

COMMENT

TRCP 91A: RESOLVING THE CONFUSION*

ABSTRACT

On the heels of the U.S. Supreme Court's decision in *Ashcroft v. Iqbal*, the Texas Supreme Court promulgated Texas Rule of Civil Procedure 91a, which permitted trial courts to dismiss actions that have no basis in either law or fact. Since then, Rule 91a has created considerable confusion among both state and federal courts applying Texas pleading procedure. Looking for guidance, the courts have analogized Rule 91a to Federal Rule of Civil Procedure 12(b)(6), which similarly allows trial courts to dismiss baseless claims at the pre-trial stage. Neither the legislature nor the drafting committee appear to have intentionally invited this analogy. This Comment proposes new language to resolve Rule 91a's interpretive confusion. Part II begins by discussing the history of Texas pleading—the “fair notice” tapestry into which Rule 91a was woven. It also explores Rule 91a's legislative and committee history, focusing on the battle over what language to include and exclude, as well as whether to adopt the federal plausibility standard. Part II concludes that neither the legislature nor the drafting committee intended to adopt the federal plausibility standard in Texas. Part III discusses the various analogy-laden appellate and federal district court decisions that attempt to make sense of the rule, but ultimately leaving Texas litigants in a state of uncertainty about the specificity and plausibility a pleading must contain to

* J.D. Candidate, University of Houston Law Center, 2017. This Comment received the King & Spalding LLP Award for Best Researched and Summated Paper. I would like to thank my parents, Carol and Alex, for their endless encouragement and support. I would also like to thank Professor Lonny Hoffman for his vital guidance on this project (and, of course, for teaching me civil procedure in the first place). Finally, thank you to the Editors of the *Houston Law Review* for their critical assistance preparing this Comment for publication.

survive dismissal. Part IV concludes by proposing new language to resolve this apparent confusion. The proposed language clearly distinguishes Rule 91a and the federal plausibility standard. It also clearly delineates each of Rule 91a’s standards—”no basis in law” and “no basis in fact”—to highlight their distinction. This Comment argues that the new language better encapsulates the drafting committee’s true intent and provides courts with a clearer standard that does not invite the improper FRCP 12(b)(6) analogy.

TABLE OF CONTENTS

- I. INTRODUCTION 776
- II. TEXAS PLEADING PRIOR TO 91A, LEGISLATIVE HISTORY, AND THE RULES COMMITTEE 779
 - A. *Texas Pleading Practice Prior to Rule 91a: The “Fair Notice” Standard*..... 779
 - B. *Dismissal Before Rule 91a: Special Exceptions*..... 781
 - C. *H.B. 274: Rule 91a’s Tort Reform Underpinnings* 783
 - D. *Drafting the Rule: SCAC and the “No Basis in Law or Fact” Problem* 785
- III. CONFUSION IN THE COURTS..... 788
 - A. *GoDaddy.com, LLC v. Toups: Ground Zero for the Rule 91a Confusion*..... 789
 - B. *Wooley v. Schaffer: Deepening the Confusion* 790
 - C. *Federal Courts Add to the Confusion* 792
- IV. RESOLVING THE CONFUSION 794
 - A. *Rule 91a: An Animal Unlike Any Other?* 795
 - B. *Fixing “No Basis in Law”*..... 795
 - C. *Fixing “No Basis in Fact”* 799
- IV. CONCLUSION..... 801

I. INTRODUCTION

On the heels of the U.S. Supreme Court’s decision in *Ashcroft v. Iqbal*, the Texas Supreme Court promulgated Texas Rule of Civil Procedure 91a, which permitted trial courts to dismiss actions that have no basis in either law or fact.¹ Since

1. See Tex. R. Civ. P. 91a (entitled “Dismissal of Baseless Causes of Action”).

then, Rule 91a has created considerable confusion among both state and federal courts applying Texas pleading procedure.² Looking for guidance, Texas courts have analogized Rule 91a to Federal Rule of Civil Procedure 12(b)(6),³ which similarly allows trial courts to dismiss baseless claims at the pre-trial stage.⁴ The Texas legal community was also quick to compare the two rules.⁵ While neither the legislature nor the drafting committee appear to have intended this analogy be drawn,⁶ some members of both institutions foresaw it.⁷

The rule provides for dismissal under two different standards—“no basis in law” and “no basis in fact.”⁸ It states that a claim or 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.”⁹ A claim has no basis in fact if “no reasonable person could believe the facts pleaded.”¹⁰ Furthermore, the rule requires the moving party to specify whether the cause of action “has no basis in law, no basis in fact, or both.”¹¹ Despite the drafting committee’s

2. See *infra* Part III (discussing the varying interpretations and applications of Rule 91a, which have led to its close comparison to Federal Rule of Civil Procedure 12(b)(6)).

3. See, e.g., *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied) (“While not identical, Rule 91a is analogous to Rule 12(b)(6); therefore, we find case law interpreting Rule 12(b)(6) instructive.”); *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (stating that when interpreting Rule 91a, “case law interpreting Rule 12(b)(6) [is] instructive”).

4. See FED. R. CIV. P. 12(b)(6) (allowing litigants to seek dismissal for a party’s failure to state a claim upon which relief can be granted). For a deeper exploration of this rule, particularly as it exists in its post-*Twombly/Iqbal* state, see Kendall W. Hannon, Comment, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1812 (2008).

5. See *infra* Part II.D (discussing the comparisons made between Rule 91a and Federal Rule 12(b)(6) among legal practitioners).

6. See House Comm. on Judiciary and Civil Jurisprudence, Bill Analysis, Tex. H.B. 274, 82d Leg., R.S., at 5 (2011), <http://www.hro.house.state.tx.us/pdf/ba82R/HB0274.PDF> [<https://perma.cc/KP48-SJUX>] (“The court would not have to adopt the federal standard.”); see also *infra* Part II.D (discussing the subcommittee’s consideration and ultimate rejection of FRCP 12(b)(6)’s language as a model for Rule 91a).

7. See, e.g., House Comm. on Judiciary and Civil Jurisprudence, Bill Analysis, Tex. H.B. 274, 82d Leg., R.S., at 7 (2011), <http://www.hro.house.state.tx.us/pdf/ba82R/HB0274.PDF> [<https://perma.cc/4DNB-WVSC>] (“If a motion to dismiss for failure to state a claim was created in Texas, it would move away from the general pleading system currently in use.”); Letter from Lonny Hoffman, Professor of Law, University of Houston Law Center & Alexandra W. Albright, Senior Lecturer, University of Texas School of Law, to Justice Nathan L. Hecht, Supreme Court of Texas, 2 (Dec. 17, 2012) (on file with author) (cautioning that the proposed language will “invite courts to look to federal dismissal law”).

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

9. Tex. R. Civ. P. 91a.

10. *Id.*

11. *Id.*

apparent intent to establish these two dismissal standards as separate and distinct from each other, both have been analogized to Federal Rule of Civil Procedure 12(b)(6).¹² Often, their separate definitions do not factor into the court's analysis.¹³

As appellate decisions interpreting Rule 91a continue to be published against the backdrop of a silent Texas Supreme Court,¹⁴ commentators have criticized both the rule's usefulness¹⁵ and the appellate court's attempts at interpreting it.¹⁶ Much of the criticism centers around the court's penchant for analogizing Rule 91a to FCRP 12(b)(6).¹⁷ This Comment proposes new language to resolve this interpretive confusion.¹⁸

Part II begins by discussing the history of Texas pleading—the “fair notice” tapestry into which Rule 91a was woven. It also explores Rule 91a's legislative and committee history, focusing on the battle over what language to include and exclude, as well as whether to adopt the federal plausibility standard. Part II concludes that neither the legislature nor the drafting committee

12. For example, in *Wooley v. Schaffer*, the court remarked that, like Rule 91a, “Federal Rule of Civil Procedure 12(b)(6) similarly allows dismissal if a plaintiff fails ‘to state a claim upon which relief can be granted.’” 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014). “[T]herefore,” the court opined, “we find case law interpreting [Federal] Rule 12(b)(6) instructive.” *Id.*

13. For example, the *Wooley* majority concluded the movant's Rule 91a motion should be granted because *Wooley's* claims “have no basis in law *or fact*.” 447 S.W.3d at 78 (emphasis added). However, in her concurrence, Justice Kem Thompson Frost noted that the movant “did not assert that any of *Wooley's* causes of action have no basis in fact.” *Id.* at 82 (Frost, C.J., concurring). Thus, the *Wooley* majority apparently drew no distinction between the “no basis in law” and “no basis in fact” standards when reaching their conclusion.

14. While the Texas Supreme Court has actually addressed Rule 91a in *In re Essex Insurance Co.* and *City of Dallas v. Sanchez*, those decisions did not require the court to interpret either of Rule 91a's two dismissal standards, which are the focus of this Comment. *See* 450 S.W.3d 524, 525–26 (Tex. 2014) (per curiam); 494 S.W.3d 722, 724–25 (Tex. 2016) (per curiam). While the *Sanchez* court discussed Rule 91a at great length, the court's decision, and the bulk of its analysis, hinged on the issue of governmental immunity under the Texas Tort Claims Act. 494 S.W.3d at 724, 726–27.

15. *See, e.g.*, Hon. Randy Wilson, *From My Side of the Bench: Motions to Dismiss*, THE ADVOC. (ST. B. TEX.), Winter 2013, at 81, 82 (“For a suit alleging a claim with no basis in law, it is largely redundant to special exceptions.”).

