiff from presenting evidence of the employer's discrimination.

A flexible standard would remove these barriers to the plaintiff by allowing the plaintiff to present all relevant evidence of discrimination by the employer at once, instead of being required to first clear a series of hurdles before presenting such evidence. As discussed in Part II, courts are willing to enforce the hierarchy of the *McDonnell Douglas* framework to the detriment of the plaintiff, cutting off the analysis at the prima facie stage.[125] Freeing the plaintiff from these unnecessary constraints would not only ease the burden on plaintiff, but would also save the court's judicial resources, as it would no longer be required to evaluate comparators or the qualifications of the plaintiff. Although a court might still consider such evidence, the benefit to be had by the flexible standard is that courts would not be *required* to consider that evidence if it did not think it was relevant to the question of discrimination.

B. Intellectual Honesty

Professor Malamud argues that abolishing the *McDonnell Douglas* framework would have the benefit of restoring intellectual honesty to the courts' analysis of employment discrimination claims.[126] Courts often purport to adhere to the hierarchy of steps in the *McDonnell Douglas* framework, but then apply the framework in a haphazard, disorderly fashion by combining steps of the prima facie case and the pretext analysis into one, or by skipping the first two stages altogether by presuming that the plaintiff could establish her prima facie case and moving directly to the pretext analysis.[127] It makes little sense to require the courts to declare their loyalty to the *McDonnell Douglas* framework if they are going to simply ignore it.

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125. *See* Coco v. Elmwood Care, 128 F.3d 1177, 1179–80 (7th Cir. 1997) (explaining the importance of the plaintiff meeting all prima facie "hurdles" before being permitted to continue, and speaking of the plaintiff's "oblig[ation] to present evidence . . . . so he could have moved on to the next stage"); Holifield v. Reno, 115 F.3d 1555, 1563 (11th Cir. 1997) ("If a plaintiff fails to show the existence of a similarly-situated employee, summary judgment is appropriate where no other evidence of discrimination is present.").

126. Malamud, *supra* note 77, at 2319.

127. *See supra* Part III.B.

This act of reciting the steps and then applying a different standard also creates the danger that the court's actions will be mistakenly construed by district courts as actually applying the *McDonnell Douglas* framework, thereby creating more confusion and uncertainty as to how to appropriately apply the framework. The fact that the courts often do ignore the framework and analyze the evidence in a more direct manner suggests that a flexible standard, like Judge Wood's test, would be more effective and useful to courts.

C. Eliminate Pseudo-Uniform Rules

Professor Malamud also cites the deterrence of the creation of "pseudo-uniform" rules as a potential benefit by abolishing the *McDonnell Douglas* framework and adopting a flexible standard in its place.[128] Although the Supreme Court has handed down a number of decisions purporting to clarify the pretext requirement of the framework, the Court has failed to give any substantive guidance for determining the content of the plaintiff's prima facie case.[129] The result is wide variation in the application of the *McDonnell Douglas* framework in the lower courts, despite the supposed uniformity of the rules. Replacing the framework with a flexible standard would obviate the need for the Supreme Court to provide any further substance to the other stages of the *McDonnell Douglas* framework, which could potentially cause more confusion and disparity among the courts' application of the framework. Indeed, while the Court attempted to clarify the "pretext plus" debate in *Reeves*, the lower courts have remained unsure of what evidence is required at the pretext stage.[130] Adopting Judge Wood's flexible standard would prevent any further discord between the supposed uniform nature of the rules and their decidedly uniform effects on the ground.[131]

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128. Malamud, *supra* note 77, at 2320.
129. *Id.* at 2249.
130. *See supra* Part II.C.
131. Malamud, *supra* note 77, at 2318.

D. *A More Flexible Standard Would Properly Focus the Court's Inquiry on the Question of Discrimination*

Perhaps the most important benefit of abolishing the *McDonnell Douglas* framework and adopting Judge Wood's flexible standard would be refocusing the courts' inquiry on the question of discrimination. The courts would be freed from having to interpret the various requirements of the prima facie case, such as whether they should require a plaintiff to "possess[] the basic skills necessary for performance of the job"[132] or instead, require the plaintiff "to show that she was performing her job satisfactorily."[133] Courts are often mired in the details of a plaintiff's qualifications for the job and the degree of similarity between the plaintiff and the comparator. This type of evidence *may* be useful to the courts' analysis of discrimination, and should be considered where it is useful, but it is not necessary and is often irrelevant to the ultimate question of discrimination. Focusing on irrelevant details not only wastes judicial resources, it can cause the court to not see the forest for the trees. A flexible standard for evaluating employment discrimination claims would refocus the courts' attention on the ultimate question of discrimination.

VIII. WOULD ADOPTING JUDGE WOOD'S TEST CHANGE ANYTHING?

Even in light of the potential benefits to be had by adopting Judge Wood's flexible standard, the question remains whether these benefits are just that: *potential*. There are strong forces at work in employment discrimination law and in the courts' jurisprudence at large that may militate against any potential benefits and render the flexible standard barren of any usefulness—in other words, adopting Judge Wood's test might not change anything at all. The prevalent

132. *See* Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001) (quoting Owens v. N.Y.C. Hous. Auth., 934 F.2d 405, 409 (2d. Cir. 1991)).

133. Arnold v. Nursing & Rehab. Ctr. at Good Shepherd, LLC, 471 F.3d 843, 846 (8th Cir. 2006), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).

judicial bias against employment discrimination plaintiffs, the courts' strong sense of loyalty to employers' freedom in making business decisions, and the potential for courts to complicate and rigidify Judge Wood's proposed test indicate that adopting her test may not make much of a difference in employment discrimination law. However, Part VIII will discuss the importance and necessity of adopting Judge Wood's test even in light of this possibility.

A. Judicial Bias Against Employment Discrimination Plaintiffs

Judicial bias against employment discrimination claims in general may prevent the adoption of a more flexible standard for evaluating discrimination claims from effecting any real change. Professor Michael Selmi puts forth two potential sources of judicial bias against employment discrimination plaintiffs.[134] First, there is a general misperception that employment discrimination cases are easy to win, and that the "volume of employment discrimination cases [reflects] an excessive amount of costly nuisance suits," which influences the courts' perception of the cases.[135] Second, there are various biases that stem from the nature of the employment discrimination claim itself that influence the courts' treatment of the cases.[136]

1. The Influence of the General Misperception of Employment Discrimination Claims

Professor Selmi argues that there is a general misperception that employment discrimination claims are both easy to file and easy to win, due in part to lobbying efforts to limit the reach of antidiscrimination law, which influences the courts' perception of the cases.[137] However, the statistics of employment discrimination

134. Michael Selmi, Why Are Employment Discrimination Cases So Hard to Win?, 61 LA. L. REV. 555, 556 (2001).

135. *Id.* at 556.

136. *Id.* at 556–57.

137. *Id.* at 557.

claims do not support this perception—in fact, the statistics show that employment discrimination claims are extremely difficult to win. Although Professor Selmi does provide an overview of relevant statistics, additional, more recent statistics have been collected to more accurately reflect the current state of employment discrimination claims.

When plaintiffs bring employment discrimination claims in federal court, they do not fare very well.[138] From 1979--2006, plaintiffs won only 15% of employment discrimination cases, compared to 51% of non-employment discrimination cases.[139] During the same time period, employment discrimination plaintiffs have won just 3.59% of pretrial adjudications (including motions for summary judgment) while other, non-employment discrimination plaintiffs won 21.05% of pretrial adjudications.[140]

Even if employment discrimination claims are easy to file, plaintiffs are bringing fewer and fewer claims. Beginning in the early 1990s, employment discrimination claims exploded into the largest single category of federal civil cases, constituting nearly ten percent of the federal docket.[141] Of the employment discrimination claims, Title VII claims constitute nearly seventy percent.[142] However, beginning in 2001, the number of employment discrimination claims has dropped in absolute number of terminations every year after fiscal year 1999 and as a percentage of the federal docket each year.[143] Now the category only accounts for under six percent of the federal docket, behind personal injury liability and habeas corpus petitions.[144] Professor Selmi concludes that the "real statistical story" of employment discrimination cases "diverges from the common wisdom" and that, based on the

138. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127 (2009) ("Over the period of 1979–2006 in federal court, the plaintiff win rate for jobs cases (15%) was much lower than that for non-jobs cases (51%).").

139. *Id.*

140. *Id.* at 128.

141. *Id.* at 103.

142. *Id.* at 117.

143. *Id.* at 104.

144. *Id.*

statistics, "[i]t seems clear that courts are hostile to employment discrimination cases."[145]

2. Biases Stemming from the Nature of the Claim Itself

Judicial biases towards employment discrimination claims can also stem from the nature of the claim itself. When evaluating race-based claims, courts "often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way."[146] Professor Selmi argues that this particular bias could be explained by the seeming "general consensus today [] that the role discrimination plays in contemporary America has been sharply diminished, and those who take this view are reluctant to find discrimination absent compelling evidence," and that as a result "courts appear hesitant to draw inferences of racial discrimination based on circumstantial evidence."[147] Courts also seem to exhibit judicial bias towards employment discrimination claims under the Americans with Disabilities Act, as they appear to be concerned with the potential breadth of the statute and have set out to limit its scope, but with the result of excluding claims that were intended to fall within the scope of the ADA.[148]

The evidence of judicial bias stemming both from employment discrimination claims in general and from the nature of the claims themselves could indicate that, even if a more flexible standard is adopted, courts will continue to be biased against such claims, and changing the analytical tool from the *McDonnell Douglas* framework to Judge Wood's flexible standard will have little effect on the courts' behavior towards employment discrimination claims.

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145. Selmi, *supra* note 134, at 557, 561.
146. *Id.* at 556.
147. *Id.* at 563.
148. *Id.* at 556.

B. *Adherence to the Employment at Will Doctrine*

In addition to the presence of judicial bias, the courts' continuing deference to the employment at will doctrine may also indicate that changing the framework to a more flexible standard will have little effect. Evidence of the value placed on employment at will is apparent in the *McDonnell Douglas* framework itself, which requires, after the plaintiff has established her prima facie case, only that the employer articulate some "legitimate, nondiscriminatory" reason for the adverse employment action, which is a low threshold that can be easily met by the employer.[149] This low threshold was affirmed by the Supreme Court in *Furnco Construction Corporation v. Waters*, which held that the employer's stated reason need only be "legitimate" and "nondiscriminatory," and that Title VII "does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."[150] Professor Corbett believes that the court's rationale in *Furnco* is "quite clear: courts should not tread on employers' prerogatives in order to achieve the goals of Title VII."[151] Because "many of the Court's decisions have both rhetorically and practically subordinated the discrimination laws to employer prerogatives,"[152] the courts' deference to the employment at will doctrine may override any benefits to be had by adopting Judge Wood's flexible standard.

C. *Potential for Courts to Complicate Judge Wood's Test*

Another potential problem that could nullify the effects of adopting a flexible standard is the courts' ability to create hurdles and complex requirements within the new framework, rendering the supposedly "flexible" standard just as rigid and complicated as the *McDonnell Douglas* framework. The courts' ability to do just that

149. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

150. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577–78 (1978).

151. William R. Corbett, *The "Fall" of* Summers, *the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 334 (1996).

152. *Id.* at 391.

can be shown by the evolution of the *McDonnell Douglas* framework itself—an analytical tool that was "never intended to be rigid, mechanized, or ritualistic," but a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," which has been morphed by the courts into a set of rigid requirements at the prima facie stage creating an often insurmountable barrier to plaintiffs and prevents the court from ever reaching the ultimate question of discrimination.[153]

Courts could manipulate the flexible standard into a similar set of rigid requirements, for example, by continuing to require comparator evidence or by incorporating a form of a "pretext plus" requirement into the standard. Furthermore, the existence of judicial biases and continuing deference to the employment at will doctrine may increase the likelihood that courts would be predisposed to complicating Judge Wood's test, whether they were conscious of the reasons for doing so or not.

IX. CONCLUSION: THE *MCDONNELL DOUGLAS* FRAMEWORK SHOULD BE ABOLISHED DESPITE THE POTENTIAL RISKS OF JUDGE WOOD'S PROPOSED STANDARD

Even in light of the potential problems identified in Part VII that may prevent Judge Wood's flexible standard from alleviating all of the problems employment discrimination plaintiffs encounter, the *McDonnell Douglas* framework should nevertheless be abolished. Judge Wood's flexible standard should be adopted regardless of the potential risks because courts, if they do choose to make the standard more complicated and rigid, will at least have to do so *openly*, as there would not be any language in the flexible standard that they could use to hide their actions behind. The language of the *McDonnell Douglas* framework does allow the courts to make it harder for plaintiffs to succeed at the summary judgment stage while purporting to be following the steps of the framework, simply by "interpreting" elements of the prima facie case in an increasingly

153. *Furnco*, 438 U.S. at 577.

rigid manner and construing *Reeves* to require "pretext-plus" evidence. Pulling back the curtain that obscures the courts' current behavior by abolishing the *McDonnell Douglas* framework and forcing courts to be open with their actions regarding employment discrimination claims may have the effect of deterring the courts from attempting to overcomplicate a flexible standard and using the standard as a tool to quash employment discrimination claims.

Furthermore, it makes little sense to retain a framework that can preclude plaintiffs from putting on evidence of discrimination, and preclude the court from considering that evidence, simply because the plaintiff could not clear the high hurdle of a rigidly defined prima face element. The current risk to plaintiffs of being unable to avoid summary judgment because of arbitrary and rigid requirements is too high under the *McDonnell Douglas* framework, and if adopting Judge Wood's flexible standard offers even a chance of reducing that risk, we should take it.

When the Customer Is Wrong: Defamation, Interactive Websites, and Immunity

Andrew Bluebond*

I. INTRODUCTION

"There are no saints online . . . but the Internet will be cleaned up, yet," proclaimed Stephen Marche in his column for *Esquire*.[1] Suggesting that the Internet has reached "peak hate," the

* J.D., The University of Texas School of Law, 2014; B.A., Claremont McKenna College, 2011. Professor David Anderson's attention to developments in mass media law piqued the curiosity that led to this Note. His guidance and Volume 33's dedication made drafting and revising this Note a pleasure.

1. Stephen Marche, *There Are No Saints Online . . . But the Internet Will Be Cleaned Up, Yet*, ESQUIRE MAGAZINE, May 2013, at 60. This Note focuses narrowly on defamatory speech in consumers' online communications, but harmful

novelist posited that a developing backlash against vicious and hateful online speech will lead us back to the rules of civility that have not changed in 2,000 years. A backlash may be imminent, but it hasn't arrived. Internet users are still inundated in hatred and dishonesty seemingly everywhere they look. Elaborate tales involving celebrities expose wild stories of online dishonest and mean-spirited schemes,[2] but much less discussed are the effects of untruthful and uncivil speech in the influential medium of online consumer reviews of goods and services.[3]

A web of state and federal laws protect the free speech rights of consumer reviewers, allow businesses to recover for defamatory reviews, and grant immunity[4] to website operators for the statements

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noncommercial online speech has received thoughtful treatment. *See, e.g.*, Emily Bazelon, *How to Stop the Bullies*, THE ATLANTIC (Feb. 20, 2013), http://www.theatlantic.com/magazine/archive/2013/03/how-to-stop-bullies/309217/3/ (discussing the culture of "cyberbullying" and ways in which social networking sites can help to combat it); *see also* EMILY BAZELON, STICKS AND STONES (2013).

