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You Better Act Fast: Appellate Tips for 91a and TCPA Motions

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Rule 91a

Texas Rule of Civil Procedure 91a allows a court to “dismiss a cause of action on the grounds that it has no basis in law or fact.”

The Rule is meant to serve as a mechanism for “early and speedy resolution[s] of baseless claims.”

Tex. R. Civ. P. 91a.1

Enacted in 2013

The Texas Citizens Participation Act

- Enacted in 2011.
- Codified in Chapter 27 of the Tex. Civ. Prac. & Rem. Code.
- Referred to as the *Anti-SLAPP Statute*.
- Allows a court to dismiss claims that infringe on the defendant's right to petition, right of free speech, and the right of association.

91a and TCPA

Both are avenues for speedy dismissal but, practitioners should be aware of the requirements, burden of proof, and the quick procedural timeline.

91a Procedural Timeline

- **91a.3 A motion to dismiss must be:**
 - (a) filed within **60 days** after the first pleading containing the challenged cause of action is **served** on the movant;
 - (b) **filed at least 21 days** before the motion is heard; and
 - (c) **granted or denied within 45 days** after the motion is filed.

Procedural Considerations

- The plaintiff can nonsuit or amend the challenged cause of action up to 3 days before the hearing.
- The movant can withdraw or amend the 91a motion up to 3 days before the hearing. If amended, the clock restarts under 91a.
- **Pitfall**: Make sure to withdraw or amend the motion within the timeframe if necessary, otherwise the court could award prevailing party attorneys' fees.

91a - No Basis in Law

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.”

Tex. R. Civ. P. 91a.1

No Basis in Fact

A cause of action has no basis in fact “if a reasonable person could not believe the facts pleaded.”

Tex. R. Civ. P. 91a.1.

Evidence

When ruling on a Rule 91a motion, a court may **not** consider evidence and must decide the motion based solely on **the pleading of the cause of action.**

However, a court may consider as evidence the pleadings and pleading exhibits permitted by Texas Rule of Civil Procedure 59.

Tex. R. Civ. P. 91a.6.

Texas Rule of Civil Procedure 59

“Notes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on, may be made a part of the pleadings . . . *or by copying the same in the body of the pleading in aid and explanation of the allegations in the petition* or answer made in reference to said instruments and shall be deemed a part thereof for all purposes.

Caution

You cannot reference portions of a document that are not included within plaintiff's petition.

Raider Ranch, LP v. Lugano, Ltd., 579 S.W.3d 131, 134 (Tex. App.—Amarillo 2019, no pet.) (an amendment of the same contract that was attached to the plaintiff's petition could not be considered).

You cannot ask the court to take judicial notice as judicial notice is a matter of evidence and therefore cannot be considered.

Reynolds v. Quantlab Trading Partners US, LP, 608 S.W.3d 549 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

Example: No Basis in Law

Most common scenario is when there is no viable cause of action. Maybe there are too few facts to establish a cause of action.

In re Essex Ins. Co., 450 S.W.3d 524, 525 (Tex. 2014) (per curiam.) (orig. proceeding).

A plaintiff sued an insurer directly, but the pleadings showed that the plaintiff had not first secured a judgment against the insured, the Texas Supreme Court held that the claim had no basis in law as it was barred by the Texas “no direct action” rule.

Examples: No Basis in Law

But, now you can rely on an affirmative defense.

Bethel v. Quilling, 595 S.W.3d 651 (Tex. 2020)
The Texas Supreme Court considered whether an affirmative defense can form the basis of a 91a, yes it can. When the pleading gave rise to attorney qualified immunity.

Examples: No Basis in Fact

Courts use the fair notice pleading standard to determine whether there is a basis in fact.

Darnell v. Rogers, 08-17-00067-CV, 2019 WL 2897489, at *6-*7 (Tex. App.—El Paso July 5, 2019, no pet.)

For the defamation claim, the petition did not indicate the manner of publication, the content of any “negative” statements, whether or how any such statements were false, the identity of the “various individuals” to whom the statements were made, or the context of any statements.

Caution

- You must specifically articulate why the 91a motion is being asserted. Conclusory or vague statements that a claim or cause of action has no basis in law or fact will not work.
- Be careful in referencing facts outside of the pleadings. You should cite to the pleading to ensure that you are not outside the realm of 91a.

Appellate Review

In re Essex Ins. Co., 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding) (per curiam) (holding denial of Rule 91a motion to dismiss is subject to mandamus review).

But an order denying a Rule 91a motion to dismiss may be the subject of an interlocutory appeal if its component rulings fall within the categories of appeals authorized by Section **51.014 of the Civil Practice and Remedies Code** (which lists the types of orders from which interlocutory appeal is available)

TCPA / Anti-SLAPP

Recent Amendments effective as to legal actions filed on or after September 1, 2019

Opinions will indicate which version of the statute is at issue in a footnote.

The Texas Citizens Participation Act Generally

The legislative purpose is to encourage and safeguard the constitutional rights of a defendant to speak freely, petition, associate freely, and otherwise participate in government to the maximum extent provided by law.

Tex. Civ. Prac. & Rem. Code § 27.002.

The Texas Citizens Participation Act Generally

If a legal action infringes on the right to petition, right to free speech, or right to association, the defendant can file a motion to dismiss under Chapter 27 within 60 days after being served.

The Texas Citizens Participation Act Generally

In determining whether a motion to dismiss is meritorious, the court considers whether the legal action is based on or in response to the movant's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct related to.

Legal Action

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief. The term does not include:

(A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;

(B) alternative dispute resolution proceedings;
or

(C) post-judgment enforcement actions.