16. *See, e.g.*, Dustin B. Benham, *Emerging Issues in Texas Dismissal Practice: Pleading Standards and Important Miscellany*, 6 HLRe 123, 127 (2015), http://www.houstonlawreview.org/wp-content/uploads/2015/10/Benham_Final1.pdf [<https://perma.cc/4FQD-D29K>] (describing the court's interpretations as “sub-optimal, and potentially conflicting”).

17. *See* Timothy Patton, *Motions to Dismiss Under Texas Rule 91a: Practice, Procedure and Review*, 33 REV. LITIG. 469, 496–505 (2014) (arguing that the legislature disclaimed any intent to increase the specificity required to plead into Texas courts, and listing various reasons why adopting the federal plausibility standard in Texas is ill-advised).

18. *See infra* Part IV.B–C (proposing new language for the “no basis in law” and “no basis in fact” prongs of Rule 91a).

intended to adopt the federal plausibility standard in Texas. Part III discusses the various analogy-laden appellate and federal district court decisions that attempt to make sense of the rule, but ultimately leave Texas litigants in a state of uncertainty about the specificity and plausibility a pleading must contain to survive dismissal. Part IV concludes the Comment by proposing new language to resolve this apparent confusion. The proposed language clearly distinguishes Rule 91a and the federal plausibility standard. It also clearly delineates each of Rule 91a's standards—"no basis in law" and "no basis in fact"—to highlight their distinction. This Comment argues that the new language better encapsulates the drafting committee's true intent and provides courts with a clearer standard that does not invite the improper FRCP 12(b)(6) analogy.

II. TEXAS PLEADING PRIOR TO 91A, LEGISLATIVE HISTORY, AND THE RULES COMMITTEE

This section begins by discussing Texas's fair notice pleading standard in order to uncover the effect the Texas Legislature and the Supreme Court intended Rule 91a to have on Texas pleading practice.¹⁹ Part II.B explores Rule 91a's procedural predecessor: Special Exceptions.²⁰ Part II.C discusses Rule 91a's tort reform underpinnings and its eventual passage as part of House Bill 274.²¹ Part II.D follows the Supreme Court Advisory Committee and subcommittee drafting process that resulted in Rule 91a's codified language.²²

A. *Texas Pleading Practice Prior to Rule 91a: The "Fair Notice" Standard*

Because "pleading standards and dismissal practice are inextricably intertwined," an exploration of Rule 91a's impact requires an understanding of Texas's pleading standard prior to its promulgation.²³ Texas's rules, along with state court interpretations of the rules, make clear that Texas subscribes to a "fair notice" pleading standard.²⁴ This standard only requires

19. See *infra* Part II.A (discussing Texas's fair notice pleading and its interaction with Texas Rule of Civil Procedure 13).

20. See *infra* Part II.B (discussing Texas Rule of Civil Procedure 91—the Special Exceptions rule).

21. See *infra* Part II.C (providing an overview of Rule 91a's legislative history).

22. See *infra* Part II.D (examining the drafting committee's multiple iterations of Rule 91a).

23. Benham, *supra* note 16, at 125.

24. See Tex. R. Civ. P. 45 ("That an allegation be evidentiary or be of legal

that “an opposing party can ascertain from the pleading the nature, basic issues, and the type of evidence that might be relevant to the controversy.”²⁵

The “fair notice” standard has been described by a Texas court as a “relatively liberal standard”; albeit one which still “requires a pleading’s signatory to certify that he or she conducted a reasonable inquiry into the allegations and concluded that each allegation or other factual contention in the pleading has or is likely to have evidentiary support.”²⁶ This latter point is crucial because, as liberal as “fair notice” pleading may be, the standard has never been so lax as to grant plaintiffs *carte blanche*, even prior to Rule 91a’s passage.²⁷ Texas Rule of Civil Procedure 13 requires “that pleadings, motions, and other papers are filed in good faith,” and permits courts to impose sanctions for noncompliance.²⁸ Thus, under Rule 13, a plaintiff is always required to plead nonfrivolous claims, even though his initial pleading may be conclusory.²⁹

The federal pleading standard espoused in *Bell Atlantic Corp. v. Twombly*³⁰ and *Ashcroft v. Iqbal*³¹ is distinguishable

conclusion shall not be grounds for an objection when *fair notice* to the opponent is given by the allegations as a whole.”) (emphasis added); Tex. R. Civ. P. 47(a) (“An original pleading which sets forth a claim . . . shall contain . . . a short statement of the cause of action sufficient to give *fair notice* of the claim involved.”) (emphasis added); *Low v. Henry*, 221 S.W.3d 609, 612 (Tex. 2007) (“Texas follows a ‘fair notice’ standard for pleading.”).

25. *Low*, 221 S.W.3d at 612; see also *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494–95 (Tex. 1988) (“The purpose of the fair notice requirement is to provide the opposing party with sufficient information to enable him to prepare a defense. Rule 45 does not require that the plaintiff set out in his pleadings the evidence upon which he relies to establish his asserted cause of action.”) (citation omitted).

26. *Low*, 221 S.W.3d at 612.

27. See Tex. R. Civ. P. 13. Rule 91a’s “no basis in law or fact” language also appears verbatim in Rule 13. Compare Tex. R. Civ. P. 13 (“no basis in law or fact”), with Tex. R. Civ. P. 91a.1 (same). Thus, to assess the role Rule 91a can or should play in state practice, one must take into account that even prior to the passage of Rule 91a (and, indeed, even as far back as 1898), Texas courts have not been entirely without recourse against plaintiffs who plead suits with “no basis in law or fact.” See, e.g., *Boyd v. Beville*, 44 S.W. 287, 290 (1898) (applying a precursory version of Rule 13, dubbed Rule 51, the Supreme Court held that “[t]he spirit and intent of the rule prescribed were to enforce the observance of that sound and wholesome principle of pleading that allegations contained in pleas filed in court shall be true,—at least, that they shall not be false within the knowledge of the pleader”); see also *infra* Part II.B (discussing Rule 91 special exceptions as an alternative tool to dismiss baseless actions prior to Rule 91a’s passage).

28. Tex. R. Civ. P. 13.

29. *Id.*

30. 550 U.S. 544, 570 (2007) (requiring plaintiffs to plead enough facts to establish a plausible claim for relief).

31. 556 U.S. 662, 678 (2009) (reiterating and clarifying the plausibility requirement espoused in *Twombly*).

from Texas’s “fair notice” pleading standard.³² The federal plausibility standard requires plaintiffs to plead enough facts to establish a plausible claim,³³ while the Texas’s fair notice pleading standard is more liberal.³⁴ However, as one commentator puts it: “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 Rule 91a as incorporating practice under Federal Rule of Civil Procedure 12(b)(6).”³⁵ Because the courts have established a penchant to analogize Rule 91a and FRCP 12(b)(6), the distinction between the two rules has indeed proven significant.³⁶

B. *Dismissal Before Rule 91a: Special Exceptions*

This section discusses Rule 91a’s procedural predecessor: Texas Rule of Civil Procedure 91—Special Exceptions.³⁷ While Rule 13 sanctions provide an avenue for courts and parties to deter litigants from filing groundless pleadings,³⁸ the rule remains silent as to procedures for dismissing these “groundless”

32. See *infra* note 34 and accompanying text (explaining the distinction between the federal plausibility standard and Texas’s fair notice pleading).

33. See *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678.

34. The distinction between these two standards is best exemplified by the “improper joinder” analysis frequently conducted by federal district courts. In order to determine whether a defendant was improperly joined, the district court must first decide whether to judge the pleading under the (stricter) federal standard or the (relaxed) state standard. See, e.g., *Durable Specialties, Inc. v. Liberty Ins. Corp.*, 3:11-CV-739-L, 2011 WL 6937377, at *4 (N.D. Tex. Dec. 30, 2011) (“The state standard is more relaxed than the federal standard . . . the 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.”). Though this issue has caused a considerable deal of confusion among district courts, the majority of Texas district courts appear to be opting to apply the “fair notice” rather than federal plausibility pleading to the joinder problem. See *Evans v. Kawaski Motors Corp., USA*, No. H-15-659, 2015 WL 4434073, at *2 (S.D. Tex. July 17, 2015) (“Most Texas federal courts measure pleading sufficiency under the Texas fair-notice pleading standard, which is more lenient than the standard under Rule 8 of the Federal Rules of Civil Procedure.”); *Escalante v. Goodyear Tire & Rubber Co.*, No. 2:15-CV-136, 2015 WL 3770929, at *2 (S.D. Tex. June 17, 2015) (“The Court further joins a number of other federal courts that apply Texas ‘fair notice’ pleading rules in removal decisions, rather than federal rules and standards.”).

35. Patton, *supra* note 17, at 479–80.

36. See *infra* Part III (discussing state and federal courts’ analogies between Rule 91a and FRCP 12(b)(6)).

37. See *infra* notes 41–46 (explaining Rule 91’s utility as a means to dismiss groundless claims prior to Rule 91a’s passage).

38. See *Law Offices of Robert D. Wilson v. Tex. Univest-Frisco, Ltd.*, 291 S.W.3d 110, 113 (Tex. App.—Dallas 2009, no pet.) (“The purpose of imposing sanctions under rule 13 for filing groundless pleadings is to deter similar conduct in the future . . .”).

pleadings.³⁹ Another drawback of Rule 13 is that it requires courts to delve into whether the plaintiff filed in “bad faith”—a difficult burden to satisfy.⁴⁰ Despite Rule 13’s limited application, litigants were not entirely without recourse when dealing with frivolous pleadings prior to Rule 91a—at least for pleadings with no basis in law.