2. *See, e.g.*, Timothy Burke & Jack Dickey, *Manti Te'o's Dead Girlfriend, the Most Heartbreaking and Inspirational Story of the College Football Season, Is a Hoax*, DEADSPIN (Jan. 16, 2013, 4:10 PM), http://deadspin.com/manti-teos-dead-girlfriend-the-most-heartbreaking-an-5976517 (revealing the "catfishing" of former Notre Dame linebacker Manti Te'o); *see also* John Voorhees, *Notre Damn Says Manti Te'o Fell for a "Catfish Scam. What's That?*, SLATE.COM, (Jan. 17, 2013), http://www.slate.com/blogs/the_slatest/2013/01/17/manti_te_o_lennay_kekua_what_s_a_catfish_scam.html ("The term 'catfish' itself is used to describe someone who has created a fake social media persona through Facebook/Twitter/etc. to deceive someone—most often by seducing them online and, sometimes, later over the phone.").

3. *See generally Catering to Shoppers? Know That Online Reviews Influence Them Most*, REVIEW TRACKERS (Mar. 29, 2013), http://www.reviewtrackers.com/catering-shoppers-online-reviews-influence (discussing a Baynote study that found that online reviews trump search engine results, e-mail promotions, social networks, and mobile ads as being the most influential source of information for shoppers).

4. This Note uses "immunity" to describe the protections and limitations provided by § 230, which is consistent with judicial opinions on the CDA as well as other secondary sources. This is not immunity from suit as the term is commonly used, and that matter is not lost on some judges considering the limits of the CDA. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009) ("[I]t appears clear that neither this subsection nor any other declares a general immunity from liability from third-party content . . . 'Subsection (c)(1) does not

of their users. Overlaying state tort law, the Communications Decency Act (CDA)[5] protects interactive website operators from being subjected to publisher liability—thereby insulating them from responsibility for their users' statements. Whether this statute is too protective of website operators—perhaps immunizing those engaged in what most would recognize as content creation—is at the heart of debates over the CDA's suitability for the Internet of 2014 and beyond. It's also the subject of this Note.

Two 2012 district court cases presented the Sixth and Fourth Circuits with an opportunity to adopt a "specific encouragement" test.[6] But the Sixth Circuit rejected this approach in favor of the Ninth Circuit's widely cited en banc decision from *Roommates.com*[7] and the Fourth Circuit saw no appeal at the time of this writing. But the trial courts' specific encouragement approach, discussed below, survives as one possibility for denial of CDA immunity that would allow a defamed plaintiff to survive a website operator's motion for summary judgment.

In looking at the district court cases, this Note reviews other complications in cases involving consumer reviews. These include the limited protection provided by the First Amendment for opinion speech and the ill-suited constitutional doctrine governing the status of business owners as public figures that relies on an antiquated

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mention "immunity" or any synonym.'") (quoting Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008)).

5. Communications Decency Act of 1996, 47 U.S.C. §§ 223, 230 (2012).

6. *See* Jones v. Dirty World Entm't Recordings, LLC, 840 F. Supp. 2d 1008, 1010 (E.D. Ky. 2012) (discussing potential liability for third party libelous statements made on a website); Hare v. Richie, Civil Action No. ELH–11–3488, 2012 WL 3773116, at *18–19 (D. Md. Aug. 29, 2012) (discussing potential liability of a website for derogatory remarks made by a third party).

7. *See* Jones v. Dirty World Entm't Recordings LLC, No.13-5946, 2014 U.S. App. LEXIS 11106, *36 (6th Cir. June 16, 2014) ("Consistent with our sister circuits, we adopt the material contribution test to determine whether a website operator is 'responsible, in whole or in part, for the creation or development of [allegedly tortious] information.' And we expressly decline to adopt the definition of 'development' set forth by the district court.") (citations omitted) (quoting 47 U.S.C. § 230(f)(3)).

access to media analysis.[8] Additionally, the common law privilege for discussion of matters of a common interest remains lost in the backdrop of online defamation litigation. It provides a potential pitfall for litigants, but its use in consumer review cases is no more than the creative pleading of an inapposite doctrine. This Note argues that it is not properly applied to online consumer reviews because of the essentially limitless audience for online reviews, tweets, and blog posts.[9]

II. THE CDA AND THE INTERACTIVE INTERNET

Reliance on local newspapers for commentary on the upscale American bistro or Asian fusion café that just opened its doors has given way to the wisdom of crowds for an appraisal of the gluten-free bakery or high-end ramen house that's trending. Consumers increasingly rely on their peers' ratings and comments when choosing where to dine, which makes maintaining a good rating on popular sites such as Yelp or in Google's search results all the more important.

Consumers are aware of their fellow users' reliance.[10] Every customer is a potential reviewer—a development that has shifted economic strength from business owners and traditional media to consumers. The dissatisfied can easily reach interested (or annoyed) audiences on Yelp, Facebook, or Twitter. When business owners or

8. *See supra* Part VII (discussing the treatment of opinion speech in defamation claims and arguing that the Internet has sufficiently increased media access to warrant dropping it factor from the First Amendment analysis).

9. *See supra* Part VIII.

10. *Cf.* Marti Trewe, *When Customers Threaten to Post Negative Yelp Reviews*, AGBEAT (May 30, 2012), http://agbeat.com/real-estate-coaching-tutorials/when-customers-threaten-to-post-negative-yelp-reviews/ (suggesting a proactive solution to "Yelp extortion," which is the problem of unhappy consumers leveraging threats to write negative online reviews); Amy McKeever, *ReviewerCard Takes Extorting Restaurants to a New Level*, EATER.COM (Jan. 22, 2013), http://eater.com/archives/2013/01/22/reviewercard-takes-extorting-restaurants-to-a-new-level.php (discussing the "ReviewerCard," an ID card warning businesses that "I write reviews" to promote good service toward customers).

managers find the resulting negative reviews or comments, they can contact the customer in hopes of learning more about the customer's complaint and securing an updated review. But that isn't always possible. Customers may be unresponsive or have no interest in changing their reviews. When the complaint is small, the initial attempt to contact the customer is likely the end of the story. But when the complaints affect profits or reputation, litigation becomes a possibility.

Businesses have brought defamation actions against reviewers and dissatisfied customers who take to the Internet.[11] The suits against reviewers and commenters are more likely to find judgment-proof defendants than deep pockets, but businesses have succeeded in enjoining reviewers and compelling removal of reviews.[12] But for the business owner that seeks damages, big payouts require finding someone with assets or insurance coverage. Fortunately for website operators, their pockets and policies are

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11. *See, e.g.*, Adam Cohen, *Online Reviewers Beware: You Can Get Sued*, TIME.COM (Jan. 7, 2013), http://ideas.time.com/2013/01/07/yelp-reviewers-beware-you-can-get-sued (discussing a case in which homebuilder contractor brought defamation suit against online reviewer); Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court*, N.Y. TIMES, June 1, 2010, at A1 (highlighting a Western Michigan University student sued for $750,000 after creating "Kalamazoo Residents against T&J Towing," a Facebook group for criticizing the company).

12. Other businesses have tried to use "non-disparagement clauses" in consumer sales agreements to prevent negative reviews at the outset, but these clauses may not be enforceable. *See* Chris Morran, *KlearGear Defends $3,500 Non-Disparagement Fee, Says Court Ruling Doesn't Count*, CONSUMERIST (May 20, 2014), http://consumerist.com/2014/05/20/kleargear-defends-3500-non-disparagement-fee-says-court-order-doesnt-count/ (discussing a Utah federal court's order granting a default judgment for a consumer who refused to pay a non-disparagement clause sent to a collection agency). For more background on the case, see Joshua Brustein, *A Company Is Sued Over Its 'No Bad Reviews' Clause*, BLOOMBERG BUSINESSWEEK (Dec. 18, 2013), http://www.businessweek.com/articles/2013-12-18/a-company-is-sued-over-its-no-bad-reviews-clause (discussing a lawsuit against a web-based company because of its attempt to collect $3,500 for violation of a contractual "non-disparagement clause" prohibiting the plaintiff from writing negative reviews).

relatively safe: actions against them became a difficult sell in U.S. courts after Congress passed the CDA in 1996.[13]

Circuit courts have interpreted the CDA to broadly immunize almost all interactive website operators from defamation actions stemming from third-party content.[14] These cases have sketched the boundaries of CDA immunity, but they have left open the possibility of imposing liability for content not explicitly created by the website operator.[15] That possibility has been explored in some recent cases that provide a window into how issues of manipulation of user-created content or encouragement of users to create defamatory content could produce publisher liability for website operators.[16]

The nexus of editorial control and manipulation of content will provide the battlefield on which the courts—or Congress—will determine the limits of immunity for interactive service providers. Courts have been able to avoid these issues by turning to the illegality of the service providers' conduct under state or federal law,[17] but a class action in California[18] and two cases against Nik Richie and his gossip website, thedirty.com,[19] suggest that courts will have to address the limits of CDA immunity head on. Courts have consistently ruled that the use of editorial controls does not

13. Communications Decency Act of 1996, 47 U.S.C. §§ 223, 230 (2012).

14 . *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1161–62 (9th Cir. 2008) (en banc) ("But in cases of enhancement by implication or development by inference—such as with respect to 'additional comment' here—Section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles"); *Chi. Lawyers' Comm.*, 591 F.3d at 671–72 (holding the Lawyers' Committee can investigate landlords or owners who post online their plans to engage in unlawful discrimination, but cannot sue the websites as messengers).

15. *See Roommates.com*, 521 F.3d at 1157; *Chi. Lawyers' Comm.*, 591 F.3d at 666.

16. *See* Levitt v. Yelp! Inc., No. C 10-1321, 2011 U.S. Dist. LEXIS 99372 (2013) (discussing Yelp's potential liability for alleged deliberate manipulation of customer reviews); Jones v. Dirty World Entm't Recordings, LLC, 840 F. Supp. 2d 1008, 1010 (E.D. Ky. 2012) (discussing potential liability for third party libelous statements made on the website); Hare v. Richie, Civil Action No. ELH–11–3488, 2012 WL 3773116, at *18–19 (D. Md. Aug. 29, 2012) (discussing potential liability of the website for derogatory remarks made by a third party).

17. *Roommates.com*, 521 F.3d at 1161–62

18. *Levitt*, 2011 U.S. Dist. LEXIS 99372.

19. *Jones*, 840 F. Supp. 2d at 1010; *Hare*, 2012 WL 3773116, at *18–19.

make a website operator liable for defamatory speech by third parties under the CDA's definition of "content developer."[20] However, the boundaries of editorial control are undeveloped and inappropriately suited for determining the immunity of websites that manipulate user-generated content.

Even a broad, sweepingly protective interpretation of Congress's intent in enacting the CDA must provide only limited protection to website operators. As the Ninth Circuit explained in *Fair Housing Council of San Fernando Valley v. Roommates.com*, "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."[21] Below, this Note argues that such a "lawless no man's land" can be avoided by denying immunity to website operators that either encourage their users to post defamatory content or manipulate user-generated content to induce businesses to purchase their services.

Congress may have rightfully feared that even the possibility of being held liable for user-generated content would have deterred early website operators from providing forums for discussion, but the Internet is no longer in its infancy. Service providers no longer need to be insulated from all liability to provide online forums for discussion. Today, users demand interactive services and online business reviews. Additionally, because these platforms have been successfully monetized through advertising sales, the fear that they will disappear if *any* liability is imposed in *very* limited circumstances seems overstated. After the lower courts' decisions against Nik Richie, one communications lawyer argued that they "expose website administrators to liability for routine activities for

20. *See e.g.*, Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 986 (10th Cir. 2000) ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."); Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) (stating that § 230 rejects liability based solely on the exercise of editorial functions).

21. 521 F.3d at 1164.

which they have always been immune."[22] However, this Note will argue that the decisions were narrow and consistent with the CDA.

III. ELEMENTS OF THE DEFAMATION CLAIM

Business owners can bring defamation actions for false or misleading online reviews. To prevail, plaintiffs must show (1) a false and defamatory statement of fact concerning the business; (2) unprivileged publication of that statement to a third party; (3) the requisite degree of fault; and (4) the harmful nature of the statement.[23]

The first element requires that the statement be defamatory as a matter of law. This issue is addressed in Part IV, which gives particular attention to the constitutional and state laws concerning the distinction between fact and opinion.

The second element, the unprivileged publication of content on the Internet, is not difficult to establish when the reviewer is clearly identified.[24] Posting statements on public websites will likely satisfy this element.[25] But under the CDA, suits brought against

22. *See* Robert L. Rogers III, *The "Dirt" on Revocation of Immunity for Websites that "Encourage" Defamatory Posts*, 29 COMMC'NS LAWYER 1 (Feb. 2013) (arguing that the decisions "undermine CDA authority" and "contradict the clear intent of § 230 and prior cases").

23. The elements of defamation are a matter of state law, but they vary little from state to state. For a more thorough discussion of the slight variances in state law in the context of consumer reviews, see Jenna Morton, Note, *Online Business Reviews and the Public Figure Doctrine: An Advertising-Based Standard*, 34 HASTINGS COMMC'NS. & ENTM'T. L.J. 403, n.39–43 (citing 5 WITKIN, SUMMARY TORTS § 529 (10th ed. 2005)); 14 N.Y. PRACTICE, N. Y. LAW OF TORTS § 1:42 (2010); RESTATEMENT (SECOND) OF TORTS §§ 558, 577 (1977)).

24. Although it is not discussed in this Note, the anonymity of reviewers remains an ongoing debate in these cases. Under what circumstances website operators must disclose the identities of their users in defamation actions remains something debated by academics and courts, and the issue cannot be divorced from the terms of service of each website. For a more thorough discussion of the issue, *see* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 BC. L. REV. 1373 (2009).

25. *See* John Wilson, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533, 558 (2002)

website operators will fail unless there is evidence that they took part in the creation of the content. What conduct is sufficient to say a website operator took place in content creation is discussed in Parts V and VI.

The requisite degree of fault is governed by constitutional law and is determined by both whether the potential plaintiff is a public figure and whether consumer reviews touch upon a matter of public concern. By the Supreme Court's admission, this area of the law is neither well developed nor clear.[26] It is addressed in Part VII.

In consumer review cases, a plaintiff's ability to prove the harmful nature of the statement depends on whether the statement concerns an individual or the business itself. Individuals are not required to prove specific losses in defamation cases; instead, they may prove the harmful nature of the statement rather than tangible losses to recover.[27] However, businesses do not have personal reputations, hurt feelings, or embarrassment that would entitle them to presumed damages. Instead, businesses must show tangible losses to recover—an issue of fact that can be proven by showing the sequence of the negative review and an adverse effect on the business's operations.

