Texas Civil Procedure Update

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I. Introduction

This article examines recent changes to the Rules of Civil Procedure and relevant caselaw on Texas civil procedure since January 2020 or so. I have emphasized recent decisions on Texas Rule of Civil Procedure 91a and on responsible third parties.

II. Recent Amendments to Texas Rules of Civil Procedure

A. Rule 106

Texas now allows for substituted service through "social media, email, or other technology."[1] The impetus for this change came from the Texas Legislature in 2019 when it added section 17.033 to the Civil Practice and Remedies Code. It states:

> (a) If substituted service of citation is authorized under the Texas Rules of Civil Procedure, the court, in accordance with the rules adopted by the supreme court under Subsection (b), may prescribe as a method of service an electronic communication sent to the defendant through a social media presence.
>
> (b) The supreme court shall adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence.[2]

The Texas Supreme Court subsequently revised Rule 106 to allow alternative service by electronic communication by court order "in any other manner, including electronically by social media, email, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit."[3] Electronic service is permitted only if traditional means of service have been unsuccessful. The supreme court recognized that there are problems with serving someone through social media, providing this comment to the new provision:

> Rule 106 is revised in response to section 17.033 of the Civil Practice and Remedies Code, which calls for rules to provide for substituted service of citation by social media. Amended Rule 106(b)(2) clarifies that a court may, in proper circumstances, permit service of citation electronically by social media, email, or other technology. In determining whether to permit electronic service of process, a court should consider whether the technology actually belongs to the defendant and whether the defendant regularly uses or recently used the technology.[4]

Under the rule, a plaintiff will have to convince the court that electronic service will be "reasonably effective to give the defendant notice of the suit." The plaintiff will need to show that the account belongs to the defendant and the defendant regularly or recently looks at the account.[5]

Courts in other jurisdictions already have addressed the concerns about fake accounts. An excellent paper by Sarah A. Nicolas, Anne M. Johnson, and Keenon L. Wooten gathered several cases on this topic.[6] In one federal district court case, the plaintiff sued a bank over credit card debt and the bank then sought to bring in the plaintiff's estranged daughter as the bank suspected the daughter had opened the account in her mother's name. The bank couldn't find the daughter because of her "history of providing fictional or out of date addresses to various state and private parties" and asked the court to allow alternate methods of service, including service of process by email and Facebook message. Service via Facebook troubled the court:

> Chase has not set forth any facts that would give the Court a degree of certainty that the Facebook profile its investigator located is in fact maintained by Nicole or that the email address listed on the Facebook profile is operational and accessed by Nicole. Indeed, the Court's understanding is that anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to confirm whether the Nicole Fortunato the investigator found is in fact the third-party Defendant to be served.[7]

In several recent federal district court cases, courts have denied the motion for alternative service. In *Osio v. Maduro Moros*, the plaintiff had sued, among others, individual Venezuelans for kidnapping, torture, and murder. The plaintiffs sought alternative service via email, text message, or social media. To serve individuals outside of the United States, a plaintiff can use "any internationally agreed means of service that is reasonably calculated to give notice" such as the Hague Convention.[8] A court can order alternate means of service as long as the signatory nation has not expressly objected to those means and the alternate method of service comports with constitutional notions of due process.[9] There, the court found the plaintiffs had not established that the individual defendants had successfully evaded service. Moreover, the court expressed concerns about the reliability of service via email, text message, social media outlets, or weblinks. While the plaintiffs said that electronic messages to the defendants did not "bounce back," the court noted that "this did not mean that the email accounts, social media accounts, or phone numbers are actively monitored or that the messages or weblinks will be opened or read."[10] The court also was concerned that the plaintiffs wanted to serve the individual defendants "*only* through social media, whether Facebook or Twitter, which raises due process concerns."[11] The court recognized that other district courts had allowed alternative electronic service but explained those circumstances were "distinctly different."[12]