Before Rule 91a’s promulgation, filing special exceptions under Rule 91 was the proper procedural tool to challenge the legal sufficiency of a plaintiff’s claim.⁴¹ The rule allows a litigant to raise objections to defects in a plaintiff’s pleading, including that the plaintiff’s claim has no basis in law, by pointing them out “intelligibly and with particularity.”⁴² If a court sustains special exceptions, the pleader generally has an opportunity to amend the pleading.⁴³ However, if the amended pleading still fails to state a valid cause of action, or if the pleading “is of the type that could not be cured by an amendment[,]” the court may grant summary judgment.⁴⁴ When applied to pleadings which have no basis in law, special exceptions effectively act as motions to dismiss.⁴⁵ Indeed, the fact that special exceptions motions already serve the purpose of dismissing legally deficient pleadings has prompted at least one commentator to question the utility of Rule 91a’s “no basis in law” prong.⁴⁶

However, before Rule 91a, Texas had no procedural method for dismissing claims with no basis in fact—a fact on which the rule’s supporters would come to rely.⁴⁷ Even those skeptical

39. See Tex. R. Civ. P. 13 (providing no avenue for the dismissal of groundless claims).

40. See, e.g., *In re Willa Peters Hubberd Testamentary Tr.*, 432 S.W.3d 358, 369 (Tex. App.—San Antonio 2014, no pet.) (“Sanctions are not appropriate in the absence of a showing of bad faith. ‘Bad faith is not simply bad judgment or negligence, but means the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose.’” (internal citations omitted) (quoting *Robson v. Gilbreath*, 267 S.W.3d 401, 407 (Tex. App.—Austin 2008, pet. denied)).

41. *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); see also *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998) (“Special exceptions may be used to challenge the sufficiency of a pleading.”).

42. See Tex. R. Civ. P. 91; *Wayne Duddlesten, Inc. v. Highland Ins. Co.*, 110 S.W.3d 85, 96–97 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (“If the plaintiff’s suit is not permitted by law, the defendant may file special exceptions and a motion to dismiss.”).

43. *Friesenhahn*, 960 S.W.2d at 658.

44. *Id.*

45. See *Patton*, *supra* note 17, at 483–84. (“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 have been appropriate.”).

46. See *Wilson*, *supra* note 15, at 82 (arguing that, for dismissing legally deficient claims, Rule 91a is “largely redundant to special exceptions”).

47. For example, Governor Rick Perry, arguably Rule 91a’s chief supporter, stated, “Texas is also one of few states that doesn’t have an early dismissal option for obviously

about Rule 91a's utility concede that it could serve as "a useful tool to dismiss the occasional nut suits" the courts sometimes encounter.⁴⁸ Because Texas had no prior standard for dismissing claims with no basis in fact, the rule's drafters (and courts interpreting the rule) would eventually face the policy question of whether the standard should serve only to dismiss the truly fringe cases, or whether its application should resemble the more expansive federal plausibility standard.⁴⁹

C. H.B. 274: Rule 91a's Tort Reform Underpinnings

Rule 91a became effective March 1, 2013.⁵⁰ However, the story of Rule 91a begins not in March 2013, but in March 2011, with the introduction of House Bill (H.B.) 274,⁵¹ a contentious piece of tort reform legislation.⁵² Section 5 of the introductory version of H.B. 274, entitled "Early Dismissal of Actions," states: "[i]t is the policy of this state that all civil actions be disposed of fairly, promptly, and with the least possible expense to the

frivolous lawsuits, but we should." See Patton, *supra* note 17, at 566 (explaining that Governor Perry insisted that adding motions to dismiss to Texas law was "imperative to deal with the supposed onslaught of frivolous and abusive lawsuits").

48. Wilson, *supra* note 15, at 81–82.

49. See *id.* A prime example of a "truly fringe case" can be found in Judge Wilson's account of a recent Harris County case, where the plaintiff's petition "stated she was murdered by defendants, [and] resurrected by God at jail where she had been incarcerated for 330 years." *Id.* Contrast this with the considerably more sober petition of Javaid Iqbal, who alleged he was subjected to significant physical and verbal abuse at the hands of prison guards while being detained pursuant to federal terrorism investigations following the September 11th terrorist attacks due to his Pakistani ethnicity. *Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009). There, the United States Supreme Court held that Iqbal's allegations did not cross the line "from conceivable to plausible." *Id.* at 680. The federal plausibility standard, it seems, permits the dismissal of more than just the "nut suits" described by Judge Wilson. See *id.* at 681 ("[W]e do not reject these bald allegations on the ground that they are unrealistic or nonsensical . . . [i]t is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.").

50. *Final Approval of Rules for Dismissals and Expedited Actions*, 76 TEX. B.J. 221, 221–23 (2013); see also Tex. R. Civ. P. 91a (stating that Rule 91a applies "to all cases, including those pending on March 1, 2013").

51. Act of May 30, 2011, 82nd Leg., R.S., § 5, 2011 Tex. H.B. 274 (current version at Tex. R. Civ. P. 91a). House Bill 274 was first filed on March 10, 2011. See History of H.B. 274, TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB274> [<https://perma.cc/FC88-PD9U>] (last visited Feb. 1, 2017).

52. See John Council, *Defense and Plaintiffs Attorneys Riled Up Over Tort Reform Bills*, TEX. LAW. (Mar. 21, 2011), <http://www.texaslawyer.com/id=1202486816616/Defense-and-Plaintiffs-Attorneys-Riled-Up-Over-Tort-Reform-Bills> [<https://perma.cc/C4TW-CAFT>] (illustrating the contentious nature of tort reform in Texas). Even the president of the Texas Association of Defense Council, a professional association of defense attorneys who typically benefit from tort reform, voiced concerns that further reform could "become[] so Draconian that it's not fair or good for anybody . . ." *Id.*

litigants and to the state.”⁵³ This policy’s emphasis on reducing expense to litigants reflected Governor Rick Perry’s view that “frivolous lawsuits . . . can grind almost any business to a halt as owners are forced to deal with mounting legal fees and court costs”⁵⁴

Governor Perry championed the bill as a means to “combat the problem of plaintiff’s lawyers, filing questionable lawsuits, and rolling the dice with jury and judge in hope of striking it rich.”⁵⁵ H.B. 274’s opponents argued that Perry’s premise that that courts are filled with frivolous lawsuits is false because plaintiff’s attorneys are typically only paid if they win and thus “have a strong incentive to take only cases they feel have merit in order to maximize their chances of winning[.]”⁵⁶ Specifically addressing Section 5, the bill’s opponents cautioned that creating a motion to dismiss would “fundamentally and inappropriately alter the way civil trials are conducted” by morphing Texas’s liberal fair notice pleading standard into to one where “pleadings [must] be very specific in order to survive such a motion.”⁵⁷

Seeking to allay these concerns, supporters assured that the bill “would not change the forms of pleadings in Texas” and “would not require the Supreme Court to make a change in specificity of pleadings” in order to achieve its purpose.⁵⁸ Despite

53. Act of May 30, 2011, 82nd Leg., R.S., § 5, 2011 Tex. H.B. 274 (current version at Tex. R. Civ. P. 91a).

54. Press Release, Office of the Governor Rick Perry, Gov. Perry: Lawsuit Reforms Will Expedite Justice for Legitimate Claims and Help Strengthen Texas[s] Economic Climate (Mar. 14, 2011), <http://www.lrl.state.tx.us/scanned/govdocs/Rick%20Perry/2011/speech031411.pdf> [<https://perma.cc/GT7P-37HA>].

55. *Id.*

56. House Comm. on Judiciary and Civil Jurisprudence, Bill Analysis, Tex. H.B. 274, 82nd Leg., R.S., at 6, (2011), <http://www.hro.house.state.tx.us/pdf/ba82R/HB0274.PDF> [<https://perma.cc/RR98-TF9K>] (summarizing the positions of H.B. 274’s opponents).

57. *Id.* at 7. In a premonition of issues to come, the bill’s opponents alluded to the fact that the federal courts also have a motion to dismiss, which requires plaintiffs to plead their case with a degree of specificity “only possible after extensive discovery.” *Id.* This criticism of the federal pleading standard has been frequently echoed by critics of the *Twombly* and *Iqbal* decisions. See, e.g., *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) (testimony of Arthur R. Miller, Professor, New York University School of Law) (“*Twombly-Iqbal* will weigh heavily on under-resourced plaintiffs who typically contest with industrial and governmental Goliaths, often in cases in which critical information is largely in the hands of defendants that is unobtainable without access to discovery.”); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009) (“*Twombly* and *Iqbal* . . . deny access to court to plaintiffs and prospective plaintiffs . . . who cannot satisfy their requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries.”).