IV. THE IMPORTANCE OF EARLY DISMISSAL

Pleading and procedure, including the allocation of burdens, are intimately involved in the policy choices underlying defamation law. High litigation costs, including expensive discovery, make defending a case past summary judgment feel like a loss in defamation actions.[28] In cases involving free speech, courts have

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(proposing that a statement is published where it is posted on a message board or chat room).

26. Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011).

27. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985).

28. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174–75 (9th Cir. 2008) (noting the heavy burdens of successfully defending against a defamation suit).

recognized the virtue of rules permitting cases to be dismissed on the pleadings.[29] These cases often refer to the chilling effect created by imposing litigation defense costs on defendants—what the Ninth Circuit called a "death by a thousand duck bites."[30] The decisions allowing discovery to determine whether the defendants in *Jones* and *Hare* specifically encouraged users to post what was defamatory about the content may present a challenge to the policies underlying previous cases.[31] Legislatures have also recognized the value of allowing defamation cases to be dismissed on the pleadings. The majority of states and the District of Columbia have enacted anti-SLAPP statutes that provide procedural devices to quickly dismiss lawsuits aimed at suppressing speech through defamation actions.[32] These statutes often award attorneys' fees to the defendant who succeeds in dismissing a case under the anti-SLAPP statute.[33]

But litigation is only one option. When business owners believe a review, comment, or tweet contains false statements, they can contact the dissatisfied customer or the website operator in an effort to reach an agreement to remove or update the post. Instead of taking legal action, the business might provide some discount or incentive to the reviewer in hopes that she will revise her review. Given the costs of litigation and the modest compensation—perhaps a discount or a free service—that may be required to get the user to remove the review, it should come as no surprise that businesses might want to avoid litigating even their meritorious claims against defaming customers. But as discussed in in Part VI, review websites cannot agree to remove bad reviews in exchange for compensation without risking losing immunity under the CDA.

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29. *See id.* (citing to the same costs for such a virtue).

30. *Id.* at 1174.

31. For a critical appraisal of the federal district court's denial of summary judgment in *Hare*, see Rogers, *supra* note 22, at 2.

32. *See* Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845 (2010) (providing background on operation and purpose of state anti-SLAPP statutes); *see also* Summit Bank v. Rogers, 42 Cal. Rptr. 3d 40, 46–47 (Cal. Ct. App. 2012) (applying the two-step process required by California's anti-SLAPP statute).

33. Barylak, *supra* note 32, at 866.

V. *STRATTON OAKMONT'S* LONG LIFE IN § 230 OF THE CDA

Congress included § 230 in the CDA in response to a New York state court opinion, *Stratton Oakmont v. Prodigy Services*,[34] which subjected an online message board operator to publisher liability for defamatory posts the operator failed to remove. The court based its holding on the operator's voluntary removal of other posts by third parties.[35] The *Stratton* ruling was widely criticized for discouraging website administrators from screening posts because doing so would trigger liability that could otherwise be avoided by doing nothing.[36] While Congress could have taken a narrow approach to this issue—or simply waited for review of *Stratton Oakmont* on appeal—it enacted sweeping legislation that gave courts the ability to dismiss suits against website operators based on the pleadings.

A. The CDA as a Procedural Device

The CDA is substantive law, but its impact rests largely in procedure. Statutory and common law grants of immunity and privilege provide grounds for dismissing suits at summary judgment with limited or no factual inquiry. In the cases affected by § 230 immunity, motions for summary judgment ask courts to dismiss suits based on the posts of interactive service users. When a plaintiff fails

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34. *See CDA: Legislative History*, ELEC. FRONTIER FOUND. https://www.eff.org/issues/cda230/legislative-history (last visited April 2, 2014), ("Worried about the future of free speech online and responding directly to *Stratton Oakmont*, Representatives Chris Cox (R-CA) and Ron Wyden (D-OR) introduced an amendment to the Communications Decency Act that would end up becoming Section 230.") (referencing Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995)).

35. *Id.* at *7–8.

36. *See* F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1195 (10th Cir. 2009) (noting the criticism of the *Stratton* decision for discouraging voluntary filtration of online content); R. Hayes Johnson, Jr., Case Note, *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co.*, 49 ARK. L. REV. 589 (1996) (discussing criticism of the *Stratton* decision).

to plead a prima facie case of content creation or development by the website operator, § 230 provides the basis on which the court can dismiss the claim.

B. Textual Analysis of § 230

Congress's 1996 effort "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services" required drafting definitions for the players in the market it hoped to regulate. The two critical terms for suits against website operators are "interactive computer service" and "information content provider."[37] The former captures any individual or entity that "provides or enables access by multiple users to a computer server;" the latter includes "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[38] In disputes over liability for consumer reviews, it is the meaning of "creation" and "development" as used in § 230(f)(3) that fills judges' briefing books.[39]

The CDA's provisions for liability in actions against interactive content services appear in 47 U.S.C. § 230(c), which states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[40] Because

37. 47 U.S.C. § 230 (2012).

38. *Id.*

39. *See, e.g.*, *Roommates.com*, 521 F.3d at 1168–69 ("[T]he dissent overlooks the far more relevant definition of '[web] content development' in Wikipedia: 'the process of researching, writing, gathering, organizing and editing information for publication on web sites.' Our interpretation of 'development' is entirely in line with the context-appropriate meaning of the term, and easily fits the activities Roommate engages in."). The categories are sweeping, created long before television shows encouraged participation via Twitter, Podcasts dedicated segments to write-in content, and Buzzfeed's user-generated "listicles" were ubiquitous. These services must be considered under the CDA's eighteen-year-old definitions for a fast-changing marketplace, putting additional pressure on courts to cogently apply § 230.

40. 47 U.S.C. § 230(c)(2) (2012).

publishers of defamatory content—including reviews—can be held liable for their defamatory content under state tort law, the treatment of interactive computer service providers as publishers was thought to expose them to liability for filtering their user-created content.[41] However, because of § 230(c)(1)'s guarantee that interactive service providers will not be treated as publishers as well as § 230(c)(2)(A)'s protection from liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected,"[42] the universe of disputes for which interactive service providers could face liability was decimated by the CDA.

In one of the first appeals to consider § 230, the Fourth Circuit discussed the balance Congress attempted to strike with the CDA. "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium," wrote the court, adding that Congress wanted "to keep government interference in the medium to a minimum."[43] Instead of allowing regulation at the state level and encouraging experimentation with state law governing Internet defamation, Congress granted outright immunity to the websites. After the CDA, Congress stepped aside and watched courts use this immunity to dismiss suits against website operators who either failed to confirm the accuracy of

41. *See* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 10, 207–08 ("[S]ection [230] provides 'Good Samaritan' protections from civil liability for providers . . . of an interactive computer service for actions to *restrict* . . . access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont* [sic] *v. Prodigy* and any other similar decisions which have treated such providers . . . as publishers or speakers of content that is not their own *because they have restricted access* to objectionable material.") (emphasis added); *Roommates.com*, 521 F.3d at 1163 ("Under the reasoning of *Stratton Oakmont*, online service providers that voluntarily filter some messages become liable for all messages transmitted, whereas providers that bury their heads in the sand and ignore problematic posts altogether escape liability.").

42. 47 U.S.C. § 230(c)(2)(A) (2012).

43. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

defamatory comments posted on their websites or refused to remove comments after being notified that they were inaccurate.[44]

VI. PUSHING THE BOUNDARIES OF CDA IMMUNITY

The broad immunity granted by CDA may have been appropriately suited for 1996, but its efficacy in 2014 and beyond is less clear. Cases applying the CDA indicate that interactive service providers will push the boundaries of their immunity and force circuit courts to provide guidance for distinguishing between interactive content service operators and Internet content developers.

A. Determining the Boundaries of § 230 Protection

Although the Ninth Circuit's decision in *Roommates.com* rested on the illegality of the website operator's conduct under state law, it was a turning point for CDA immunity: the court permitted liability even when the content was not created by the website operator. The court held that interactive service providers are not immune from suit for user-created content when the websites (1) require users to provide unlawful or discriminatory content and (2) use that information to operate or enhance the site's functions.[45] The court in *Roommates.com* found that the operator of a roommate-matching website violated fair housing laws by requiring subscribers to answer questions about their gender and sexual orientation preferences for roommates. By doing so, Roommates.com was no longer an interactive service provider free from liability for user-generated content. The court explained, "[R]equiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, [Roommates.com] becomes much more than a passive transmitter of information provided by others; it becomes the

44. Rogers, *supra* note 19, at 1 (citing Johnson v. Arden, 614 F.3d 785, 790–92 (8th Cir. 2010)); Ascentive, LLC v. Op. Corp., 842 F. Supp. 2d 450, 475–76 (E.D.N.Y. 2011); Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008).

45. *Roommates.com*, 521 F.3d at 1157.

developer, at least in part, of that information."[46] The court's choice of language—"more than a passive transmitter"—reflects a willingness to look more critically at website operators' role in the collection and transmission of content, but this case must not be applied too broadly. Immunity was denied when the website *required*, not just allowed or encouraged, users to post discriminatory content.[47]

The difficulties of applying the CDA to the ever-changing world of Internet commerce were on full display in *Roommates.com*, where the court was divided on the proper meaning of "developer" under § 230. The majority stated that "encourag[ing] subscribers to provide *something* in response to the prompt is not enough to make it a 'develop[er]' of the information under the common-sense interpretation of the term."[48] Criticizing the dissent's use of a dictionary to define "developer," the majority cited Wikipedia's definition of web development, which describes web development as "the process of researching, writing, gathering, organizing and editing information for publication on web sites."[49] Stating that the Wikipedia "interpretation of 'development' is entirely in line with the context-appropriate meaning of the term" and "easily fits the activities Roommates engages in," the court held that Roommates.com was not entitled to CDA immunity.[50]

The Ninth Circuit panel's discussion and division is more than an academic exercise. Its disagreement reflects a persistent discord over whether Internet communications should be given

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46. *Id.* at 1166. The Court also explained that Roommates.com was "not entitled to CDA immunity for the operation of its search system, which filters listings, or of its email notification system, which directs emails to subscribers according to discriminatory criteria." *Id.* at 1167.

47. *Id.* at 1166.

48. *Id.* at 1174.

49. *Id.* at 1168 ("It's true that the broadest sense of the term 'develop' could include the functions of an ordinary search engine—indeed, just about any function performed by a website. But to read the term so broadly would defeat the purposes of § 230 by swallowing up every bit of the immunity that the section otherwise provides.").

50. *Id.* at 1168–69.

alternative treatment. The majority's criticism of the dissent's approach captures that well:

> The dissent stresses the importance of the Internet to modern life and commerce, and we, of course, agree: The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.[51]

B. Good-Faith Manipulation of Consumer Reviews?

Collecting user-generated posts, such as reviews, ratings, and comments, and manipulating them for website content could approach content creation under the CDA. Courts will consider whether such conduct transcends traditional editorial controls, which are not sufficient for content creation.

A dismissed class action against Yelp in California provides a useful discussion of the law surrounding manipulation of consumer reviews and the interaction of state law defamation law with § 230.[52] The court in *Levitt v. Yelp* considered two possible theories of liability under § 230. One failed as a matter of law and the other had insufficient support in the record. First, the court addressed the plaintiffs' contention that Yelp "creates" its aggregate business rating, which would constitute editorial content created by Yelp that

51. *Id.* at 1164 n.15 (citations omitted).

52. Levitt v. Yelp!, Inc., No. C-10-1321 MHP, 2011 U.S. Dist. LEXIS 99372 (N.D. Cal. Mar. 22, 2011).

makes § 230(c)(1) inapplicable.[53] The court rejected this contention.[54] Had it not done so, the court may have opened the door to liability for the hundreds, or thousands, of websites that aggregate information created by others. Under the plaintiff's reading, any website that allows users to give ratings or write comments before the operators combine, analyze, or display the user-generated content could have been subjected to liability.

The court was more amenable to the second theory of liability, which rested in other actions that could have made Yelp a content developer or creator. The plaintiffs alleged that "approximately 200 Yelp employees or individuals acting on behalf of Yelp have written reviews of businesses on Yelp," that Yelp has paid users to write reviews, and that Yelp's employees threatened to manipulate reviews to the detriment of businesses who refuse to purchase advertising.[55] Any of these three allegations, if true, could have given rise to liability for Yelp as a content creator. However, the court dismissed the allegations as "entirely speculative."[56]

Although the suit was dismissed, the court left open the door to another way in which website operators might be liable for third-party content. When considering whether Yelp's alleged conduct was sufficient to remove its immunity, the court noted that "§ 230(c)(1) contains no explicit exception for impermissible editorial motive."[57] However, the court noted that the posting or removing of user reviews to demand increased advertising from the subjects of those reviews would seem "quite distinct from the traditional editorial functions of a publisher."[58] The court stated that the decision to remove certain content is immunized under this logic

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53. Levitt v. Yelp!, Inc., No. C-10-1321 EMC, 2011 U.S. Dist. LEXIS 124082, at *21 (N.D. Cal. Oct. 26, 2011).

54. *Id.* at *22–29.

55. *Id.* at *8–9.

56. *Levitt*, 2011 LEXIS 99372 at *35.

57. *Levitt*, 2011 LEXIS 124082 at *23, 26 ("[W]hile courts have described the functions of an editor (and the application of § 230(c)(1) thereto), they have not scrutinized the purposes behind an editor's exercise of those functions under § 230(c)(1)."). *Id.* at *26.

58. *Id.* at *26.

because it "is something publishers do"[59] and § 230(c)(1) immunity protects service providers from publisher liability for "its exercise of a publisher's traditional editorial functions."[60]

The court noted that reading a good-faith requirement into § 230(c)(1) "could force Yelp to defend its editorial decisions in the future on a case by case basis and reveal how it decides what to publish and what not to publish."[61] The court feared that this "exposure could lead Yelp to resist filtering out false/unreliable reviews . . . or . . . to immediately remove all negative reviews about which businesses complained."[62] The court's analysis rightly considers the burden imposed on Yelp by reading a good-faith requirement into § 230(c)(1), but the mere apprehension that Yelp would start removing protected reviews should not be decisive. Such an approach, which attempts to do some justice to Congress's effort to divorce itself from regulating this realm of the Internet, invites businesses to assert that they would discontinue services or have their entire business models undermined—even when such claims are unfounded or dishonest. The business of online reviews is lucrative and consumers have choices about where they will look for reviews—choices that would almost certainly depend upon their ability to trust that the website includes both negative and positive reviews of businesses.[63]

C. *A "Dirty World" for CDA Immunity*

Two district courts, one of which was reversed on appeal, recently held that website operators act without CDA immunity for users' content when the operators encourage what is defamatory

59. *Id.* at *34 (quoting Barnes v. Yahoo!, Inc., 570 F.3d 1069, 1103 (9th Cir. 2009)).