In *Capturion Network, LLC v. Liantronics, LLC*, the district court denied the motion for alternate service via email because the plaintiff failed to establish that the defendant would receive the summons and complaint through email addresses. A plaintiff has to show that an email account "is a reliable form of contact" with the defendant. The court denied the motion because the plaintiff did not present any information showing the defendant "regularly uses the email accounts to conduct business or that the accounts are actively monitored."[13]

A good example of what is needed to show the electronic communication will be reasonably effective to give notice is found in *CKR Law LLP v. Anderson Investments International, LLC*.[14] There, the district court granted the motion for alternative service using email and WhatsApp using a particular phone number for one defendant because the plaintiff showed that the email had been used to communicate with the defendant and the plaintiff had recently received messages via WhatsApp from the defendant from that number. But the court rejected using email for another defendant where the plaintiff alleged that was the defendant's last known email and messages sent to it didn't bounce back. The court concluded that "the mere fact that it is an operative email address is plainly insufficient without some allegation that the email is somehow associated" with the defendant. Because the plaintiff also failed to allege having ever communicated with the defendant through that email address, the court found that that service through that address would not be reasonably calculated to apprise the defendant of the pendency of the action.[15]

In the federal district court cases, the concerns about whether the alternative service is reasonably effective to give notice or meet due process concerns were raised by the courts *sua sponte* when faced with motions for alternate service. In Texas state courts, these concerns undoubtedly will be raised by defendants attempting to overturn default judgments. Plaintiffs will have to build a record in the trial court that will be able to meet these attacks. One federal district court has nicely summarized when electronic service will satisfy due process:

> There does not appear to be any specific criteria that

must be satisfied in order for electronic service on a foreign defendant to satisfy due process. However, courts that have permitted electronic service have found it complied with due process when, for example: (i) the plaintiff provided the e-mail address, account, and/or website through which the plaintiff intends to contact the defendant; (ii) the plaintiff provided facts indicating the defendant to be served would likely receive the summons and complaint; (iii) the e-mail address used was for the defendant's retained attorney; (iv) the summons and complaint were translated into the language spoken in the nation in which service was effectuated; and/or (v) multiple valid forms of service were attempted.[16]

B. Expedited Actions: Rules 47, 169, 190.2

The Texas Supreme Court also has revised the rules pertaining to expedited actions. The Texas Legislature was again the impetus for these changes, although the court went beyond what the legislature mandated. The Legislature added subsection h-1 to section 22.004 of the Texas Government Code:

> In addition to the rules adopted under Subsection (h), the supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000. The rules shall balance the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions. The supreme court may not adopt rules under this subsection that conflict with other statutory law.[17]

The Texas Supreme Court subsequently revised rules that affected more than county courts at law. The court explained its rationale in a comment to Rule 169:

> Rule 169 is amended to implement section 22.004(h-1) of the Texas Government Code—which calls for rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000—and changes to section 22.004(h) of the Texas Government Code. To ensure uniformity, and pursuant to section 22.004(b) of the Texas Government Code, Rule 169's application is not limited to suits filed in county courts at law; any suit that falls within the definition of subsection (a) is subject to the provisions of the rule.[18]

Rule 47 contains pleading requirements for claims for relief (i.e., petitions). Among those requirements is a list of ranges of damages from which a plaintiff must select; one of those selections triggers the procedures for expedited actions. The list of available options changed because the upper limit of an expedited action was increased. Rule 47(c) now reads:

> (c) except in suits governed by the Family Code, a statement that the party seeks:
> (1) only monetary relief of $250,000 or less, excluding interest, statutory or punitive damages and penalties, and attorney fees and costs;
> (2) monetary relief of $250,000 or less and non-monetary relief;
> (3) monetary relief over $250,000 but not more than $1,000,000;
> (4) monetary relief over $1,000,000; or
> (5) only non-monetary relief [19]

A plaintiff pleading Rule 47 (c)(1) puts the case in the expedited action procedure.[20]