58. See House Comm. on Judiciary and Civil Jurisprudence, Bill Analysis, Tex. H.B. 274, 82nd Leg., R.S., at 6, (2011) (summarizing the positions of H.B. 274’s supporters).

these assurances, the original version of H.B. 274 instructs the Texas Supreme Court to “model the [early dismissal] rules after Rules 9 and 12, Federal Rules of Civil Procedure, to the extent possible[,]” expressly inviting Texas’s adoption of the federal pleading standard.⁵⁹ H.B. 274 eventually passed both houses and was signed into law on May 30, 2011.⁶⁰ It amended Section 22.004 of the Government Code by adding subsection (g), which reads:

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.⁶¹

Notably, the legislature’s finalized directive to the Texas Supreme Court did not contain language inviting an adoption of the federal rule pleading standard, as was in the original bill.⁶² However, the legislature also did not include language to prevent or discourage such a link, leaving this decision entirely in the Supreme Court’s hands.⁶³

D. Drafting the Rule: SCAC and the “No Basis in Law or Fact” Problem

With the legislature’s new directive signed into law, the Texas Supreme Court turned to the Supreme Court Advisory Committee (“SCAC”), who in turn formed a ten-member subcommittee to draft the language of the new rule in accordance with Section 22.004(g).⁶⁴ As they set out to craft what would

59. Act of May 30, 2011, 82nd Leg., R.S., § 5, 2011 Tex. H.B. 274 (current version at Tex. R. Civ. P. 91a).

60. H.J. of Tex. 82 Leg., R.S. 6917 (2011).

61. Tex. Gov’t Code Ann. § 22.004(g) (West 2013).

62. Compare Act of May 30, 2011, 82nd Leg., R.S., § 5, 2011 Tex. H.B. 274 (current version at Tex. R. Civ. P. 91a) (instructing the Texas Supreme Court to model the new dismissal rule after Federal Rules 9 and 12), with Tex. Gov’t Code Ann. § 22.004(g) (West 2013) (containing no such rule-modeling instruction).

63. See Tex. Gov’t Code Ann. § 22.004(g) (West 2013) (providing no specific instructions for drafting a “no basis in law or fact” standard). One commentator observed that the Texas Supreme Court was provided fairly little in the way of direction for crafting new rules, particularly regarding the legislature’s “intended meaning of the phrase ‘no basis in law or fact.’” See Patton, *supra* note 17, at 475–76.

64. See generally Letter Regarding Referral of Rules Issues from Nathan L. Hecht, Justice, Tex. Supreme Court, to Charles L. Babcock, Chair, Supreme Court Advisory Comm. (July 13, 2011) (on file with author). See also William V. Dorsaneo, III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 815–16 (2013) (“[T]he Court referred the dismissal rule to a ten-member subcommittee chaired by Judge David

become Rule 91a, members of the subcommittee considered a number of standards to best give effect to Section 22.004(g)'s "no basis on law or fact" dismissal standard.⁶⁵ One option was to simply include the "no basis in law or fact" language from the statute into the new rule verbatim and allow courts to construe it.⁶⁶ After all, the "no basis in law or fact" language is not wholly new to Texas courts—Rule 13 contains this exact language.⁶⁷ The subcommittee also considered a number of other standards to supplant this language entirely, including the modern federal plausibility standard from *Twombly* and *Iqbal*, the pre-*Twombly* and *Iqbal* federal standard espoused in *Conley v. Gibson*, and the general demurrer standard ("the pleading fails to state a cause of action").⁶⁸

Ultimately, the subcommittee chose to retain the "no basis in law or fact" language.⁶⁹ However, rather than leaving the task of interpreting "no basis in law or fact" entirely in the hands of the lower courts, the subcommittee opted instead to treat "no basis in law" and "no basis in fact" as separate inquiries with distinct definitions.⁷⁰ The subcommittee modeled its first proposal for the "no basis in law" standard after Federal Rule of Civil Procedure 11's "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law" language.⁷¹ However, the codified Rule 91a

Peebles, which proposed adoption of a draft rule.").

65. See generally Memorandum from Frank Gilstrap, Member, Supreme Court Advisory Comm., to Hon. David Peebles, Member, Supreme Court Advisory Comm. 1–3 (Nov. 10, 2011) (on file with author) (listing ten different dismissal standards the subcommittee considered when drafting Rule 91a).

66. *Id.* at 1.

67. See Tex. R. Civ. P. 13 ("no basis in law or fact").

68. See Memorandum from Frank Gilstrap to Hon. David Peebles, *supra* note 65, at 1–2.

69. See Tex. R. Civ. P. 91a.1 ("[A] party may move to dismiss a cause of action on the grounds that it has no basis in law or fact.").

70. See Tex. R. Civ. P. 91a.1 (providing different standards for "no basis in law" and "no basis in fact").

71. Compare Subcommittee Draft of Rule 94a, SUPREME COURT ADVISORY COMMITTEE (Dec. 7, 2011), <http://jwclientservices.jw.com/sites/scac/Document%20Library/2/1/SCAC%20-%20HB%20274%20-%20Subcommittee%20Draft%2012-7-11%20of%20Rule%2094a.pdf> [<https://perma.cc/3VBH-3UQT>] ("On motion a court must dismiss a claim that is not supported by existing law or by a reasonable argument for extending, modifying, or reversing existing law."), with FED. R. CIV. P. 11(a)(2) ("legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"). The only cognizable difference between the two articulations is that the committee's version replaces Rule 11's "nonfrivolous" language with "reasonable." It is worth noting, however, that the final version of the rule does not include any sort of language to permit arguments for extending, modifying, or reversing existing law. See Tex. R. Civ. P. 91a.1 (providing only that a claim has no basis in law if the allegations do not entitle the claimant to the relief sought). This issue will be addressed later in this Comment. See *infra* Part IV.B (discussing Rule 91a's exclusion of a

includes none of this language, and instead states that a claim has no basis in law if the allegations “do not entitle the claimant to the relief sought.”⁷² While this language is similar to the federal motion to dismiss standard found in FRCP 12(b)(6), the two are decidedly (and importantly) not identical, possibly evincing the subcommittee’s intent to differentiate Rule 91a from FRCP 12(b)(6).⁷³

As codified, Rule 91a’s “no basis in fact” standard bears even less resemblance to FRCP 12(b)(6).⁷⁴ Under Rule 91a, a claim has “no basis in fact if no reasonable person could believe the facts pleaded.”⁷⁵ This language appears to be largely novel, though it bears some resemblance to (and was likely informed by) the *de minimus* probability standard.⁷⁶ However, Rule 91a’s “no reasonable person could believe” test appears similar to the federal standard, which asks whether “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable[.]”⁷⁷

Even though the subcommittee looked to the federal plausibility standard for potentially useful language, they did not believe the legislature intended to bring the federal standard to Texas.⁷⁸ Despite the subcommittee’s efforts to differentiate Rule 91a from FRCP 12(b)(6), many commentators quickly identified the parallels between the two rules and concluded that Rule 91a’s promulgation amounted to Texas’s de facto adoption of the federal plausibility standard.⁷⁹ Others

means to argue for a good faith extension of existing law).

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

73. Compare Tex. R. Civ. P. 91a.1 (“A cause of action has no basis in law if the allegations . . . do not entitle the claimant to the relief sought.”), with FED. R. CIV. P. 12(b)(6) (providing that actions may be dismissed for “failure to state a claim upon which relief can be granted”). See also *infra* note 78 and accompanying text (discussing the subcommittee’s belief that the Texas legislature did not intend to adopt the federal plausibility standard).

74. Compare Tex. R. Civ. P. 91a.1 (“A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.”), with FED. R. CIV. P. 12(b)(6) (providing that actions may be dismissed for “failure to state a claim upon which relief can be granted”).

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

76. See Patton, *supra* note 17, at 490 n.114 (“The phrase does not appear in any Texas statute or rule.”); see also Memorandum from Frank Gilstrap to Hon. David Peeples, *supra* note 65, at 4 (discussing the *de minimis* probability standard as “another formulation of ‘no basis in fact’”).

77. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

78. See Letter from Hoffman & Albright, *supra* note 7, at 2–3 (“[N]o one on the SCAC subcommittee . . . thought that the legislative intent was to incorporate into Texas practice the federal motion and interpretive case law.”).

79. See, e.g., Frank O. Carroll III, *TRCP 91a: A State Court 12(b)(6)?*, TEXAPPBLOG (May 7, 2013), <http://texappblog.com/2013/05/07/trcp-91a-a-state-court-12b6/> [https:

elected to reserve judgment until the courts interpreted Rule 91a.⁸⁰ Indeed, the premonitions that a motion to dismiss would inevitably lead to an analogy to the federal pleading standard voiced by H.B. 274's opponents⁸¹ and by some subcommittee members⁸² had already begun to take shape.⁸³ However, those fears would only be fully realized once Texas courts had an opportunity to weigh in.⁸⁴

III. CONFUSION IN THE COURTS

In the months following Rule 91a's promulgation, litigants began using this new procedural device both directly by motion in state courts⁸⁵ and indirectly in federal courts applying state procedure.⁸⁶ As this section will show, the Rule promptly caused confusion in both federal and state courts.⁸⁷ Part III.A discusses the first major Rule 91a case—*GoDaddy.com, LLC v. Toups*—which set the stage for much of the interpretive confusion that followed.⁸⁸ Part III.B examines a later case, *Wooley v. Schaffer*, where the court draws a number of strained analogies in an

[//perma.cc/Z25D-TVQF](http://perma.cc/Z25D-TVQF)] (comparing similarities between language used in Rule 91a and in the *Twombly* court's interpretation of FRCP 12(b)(6)); Scott Dayton, *Texas Finally Promulgates Its Version of FRCP 12(b)(6)*, WEIL GOTSHAL PROD. LIAB. MONITOR (Feb. 2, 2013), <http://product-liability.weil.com/uncategorized/texas-finally-promulgates-its-version-of-frcp-12b6/> [<https://perma.cc/ZL53-SS8U>] (referring to Rule 91a as Texas's "equivalent to a FRCP 12(b)(6) motion").

80. See, e.g., Andrea L. Kuperman, *Pleading and Early Dismissal in Federal Court after Twombly and Iqbal*, 67 THE ADVOC. (TEXAS) 12, 16 (2014) ("It remains to be seen whether new Texas Rule 91a will bring a practice similar to that under Federal Rule 12(b)(6) into the state court system.").