60. *Id.* (citing Mazur v. eBay, Inc., 2008 U.S. Dist. LEXIS 16561, at *9 (N.D. Cal. Mar. 4, 2008) (quoting Gentry v. eBay, Inc., 99 Cal. App. 4th 816 (Cal. App. 4th Dist. 2002))).

61. *Levitt*, 2011 LEXIS 124082, at *28.

62. *Id.*

63. *See* Cheryl Conner, *The Marketer's Guide to Customer Reviews' (And Why They Matter So Much)*, FORBES (Aug. 23, 2013, 2:31AM), http://www.forbes.com/sites/cherylsnappconner/2013/08/23/the-marketers-guide-to-customer-reviews-and-why-you-should-care/ (explaining that including both positive and negative reviews and feedback "lends legitimacy to [a] company").

about the posted content. In *Jones v. Dirty World*, a federal district court in Kentucky considered whether to impose liability upon Nik Richie, the operator of thedirty.com, a website where Richie reports and comments on users' submissions without verifying their accuracy.[64] The submissions often concern celebrities or other followers of the website.[65] Importantly, Richie also removes some of the comments at his discretion.[66]

The trial court in *Jones* considered a defamation action by a high school teacher and cheerleader for the Cincinnati Bengals against Richie and Dirty World.[67] Jones, the plaintiff, sought relief for posts on thedirty.com that suggested that she "slept with every Bengal football player" and "had sexually transmitted diseases."[68] The defamatory statements were submitted by users, but Richie posted several responsive comments that mentioned Jones by name ("Sarah"), commented on her profession's morals ("Why are all high school teachers freaks in the sack?"), and insulted her appearance ("one ugly cheerleader").[69] When the defendants moved for a judgment as a matter of law, the court denied their motion and held that they were not entitled to CDA immunity. The court relied on the Tenth Circuit's opinion in *FTC v. Accusearch*, which held that a service provider could be "'responsible' for the development of offensive content only if it some way *specifically encourages* the development of what is offensive about the content."[70] The court also held that Richie "specifically encouraged what is offensive

64. Jones v. Dirty World Entm't Recordings, LLC, 840 F. Supp. 2d 1008, 1012 (E.D. Ky. 2012).

65. *Id.* at 1009.

66. *Id.* at 1012.

67. *Id.* at 1009–10.

68. *Id.*

69. *Id.* at 1012.

70. *Id.* at 1011 (emphasis added) (citing F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009) ("We therefore conclude that a service provider is 'responsible' for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content.")); Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1161–62 (9th Cir. 2008) (en banc)).

about the content of his website"[71] by (1) naming the website "thedirty.com"; (2) selecting which comments were posted; (3) posting comments without confirming their accuracy; (4) deciding which posts to remove; and (5) posting Richie's own comments.[72]

Following *Jones*, a U.S. District Court in Maryland addressed *Hare v. Richie*, a similar action against the same defendants.[73] The court held that Richie and Dirty World could be held liable for users' defamatory statements if they "specifically encouraged" the development of defamatory content on thedirty.com.[74] The plaintiff's defamation claim arose out of comments posted on thedirty.com that suggested that he stalked women.[75] As Richie had in *Jones*, he responded to some of the defamatory posts. The Court denied Richie's motion to dismiss the defamation claim as barred by CDA immunity and allowed discovery on whether the defendant "specifically encourages development of what is offensive about the content" posted to thedirty.com by third parties.[76] The court focused its attention on determining Richie's liability for statements posted by the "Dirty Army"—Richie's term for the website's users.[77]

D. *Specific Encouragement of What is Defamatory About User Content*

The decisions in *Hare* and *Jones* addressed the possibility that specific encouragement of defamatory content removes the immunity provided by the CDA to interactive service providers. One commentator, writing in *Communications Lawyer*, suggested that this decision creates a great deal of uncertainty for interactive service providers, but the rulings in these cases can and should be understood as less groundbreaking and surprising than the author

71. *Jones*, 840 F. Supp. 2d at 1012.
72. *Id.*
73. Hare v. Richie, Civil Action No. ELH–11–3488, 2012 WL 3773116, at *12 (D. Md. Aug. 29, 2012).
74. *Id.* at *17–18.
75. *Id.* at *2–3.
76. *Id.* at *19.
77. *Id.* at *16.

suggests.[78] With no precedent from their respective circuits, the trial courts looked to the Tenth Circuit.[79] *Accusearch* recognized that the CDA provided only limited protections for website operators. To say that one of those limits would leave Richie's endorsement of and comments on user-generated, defamatory content outside of the protection of the CDA hardly seems out of line with the CDA's distinction between website development and content creation. When denying the motion for summary judgment, both courts rested their holdings on Richie and Dirty World's participation in content creation.[80]

But the district courts provided little discussion of how encouragement fits into the CDA's framework. The reach of the term "development" is not a new issue for courts applying the CDA, but the notion that website operators' encouragement of content creation could create liability appeared only in 2009.[81] Although this may seem like a broad, judicially forged exception to CDA immunity, the decisions capture both Congress's intention of minimal interference with online speech and the concern for

78. *See* Rogers, *supra* note 22, at 2 (noting that the decisions in *Jones* and *Hare* "have broken new ground" that should alarm website operators).

79. At the time the cases were heard, few trial courts had the opportunity to consider *Accusearch*'s specific encouragement test, which meant few opinions were available to the court for additional authority. Shortly after it was decided, citations to *Hare* that turned up in courts across the country. *Hare* is discussed briefly by Rist v. Xcentric Ventures, LLC, Civil Action No. MJG–12–3660, 2013 WL 2946762, at *6 (D. Md. June 12, 2013) and Ascend Health Corp. v. Wells, No. 4:12–CV–00083–BR, 2013 WL 1010589, at *8 (E.D.N.C. Mar. 14, 2013). *Hare* is also cited by Russell v. Implode-Explode Heavy Indus. Inc., Civil Action No. DKC 08–2468, 2013 WL 5276557, at *6 (D. Md. Sept. 18, 2013). *Jones* is distinguished briefly by S.C. v. Dirty World, No. 11–CV–00392–DW, 2012 WL 3335284, at *5 (W.D. Mo. Mar. 12, 2012) and by Hill v. StubHub, Inc., 727 S.E.2d 550, 558 (N.C. Ct. App. 2012).

80. Jones v. Dirty World Entm't Recordings, LLC, 840 F. Supp. 2d 1008, 1012 (E.D. Ky. 2012); *Hare*, 2012 WL 3773116, at *18.

81. *See* F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009) (concluding that a service provider is "responsible" for the offensive content only if it in some way specifically encourages its development).

"creating a lawless no man's land" of the Internet that was voiced by the court in *Roommates.com*.[82]

Allowing specific encouragement of what is defamatory about user content to remove CDA immunity would not open Pandora's Box of liability for website operators. In *Jones* and *Hare*, the operators of thedirty.com trafficked in gossip and rumors from anonymous sources without regard for reliability or truthfulness before placing Richie's comments and his name on the users' submissions. In doing so, they faced erosion of CDA immunity.[83] The Sixth Circuit disagreed with the trial court, but affirming the decision would have provided only a small window for future litigants. When users post defamatory content without encouragement from the website operators, these precedents are unlikely to be cited in support of liability for website operators for third-party content. Further, these cases could have been distinguished from many future cases based on Richie's engagement with and comments on users' content.

The court in *Hare* did not address whether Richie and Dirty World could be held liable if they only generally encouraged others to post defamatory statements.[84] Even if it had, it's not yet clear where the line between specific and general encouragement will fall. Still, the court permitted discovery to determine if and how the defendants encouraged others to post such statements.

In a another case involving thedirty.com, a Missouri federal court criticized the *Jones* ruling and held that "merely encouraging defamatory posts is not sufficient to defeat CDA immunity."[85] The Missouri court noted that courts construing defamation claims against consumer advocacy websites have consistently held that neither using a disreputable web address like "ripoffreport.com" nor inviting visitors to post potentially defamatory statements renders the website operator responsible, in whole or in part, for the creation or

82. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008).

83. Hare, 2012 WL 3773116, at *18–19.

84. *Id.* at *19.

85. S.C. v. Dirty World, No. 11–CV–00392–DW, 2012 WL 3335284, at *5 (W.D. Mo. Mar. 12, 2012).

development of every post on the site.[86] To be sure, it seems fair to say that Richie did more than invite potentially defamatory statements. Whether that distinction is legally relevant remains a matter for the circuit courts.

In short, searches for "encourag!" might just see an uptick on Lexis and Westlaw in the coming years. Operators' encouragement of user-generated defamatory content—whether through direct messages on social media services, responsive comments by authors of blog posts, or holding a website out as a home for unconfirmed gossip—will likely remain a topic of debate in CDA litigation.

VII. CONSTITUTIONAL PROTECTIONS FOR CONSUMERS' SPEECH

A. Facts, Opinions, and Defamation Claims

The First Amendment prevents the opinions expressed in consumer reviews from serving as the basis of defamation actions. Quite sensibly, few will argue that a user's rating of her dinner as "two stars" or a review describing her soup as bland could serve as the basis for a defamation action.[87] However, when reviews contain

86. *Id.* at *3–4 (citing Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (holding that under § 230 of the CDA, merely encouraging third parties to submit negative product reviews on a website called ripoffreport.com does not render the operator of the website responsible for such reviews); Ascentive, LLC v. Op. Corp., 842 F. Supp. 2d 450, 475–76 (E.D.N.Y. 2011); Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *11–12 (M.D. Fla. Feb. 15, 2008)).

87. An illustration involving reviews written about a tailor may be helpful. While a customer who asserts that her suits were not ready on time may be asserting the fact that a deadline was missed, someone who says that the work "took entirely too long" is undoubtedly stating an opinion. Similarly, one who asserts that the tailor is overscheduled is likely stating an opinion, but one who says that the tailor cannot meet the demands of the clients he already has moves into more ambiguous territory. Finally, an assertion that the "stitching was poor" is clearly stating an opinion about the quality of the work—if for no other reason than that the statement is insufficiently concrete to be proven false. However, if the same reviewer asserted that the stitching broke with normal wear, there might be a question of fact sufficient to be proven or disproven.

facts, or opinions that imply facts, that are capable of being proven false, a defamation action may be available.[88]

The leading case concerning the constitutional limits of the fact–opinion distinction is *Milkovich v. Lorain Journal Co.*[89] In that case, the Supreme Court addressed the liability of an Ohio newspaper for implying that a high school wrestling coach lied under oath concerning an incident that was witnessed by the reporter.[90] The Court reversed the lower court's decision granting the paper's motion for summary judgment and remanded the case without recognizing a new constitutional protection for opinions.[91] The Court also made clear that the expression of opinion could imply an assertion of objective fact sufficient to give rise to a defamation claim.[92]

The ruling in *Milkovich* provoked states into taking action on defamation law. Some enacted an opinion privilege by state constitutional amendment or through legislation; others—through their courts—adopted the Court's approach in *Milkovich* and refused to recognize a privilege for opinion.[93] This non-uniformity in state law forces website operators to use a set of procedures that works in all or most of the jurisdictions in which they operate. It will become particularly important if the reach of CDA immunity continues to divide circuit courts and district courts, as website operators might find themselves in the position of having to defend cases on their merits—including the truthfulness of the statements.

A recent case involving a former tenant's Yelp review of her apartment building provides some analysis of how the fact–opinion distinction applies in consumer review cases.[94] The case implicated

88. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986); Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990).

89. 491 U.S. 1.

90. *Id.* at 21–23.

91. *Id.* at 18.

92. *Id.*

93. For a discussion of responses to *Milkovich*, see Kathyrn Dix Sowle, *A Matter of Opinion*, 3 WM. & MARY BILL RTS. J. 467 (1994) (discussing eight categories of decisions by lower courts following *Milkovich* and state laws that provide broader protection for opinion than the constitutional doctrine).

94. Brompton Bldg., LLC v. Yelp!, Inc., No. 1-12-0547, 2013 WL 416185 (Ill. App. Ct. Jan. 31, 2013).

two allegedly defamatory statements.[95] The court first addressed a reviewer who said that her management's claim that it did not receive her rent check on time was a "total lie."[96] The court was also concerned with the statements surrounding the allegedly defamatory statements, including the reviewer's description of how she "asked for confirmation of the date of the post mark on her rent check envelope."[97] That reviewer conceded a postmark was "not legal 'proof' that [her] rent was actually received [on time]."[98] The court noted the reviewer's acknowledgement of the "possibility that her rent check had been received late" was sufficient, when viewed in the context of the entire posting, to make her statement that "[t]his is a total lie" a representation of her opinion rather than a statement of fact.[99] The reviewer also accused the management of illegally charging late fees, which the court reasoned to be "more in the nature of conclusory speculation than factual statements."[100] Noting that "[t]he paragraph regarding the 'illegal' late fee charges begins with '[a]fter reading several Yelp reviews,'" the court held that "subsequent statements about [the management] illegally charging late fees represent her opinion based on her experience regarding her . . . payment . . . and her reading of other Yelp reviews."[101]

The decision in *Brompton Building* suggests that the fact–opinion distinction could be broadly applied to consumer review cases to protect speech under state opinion privileges. In some ways, the court strained to view the statements as opinion. While the reviewer was quite reasonable in conceding that her postmark was not legal proof of timely payment, accusations of lying about receiving payment and charging unlawful late fees straddle the line of what most would consider opinion and could quite reasonably be understood as capable of being proven false. If nothing else, the case indicates that business owners may be hard-pressed to recover

95. *Id.* at *6.
96. *Id.*
97. *Id.* at *7.
98. *Id.*
99. *Id.*
100. *Id.* at *7.
101. *Id.*

in cases of arguable opinion—even when the reviewers make accusations that seem quite capable of being proven false.

B. *The Private–Public Figure Distinction*

The public figure doctrine of the First Amendment overlays state defamation law. That doctrine affects the requisite fault standard for imposing liability. When the potential plaintiff is a public figure, he or she must prove actual malice or reckless disregard for the truth of the statement by the speaker or publisher to recover in a defamation action.[102] Private figures require more complex analysis; they present three possible standards for liability that impact whether the plaintiff can recover punitive or compensatory damages.[103] When allegedly defamatory speech involves a private figure and relates to a matter of public concern, the First Amendment imposes a minimum standard of negligence, but meeting the standard of negligence permits recovery of only compensatory damages.[104] But First Amendment cases provide no restraints on imposing liability for speech that concerns a private figure, is not protected opinion, and does not involve a matter of public concern.[105] Instead, these cases rest on state tort law standards.

Under constitutional jurisprudence, business owners can be considered general-purpose public figures, limited-purpose public figures, or private figures. In cases involving individual plaintiffs, determining the appropriate category for a given plaintiff depends on (1) the plaintiff's relationship to a public controversy and (2) that plaintiff's access to the media[106] or other channels of communication.[107] Courts apply these two factors when determining

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102. New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

103. *See* Gertz v. Welch, 418 U.S. 323, 350 (1974) (discussing three possible standards for liability); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (discussing presumption of damages in libel cases).