Rule 169 was dramatically expanded. Old Rule 169 said expedited actions only applied to claims of "monetary relief aggregating $100,000 or less, *including* damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees."[21] Rule 169 now states, "The expedited actions process in this rule applies to a suit in which all claimants, other than counter-claimants, affirmatively plead that they seek only monetary relief aggregating $250,000 or less, *excluding* interest, statutory or punitive damages and penalties, and attorney fees and costs."[22] Not only has monetary relief number increased from $100,000 to $250,000, interest and attorney's fees were included in the old amount and are excluded in the increased amount. The requirement that the plaintiff can't seek non-monetary damages still remains. The court also removed the language that categorically excluded claims "governed by the Family Code, the Property Code, the Tax Code, or Chapter 74 of the Civil Practice & Remedies Code."[23] The court warned in its comment to Rule 169 that "certain suits are exempt from Rule 169's application by statute."[24]

Reflecting the heavy influence of Federal Rule of Civil Procedure 26, disclosures are now required, not requested.

Rule 190.2 also was revised. The discovery period was changed. The prior version stated that the discovery period "begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party."[25] The discovery period for expedited action now "begins when the first initial disclosures are due and continues for 180 days."[26] The previous rule limited depositions for each party to "no more than six hours in total to examine and cross-examine all witnesses in oral depositions" and permitted parties to go up to ten hours in total by agreement."[27] The new version provides, "Each party may have no more than 20 hours in total to examine and cross-examine all witnesses in oral depositions."[28] The provision on requests for disclosure was changed to reflect the new rule on required disclosures, as we shall soon see.

The court provided a comment that explains the changes to Rule 190.2:

> Rule 190.2 is amended to implement section 22.004(h-1) of the Texas Government Code. Under amended Rule 190.2, Level 1 discovery limitations now apply to a broader subset of civil actions: expedited actions under Rule 169, which is also amended to implement section 22.004(h-1) of the Texas Government Code, and divorces not involving children in which the value of the marital estate is not more than $250,000. Level 1 limitations are revised to impose a twenty-hour limit on oral deposition. Disclosure requests under Rule 190.2(b)(6) and Rule 194 are now replaced by required disclosures under Rule 194, as amended. The discovery periods under Rules 190.2(b)(1) and 190.3(b)(1) are revised to reference the required disclosures.[29]

C. Disclosures: Rules 194 and 195

Disclosures have been overhauled. Reflecting the heavy influence of Federal Rule of Civil Procedure 26, disclosures are now required, not requested.[30] Rule 194 mandates a "duty to disclose" without waiting for a discovery request.[31] Rule 194 also requires a party either produce "copies of all responsive documents, electronically stored information, and tangible things" in its response or state a "reasonable time

and method for the production of these items."[32]

The amended rule also stipulates when a party must make its initial disclosures—"within 30 days after the filing of the first answer or general appearance unless a different time is set by the parties' agreement or court order."[33] Rule 192.2 (a) says, "Unless otherwise agreed to by the parties or ordered by the court, a party cannot serve discovery on another party until after the other party's initial disclosures are due." This means that a plaintiff can no longer serve discovery with or in its petition; all the references to discovery requests served before the defendant's answer "need not respond until 50 days after service of the request" have been excised.[34]

There are now three categories of required disclosures: (1) initial disclosures, (2) expert disclosures, and (3) pretrial disclosures.[35] Initial disclosures are largely the same disclosures as listed in the earlier version of Rule 194. Initial disclosures excludes expert disclosures and adds copies of "all documents, electronically stored information, and tangible things that the responding party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment."[36] The comment admits that this change is "based on Federal Rule of Civil Procedure 26(a) to require disclosure of basic discovery automatically, without awaiting a discovery request."[37]

The second category of required disclosures pertains to testifying experts. Rule 194.3 says, "In addition to the disclosures required by Rule 194.2, a party must disclose to the other parties testifying expert information as provided by Rule 195." Rule 195.5 now contains the expert disclosures formerly found in Rule 195.2. It adds three additional disclosures, which it borrowed from Federal Rule of Civil Procedure 26(a)(2)(B). These disclosures require a party to provide:

> (C) the expert's qualifications, including a list of all publications authored in the previous 10 years;
> (D) except when the expert is the responding party's attorney and is testifying to attorney fees, a list of all other cases in which, during the previous four years, the expert testified as an expert at trial or by deposition; and
> (E) a statement of the compensation to be paid for the expert's study and testimony in the case.[38]

Draft expert reports or disclosures are now protected from discovery, "regardless of the form in which the draft is recorded."[39]

The third category of required disclosures are pretrial disclosures. This new section says,

> In addition to the disclosures required by Rule 194.2 and 194.3, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:
> (1) the name and, if not previously provided, the address, and telephone number of each witness–separately identifying those the party expects to present and those it may call if the need arises;
> (2) an identification of each document or other exhibits, including summaries of other evidence–separately identifying those items the party expects to offer and those it may offer if the need arises.[40]

Unless the court orders otherwise, these disclosures are due at least 30 days before trial.[41]

The timing of discovery periods under Level 1 and 2 now refer to the required disclosures. The Level 1 discovery period begins "when the first initial disclosures are due and continues for 180 days."[42] The Level 2 discovery period begins "when the first initial disclosures are due" and continues—in non-Family Code cases—until "the earlier of (i) 30 days before the date set for trial, or (ii) nine months after the first initial disclosures are due."[43]

Another ripple effect of required disclosures: citations now must "notify the defendant that the defendant may be required to make initial disclosures."[44] A citation must include this notice to a defendant (the last three sentences are new):

> You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you. *In addition to filing a written answer with the clerk, you may be required to make initial disclosures to the other parties of this suit. These disclosures generally must be made no later than 30 days after you file your answer with the clerk. Find out more at TexasLawHelp.org.*[45]

A plaintiff needs to ensure that the citation has the new language. Strict compliance with the rules for service of citation must affirmatively appear on the record in order for a default judgment to withstand direct attack.[46]

III. Recent Texas Supreme Court Cases

In this section I will discuss some recent cases from the Texas Supreme Court. Decisions on Rule 91a motions to dismiss and on responsible third parties will be discussed separately below.

A. Personal Jurisdiction

In *Luciano v. SprayFoamPolymers.Com, LLC*, the Texas Supreme Court held a Texas court could exercise personal jurisdiction over a manufacturer. The court was guided by a United States Supreme Court opinion from earlier that year. The court quoted that opinion when it announced its holding: "We reverse and hold that when a manufacturer like SprayFoam 'serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit.'"[47] The Lucianos allegedly got sick from the spray foam insulation installed in their new home. They sued the installer, Old World Cast Stone, and the manufacturer, SprayFoam. The trial court denied SprayFoam's special appearance; however, the court of appeals reversed, concluding the Lucianos had not shown SprayFoam had minimum contacts with Texas. The Texas Supreme Court reversed, finding the Lucianos' lawsuit conferred specific jurisdiction over SprayFoam. After reviewing SprayFoam's contacts with Texas, the court concluded SprayFoam's "conduct in Texas resulted not in a mere dribble, but in a stream of activity that allowed it to enjoy the benefits of doing business in this state."[48]

The supreme court concluded that SprayFoam placing its product into the stream of commerce along with its "additional conduct" of soliciting business and distributing its product in Texas is "sufficient to hold SprayFoam purposefully availed itself of the Texas market." But a nonresident defendant's flood of purposeful contacts with the forum state won't suffice if the lawsuit doesn't arise out of or relate to the defendant's contacts with the forum. The court also looked at whether the contacts with Texas were related to the operative facts of the litigation. SprayFoam argued that a direct causal connection was required to satisfy the relatedness prong. In other words, according to SprayFoam, the Lucianos had to show they selected the installer "because of a known, preexisting relationship with SprayFoam, that the Lu-

cianos specifically chose Thermoseal 500, or that the Lucianos knew that the Thermoseal 500 installed in their home originated from its Texas warehouse" to show the lawsuit was related to the contacts. Here, the Lucianos were saved by the United States Supreme Court's opinion in *Ford Motor Co*. earlier that spring. The United States Supreme Court explained, "None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do."[49]