81. See House Comm. on Judiciary and Civil Jurisprudence, Bill Analysis, Tex. H.B. 274, 82nd Leg., R.S., at 6 (2011) (summarizing the positions of H.B. 274's opponents), <http://www.hro.house.state.tx.us/pdf/ba82R/HB0274.PDF> [<https://perma.cc/6Y6V-SE5K>] ("If a motion to dismiss for failure to state a claim was created in Texas, it would move away from the general pleading system currently in use. Federal law contains such a motion and, as a result requires that pleadings be very specific in order to survive such a motion.").

82. See, e.g., Letter from Hoffman & Albright, *supra* note 7, at 2–3 (cautioning that certain language in the final version of Rule 91a invites courts to look to the federal case law interpreting FED. R. CIV. P. 12(b)(6)).

83. See *supra* note 79 and accompanying text (discussing the analogy drawn between Rule 91a and FRCP 12(b)(6)).

84. See *infra* Part III (discussing the confusion in the state and federal courts caused by Rule 91a's apparent similarity to FRCP 12(b)(6)).

85. See, e.g., *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied) (deciding on a Rule 91a motion for the first time since the rule's promulgation).

86. See, e.g., *Bart Turner & Assocs. v. Krenke*, No. 3:13-CV-2921-L, 2014 WL 1315896, at *5 (N.D. Tex. Mar. 31, 2014) (deciding that Rule 91a modifies Texas's fair notice pleading standard in the improper joinder context).

87. See *infra* Part III.A–C (discussing the state and federal cases inconsistently interpreting Rule 91a).

88. See *infra* Part III.A (exploring the court's analysis of Rule 91a in *GoDaddy*).

attempt to make sense of Rule 91a.⁸⁹ As Part III.C will discuss, the federal courts appear just as confused by the rule as the state courts and just as prone to analogizing it to FRCP 12(b)(6).⁹⁰

A. *GoDaddy.com, LLC v. Toups: Ground Zero for the Rule 91a Confusion*

In the earliest Texas case interpreting Rule 91a, the Ninth Court of Appeals committed the very sin that Rule 91a's opponents and its concerned drafters feared—it analogized Rule 91a to FCRP 12(b)(6).⁹¹ In *GoDaddy.com, LLC v. Toups*, a Texas-based webhosting service filed a Rule 91a motion to dismiss on the grounds that it was immune from tort liability under Section 230 of the Communications Decency Act.⁹²

The *GoDaddy* court explained: “While not identical, Rule 91a is analogous to Rule 12(b)(6); therefore, we find case law interpreting Rule 12(b)(6) instructive.”⁹³ Though the court acknowledged the two rules are not identical, the court proceeded to recite the Supreme Court's federal plausibility standard from *Iqbal*: “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”⁹⁴ Continuing its analogy to the federal pleading standard, the court added that a claim must contain “enough facts to state a claim to relief that is plausible on its face.”⁹⁵

The *GoDaddy* court remained silent as to how this standard of review fits into its analysis.⁹⁶ Instead, it rested on its belief in the aptness of its analogy and held that because FRCP 12(b)(6) is the proper avenue for asserting the affirmative defense of immunity under the federal rules, Rule 91a must likewise be the proper avenue for asserting immunity in state court.⁹⁷ The court concluded that GoDaddy was entitled to immunity without expressly applying either the federal plausibility standard or any of Rule 91a's articulated standards to the facts of the case.⁹⁸ The

89. See *infra* Part III.B (discussing the *Wooley* court's analogies to pleas to the jurisdiction and legal sufficiency challenges).

90. See *infra* Part III.C (examining a number of federal court cases that apply Rule 91a in the improper joinder context).

91. See *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied).

92. *Id.* at 753.

93. *Id.*

94. *Id.* at 754 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

95. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

96. *Id.* at 754–55.

97. *Id.*

98. See *id.* at 761.

court's conclusion—that GoDaddy properly asserted an immunity-from-liability defense under Rule 91a's "no basis in law" prong—hinged on the court's analogy to FRCP 12(b)(6).⁹⁹ By analogizing Rule 91a to FRCP 12(b)(6) before any other court had an opportunity to weigh in, the *GoDaddy* court set the stage for a string of future decisions extending this analogy.¹⁰⁰

B. *Wooley v. Schaffer: Deepening the Confusion*

Following the *GoDaddy* court's lead, the *Wooley* court acknowledged Rule 91a's unique language but nevertheless proceeded to state that it "find[s] case law interpreting Rule 12(b)(6) instructive[.]" citing the *GoDaddy* court as its example.¹⁰¹ Like the *GoDaddy* court, the *Wooley* court also expressly cited the federal plausibility standard from *Twombly* and *Iqbal* before proceeding into its Rule 91a analysis.¹⁰²

Adding to the confusion, the *Wooley* court also analogized Rule 91a to pleas to the jurisdiction and legal sufficiency challenges.¹⁰³ First, the court acknowledged that it must "construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings" when conducting its Rule 91a analysis, just as in a plea to the jurisdiction.¹⁰⁴ However, while interpreting Rule 91a's no basis in fact standard—"no reasonable person could believe the facts pleaded"¹⁰⁵—the court explained that "[t]his language is similar to a legal sufficiency challenge, in which we ask whether evidence at trial would enable reasonable people to reach the verdict under review."¹⁰⁶

The *Wooley* court's analogy to the legal sufficiency standard is a dangerous one because legal sufficiency challenges are evaluated using evidence presented at trial.¹⁰⁷ By contrast, Rule

99. See *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 762 (Tex. App.—Beaumont 2014, pet. denied) ("Plaintiffs seek to hold GoDaddy liable as the publisher of the contested website content; therefore, plaintiffs' claims are barred under 47 U.S.C. § 230. Even taking plaintiffs' allegations as true, plaintiffs' have failed to state a viable claim against GoDaddy.").

100. See *infra* Part III.B (discussing the *Wooley* court's continuation of the analogy between Rule 91a and FRCP 12(b)(6)).

101. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

102. *Id.*

103. *Id.* at 75.

104. *Id.*

105. Tex. R. Civ. P. 91a.

106. *Wooley*, 447 S.W.3d at 75.

107. See, e.g., *City of Keller v. Wilson*, 168 S.W.3d 802, 803 (Tex. 2005) (discussing at length legal sufficiency challenges and the types of evidence considered).

91a requires the court to decide motions to dismiss *without considering any evidence*.¹⁰⁸ At least one commentator foresaw this very issue, stating that Rule 91a’s “no reasonable person could believe the facts pleaded” language “seems to create a hopelessly subjective test—particularly since Rule 91a prohibits the court from considering evidence that, if allowed, might place pleaded facts in context.”¹⁰⁹ The *Wooley* court’s analogy between Rule 91a’s “no basis in fact” test and legal sufficiency challenges does not seem to account for this pre-evidentiary concern, calling into question this analogy’s veracity.¹¹⁰

Seemingly attempting to reign in its own analogies, the *Wooley* court then explained that, to determine whether a cause of action has a basis in law or fact, “we apply the fair notice pleading standard applicable in Texas to determine whether the allegations of the petition are sufficient.”¹¹¹ After setting out a sufficiently confusing web of analogies, the *Wooley* court proceeded to apply Rule 91a in a summary manner that shed no further light on the rule’s operation in the Fourteenth Court of Appeals.¹¹² Despite the rule’s mandate, the *Wooley* court made no distinction between whether dismissal was sought on the distinct “no basis in law” prong, the “no basis in fact” prong, or both, summarily concluding that the plaintiff’s claims “have no basis in law or fact.”¹¹³

Seeking to establish a clearer standard of review for Rule 91a motions, Chief Justice Frost wrote a concurrence criticizing the considerable confusion created by the majority’s amalgam of analogies.¹¹⁴ First, Justice Frost argued that fair notice was not the standard for determining sufficiency of the pleadings under Rule 91a—a patently different view than that taken by the majority.¹¹⁵ Instead, Justice Frost opined that the test was

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

109. Patton, *supra* note 17, at 490–91 (discussing the “no reasonable person could believe” standard) (citations omitted).

110. Nevertheless, in the wake of *Wooley*, the Texas Supreme Court has drawn the same analogy. See *City of Dall. v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam) (“[T]he rule’s factual-plausibility standard is akin to a legal-sufficiency review.”). The *Sanchez* court even referred to Rule 91a’s “no basis in fact” prong as the rule’s “factual-plausibility standard,” possibly evincing the court’s agreement with the perception that Rule 91a is Texas’s de facto enactment of FRCP 12(b)(6). See *id.*

111. *Wooley*, 447 S.W.3d at 76.

112. See *generally id.* at 76–78 (applying Rule 91a to conclude that plaintiff failed to state a claim with a basis in law or fact).

113. *Id.* at 78.

114. *Id.* at 83–84 (Frost, C.J., concurring) (elucidating the distinctions between Rule 91a, pleas to the jurisdiction, and legal sufficiency challenges).