104. *Gertz*, 418 U.S. at 350.

105. *Dun & Bradstreet*, 472 U.S. at 757–59.

106. *Gertz*, 418 U.S. at 345.

107. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

the appropriate standard for a business, but they may also consider additional factors, depending on the context of the case.

When applying this doctrine to a corporation, the First Circuit held that corporations are not de facto public figures for two reasons.[108] First, "[c]orporations have no particular advantage over private individuals" in their access to the media.[109] Second, the sale of products does not thrust a business into a public controversy.[110] The court offered three additional "relevant factors that courts could take into consideration in determining whether a corporation is a public figure: (1) whether the controversy that gave rise to the defamation is public or private, (2) whether the controversy preexisted the statements at issue, [and] (3) the nature and extent of the plaintiff's participation in the controversy."[111]

The court's application of this doctrine to corporations is strained—reflecting the inadequacy of applying the doctrine to businesses. The court's conclusion that corporations do not inherently have greater access to the media should be understood narrowly. Corporations do not *inherently* have special access to the media that is not available to individuals. Some businesses' economic influence and connections may give them heightened leverage with and access to journalists, but that is a function of their size and resources rather than their election of the corporate form. Wealthy individuals could enjoy similar access as large corporations and small businesses may well have no more access than the typical private citizen. A related point—one that was not addressed by the court—concerns whether access to media remains relevant. When most sites require only signing up with an email address or

108. Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 593 (1st Cir. 1980) (remanding to the district court to determine whether a public controversy implicating the company existed apart from the challenged statements and whether the "prominence, power, or involvement of the company in respect to the controversy—or its public efforts to influence the results of such controversy—were such as to merit public figure treatment").

109. *Id.* at 589.

110. *Id.* at 589–90.

111. Morton, *supra* note 23, at 416 (citing *Bruno*, 633 F.2d at 583).

connecting a Facebook account to post or respond, the barriers to media access seem to have faded.

Both the stringent requirement of active injection into a public debate and the media-access distinction are inapposite in the case of businesses. The public controversy requirement was premised on the need to protect the privacy concerns of individuals, but businesses' privacy rights are not the same as those of citizens.[112] Additionally, businesses have access to online forums on which they can rebut assertions of reviewers. Their access to channels of media is equal to consumers in online review cases, and this raises doubts about the applicability of a doctrine that rests on unequal access to the media to determine the requisite level of fault. Indeed, on the subjects they typically concern—including business reviews—review websites like Yelp may have greater reach than traditional media.[113] Such sites are the media about which courts should be concerned in these cases.

Some businesses involved in defamation actions could be considered general-purpose public figures, but the qualifications are high enough that few are likely to meet them.[114] Public figures "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[115] These figures, who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events of concern to society at large," may only recover in defamation actions when they can prove actual malice on the part of the speaker.[116]

Recognizing that not all plaintiffs are appropriately situated to be fairly denied recovery, courts developed the category of limited-purpose public figures. Limited-purpose public figures "thrust themselves to the forefront of particular public controversies

112. Wilson, *supra* note 25, at 560.

113. *Cf. Yelp.com Welcomes 100 Million Unique Visitors in January 2013*, YELP (Feb. 16, 2013), http://officialblog.yelp.com/2013/02/yelpcom-welcomes-100-million-unique-visitors-in-january-2013.html.

114. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring). Still, this standard seems inappropriate for all but a few businesses. On the other hand, it can hardly be argued that businesses are never influential enough to merit the same treatment as individual public figures.

115. Gertz v. Welch, 418 U.S. 323, 345 (1974).

116. *Id.* at 337.

in order to influence the resolution of the issues involved."[117] This category is more likely to capture business owners than the general purpose category. Businesses may be involved in a narrow set of public matters, but they are unlikely to meet the criteria necessary to be considered general-purpose public figures. The Supreme Court also recognized the possibility that someone could involuntarily become a public figure "through no purposeful action of his own."[118] However, the Court cautioned that this type of public figure must be "exceedingly rare" and noted that "[f]or the most part those who attain this status have assumed roles of especial prominence in the affairs of society."[119] Indeed, the probability of a business owner becoming an involuntary public figure in the context of business review seems unlikely.[120]

Other commentators have recognized the need for a clearer doctrine that is better suited for determining the status of business owners as public figures. One student note proposed a test "more tailored to businesses" that treats businesses as public figures when they choose to advertise their goods and services online.[121] Reasoning that they "voluntarily invite comment and criticism about the quality of those goods and services," the author argues that this test strikes a balance between allowing dismissal on the pleadings of non-meritorious cases and protecting the reputation of business owners.[122]

This approach has the virtue of simplicity and it resolves some of the problems of uncertainty; however, it does so at the cost

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117. *Id.* at 345.

118. *Id.*

119. *Id.* Subsequent cases make clear that the fact that a review was written about a plaintiff does not make the subject a public figure or the subject of a topic of public concern. *Cf.* Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) ("Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.").

120. Perhaps an unexpected event taking place in the owner's restaurant—a fire that engulfs the kitchen and ruins the dinner of guests while making the evening news—would send an unwitting owner into the rarified air of involuntary public figures.

121. Morton, *supra* note 23, at 425.

122. *Id.* at 425.

of perpetuating a false divide between what takes place online and in person. Moreover, it incentivizes avoidance of Internet commerce, which seems to run contrary to what courts and legislatures have hoped to accomplish when crafting doctrine and laws concerning Internet communications.[123]

Of course, it is easier to throw stones than build a house out of them, and criticizing other proposals for improving the doctrine for business owners does not resolve the problems with the existing doctrine. Instead of a dramatic overhaul, this Note proposes a modest change to the doctrine: elimination of the access to media prong from the court's analysis of whether a business is a public figure. The free and open access to relevant and widely read media has left this factor inappropriate for distinguishing between plaintiffs.

VIII. DISCUSSION OF MATTERS OF COMMON INTEREST

The common law provides both the elements of a defamation claim as well as the potential privileges in consumer review cases. Although the argument seems to have received little attention in previous cases—in part because of the development of the standards articulated in *New York Times v. Sullivan*—online consumer review cases might implicate the common law privilege for discussion of matters of common interest. The privilege provides immunity for defamatory statements made in good faith to individuals with an interest in the statement.[124] The privilege is a qualified one—not extending to excessive publication or statements made with actual malice.[125]

Consumer reviewers might argue for protection under this privilege because consumers share a common interest in

123. *See, e.g.*, 47 U.S.C. § 230(b)(1)–(2) (2011) (identifying the "policy of the United States" as both "to promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet").

124. *See* Hailstone v. Martinez, 87 Cal. Rptr. 3d 347, 354–358 (Cal. Ct. App. 2008) (applying California's anti-SLAPP statute and CAL. CIV. CODE §§ 47, 48).

125. *Id.*

communicating their experiences and thoughts through reviews. This seems to be a strong case for extending the privilege to online reviews, but the expansive audience for online consumer reviewers undermines the purpose of the privilege. Statements are not protected when they are "excessively published," which courts have interpreted to exclude widely disseminated speech.[126] To say that all visitors to a website share an interest in the subject is to read the privilege so broadly as to permit all statements about businesses to enjoy the privilege. Of course all consumers have a shared interest in the quality of goods and services, but statements made in online reviews reach broadly to unknown numbers of people. Moreover, they seem most likely to harm businesses when communicated through consumer review websites that can make or break new businesses.

IX. CONCLUSION

Against whom we will allow defamed businesses to pursue lawsuits reflects our value judgments about how we want the Internet to develop. Those judgments include whether we allow the twenty-first century's Wild West to be a relatively unsettled, unregulated, and unfiltered frontier—profitable for some but lacking recourse for most. Congress seemed to adopt this view when it passed the CDA, but, in light of the role Internet commerce plays in the economy, it is time we rethink the CDA's definitions and distinctions.

This Note has attempted to identify areas of debate in upcoming CDA cases, including the limits of editorial control and the degree to which interactive content providers can encourage defamatory content from their users while still enjoying immunity. It has also attempted to provide some clarity regarding the constitutional doctrines that address consumer reviews by proposing that courts should abandon the access-to-media prong of their

126. *See* RESTATEMENT (SECOND) OF TORTS § 604 (1977) (describing circumstances constituting "excessive publication").

analysis for determining if businesses are public figures. This Note has also identified the vexing problem of the fact–opinion distinction in consumer reviews, which undoubtedly requires further study. Finally, this Note attempted to raise and dismiss a background argument—the application of the common interest privilege to online consumer review cases. The multitude of issues addressed—as well as the admittedly brief treatment some of them received—reflects the complexity of the problem. Hopefully, it also captures the need for further development of these arguments.

Perhaps Stephen Marche was not entirely wrong; perhaps the Internet will be cleaned up one day. If that is to happen through legal reform, it can start by giving those with tarnished reputations and diminished sales a better means to make themselves whole.

Into Thin Air: Unconstitutional Taking by Preemption of State Common Law Under the Clean Air Act

Rory Hatch*

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* Rory Hatch is a recent graduate of the University of Texas School of Law. He would like to thank his friends and family for their support, and the editors of *The Review of Litigation* for their hard work on this Note.

"Where has the Court left us?"[1] Since the Supreme Court's June 2011 *American Electric Power Co., Inc. v. Connecticut* decision, many legal scholars have been attempting to answer that very question.[2] In *American Electric*, the Court ruled that the Clean Air Act preempts federal common law claims.[3] However, the Court was silent on the extent of the preemption, particularly whether the Act also preempted state common law claims.[4] Over a year later, the question remains largely unanswered.[5]

Recently, two federal district courts penned the first judicial decisions since *American Electric* to consider the issue of state common law preemption; both ruled that the Clean Air Act preempts both federal *and* state common law.[6] The most recent, *Bell v. Cheswick*, will be the focus of this Note. Although neither the litigants nor the district court addressed the issue, this Note will show that the facts of *Cheswick* demonstrate a previously unexplored

1. Terry Oxford, *Climate Change and* Connecticut v. American Electric Power–*Where Has the Supreme Court Left Us?*, 57 THE ADVOC. (TEXAS) 89 (2011).

2. 131 S. Ct. 2527, 2540 (2011). For a survey of reactions to the *American Electric* decision, see Allison Fischman, *Preserving Legal Avenues for Climate Justice in Florida Post-*American Electric Power, 64 FLA. L. REV. 295 (2012) (discussing environmental justice implication of *American Electric*); Hari M. Osofsky, AEP v. Connecticut's *Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101 (2011) (discussing possible ways that *American Electric* may affect future litigation); Oxford, *supra* note 1 (discussing *American Electric* and making predictions on future case law).

3. *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

4. Oxford, *supra* note 1, at 91.

5. *Compare* Oxford, *supra* note 1, at 92 ("[S]tate law nuisance claims should also survive."), *with* Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (the Clean Air Act preempts both federal and state common law claims).

6. *See infra* Part III (discussing these judicial opinions).

aspect of Clean Air Act preemption—the Fifth Amendment's Takings Clause.[7]

If the Clean Air Act preempts both state and federal common law claims, then fact patterns similar to *Cheswick* create Takings Clause violations. Further, this Note will demonstrate that this problem frustrates the underlying rationale for total preemption in *Cheswick*. Therefore, instead of preempting all common law claims, courts should adopt a compromise that preempts some, but not all, state common law claims.[8]

Part I of this Note will survey provisions of the Clean Air Act that are particularly important to the forthcoming analysis. It will demonstrate the overall complexity of the Clean Air Act's regulatory system and briefly explore the Act's savings clause as well as various civil actions authorized by the Act.[9]

Part II explores the reasoning of the *American Electric* opinion. It surveys the jurisprudence that led to the decision, and examines how the Court applied that jurisprudence—especially cases dealing with the Clean Water Act—to the Clean Air Act.

The remaining parts of this Note investigate the preemption of state common law claims by the Clean Air Act. Part III examines the two post-*American Electric* federal district court rulings in favor of total preemption. Part IV shows why the most recent of these cases, *Bell v. Cheswick*, actually presents a Takings Clause problem. Part V demonstrates that *Cheswick* is not an esoteric example; total preemption of common law claims would produce many similar Takings Clause violations. Part VI discusses how these Takings Clause issues undermine the rationale behind total preemption presented in *Cheswick*. The Note concludes by suggesting a different approach: applying the Supreme Court's *International Paper Co. v. Ouellette* holding to the Clean Air Act.

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7. *See* Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314 (W.D. Pa. 2012), *rev'd and remanded*, 734 F.3d 188 (3d Cir. 2013) (Takings Clause is not mentioned); *see also infra* Part IV (demonstrating that *Cheswick* presents a Takings Clause problem).

8. *See infra* Part VI (discussing this compromise).

9. A reader sufficiently familiar with these features of the Clean Air Act should consider the reading of this section to be advisable, but not necessary.

I. INTRODUCTION TO THE CLEAN AIR ACT

Three features of the Clean Air Act are especially relevant to the issue of common law preemption. First, the Act creates a national, comprehensive regulatory framework. Second, the Act authorizes a number of civil remedies to protect individuals harmed by air pollution. Third, the Act includes a savings clause that, in theory, preserves at least some claims beyond those explicitly authorized by the Act.

A. *The Clean Air Act Is a Comprehensive Regulatory Scheme*

The Clean Air Act provides a systematic, adaptable framework for regulating the nation's ambient air quality. The federal Environmental Protection Agency (EPA) oversees air quality regulation under the Act.[10] Most importantly, the EPA issues nationwide air quality benchmarks, called National Ambient Air Quality Standards (NAAQS).[11]

Despite the Act's national scope, its framework is highly adaptable and its implementation is largely local. The Act divides the country into Air Quality Control Regions (ACQRs).[12] For each region, the respective state drafts a State Implementation Plan (SIP), a regulatory plan for the AQCR to attain NAAQS for each category of air pollution regulated by the Clean Air Act.[13] If the EPA approves the proposed SIP, it becomes enforceable as federal law.[14]

Notably, the SIPs require major polluters to obtain a government-issued permit for their emissions. Pre-existing sources

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10. *See* William B. Johnson, Annotation, *Propriety of EPA Determinations Whether State Implementation Plans (SIPs) or Revisions Complied with Criteria for Approval Under Clean Air Act (42 U.S.C.A. §§ 7401 et seq.)*,174 A.L.R. Fed. 137, § 2[a] (2001) (discussing EPA oversight of state implementation of Clean Air Act).

11. *Id.*; 42 U.S.C.A. § 7409 (West, Westlaw through P.L. 113–74 (excluding 113–66, 113–67, and 113–73)).

12. 42 U.S.C.A. § 7410 (West, Westlaw through P.L. 113–74 (excluding 113–66, 113–67, and 113–73)).