The Exercise of the Right to Petition

The most frequently litigated definition of the “right to petition” is a communication in or pertaining to a judicial proceeding.

The Exercise of the Right to Free Speech

The “right of free speech” is defined as a communication made in connection with a matter of public concern.

The Exercise of the Right of Association

The “right of association” means to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern.

The Exercise of the Right of Association

(2) "Exercise of the right of association" means to [~~a communication between individuals who~~] join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern.

A Matter of Public Concern

A “matter of public concern” means a statement or activity regarding:

- (A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;
- (B) a matter of political, social, or other interest to the community; or
- (C) a subject of concern to the public.

Matter of Public Concern

(7) "Matter of public concern" means a statement or activity regarding:

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.(B) a matter of political, social, or other interest to the community; or

.(C) a subject of concern to the public [~~includes an issue related to:~~

~~[(A) health or safety,~~

~~[(B) -- environmental, economic, or community well being,~~

~~[(C) the government,~~

~~[(D) a public official or public figure, or~~

~~[(E) -- a good, product, or service in the marketplace].~~

SLAPP-able Lawsuits

Right to Petition:

A patient files a lawsuit against a doctor for medical malpractice and it causes the doctor's insurance premiums to rise. The doctor turns around and sues his former patient for defamation, claiming that the lawsuit cost him time, money, and harm to his reputation.

SLAPP-able Lawsuits

Right Free Speech:

An internal mem at a pipeline company regarding an employee's failure to properly gauge petroleum levels and the potential risk to the environment is considered free speech.

Employee sues the employer for defamation but lawsuit was "SLAPP-able" because internal memo was regarding a matter of public concern: the environment.

SLAPP-able Lawsuits

Right of Association

Group of activists join together to protest the dumping of waste into clean water. They protest by mentioning the names of the companies involved. The companies turn around and sue the activists for defamation, attempting to silence the protests.

Procedural Requirements

- Must be filed “not later than the 60th day after the date of service of the legal action.”
- 21-day notice requirement for the hearing on the motion to dismiss.
- The nonmovant’s response to the motion to dismiss is due 7 days before the hearing.

Procedural Requirements

- The hearing on the motion must be set not later than the 60th days after the date of the service of the motion unless good cause or docket conditions prevent a hearing within 60 days but in no event later than 90 days after service of the motion.
- Court must rule on the motion not later than the 30th day following the hearing. Otherwise, the motion is overruled by operation of law.

Procedural Requirements

- All discovery is stayed.
- However, on a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Evidence and Attorneys' Fees

- Court can consider pleadings, 166a evidence, and affidavits. Tex. Civ. Prac. & Rem. Code § 27.006(a).
- Mandatory attorneys' fees but sanctions are discretionary. Don't forget to present evidence. Tex. Civ. Prac. & Rem. Code § 27.007.

Burden Shifting

Step One:

The movant must demonstrate that the nonmovant's legal action is based on or in response to the movant's exercise of the right of free speech, right to petition, or right of association

Burden Shifting

Step Two:

If the movant successfully demonstrates Chapter 27's applicability, the burden shifts to the nonmovant to establish by clear and specific evidence, a prima facie case for each essential element of its claim

Burden Shifting

Step Three:

Even if the nonmovant establishes a prima facie case, the burden then shifts back to the movant to establish each essential element of a valid affirmative defense

The Right to Petition

Snell v. Ellis, No. 05-20-00642-CV, 2021 WL 1248276, at *9 (Tex. App.—Dallas Apr. 5, 2021, no pet. h.).

Mere mention of a court proceeding is not enough it must be claim based on a communication in or pertaining to a judicial proceeding.

The Right to Petition

Youngkin v. Hines, 546 S.W.3d 675 (Tex. 2018).

The protection extends to lawyers acting on behalf of a client.

The Right to Free Speech

Choctaw Construction Services LLC v. Rail-Life Railroad Services, LLC, 617 S.W.3d 143 (Tex. App.—Houston [1st. Dist.] 2020, no pet.)

The Right of Association

Chesser v. Aucoin, 2020 Tex. App. LEXIS 9978, at *1 (Tex. App.—Houston [1st Dist.] Dec. 17, 2020, no pet.).

Exemptions

Government enforcement actions

Commercial transactions

Personal injury and wrongful death

Insurance claims

Certain employment claims (e.g., trade secrets and non-competes)

Family law claims

DTPA claims

Medical peer-review lawsuits

Evictions

Attorney discipline actions

Whistleblower suits

Common-law fraud

Common Pitfalls

The procedural timeline

*Don't forget about counterclaims/amended and supplemental claims

Montelongo v. Abrea, 622 S.W.3d 290 (Tex. 2021)
(Amended petition that asserts a new claim or legal theory, but does so based on the same essential factual allegations included in prior petition, asserts a new “legal action” and thus triggers a new 60-day period for the filing of motion to dismiss the new claims under the Texas Citizens Participation Act).

Common Pitfalls

Motion is overruled by operation of law if there is no ruling within 30 days of the hearing.

Must timely appeal under T.R.A.P 26.1(b)

Montiel v. Lechin, No. 01-18-00781-CV, 2019 WL 1186695, at *3 (Tex. App.—Houston [1st Dist.] March 14, 2019, no pet.).

Common Pitfalls

Must present evidence of attorneys' fees and you can do so with the motion **or** at a later date.

Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469 (Tex. 2019).

Common Pitfalls

BUT... the interlocutory appeal deadline runs from the date of the ruling on the motion, not subsequent ruling on attorneys' fees or sanctions

Eureka Holdings Acquisitions, L.P. v. Marshall Apartments, LLC, 597 S.W.3d 921 (Tex. App.—Austin, 2020 pet. denied).

Conclusion

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