115. *Id.* at 83 (Frost, C.J., concurring). As noted previously, the majority elected to apply fair notice to determine the sufficiency of the pleadings. See *supra* text

simply “whether the challenged causes of action have no basis in law or no basis in fact under the standards promulgated in Rule 91a”—absent any sort of analogy.¹¹⁶ Finally, Justice Frost cautioned against any attempts to analogize Rule 91a to other aspects of procedure:

Rule 91a is unique, an animal unlike any other in its particulars. Because this new procedural creation differs from other procedures in its terms, benefits, and application, courts should treat it as its own kind without analogizing it to other species, lest practitioners and trial courts fall into error by tailoring their motions and rulings to meet provisions that are different from the terms of Rule 91a.¹¹⁷

Courts in the wake of *Wooley* have not adopted Justice Frost’s understanding of Rule 91a and instead continue to cite the *Wooley* court’s majority that Rule 91a applies in the context of fair notice pleading.¹¹⁸

C. Federal Courts Add to the Confusion

Federal district courts in Texas have also assumed the task of interpreting Rule 91a and its effect on Texas’s fair notice pleading standard.¹¹⁹ Those courts must often apply Texas’s fair notice pleading standard in the improper joinder context.¹²⁰ Improper joinder issues arise when a diverse defendant in a multi-party suit alleges another non-diverse defendant was joined for the sole purpose of defeating diversity jurisdiction.¹²¹ Though the federal trial courts have previously wrestled with the issue of whether Texas fair notice pleading or federal plausibility pleading governs in improper joinder cases, the Fifth Circuit court recently decided the issue in favor of Texas’s fair notice

accompanying note 111.

116. *Wooley*, 447 S.W.3d at 83 (Frost, C.J., concurring).

117. *Id.* at 84 (Frost, C.J., concurring).

118. *See, e.g.*, *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 184 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (“We apply the fair-notice pleading standard to determine whether the allegations of the petition are sufficient to allege a cause of action.”).

119. *See, e.g.*, *Bart Turner & Assocs. v. Krenke*, No. 3:13-CV-2921-L, 2014 WL 1315896, at *5 (N.D. Tex. Mar. 31, 2014) (applying Texas fair notice pleading “in the context of Texas Rule of Civil Procedure 91a”).

120. *See, e.g.*, *Evans v. Kawasaki Motors Corp., USA*, No. H-15-659, 2015 WL 4434073, at *2–3 (S.D. Tex. July 17, 2015) (deciding in the affirmative whether the Texas fair notice pleading standards govern in improper joinder cases).

121. *See, e.g.*, *Garza v. Scottsdale Ins. Co.*, No. 2:15-CV-149, 2015 WL 3756917, at *1 (S.D. Tex. June 16, 2015) (granting a motion to remand on the basis that the non-diverse defendant was properly joined).

pleading standard.¹²² Thus, the federal courts also require clear guidance as to what effect, if any, Rule 91a has had on Texas's ostensibly liberal pleading standard.

Like the state courts, the federal district courts are similarly unclear about whether Rule 91a creates a heightened pleading standard.¹²³ One stark example is *Bart Turner & Associates v. Krenke*.¹²⁴ On the issue of improper joinder, the *Krenke* court purported to apply Texas's fair notice pleading "in the context of Texas Rule of Civil Procedure 91a" after expressly disclaiming the federal plausibility standard as the proper test.¹²⁵ In its analysis, however, the court held that "[t]he allegations of the Petition are 'bare-bone' or 'threadbare'"—language pulled directly from the federal plausibility standard.¹²⁶ The court added: "[t]hey are wholly conclusory, and the court cannot say that the allegations against Gibson meet the 'fair notice' standard that governs in the Texas court system."¹²⁷ Other federal courts in Texas have also conducted a FCRP 12(b)(6)-like analysis, often citing *Wooley* for support.¹²⁸

While *Krenke* and its ilk represent the view that Rule 91a has morphed Texas's fair notice pleading into FCRP 12(b)(6), federal courts on the other end of the spectrum have expressly disclaimed this fusion.¹²⁹ For example, in *Escalante v. Goodyear Tire & Rubber Co.*, the court explained that despite Rule 91a's promulgation, "the Texas concept of 'fair notice' has not morphed into the Federal Rule of Civil Procedure 12(b)(6) standard re-defined in [*Iqbal*] . . . and [*Twombly*]."¹³⁰ Similarly, the court in *Mainali Corp. v. Covington Specialty Insurance Co.* stated it "has continued to apply the 'fair notice' pleading standard in a manner that is unaltered by Rule

122. See *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 800 F.3d 143, 149 (5th Cir. 2015) (holding the Texas fair notice pleading standard, not the federal plausibility standard, applies in the improper joinder context).

123. See, e.g., *Rush v. Jacobs Eng'g Grp., Inc.*, No. 3:14-CV-3723-B, 2015 WL 1511122, at *2 (N.D. Tex. Apr. 2, 2015); *Krenke*, 2014 WL 1315896, at *5.

124. 2014 WL 1315896, at *1.

125. *Id.* at *5.

126. Compare *id.* ("The allegations of the Petition are 'bare-bone' or 'threadbare.'"), with *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

127. *Krenke*, 2014 WL 1315896, at *5.

128. See, e.g., *Rush*, 2015 WL 1511122, at *2 ("While not identical to the Rule 12(b)(6) standard, the Texas Courts of Appeal have interpreted Rule 91a as essentially calling for a Rule 12(b)(6)-type analysis and have relied on the 12(b)(6) case law in applying Rule 91a.") (citing *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014)).

129. See cases cited *infra* notes 130–31.

130. No. 2:15-CV-136, 2015 WL 3770929, at *2 (S.D. Tex. June 17, 2015) (citations omitted). Notably, the *Escalante* court cites *Wooley* to support this proposition. *Id.* at *3.

91a.”¹³¹ These courts appear to take a position more in line with Justice Frost’s understanding of Rule 91a as a standard separate from fair notice and plausibility pleading.¹³²

Though the federal court opinions can be a useful interpretive guide, often functioning as an extra set of eyes on a particular issue, the only thing clear from these decisions is that Rule 91a is sufficiently bewildering in its current state. Accordingly, the remainder of this Comment will focus on proposing and defending new language to resolve the confusion.¹³³

IV. RESOLVING THE CONFUSION

As the discussion in Part III demonstrates, Rule 91a has proven problematic.¹³⁴ It invites an analogy to FCRP 12(b)(6) while simultaneously suggesting a slight distinction.¹³⁵ Many commentators have raised significant concerns regarding the *Twombly-Iqbal* interpretation of FCRP 12(b)(6).¹³⁶ Furthermore, the legislative and drafting committee history seems to suggest bringing *Twombly-Iqbal*-style plausibility pleading was not the intent.¹³⁷ As such, the issue here is not whether plausibility pleading in Texas would be prudent; instead, it is how to resolve the confusion around the current rule.¹³⁸ The major questions that arise are: If we accept that Rule 91a was not meant to create a plausibility standard in Texas, then how exactly does Rule 91a fit into the paradigm of fair notice pleading? Does Rule 91a heighten the pleading standard? Or, instead, is fair notice pleading unaffected by Rule 91a, and is this rule meant to be “an animal unlike any other,” as Chief Justice Frost suggests?¹³⁹

131. No. 3:15-CV-1087-D, 2015 WL 5098047, at *3 n.2 (N.D. Tex. Aug. 31, 2015).

132. Compare *id.* (“[T]he ‘fair notice pleading’ standard . . . is unaltered by Rule 91a.”), with *Wooley*, 447 S.W.3d at 83 (Frost, C.J., concurring) (opining that Rule 91a’s standard is unique and separate from Texas’s fair notice pleading standard).

133. See *infra* Part IV.B–C (proposing new language for Rule 91a).

134. See *supra* Part III (discussing various state and federal cases inconsistently interpreting Rule 91a).

135. See *supra* text accompanying notes 73, 79, 93 (comparing and contrasting Rule 91a and FCRP 12(b)(6)).

136. See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 822 (2010) (criticizing the Supreme Court’s decisions in *Twombly* and *Iqbal* for “destabiliz[ing] the entire system of civil litigation”); see also Patton, *supra* note 17, at 499–503 (listing numerous arguments against adopting the federal plausibility standard into state practice).

137. See *supra* Parts II.C–D (discussing the various iterations of the rule, coupled with correspondence among the drafting committee members, which all seem to suggest bringing federal plausibility pleading to Texas was not the drafter’s intent).

138. See *supra* note 134 and accompanying text.

139. *Wooley v. Schaffer*, 447 S.W.3d 71, 84 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (Frost, C.J., concurring).

A. Rule 91a: An Animal Unlike Any Other?

In her concurrence, Chief Justice Frost argued that “the issue under Rule 91a is not whether the claimant sufficiently pleaded a cause of action under Texas’s liberal notice-pleading standards; rather, the issue is whether the challenged causes of action have no basis in law or no basis in fact under the standards promulgated in Rule 91a.”¹⁴⁰ While this argument appears immediately pleasing to the simplicity-seeking mind, especially from the perspective of a court interpreting and applying Rule 91a, this line of thinking does very little to create certainty and clarity for a potential plaintiff.¹⁴¹ Even by Justice Frost’s own admission, a plaintiff does not have the luxury of disregarding Rule 91a when filing a petition.¹⁴² Instead, a plaintiff must plead his causes of action in a way that both provides fair notice and satisfies Rule 91a; otherwise, he risks Rule 91a dismissal and the payment of opposing attorney’s fees.¹⁴³ As such, Rule 91a currently acts as a heightened standard of sorts, or, at the very least, as an additional consideration.¹⁴⁴ However, by creating a clearer standard with time-tested wording, this Comment argues that Justice Frost’s notion that Rule 91a is a unique and separate test can co-exist with the notion that providing fair notice is meant to be the most stringent bar to entry into court.¹⁴⁵

B. Fixing “No Basis in Law”

Currently, Rule 91a provides that a cause of action “has no basis in law if the allegations, taken as true, together with

140. *Id.* at 83.

141. Justice Frost’s concurrence is aimed at preventing “practitioners and trial courts [from] fall[ing] into error by tailoring their motions and rulings to meet provisions that are different from the terms of Rule 91a.” *Id.* at 84.