13. Johnson, *supra* note 10, § 2[a]; *Id.*

14. 42 U.S.C.A. §§ 7410, 7413 (West, Westlaw through P.L. 113–74 (excluding 113–66, 113–67, and 113–73)).

may obtain a permit only if they utilize "Reasonably Available Control Technology."[15] The RACT standard is largely defined by local SIPs, but it is generally the most lenient of any permitting standard under the Clean Air Act.[16]

New or modified sources must meet both national and local standards in order to obtain a permit. First, the source must meet nationwide New-Source Performance Standards (NSPS).[17] The NSPS are industry-specific standards; for each type of source, the EPA evaluates technologies' effectiveness and cost to determine the "best system of emission reduction."[18] By establishing baseline national standards, the Clean Air Act prevents states from using forgiving pollution controls to compete among each other for new industry.[19]

Additionally, a new emissions source must meet standards specific to its particular AQCR. Within a non-attainment region, this involves a costly New-Source Review; the source must achieve the lowest available emissions rate, an extremely stringent standard.[20] Within an attainment region, the source faces a considerably lighter standard, Best Available Control Technology (BACT), which is determined state-by-state.[21]

Thus, the Clean Air Act creates a complex series of local and national controls designed to work together as a comprehensive national regulatory system.

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15. Johnson, *supra* note 10, § 2[a].

16. *Id.*

17. 42 U.S.C.A. § 7410 (West, Westlaw through P.L. 113–74 (excluding 113–66, 113–67, and 113–73)).

18. *Id.*

19. *Clean Air Act Oversight Before the Subcomm. on Oversight and Investigations of the H. Comm. on Commerce*, 104th Cong. 20 (1995) (statement of Carol M. Browner, Administrator, EPA).

20. Clean Air Act Handbook §§ 4:5, 4:8 (2012).

21. *Id.* § 4:13.

B. *Civil Actions Authorized by the Clean Air Act*

The Clean Air Act also authorizes a number of possible civil actions.[22] EPA decisions and emissions standards may be subject to judicial review.[23] Additionally, the EPA itself has civil enforcement power.[24] Perhaps most importantly, private plaintiffs can file a "citizen suit" seeking injunctive relief against a polluter who is violating pollution regulations or a government agency that fails to enforce such regulations.[25] Though powerful, citizen suits have an extremely important limitation: plaintiffs cannot recover damages, only equitable remedies.[26]

C. *The Savings Clause of the Clean Air Act*

Lastly, the Clean Air Act has a savings clause that preserves at least some legal claims otherwise preempted by the Act.[27] Thus private plaintiffs retain "any right . . . under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."[28] Although the clause's broad language seems to

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22. *See* Del. Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256, 265 (3d Cir. 1991) (discussing lawsuits authorized by § 7604 and § 7607).

23. 42 U.S.C.A. § 7607 (West, Westlaw through P.L. 113-74 (excluding 113–66, 113–67, and 113–73)); for an example of an action authorized under this provision, *see* Massachusetts v. E.P.A., 549 U.S. 497, 510–14 (2007) (challenging EPA's denial of rulemaking petition by bringing action in federal court).

24. 42 U.S.C.A. § 7411(c)(1), (d)(2) (West, Westlaw through P.L. 113-74 (excluding 113-66, 113-67, and 113-73)); *see* Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2538 (2011) (examining EPA enforcement powers).

25. 42 U.S.C.A. § 7604 (West, Westlaw through P.L. 113-74 (excluding 113–66, 113–67, and 113–73)).

26. *See* Powell v. Lennon, 914 F.2d 1459, 1462 n.7 (11th Cir. 1990) (presenting an overview of federal case law prohibiting private plaintiffs from seeking damages in citizen suits); *see also* Abuhouran v. Kaiserkane, Inc., No. 10-6609 (NLH/KMW), 2011 WL 6372208, at *4 (D.N.J. Dec. 19, 2011) ("The Clean Air Act does not authorize a private cause of action for compensatory damages for alleged violations of the Act.") .

27. 42 U.S.C.A. § 7604(e) (West, Westlaw through P.L. 113–74 (excluding 113–66, 113–67, and 113–73)).

28. *Id.*

preclude any common law preemption, recent case law has dramatically limited the clause's scope.[29]

II. PREEMPTION OF FEDERAL COMMON LAW BY THE CLEAN AIR ACT

In its June 2011 *American Electric Power Co. v. Connecticut* decision, the Supreme Court announced that, despite the savings clause, the Clean Air Act preempts federal common law claims.[30] To preempt federal common law, Congress need only provide relevant legislation;[31] several earlier cases suggested that Congress had done just that by passing the Clean Air Act.[32] Following this logic, and noting that the Act's civil actions provided substantially similar relief as could be attained under common law, the Court held that the Act preempted federal common law.[33]

Though *American Electric* shocked many environmentalists, earlier case law had suggested that the Clean Air Act's savings clause might not be the bulwark its broad language implies. In 1981, the Court held in *Milwaukee v. Illinois* that, although it contains a savings clause similar to the Clean Air Act's,[34] the Clean Water Act preempts federal common law.[35] Six years later, in *International Paper Co. v. Ouellette*, the Court extended the Clean Water Act's preemption to extraterritorial state-law claims (although all other state claims were preserved).[36] In 2010, a year before the *American*

29. *See infra* Part II (discussing this case law).

30. Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2540 (2011).

31. Milwaukee v. Illinois, 451 U.S. 304, 315 (1981).

32. *See* Andrew Jackson Heimert, *Keeping Pigs out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403, 474 (1997) (writing years before the Court decided *American Electric*, the author notes that *Milwaukee* likely applies to the Clean Air Act).

33. *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

34. *Compare* 33 U.S.C.A. § 1365(e) (West, Westlaw through P.L. 113–74 (excluding 113–66, 113–67, and 113–73)) *with* 42 U.S.C.A. § 7604(e) (West, Westlaw through P.L. 113–74 (excluding 113–66, 113–67, and 113–73)).

35. *Milwaukee*, 451 U.S. at 315.

36. Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); *see also infra* Part VI (discussing *Ouellette* in more detail).

Electric decision, the Fourth Circuit applied *Milwaukee* and *Ouellette* to the Clean Air Act, ruling in *ex rel. Cooper* that North Carolina could not apply its public nuisance law against permitted emitters in Alabama and Tennessee.[37]

Cases like *Milwaukee*, *Ouellette*, and *ex rel. Cooper* suggested that the Clean Air Act preempts at least some common law claims.[38] However, the scope and boundaries of the preemption were unknown until the *American Electric* ruling established preemption of all federal common law claims by the Clean Air Act.

In *American Electric*, a coalition of states and private environmental groups sued several major energy companies for creating a public nuisance by emitting greenhouse gases and contributing to global warming.[39] The plaintiffs sought an injunction to cap the defendants' greenhouse emissions.[40] The defendants, meanwhile, argued that the political question doctrine barred, and the Clean Air Act preempted, all of the plaintiffs' state and federal common law claims.[41] The Justices split on the political question issue,[42] and declined to rule on preemption of the plaintiffs' state law claims.[43] A majority agreed, however, that the Clean Air Act preempted the plaintiffs' federal common law claims.[44]

Generally, federal common law no longer exists; under the well-known *Erie* doctrine, federal courts merely apply state substantive law.[45] Case law after *Erie* created an important exception to this doctrine: federal courts may adopt their own unique common law if there is a manifest need for a federal rule and Congress has not acted.[46] Once Congress passes legislation that speaks "directly to

37. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 302–03 (4th Cir. 2010).

38. *See* Heimert, *supra* note 32, at 474 (writing before the decision in *American Electric* and discussing how these cases might apply to the Clean Air Act).

39. Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2532 (2011).

40. *Id.* at 2532, 2534.

41. *Id.* at 2534–35.

42. *Id.* at 2535.

43. *Id.* at 2540.

44. *Id.* at 2537.

45. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no general federal common law.").

46. *Am. Elec. Power Co.*, 131 S. Ct. at 2535–36.

[the] question," the exception no longer applies and *Erie* destroys the conflicting federal common law.[47] Thus, an act of Congress *automatically* preempts relevant federal common law.[48]

The *American Electric* opinion uses this analytical framework, relying heavily on *Milwaukee v. Illinois*—an earlier case on preemption by the Clean Water Act. In *Milwaukee*, the Court affirmed the manifest need for a federal rule regarding interstate water pollution.[49] However, the Court also concluded that the exception to *Erie* did not apply; Congress had already spoken directly to the question by passing the Clean Water Act and empowering the EPA to regulate water pollution.[50] Thus, the Clean Water Act preempts any federal common law.[51]

The Court viewed the facts of *American Electric* as analogous to *Milwaukee*.[52] Although there may be a manifest need to regulate greenhouse-gas emissions, Congress already acted by passing the Clean Air Act, giving the EPA an affirmative duty to regulate greenhouse gasses.[53] Because it speaks directly to the question of air-pollution regulation, the Clean Air Act preempts federal common law.[54]

III. PREEMPTION OF STATE COMMON LAW BY THE CLEAN AIR ACT

Compared to its federal counterpart, state common law is far more difficult for Congress to preempt; merely speaking to the question is not enough.[55] Instead, Congress must leave no room for state law to augment federal legislation—it must either explicitly

47. Milwaukee v. Illinois, 451 U.S. 304, 315 (1981).
48. *Id.*
49. *Id.* at 313.
50. *Id.*
51. *Id.* at 314.
52. Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2535 (2011).
53. *See* Massachusetts v. E.P.A., 549 U.S. 497 (2007) (holding that greenhouse gases are pollutants under the Clean Air Act, and that the EPA must regulate their emission).
54. *Am. Elec. Power Co.*, 131 S. Ct. at 2538.
55. *Id.* at 2537 (citing *Milwaukee*, 451 U.S. at 315).

preempt state law or create such a complete statutory scheme that there is no space left for common law to fill.[56] Thus, as the Fourth Circuit explained, "A field of state law . . . would be preempted if a scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[57] Additionally, federal law preempts any directly conflicting state law.[58]

The *American Electric* Court remained silent on whether or not the Clean Air Act preempts state common law claims.[59] As lower courts begin to examine this question, three possible answers are especially likely: total preservation of state common law,[60] preemption of extraterritorial state common law only (following *International Paper v. Ouellette*),[61] or total preemption of all state common law.

The first two district courts to rule on the issue since *American Electric* both selected the third option—total preemption—concluding that the comprehensiveness and complexity of the Clean Air Act creates the inference that Congress intended to preempt state common law.[62]

A. *Comer v. Murphy Oil*

The first case to apply *American Electric* to state common law was *Comer v. Murphy Oil*.[63] In *Comer*, landowners across the Gulf Coast sued major energy companies for nuisance, trespass, and

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56. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987).

57. North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 303 (4th Cir. 2010) (alternation in original) (internal quotations and citations omitted).

58. *Ouellette*, 479 U.S. at 492.

59. *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

60. Several courts prior to *American Electric* held that the Clean Air Act preserved state common law. *See, e.g.*, Moon v. N. Idaho Farmers Ass'n, CV 2002 3890, 2002 WL 32102995, at *3–5 (D. Idaho Nov. 19, 2002) (unpublished decision) (finding that the Clean Air Act does not preempt state common law nuisance and trespass).

61. This is the rule for state common law claims with respect to the Clean Water Act. *Ouellette*, 479 U.S. 481, 497; *see also infra* Part VI (discussing *Ouellette*).

62. *See infra* Part III.A–B. (discussing *Comer v. Murphy Oil* and *Bell v. Cheswick*).

63. Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012).

negligence arising from the defendants' greenhouse-gas emissions.[64] The landowners claimed these emissions exacerbated global warming, which caused Hurricane Katrina to artificially strengthen, and thereby increased property damage from the storm.[65]

The district court dismissed the suit for many reasons, including preemption by the Clean Air Act.[66] In the court's brief preemption analysis, it found that the Clean Air Act's regulatory scheme is so pervasive that there is no room left for the common law to supplement it.[67]

B. Bell v. Cheswick

Cheswick is a class action arising out of Springdale, Pennsylvania, a suburb of Pittsburgh, brought on behalf of nearly 1,500 people living within a mile of the local power plant, the Cheswick Generating Station.[68] Residents claim they could not enjoy the land surrounding their homes because of the noxious fumes from the plant; moreover, particulates emitted by the plant regularly fall on their properties, covering their yards and homes with white fly ash and black carbon powder.[69] Despite numerous complaints, the EPA (and state equivalents) have insisted that the plant was properly permitted and in compliance with the Clean Air Act.[70] Frustrated and seeking remediation, several residents filed suit for nuisance, negligence, and trespass.[71]

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64. *Id.* at 852–53.

65. *Id.*

66. *Id.* at 868.

66. *Id.* at 868.

67. *Id.* at 865.

68. Bell v. Cheswick Generating Station, 903 F.Supp.2d 314, 315 (W.D. Pa. 2012), *rev'd and remanded,* 734 F.3d 188 (3d Cir. 2013).

69. *Id.* For a short description of the residents' plight, see Rich Lord, *Cheswick Residents File Suit Against Power Plant*, PITTSBURGH POST-GAZETTE (July 7, 12:04 PM), http://www.post-gazette.com/local/north/2012/07/07/Cheswick-residents-file-suit-against-power-plant/stories/201207070141 (interviewing the residents' attorney).

70. *Cheswick*, 903 F. Supp.2 d at 318; Lord, *supra*, note 69.

71. Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314, 319 (W.D. Pa. 2012), *rev'd and remanded*, 734 F.3d 188 (3d Cir. 2013).

The district court ruled that the Clean Air Act's complex regulatory framework is incompatible with any common law supplement; therefore, the Clean Air Act preempted the plaintiffs' state common law claims. As the court noted, power plants are "regulated by agency permits, governed by the [environmental agencies], and imposed through the preconstruction-permit process . . . the specific controls, equipment, and processes to which the Cheswick Generating Station is subject to are implemented and enforced by the EPA [and similar state regulatory agencies]."[72] Thus, the Clean Air Act's regulatory scheme is so pervasive that no other regulation can exist alongside it; any common law would interfere, rather than assist it. Agreeing with the holding in *Comer*, the court explained: "Here, the Clean Air Act represents a comprehensive statutory and regulatory scheme that establishes the standards with which the Cheswick Generating Station must abide."[73] The Act preempted the common law claims because "[the] Plaintiffs' claims impermissibly encroach[ed] on and interfere[d] with that regulatory scheme."[74]

It is important to note the difference between the analysis in *American Electric* and *Cheswick*. At its core, *American Electric* was a simple application of *Erie* doctrine and its exception—once Congress speaks on an issue, *Erie* destroys the specialized federal common law, even if space remains to supplant the statutory law.[75] *Comer* and *Cheswick* look not to the existence of Congressional action, but rather to the scope of that action. Federal legislation does not preempt state common law unless it is clear that Congress intended its legislation to be not just comprehensive but also exhaustive.[76]

Cheswick was appealed to the Third Circuit, which reversed the district court's ruling.[77] The Third Circuit found that the Clean Air Act and the Clean Water Act are substantially similar, and therefore

72. *Id.* at 318.
73. *Id.*
74. *Id.*
75. *See supra* Part II (discussing the displacement of federal common law).
76. *See Cheswick*, 903 F. Supp. 2d at 322 ("[J]udicial interference in this regulatory realm is neither warranted nor permitted.").
77. Bell v. Cheswick Generating Station, 734 F.3d 188, 196 (3rd Cir. 2013).

applied *Ouellette*, a Supreme Court case that limited the Clean Water Act's preemption to extraterritorial state law.[78]

Cheswick raised another intriguing possibility that no court addressing preemption by the Clean Air Act had discussed—total preemption of common law giving rise to violations of the Fifth Amendment's Takings Clause. As this Note will demonstrate, this provides another strong argument for courts to follow the Third Circuit and apply *Ouellette* to the Clean Air Act.

IV. THE *CHESWICK* DISTRICT COURT RULING CREATES AN UNCONSTITUTIONAL TAKING

Under the district court's analysis, the facts of *Cheswick* demonstrate a violation of the Takings Clause.[79] In *Cheswick*, the government imposed an easement on the homeowners' property; the Fifth Amendment limits the government's ability to impose such a servitude.[80] The taking of this easement was per se unconstitutional because it created a permanent physical occupation, an action proscribed by the Fifth Amendment.[81]

A. In Cheswick, the Government Imposed an Easement on Nearby Property

The permit issued in *Cheswick* granted the power plant the right to emit a certain quantity of air pollution.[82] That emission created the alleged continuous trespass and nuisance that prompted the *Cheswick* lawsuit.[83] Because the district court ruled that the Clean Air Act preempts the neighboring homeowners' common law claims, the homeowners have no way to enforce their property rights against the power plant's trespass and nuisance. Therefore, by

78. *Id.*

79. U.S. CONST. amend. V (". . . nor shall private property be taken for public use, without just compensation.").

80. *Infra* Part IV.A.

81. *Infra* Part IV.B.

82. *Cheswick*, 903 F.Supp.2d at 319 (W.D. Pa. 2012).

83. *Id.* at 315.

permitting the power plant's emissions, the government granted it the right to maintain a nuisance and trespass over its neighbors' properties—an easement.

The holding in *Cheswick* deprives the homeowners of any way to protect their property rights of exclusion and enjoyment. The Clean Air Act, according to the district court, preempts any relief under the common law, and a citizen suit, authorized by the Act, would be fruitless since the plant is already lawfully permitted and in compliance with all air-quality regulations.[84]

But for the Clean Air Act's preemption of common law, the homeowners would almost certainly be able to state a valid claim against the power plant. As *Comer v. Murphy Oil* demonstrates, many high-profile Clean Air Act cases are global-warming lawsuits, which face a number of hurdles: demonstrating standing, showing causation, and avoiding the political question doctrine.[85] However, the facts of *Cheswick* largely avoid these traps. The affected properties' proximity to the power plant sufficiently demonstrates causation and standing.[86] Moreover, the *Cheswick* court ruled the political question doctrine did not bar the plaintiffs' claims.[87]

Thus, by permitting the plant's emissions, the government assigned to the power station a previously nonexistent right to

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84. *Id.* at 322; Lord, *supra* note 69. Notably, before pursuing a Takings Clause claim, a plaintiff must exhaust all of his or her administrative remedies. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186–87 (1985).

85. *Supra* Part III.A.

86. In *Cheswick*, the byproducts of coal fires harmed properties adjacent to a coal power plant. The proximity of cause and effect makes the harm "fairly traceable" to the defendant's activity. *See* Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 859 (S.D. Miss. 2012) (discussing how to demonstrate standing through geographic nexus) (citing Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d. 358, 360–61 (5th Cir. 1996)); *see also* Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 72 (3d Cir. 1990) (discussing the "fairly traceable" test).

87. *See Cheswick*, 903 F. Supp. 2d at 322 ("The only issue that remains is whether the Clean Air Act preempts state common law"). For an analysis on the various procedural hurdles cases like *Comer* must overcome, including the issues discussed here, see Katherine A. Guarino, *The Power of One: Citizen Suits in the Fight Against Global Warming*, 38 B.C. ENVTL. AFF. L. REV. 125 (2011) (using *Comer* to illustrate the problems of justiciability and standing that many climate-change lawsuits face).

maintain a trespass and nuisance upon its neighbors' properties. The right to maintain nuisance or trespass over another property is an easement.[88] Easements, like other property, cannot be taken in violation of the Fifth Amendment.[89]

B. The Government's Taking in Cheswick Is Per Se Unconstitutional

The government's action in *Cheswick* is an unconstitutional taking because the continuous right of the power plant to deposit particulates on its neighbors' properties creates a permanent physical occupation of those properties. Permanent physical occupations, even for a legitimate public purpose, are per se unconstitutional takings.[90] Therefore, the government action in *Cheswick* violates the Fifth Amendment.

A continuous trespass is a permanent physical occupation and is per se unconstitutional, no matter how inconsequential or unobtrusive it may be.[91] For example, in *Loretto v. Teleprompter Manhattan*, the Supreme Court ruled that even the smallest permanent physical occupation is unconstitutional.[92] In *Loretto*, a city ordinance compelled the plaintiff, the owner of an apartment building, to allow a cable company to install unobtrusive cable lines on the roof.[93] The city had a legitimate pubic interest in providing cable access to its citizens, and installing the cables on Loretto's roof

88. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2.

89. *E.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 825 (1987); United States v. Va. Elec. & Power Co., 365 U.S. 624, 639–40 (1961); United States v. Causby, 328 U.S. 256, 267 (1946); United States v. Welch, 217 U.S. 333, 339 (1910).

90. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("We conclude that a permanent physical occupation authorized by the government is a taking, without regard to the public interests it may serve."); *see also* 26 AM. JUR. 2d *Eminent Domain* § 10 (2013) (surveying case law on permanent physical occupations).

91. *See* 26 AM. JUR. 2d *Eminent Domain* § 10 (2013) ("A physical invasion of an owner's property is a taking, no matter how minute the intrusion and no matter how weighty the public purpose.").

92. *Loretto*, 458 U.S. at 426.

93. *Id.* at 421–24.

seemed to be a minor inconvenience—Loretto did not even notice them at first.[94] Yet the Court ruled that this was a permanent physical occupation and was unconstitutional, emphasizing: "The landowner's right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[95]

Of course, the power plant in *Cheswick* was not physically attaching anything to the properties—simply depositing fly ash and other particulates. However, as long as the government is taking the landowner's right to exclude, a permanent physical occupation occurs.[96] For example, in *Nollan v. California Coastal Commission*, the Supreme Court ruled that California could not compel coastal homeowners to allow public access to their private beach; taking a public access easement across the private beach created a permanent physical occupation and was unconstitutional.[97]

Cheswick presents facts similar to *Nollan* and *Loretto*. A continuous deposit of particulates on the homeowners' properties is certainly more of an occupation than installing a couple rooftop cable lines. Further, granting the power station an easement to continue its trespass is analogous to granting the public an easement to trespass onto private land in *Nollan*. Thus, the government's action in *Cheswick* is a permanent physical occupation and is per se unconstitutional without just compensation.

V. TOTAL PREEMPTION OF STATE COMMON LAW WILL CREATE MANY MORE TAKINGS CLAUSE VIOLATIONS

If the Clean Air Act preempts all common law claims, as the district court in *Cheswick* held, many similar Takings Clause claims will arise because the material facts of *Cheswick* are fairly common in tort litigation, and the Takings Clause will likely impact an even broader set of circumstances.

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94. *Id.* at 424–25.

95. *Id.* at 433 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

96. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987) ("We think a 'permanent physical occupation' has occurred, for purposes of [the *Loretto*] rule, where individuals are a given permanent and continuous right to pass to and fro, so that the real property may continuously be traversed .. . .").

97. *Id.* at 825.

A. *The Facts of Cheswick Are Common*

The fact pattern in *Cheswick* is common in tort litigation. For example, *Boomer v. Atlantic Cement*, a well-known case often covered in introductory torts classes, had very similar facts to *Bell v. Cheswick*.[98] In March 2014, the Western District of Kentucky decided *Merrick v. Diageo Americas Supply*, a case with almost exactly the same fact pattern as *Cheswick*.[99] Indeed, there is nothing especially remarkable or unique about the fundamental fact pattern of *Cheswick*; a quick search in a legal database reveals many lawsuits arising from industrial facilities emitting air pollution and depositing particulates on their neighbors' properties.[100]

B. *A Takings Clause Violation Is Likely Even Without Particulate Deposits*

An important distinguishing fact in *Cheswick* is the deposition of carbon powder and fly ash on the homeowners' properties, which creates a permanent physical occupation and a per se taking. Yet many emissions often stay airborne, instead of depositing particulates on the ground, which means they do not create a permanent physical occupation. A fact pattern similar to *Cheswick*, but without a permanent physical occupation, could still

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98. Boomer v. Atl. Cement Co., 26 N.Y.2d 219 (1970). Like *Cheswick*, *Atlantic Cement* involved an industrial facility emitting noxious fumes and particulates into the air, to the detriment of nearby property owners. *Id.* at 222. *Boomer*, however, was a nuisance case only. *Id.*

99. *See* Merrick v. Diageo Ams. Supply, Inc., No. 3:12-CV-334-CRS, 2014 WL 1056568 (W.D. Ky. Mar 19, 2014) (whiskey distillery sued for trespass and nuisance caused by EPA-permitted ethanol emissions).

100. *See, e.g.*, *id.*; Stevenson v. E.I. DuPont De Nemours & Co., 327 F.3d 400 (5th Cir. 2003) (petrochemical plant emits heavy metal particles into the air, contaminating neighbors' land); Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir. 1997) (release of uranium into the air and groundwater created a continuing trespass); Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979) (smelter's air pollution deposits lead and sulfoxide on plaintiff's land); Bradley v. Am. Smelting & Ref. Co., 709 P.2d 782 (Wash. 1985) (deposition of airborne microscopic particles on plaintiff's land from defendant's copper smelter gives rise to nuisance and trespass claims).

run afoul of the Takings Clause.[101] There are two possible ways that, if the Clean Air Act preempts all common law, a Takings Clause violation could occur without a permanent physical occupation: under the per se takings rule in *Lucas v. South Carolina* or the three-factor test established in *Penn Central v. New York*.

1. Deprivation of All Economically Viable Use: *Lucas v. South Carolina*

A permitted emission could create a per se taking if it were so noxious that it robbed neighboring land of all economically viable use. According to the Supreme Court's holding in *Lucas v. South Carolina*, any government action that eliminates all economically viable use of a property is a per se taking.[102] In *Lucas*, the owner of a beachfront lot sued after South Carolina enacted a law forbidding any new construction along the beach.[103] The Court ruled that the regulation so deprived the owner of his property that it became, in effect, a taking of title.[104]

By analogy, a government-permitted air emission could deprive nearby landowners of all economically viable use of their property if the pollution were so foul or toxic that it effectively rendered the nearby property uninhabitable. Ordinarily, this would give rise to a nuisance lawsuit, but if the emission source's permit preempted that common law claim, as *Chewsick* held, then the permit would be a per se taking under *Lucas*.

Of course, given the goal of air pollution regulation—cleaner air—environmental agencies would rarely grant a permit for such a

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101. *But see infra* Part V.B.3 (discussing nontrespassory permanent physical occupations).

102. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992) ("We believe similar treatment must be accorded [permanent physical occupations and] confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land.").

103. *Id.* at 1007–09.

104. *Id.* at 1028–29. Notably, the facts of *Lucas* show that the "all economically viable use" standard actually means something slightly less than "all" use—the property owner could still have used his property for beachside camping or fishing, and thus retained some small economic use of his property. *See id.* at 1065 n.3 (Stevens, J., dissenting) ("Lucas may put his land to 'other uses'—fishing or camping, for example—or may sell his land to his neighbor as a buffer. In either event, his land is far from 'valueless.'")

noxious emission.[105] Nevertheless, the holding in *Lucas* is important, despite its limited applicability, because it provides a powerful bright-line rule, a precious rarity in Takings Clause jurisprudence. Further, the per se takings rules in *Lucas* and *Loretto* bookend the extreme range of government actions that can be unconstitutional takings. Government actions often fall in between *Lucas* and *Loretto*, limiting property rights without creating a permanent physical occupation or a deprivation of all economically viable use. Such actions, though not per se unconstitutional, still must pass the three-factor test first articulated in *Penn Central v. New York*.[106]

2. The *Penn Central* Test

If courts decide that the Clean Air Act preempts state law, the constitutionality of any permitted air pollution that causes injury to property, without creating a permanent physical occupation or depriving the property of all economically viable use, would be determined by the three factors of the *Penn Central* test: the economic impact of the pollution, the pollution's interference with investor-backed expectations, and the character of the permitted emission.[107]

The first and second factors of the *Penn Central* test would pose a formidable constitutional hurdle for any air pollution permits that preempt common law claims. Dirty air can be extremely unpleasant and extremely unhealthy. For example, in *Cheswick*, dust, sulfurous fumes, and burning odors deprived property owners of the use and enjoyment of their yards and porches.[108] Additionally, some residents developed headaches and other health problems.[109]

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105. Although the facts of *Cheswick* actually come fairly close to allowing such noxious fumes, as the homeowners asserted that fumes from the power plant were not just unpleasant, but actually causing health problems. Lord, *supra* note 69.

106. *See* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978) (articulating the three-factor test).

107. *Id.*

108. Lord, *supra* note 69.

109. *Id.*

As a result, the pollution in *Cheswick* substantially impacted the economic value of the surrounding properties—the first *Penn Central* factor. Indeed, a local newspaper reported: "[the homeowners' attorney] said, 'It's not fair . . . It lowers the value of their homes. It makes their lives miserable.'"[110] The pollution substantially interfered with the homeowners' expectations of their property—the second *Penn Central* factor. As the court noted, instead of realizing their expectation of a pleasant place to live, the residents felt like prisoners in their own homes.[111] Thus, the homeowners' plight demonstrates how air pollution can significantly impact properties' economic value and substantially interfere with investor-backed expectations.

The final factor of the *Penn Central* test examines the character of the government action: is it more akin to a regulation or a physical invasion?[112] To determine the character of the action, courts weigh the invasiveness of the government's regulation against the strength of the government's public policy interest.[113]

Courts determine the invasiveness of the government action by the degree, rather than the mode, of interference with the property. For example, in *United States v. Causby*, the military's frequent, low-altitude airplane flights over the plaintiff's chicken farm upset the fowl so much that the farm became inoperable.[114] The Supreme Court ruled that the frequent, low flights amounted to "an invasion" and were an unconstitutional taking of the chicken farm.[115] A

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110. *Id.*

111. Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314, 315 (W.D. Pa. 2012), *rev'd and remanded*, 734 F.3d 188 (3d Cir. 2013).

112. The more the action resembles a physical invasion, as opposed to a mere regulation, the more likely it is that it violates the Takings Clause. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) .