142. Justice Frost’s concurrence appears to acknowledge this by implying that plaintiffs will need to plead in a manner that meets the terms imposed by Rule 91a, rather than by Texas’s fair notice pleading. *Id.*

143. Though not a central focus of this Comment, Rule 91a also provides that the “prevailing party” be awarded all costs associated with the motion. Tex. R. Civ. P. 91a.7. Unsurprisingly, the ambiguous “prevailing party” language has also drawn criticism. *See, e.g., Patton, supra* note 17, at 566–72 (discussing the ambiguity that arises when a party only partially prevails on its Rule 91a motion).

144. A plaintiff’s pleading that does not comport with both fair notice and Rule 91a risks dismissal through either Rule 91 or Rule 91a. *See* Tex. R. Civ. P. 47 (requiring plaintiffs to give fair notice of the claim involved); Tex. R. Civ. P. 91 (providing a procedural avenue for curing defects in a plaintiff’s petition and allowing for summary judgment on deficient claims); Tex. R. Civ. P. 91a.1 (providing for dismissal of claims with no basis in law or fact).

145. *See infra* Part IV.B–C (proposing new language for Rule 91a).

inferences reasonably drawn from them do not entitle the claimant to the relief sought.”¹⁴⁶ This prong of the rule reads similarly to FRCP 12(b)(6), which allows for dismissal of a claim for “failure to state a claim upon which relief can be granted.”¹⁴⁷ This similar wording may shed some light on the court’s penchant to analogize the two.¹⁴⁸ Additionally, the rule calls for “inferences” to be drawn from the allegations, inviting a fact-based inquiry into what is meant to be a purely legal determination.¹⁴⁹

Beyond the confusion the “no basis in law” clause has caused, this prong forecloses the possibility of pleading beyond existing law to advance a “good faith argument for extension, modification, or reversal of existing law.”¹⁵⁰ In earlier drafts of Rule 91a, the subcommittee settled on language that closely tracked Rule 13’s language, reading “[o]n motion a court must dismiss a claim that is not supported by existing law or by a reasonable argument for extending, modifying, or reversing existing law.”¹⁵¹ However, this language is suspiciously absent in the current version of Rule 91a.¹⁵²

The exclusion of this “good faith argument” language sparked criticism from members of the subcommittee¹⁵³ and the legal community alike.¹⁵⁴ To paint the perilous picture clearly, if

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

147. FED. R. CIV. P. 12(b)(6).

148. See *supra* Part III (discussing the numerous state and federal cases that have analogized Rule 91a and FRCP 12(b)(6)).

149. In a letter to Justice Hecht, who headed the Supreme Court Advisory Committee tasked with drafting Rule 91a, two committee members cautioned that as drafted, Rule 91a’s reference to “drawing inferences in the ‘no basis in law’ portion of the rule will only confuse courts and litigants.” Letter from Hoffman & Albright, *supra* note 7, at 2–3.

150. Tex. R. Civ. P. 13. Rule 13 continues to allow good faith arguments for extending existing law, but Rule 91a does not. Compare Tex. R. Civ. P. 13 (allowing good faith arguments for extending existing law), with Tex. R. Civ. P. 91a.1 (affording no protection for such arguments).

151. Subcommittee Draft of Rule 94a, SUPREME COURT ADVISORY COMMITTEE (Dec. 7, 2011), <http://jwclientservices.jw.com/sites/scac/Document%20Library2/1/SCAC%20-%20HB%20274%20-%20Subcommittee%20Draft%2012-7-11%20of%20Rule%2094a.pdf> [https://perma.cc/8X7X-J7LX]. This language is similar to that found in Rule 13. See Tex. R. Civ. P. 13 (“not warranted by good faith argument for the extension, modification, or reversal of existing law”).

152. See Tex. R. Civ. P. 91a.1 (allowing for dismissal of any claims that do not entitle the claimant to the relief sought).

153. See Letter from Hoffman & Albright, *supra* note 7, at 3 (“A claim challenging an existing law will be dismissed under the rule, as proposed, even if the claim in good faith makes a reasonable argument for why the law is illegal, unconstitutional or should be modified or reversed for any other reason.”).

154. See Patton, *supra* note 17, at 488 (“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 . . . as opposed to losing on the pleadings weeks after filing suit.”).

Rule 91a was in the books “when Thurgood Marshall and the NAACP challenged the ‘Separate But Equal’ doctrine, the rule would have required a court to dismiss all of their claims and to award fees to the state.”¹⁵⁵ Because Rule 91a does not allow good faith arguments for modifying, extending, or reversing current law, *stare decisis* is indeed an “inexorable command” so long as a defendant remembers to file a motion to dismiss.¹⁵⁶

To resolve the issues of unwanted analogies to FCRP 12(b)(6), to keep factual-based inquiries distinct from the “no basis in law” determination, and to allow good faith arguments for extending the law, this Comment proposes the following language:

A cause of action has no basis in law when, taking the allegations as true, it is not warranted by existing law or by good faith argument for the extension, modification, or reversal of existing law.

This language is adopted from the suggestions of multiple subcommittee members,¹⁵⁷ and based closely on the existing standard from Rule 13.¹⁵⁸ The language’s similarity to Rule 13 is intentional: it invites courts to look to the well-settled interpretation of what constitutes a “good faith argument” rather than to the federal plausibility or legal sufficiency standards.¹⁵⁹ Furthermore, because Rule 13 has peaceably co-existed with Texas fair notice pleading for at least two decades,¹⁶⁰ courts will be less tempted to conclude this new standard somehow raises the level of specificity required to plead into Texas courts.

One potential criticism of this method is that, by linking the Rule 13 and Rule 91a standards this way, litigants may become inclined to seek sanctions whenever a Rule 91a motion is granted. The rationale is that a sanctions movant would already have a determination by the court that their opponent did not raise a

155. Letter from Hoffman & Albright, *supra* note 7, at 3.

156. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Stare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.”) (internal quotations omitted).

157. See Letter from Hoffman & Albright, *supra* note 7, at 4 (“[T]his language is essentially the same language proposed by the SCAC subcommittee.”).

158. See Tex. R. Civ. P. 13 (“[N]o basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.”).

159. Cases such as *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634 (Tex. 1989) and its progeny provide ample instructive material for interpreting and applying a Rule 13-based dismissal standard. See also *Ostrow v. United Bus. Machs., Inc.*, 983 S.W.2d 101, 106 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (holding that the term “groundless” under the Deceptive Trade Practices Act is synonymous with “no basis in law or in fact”).

160. Rule 13’s “good faith” language has existed since at least 1990. See Tex. R. Civ. P. 13 (amended 1990).

good-faith legal argument. This is dangerous because sanctions are only meant to be imposed after a hearing and presentation of evidence, while Rule 91a is based solely on the pleadings.¹⁶¹ However, the rules resolve this concern by virtue of their own operation.¹⁶² Rule 91a already provides, in a separate subpart, that no evidence can be considered in ruling on the motion.¹⁶³ By contrast, Rule 13 requires the court to hold an evidentiary hearing before imposing sanctions.¹⁶⁴ The fact that a party's claim is dismissed under this new Rule 91a standard does not necessarily mean that the losing party will automatically be held liable for Rule 13 sanctions, as Rule 13 still requires "notice and hearing" for the imposition of sanctions.¹⁶⁵ Thus, the fear that that the proposed language will invite the courts and litigants to more zealously pursue sanctions is ultimately a slight one.

In conclusion, the proposed language disentangles Rule 91a from FRCP 12(b)(6)¹⁶⁶ and allows the advancement of good faith legal arguments.¹⁶⁷ Furthermore, the new language provides a well-settled backdrop of interpretive literature from which to draw and settles many of the concerns raised by Rule 91a's current "no basis in law" standard.¹⁶⁸ This time-tested standard also fits snugly within Texas's fair notice pleading, as it does not invite the court to impose a higher pleading standard.¹⁶⁹

161. See, e.g., Frank Gilstrap, *Loser Pays—Then and Now*, DALLAS B. ASS'N 11–12 (Nov. 2, 2011), <http://www.dallasbar.org/sites/default/files/loserpays--thenandnow.pdf> [<https://perma.cc/KF3E-WAEY>] (“[A]n award of sanctions under Rule 13 requires the trial court to hold an evidentiary hearing to make the necessary factual determinations’ . . . while House Bill 274, calls for dismissal ‘on motion and without evidence.’”).

162. Rule 13 requires the court to hold an evidentiary hearing before sanctions can be issued. *Keith v. Solls*, 256 S.W.3d 912, 917 (Tex. App.—Dallas 2008, no pet.). By contrast, Rule 91a does not allow evidence to be considered at all. Tex. R. Civ. P. 91a.6 (“[T]he court may not consider evidence in ruling on the motion . . .”).

163. See Tex. R. Civ. P. 91a.6 (“[T]he 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.”).

164. See *Keith*, 256 S.W.3d at 917 (“Rule 13 requires the trial court to hold an evidentiary hearing . . .”).

165. Tex. R. Civ. P. 13.

166. For a discussion of the linguistic similarities between Rule 91a and FRCP 12(b)(6), see *supra* note 73 and accompanying text (comparing the similar language of Rule 91a and FRCP 12(b)(6)).

167. See discussion *supra* notes 151–56 and accompanying text (noting the omission of the “good faith” legal argument provision from the finalized version of Rule 91a and discussing the concerns the omission raised).

168. See *supra* Part III.A–C (discussing the considerable confusion among state and federal courts applying the current Rule 91a standard).