113. For clarity and brevity, this Note does not explore this factor in depth. However, a considerable amount of ink has been spilled defining what, exactly, is the character of a government action. Some suggest that an action's character is determined by its resemblance to a per se taking; others argue that character is determined by the scope of the police power. *See* Jeffry R. Gittins, *Bormann Revisited: Using the* Penn Central *Test to Determine the Constitutionality of Right-to-Farm Statutes*, 2006 BYU L. REV. 1381, 1402–03 (2006) (discussing two different interpretations of the first *Penn Central* factor).

114. 328 U.S. 256, 259 (1946).

115. *Id.* at 265. Notably, *Causby* demonstrates that actual trespass is not required for a government action to take on an invasive character. *See id.* (holding

similarly disruptive air-pollution emission would likely be held invasive as well. Indeed, air pollution can severely interfere with a property owner's right to reasonable use and enjoyment of property, as *Cheswick* demonstrates.

The strength of the government's interest in *Cheswick*-like scenarios is unclear. Certainly, the government has a strong interest in regulating pollution, but the potential taking in such scenarios is not the regulation, but the accompanying preemption of common law. The decisions in *Comer* and *Cheswick* held that air pollution regulation, a strong government interest, requires preemption, thereby suggesting that the government's interest in preemption is also very strong.[116] However, other courts have been more skeptical of the public policy rationale for state common law preemption. In *Moon v. North Idaho Farmers Ass'n*, one district court rejected a public policy argument for state common law preemption as "misplaced."[117] In *Ouellette*, the Supreme Court rejected a similar argument for the Clean Water Act, ruling that at least some state common law claims would not "frustrate the goals of the CWA".[118] Based on these results, it is hard to predict how a court would view the strength of the government's interest.

Thus, if the Clean Air Act preempts state common law, the *Penn Central* test would provide a tough, but not insurmountable, constitutional obstacle. Depending on the circumstances, air pollution can have a dramatic economic impact and can wreak havoc with investment-backed expectations. Moreover, the character of the government's preemption of common law is unclear, but could also weigh against constitutionality. Therefore, if the Clean Air Act preempts state common law, many litigants will likely have successful Takings Clause claims because of the *Penn Central* test.

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that government action was an impermissible invasion, even though no trespass occurred).

116. *See supra* Part III (noting that both *Comer* and *Cheswick* held preemption necessary to protect the Clean Air Act).

117. No. CV 2002 3890, 2002 WL 32102995, at *5 (D. Idaho Nov. 19, 2002).

118. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 498 (1987).

3. Nontrespassory Permanent Physical Occupation: *Bormann v. Board of Supervisors*

Lastly, it is possible that the per se rule in *Loretto* would apply to a fact pattern similar to *Cheswick*, but without particulate deposits. According to the Iowa Supreme Court's controversial opinion in *Bormann v. Board of Supervisors*, a sufficiently invasive nuisance creates a permanent physical occupation, even without an accompanying trespass.[119] In *Bormann*, a state right-to-farm statute granted farmers immunity from common law nuisance claims.[120] Citing *Causby* and *Loretto*, the Iowa Supreme Court held that the grant of immunity was a per se taking, asserting that nuisances can have such an invasive effect that they may become nontrespassory permanent physical occupations.[121] According to the court, a statute that grants immunity to such invasive nuisances is "flagrantly" unconstitutional on its face.[122]

The *Bormann* holding proved to be highly controversial; it is unclear if other courts will follow Iowa's lead and endorse a theory of nontrespassory permanent physical occupations.[123] However, if *Bormann* proves persuasive, its adoption, combined with total preemption of state common law by the Clean Air Act, would provide yet another avenue to successfully assert a per se taking by common law preemption.[124]

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119. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 320–21 (Iowa 1998).

120. *Id.* at 311–12.

121. *Id.* at 320–21.

122. *Id.* at 321–22.

123. At least one other state, Oregon, has established that nontrespassory invasions might be per se unconstitutional. *See* Thornburg v. Port of Portland, 376 P.2d 100, 112 (Or. 1962) (holding that a permanent easement that confers the right to maintain an especially intrusive nuisance is an unconstitutional taking of a fee interest). Many commentators, however, remain skeptical. *See* Gittins, *supra* note 113, at 1408–14 (criticizing *Bormann* for failing to consider *Penn Central*); Tyler Marandola, *Promoting Wind Energy Development Through Antinuisance Legislation*, 84 TEMP. L. REV. 955, 974–75 (2012) (noting that most commentators are skeptical that *Bormann* will greatly impact right-to-farm statutes).

124. *See* Gittins, *supra* note 113, at 1397 ("The *Bormann* rationale could also have a serious impact on other land use issues, such as landmark laws, pollution control provisions, and even general zoning laws.").

VI. THE *OUELLETTE* ALTERNATIVE

In eliminating the supposed danger of allowing common law claims, courts have accidentally exposed the Clean Air Act to a greater systemic peril: the Takings Clause. According to the district courts in *Comer* and *Cheswick* courts, the preservation of the Clean Air Act's comprehensive regulatory framework demands the preemption of state common law; the Act's regulatory scheme is so thorough that it cannot need any common law supplement.[125] However, total preemption would give rise to numerous, successful claims of unconstitutional takings.[126] The remedies that courts would likely apply could have an extremely disruptive effect on the regulatory scheme that preemption supposedly protects. Therefore, the Takings Clause significantly undermines the rationale for total preemption of state common law by the Clean Air Act.

Conversely, as the district courts in *Comer* and *Cheswick* courts correctly noted, there are sound policy reasons why the Clean Air Act should preempt some, but not all, state common law claims. Courts should draft a limited preemption rule modeled on the Clean Water Act's state law preemption rule, as enunciated in *International Paper v. Ouellette*, to strike a better balance.

A. *Total Preemption of Common Law Would Disrupt the Clean Air Act's Regulatory Framework*

Although proponents believe it is unnecessary to safeguard the Clean Air Act, total preemption of state common law undermines the regulatory framework of the Act. As this Note's analysis of *Cheswick* suggests, any permit authorizing an emission that deposits or contaminates another's land will likely create a permanent physical occupation, and thus a per se unconstitutional taking.[127] The holdings of *Lucas* and *Penn Central* will likely lead to many other successful Takings Clause claims.[128] The surprising holding in *Bormann* may create yet another avenue for these claims.

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125. *Supra* Part III.A–B.
126. *Supra* Parts IV–V.
127. *Supra* Part IV.
128. *Supra* Part V.

The remedies that courts might award to successful plaintiffs challenging air pollution permits under the Takings Clause would be very disruptive to the Clean Air Act. The default remedy for a taking is just compensation—as specified in the Constitution—or invalidation of the offending sections of the statute or regulation plus compensation for the temporary taking that occurred while the statute was in effect.[129] For example, the Iowa Supreme Court in *Bormann*, after finding that an immunity provision in a right-to-farm statute created an unconstitutional taking, invalidated the offending section, but left the rest of the statute in place.[130]

If the Clean Air Act preempts all common law, it is because its regulatory framework is so pervasive. Therefore, the immunity granted to permitted pollution sources would flow from the scope of the Act itself, not from any one provision. Thus, the default remedy in *Bormann* would be impossible. However, there are several ways courts could imitate the default takings remedy.

First, courts could simply allow the common law suit to proceed. Ironically, because many common law claims would be litigated despite normative preemption, preemption would become a paper tiger, powerless to stop many of the lawsuits that the district court in *Cheswick* indicated could imperil the Clean Air Act.

Second, courts could invalidate the permit authorizing certain pollution. But this remedy also renders *Cheswick* an absurdity; the preemption supposedly demanded by the Clean Air Act's regulatory scheme would lead to the invalidation of permits issued under that same scheme.

Third, courts could simply order the government to pay the plaintiffs just compensation for the loss of their property rights.[131] But, such a rule could become extremely costly for regulatory

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129. *E.g.*, First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 305 (1987); Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998); 26 AM. JUR. 2d *Eminent Domain* § 136 (1997).

130. *Bormann*, 584 N.W.2d at 321–22.

131. *See First Lutheran*, 482 U.S. at 305 (holding that exercise of eminent domain power, including compensation for temporary regulatory takings, is a satisfactory remedy for inverse condemnation). Courts have applied similar remedies in nuisance cases; *see also* Boomer v. Atl. Cement Co., 257 N.E. 2d 870, 873–75 (N.Y. 1970) (awarding an injunction against cement plant causing airborne nuisance, but allowing the plant to avoid the injunction if it pays permanent damages).

agencies, which would be liable to an indeterminate number of plaintiffs for large sums. *Cheswick*, for example, has 1,500 plaintiffs seeking a minimum of $25,000 each in compensatory damages, bringing the amount-in-controversy to $37.5 million, excluding punitive damages.[132] These high costs would doubtlessly have a chilling effect on air pollution regulation, again undermining the goals of the Clean Air Act.

B. Total Preservation of Common Law Would Disrupt the Clean Air Act's Regulatory Framework

Thus, in an attempt to strengthen the Clean Air Act's regulation scheme, the *Cheswick* district court decision—total preemption of state common law—would actually serve to substantially weaken that very scheme. However, it would be a mistake to dismiss the concerns reflected in *Cheswick* and similar cases. Compared to the common law, the Clean Air Act has two notable advantages: regulatory clarity and policymaker expertise.

First, the Clean Air Act provides regulatory clarity unmatched by common law. Common law standards are often vague and vary between courts. Further, air pollution easily travels across state lines. Because each state has its own body of common law, a single point source may be held accountable to dozens of common law standards. This scenario is obviously chaotic and confusing. In contrast, the Clean Air Act provides, for any particular AQCR, a discrete corpus of bright-line regulations—a vastly simpler scheme.

Second, the Act entrusts our air quality to a single expert agency, the EPA. Moreover, trained experts author the regulations promulgated under the Act. As the Courts in *Cheswick* and *American Electric* noted, the centralized, expert administration of the EPA is preferable to regulation by common law:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job

132. Lord, *supra* note 69.

> than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.[133]

Thus, the Clean Air Act provides, for any given source, a clear set of standards crafted by policy experts. Allowing the courts free reign to interpret the common law to supplant this regulation would undermine both of these advantages. The bright-line regulations crafted by policy experts would be replaced by an indeterminate number of common law standards. Yet *Cheswick* shows that preemption of all common law will lead to unjust results and invite Takings Clause violations. Additionally, total preemption fails to account for the Clean Air Act's savings clause. Thus, neither total preservation nor total preemption of common law is sound public policy.

C. *Courts Should Adopt the Rule in Ouellette for the Clean Air Act*

To solve this dilemma, courts should follow the Third Circuit and adopt the preemption rule applied to the Clean Water Act in *International Paper v. Ouellette*. In *Ouellette*, a group of downstream landowners in Vermont sued a New York paper mill under Vermont nuisance law.[134] The central issue in the case was whether the Supreme Court would extend the Clean Water Act's preemption of federal common law in *Milwaukee* to state common law.[135]

The Court ruled that states could not apply their common law to out-of-state point sources of water pollution.[136] Under the Clean Water Act, the EPA and states regulate point sources co-operatively via a permit system; allowing other states to impose their own

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133. Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314, 321 (W.D. Pa. 2012), *rev'd and remanded*, 734 F.3d 188 (3d Cir. 2013) (quoting Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2539–40 (2011)).

134. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 484 (1987).

135. *Id.* at 484–85.

136. *Id.* at 494 ("[T]he [Clean Water Act] precludes a court from applying the law of an affected State against an out-of-state source.").

emissions standards would "disrupt this regulatory partnership established by the permit system."[137] Further, allowing extraterritorial state claims would subject permitted sources to "an indeterminate number of potential regulations," making compliance confusing and burdensome.[138] Therefore, the Clean Water Act preempted these claims.

However, the Court refused to extend this preemption to all state common law claims.[139] It noted that the Clean Water Act's savings clause creates some room for additional state law.[140] Further, while source-state nuisance law could conflict with permit standards, "a source only is required to look to a single additional authority, whose rules should be relatively predictable."[141] Additionally, "[s]tates can be expected to take into account their own nuisance laws in setting permit requirements."[142] Therefore, the *Ouellette* court preserved source-state common law because it does not substantially interfere with the Clean Water Act.

In *American Electric*, the Court applied the *Milwaukee* rule; courts should continue this trend and apply the logic of *Ouellette* to cases like *Cheswick*. Like the Clean Water Act, the Clean Air Act established a complex national system, overseen by the EPA and implemented jointly by federal and state governments, to regulate pollution emissions. Both of these regulatory systems would benefit from the *Ouellette* rule. Preempting extraterritorial state-law claims

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137. *Id.* at 499.

138. *Id.*

139. *Id.* at 497–99.

140. *Id.* at 497 ("The [Clean Water Act's] saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State [sic]."). Notably, the savings clauses of the Clean Water Act and Clean Air Act are extremely similar. *Compare* 33 U.S.C. § 1365(e) (2011) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency.") *with* 42 U.S.C. § 7604(e) (2010) (substituting "emission standard" for "effluent standard").

141. *Int'l Paper Co.*, 479 U.S. at 499.

142. *Id.*

maintains the federal-state "regulatory partnership" and protects the clarity and expertise that each regulatory system provides.

However, as *Ouellette* points out, preserving the common law of states where pollution originates does not substantially threaten these interests. No additional state is interfering with the federal-state partnership. The standards that pollution sources must follow are still fairly clear and guided by policy experts, because the permit system is supplemented only by a single set of common law standards. Further, because the same state is the supplier of the controlling SIP and common law, both are likely to consider the other when determining their respective standards.

Further, the *Ouellette* rule, applied to the Clean Air Act, would avoid the problems of total preemption of all common law. Preserving source-state common law reaffirms Clean Air Act's savings clause and circumvents potential Takings Clause complications. Therefore, the holding of *Ouellette* provides an effective solution to the problem of state law preemption under the Clean Air Act.

VII. CONCLUSION

Despite the buzz it created, *American Electric* was not unpredictable; earlier Clean Water Act cases like *Milwaukee* had already addressed substantially similar issues. It made sense to apply *Milwaukee*'s rule for the Clean Water Act to the Clean Air Act, because they are very similar statutes.

Further, the courts in *Comer* and *Cheswick* were right to be concerned that state common law could threaten the complex regulatory framework established by the Clean Air Act. The Act's framework offers several advantages, especially regulatory clarity and policymaker expertise, which a common law supplement could threaten.

However, total preemption presents its own problems. It largely ignores the Clean Air Act's savings clause. It can create unjust results, as in *Cheswick*. Moreover, as the facts of *Cheswick* show, total preemption can easily give rise to an unconstitutional taking. Far from securing the Clean Air Act's regulatory scheme, then, total preemption would hinder the goals of the Clean Air Act.

To solve this puzzle, Courts should once again look to Clean Water Act jurisprudence and apply the holding in *Ouellette*. The

Ouellette rule preserves only the common law of the state where the source of the pollution is located; it preempts all other common law. This avoids both the chaos of unfettered common law and the potential constitutional and equitable concerns that accompany total preemption. Therefore, in future litigation, courts should reject *Cheswick* and adapt *Ouellette* to the Clean Air Act.