169. At the time of writing, the Author is aware of no court decision nor legal critique of Rule 13 sanction's “groundless” standard as altering Texas's fair notice pleading in any way.

C. Fixing “No Basis in Fact”

This subsection proposes language for the “no basis in fact” standard. Arguably the more problematic of the two standards,¹⁷⁰ the “no basis in fact” standard creates a “hopelessly subjective” test.¹⁷¹ The standard provides that “[a] cause of action has no basis in fact if no reasonable person could believe the facts pleaded.”¹⁷² Like its “no basis in law” counterpart, the language of this test also invites an analogy to the *Twombly-Iqbal* decisions—particularly because of its “reasonable” test. For example, in *Iqbal*, the court states “[a] claim has facial plausibility when the pleaded factual content allows the court to draw the *reasonable* inference that the defendant is liable for the misconduct alleged.”¹⁷³

Expectedly, this “reasonable” test has proven challenging for Texas courts.¹⁷⁴ For example, the *Wooley* court analogized the Rule 91a’s “reasonable person” test with the legal sufficiency test, despite the fact that the latter is conducted in light of the evidence at trial while the former is not, because the two tests both invoke a “reasonable person” standard.¹⁷⁵ Accordingly, to effectuate the legislature’s intent that this standard be used to dispose of the “occasional nut suit,”¹⁷⁶ the new test must not be based on “reasonable” belief. This Comment proposes the following language:

A cause of action has no basis in fact if it is based on irrational or wholly incredible factual allegations.

170. As one commentator observed, “whether a cause of action has no basis in law under Rule 91a appears to be a clear-cut inquiry . . . [b]ut . . . evaluating whether a cause of action has no basis in fact has the potential to be far more problematic.” Patton, *supra* note 17, at 489.

171. *Id.* at 490–91.

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

173. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added).

174. See *supra* Part III.B (discussing the *Wooley* court’s difficulty squaring this “reasonable” test with others, such as legal sufficiency).

175. *Wooley v. Schaffer*, 447 S.W.3d 71, 75 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (“Rule 91a also requires the court to determine whether a ‘reasonable person could believe the facts pleaded’ to determine whether a pleading has a basis in fact. This language is similar to a legal sufficiency challenge.”) (citation omitted). Notably, this result was anticipated by two committee members who, prior to the rule’s promulgation, cautioned that it would cause Texas judges to treat “pleading sufficiency standard congruently with legal sufficiency.” Letter from Hoffman & Albright, *supra* note 7, at 5.

176. Wilson, *supra* note 15, at 81; see also Letter from Hoffman & Albright, *supra* note 7, at 5 (“[T]here are extreme instances in which a plaintiff may allege something that is clearly unbelievable . . . [t]he Legislature intended to allow a judge to throw out these types of claims.”).

This “irrational or wholly incredible” language is drawn from a progeny of *in forma pauperis* cases,¹⁷⁷ wherein the court is more likely to be confronted with pro se litigants who file suits rife with often fanciful allegations.¹⁷⁸ Essentially, this proposal would expand this brand of dismissal from *in forma pauperis*¹⁷⁹ and inmate litigation contexts¹⁸⁰ to the general civil litigation sphere. Just as with the proposed “no basis in law” language, this articulation also benefits from a healthy supply of instructive Texas cases.¹⁸¹

This language, along with the line of cases applying it, clearly distinguishes Rule 91a’s “no basis in fact” standard from federal plausibility pleading.¹⁸² The contrast between the facts in these decidedly fanciful cases and those in a more borderline case like *Iqbal* will serve to starkly contrast the two standards.¹⁸³ Because this standard speaks so clearly to the truly fringe cases, it will be difficult for courts to conclude that Texas’s fair notice pleading standard has been heightened or morphed into a plausibility standard.¹⁸⁴

177. See, e.g., *Gray v. Purvis*, No. 14-10-00279-CV, 2011 WL 1365001, at *3 (Tex. App.—Houston [14th Dist.] Apr. 12, 2011, no pet.) (“A claim is also considered to have no arguable basis . . . when the factual allegations on which it is based are wholly incredible or irrational.”); *Nabelek v. Dist. Attorney of Harris Cty.*, 290 S.W.3d 222, 228 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (“For a claim to have no arguable basis in law, it must . . . be based on wholly incredible or irrational factual allegations.”).

178. See, e.g., *Romano v. Kardashian*, No. A-12-CV-0535 SS, 2012 WL 2562373, at *2 (W.D. Tex. June 29, 2012) (dismissing a claim by a pro se plaintiff seeking a restraining order after he allegedly recorded a sex tape involving a motorcycle gang, Kanye West, Sandra Bullock, Khloe Kardashian, the Brooklyn Nets, buses with explosives, and more).

179. See Tex. Civ. Prac. & Rem. Code § 13.001 (providing for dismissal of frivolous actions filed *in forma pauperis*).

180. See Tex. Civ. Prac. & Rem. Code § 14.003 (providing for dismissal of frivolous inmate-initiated lawsuits).

181. In addition to the cases mentioned in notes 177–78, a slew of other Texas cases also applied the “irrational or wholly incredible” language. See, e.g., *Burnett v. Sharp*, 328 S.W.3d 594, 600 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (applying the “irrational or wholly incredible” test); *Minix v. Gonzales*, 162 S.W.3d 635, 637 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (same); *Gill v. Boyd Distrib. Ctr.*, 64 S.W.3d 601, 603 (Tex. App.—Texarkana 2001, pet. denied) (same).

182. The proposed language differs significantly from the federal plausibility standard articulated in *Iqbal*. Compare the proposed language (“A cause of action has no basis in fact if it is based on irrational or wholly incredible factual allegations.”) with the plausibility standard from *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“[A] complaint must contain sufficient factual matter . . . 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.”) (citation omitted).

183. See *supra* text accompanying note 49 (contrasting Javaid Iqbal’s relatively sober allegations of conspiracy with the fanciful allegations found in “nut suits”).

184. See *supra* note 49 and accompanying text (discussing the contrast between implausible cases and wholly fanciful cases).

IV. CONCLUSION

Upon its promulgation, Rule 91a was quickly pinned as Texas's adoption of FRCP 12(b)(6),¹⁸⁵ contrary to the legislature's and drafting committee's intent.¹⁸⁶ Despite concerns,¹⁸⁷ the finalized language bore a significant resemblance to the plain text of FRCP 12(b)(6)¹⁸⁸ and the federal plausibility standard from the *Twombly-Iqbal* decisions.¹⁸⁹ This in turn caused both the state and federal courts to draw numerous analogies to FRCP 12(b)(6) and other procedural vehicles, creating a confusing tapestry of inapt analogies.¹⁹⁰ In particular, the courts appear unsure of how, if at all, Rule 91a affects Texas notice pleading.¹⁹¹ While most seem to acknowledge that Texas has not fully adopted the federal plausibility standard, some courts nevertheless appear to apply a heightened form of notice pleading akin to plausibility pleading.¹⁹²

The solution is to articulate new standards for each of Rule 91a's legal and factual dismissal standards.¹⁹³ The two new articulations proposed in this Comment are readily distinguishable from FRCP 12(b)(6), are rooted in well-established Texas jurisprudence, have peaceably co-existed with Texas's fair notice pleading, and better effectuate the legislature's intent.¹⁹⁴ The proposed "no basis in law" language provides a much-needed avenue for plaintiffs to continue to plead good faith arguments for extending, modifying, or reversing

185. See *supra* note 79 and accompanying text (describing Rule 91a as Texas's FRCP 12(b)(6)).

186. See *supra* Parts II.C–D (discussing the legislative and subcommittee drafting processes that steadily disentangled the rule from its similarities to FCRP 12(b)(6)).

187. See *supra* Parts II.C–D (describing the criticism leading up to Rule 91a's promulgation, particularly those criticisms warning of the rule's similarity to FCRP 12(b)(6)).

188. See *supra* text accompanying notes 146–47 (comparing Rule 91a's "no basis in law" standard with the text of FRCP 12(b)(6)).

189. See *supra* text accompanying notes 172–73 (comparing Rule 91a's "no basis in fact" standard with the court's articulation of plausibility pleading from *Iqbal*).

190. See *supra* Part III (exploring the state and federal court decisions published in the wake of Rule 91a's promulgation, which have left the rule in its current baffling state).

191. See *supra* Part III (discussing the various Rule 91a cases which reach conflicting conclusions regarding the rule's effect on fair notice pleading).

192. See, e.g., *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 831 (Tex. App.—Austin 2014, no pet.). (granting a Rule 91a motion on the grounds that the court could not conceive "of a set of *plausible* factual allegations" that would allow the plaintiff to prevail) (emphasis added).

193. See *supra* Part IV.B–C (proposing and defending new language for Rule 91a's legal and factual dismissal standards).

194. See *id.* (proposing new language for the "no basis in law" and "no basis in fact" standards).

existing law—an avenue which does not exist under the rule’s current wording.¹⁹⁵ The proposed “no basis in fact” language adopts Texas’s well-settled jurisprudence regarding dismissal of frivolous *in forma pauperis* and inmate lawsuits.¹⁹⁶ These proposed standards clearly demark the line between successful pleading and dismissal and end the confusion currently plaguing Texas’s dismissal practice.¹⁹⁷

George Hayek

195. See *supra* Part IV.B (discussing the proposed language’s reintroduction of good faith arguments for extending the law).

196. See *supra* Part IV.C (discussing the numerous other cases to successfully apply the same language to dismiss fringe suits in specific contexts).

197. See *supra* text accompanying notes 166–69, 182–84.