B. Standing

Lawyers interested in how the Texas Supreme Court will look at consumer cases fleeing to state court because of standing issues raised by *TransUnion* should read *Grassroots Leadership, Inc. v. Texas Department of Family and Protective Services.*[50] There, plaintiffs—detained mothers, their children, a daycare operator, and an organization representing their interests—challenged a Department of Family and Protective Services licensing rule governing immigration detention centers. The court of appeals held that the plaintiffs lacked standing to sue. The supreme court reversed, holding that the plaintiffs have standing because "the detained mothers and children allege concrete personal injuries traceable to the adoption of the rule." For consumer and commercial lawyers, the opinion sheds light on how standing will be analyzed in FDCPA or FCRA cases filed in Texas district courts. It seems like those cases may not find a safe harbor in state court. The court noted that "Texas's standing requirements parallel federal standing doctrine" and favorably cited *TransUnion*.[51]

C. Summary Judgment and Limitations Defenses

The Texas Supreme Court also has re-affirmed its rule that a defendant moving for summary judgment on limitations must conclusively establish the elements of the affirmative defense and must conclusively negate application of the discovery rule and any tolling doctrines pled as an exception to limitations.[52] Johnson sued to evict her nephew Draughon from the house he was living in. Draughon claimed that he had inherited the house and that his later conveyance to his aunt was void because of his mental incapacity. The justice of the peace ordered Draughon to vacate; he appealed that decision and also filed a separate declaratory judgment action to quiet title. Johnson pled the affirmative defense of limitations because the deed transferring the property was recorded over eleven years before Draughon's lawsuit; Johnson subsequently moved for summary judgment. After the trial court struck Draughon's affidavits, it granted Johnson's motion.[53]

The court of appeals upheld the summary judgment. Because the courts of appeals were divided about which party has the burden when unsound-mind tolling is asserted, the supreme court granted review. Draughon argued to the supreme court that "when a traditional motion for summary judgment is based on the statute of limitations and the non-movant asserts that a tolling provision applies, it is the movant's burden to conclusively negate the application of the tolling provision."[54] The supreme court agreed with Draughon. The court explained that a defendant has the burden about any issues that "affect which days count toward the running of limitations," which would include accrual, the discovery rule, and tolling. The plaintiff has the burden to raise a fact issue on equitable defenses that would defeat limitations even though it has run, e.g., fraudulent concealment, estoppel, or diligent service.[55] Four judges dissented, arguing that the plaintiff should respond with some evidence of unsound mind to defeat summary judgment.[56]

D. Summary Judgment and Mandamus

In another summary judgment case, the supreme court granted mandamus relief from the trial court's denial of a summary judgment.[57] The plaintiffs had sued Academy Sports + Outdoors because it was the retailer that sold the weapon used in the Sutherland Springs Church shooting. Academy moved for summary judgment based upon the federal Protection of Lawful Commerce in Arms Act (PLCAA), which protects firearm retailers from lawsuits seeking damages arising out of the criminal conduct of third parties. The trial court denied the motion, and Academy unsuccessfully sought mandamus relief in the court of appeals.

Mandamus relief is supposed to be an extraordinary remedy that requires the relator to show (1) a clear abuse of discretion by the trial court and (2) an inadequate remedy by appeal. A trial court abuses its discretion when it fails to properly apply the law. After a lengthy discussion of the PLCAA, the supreme court found that the trial court abused its discretion when it denied the summary judgment motion. Because Congress intended retailers to be immune from such liability lawsuits, the supreme court held that congressional intent is not served by allowing a lawsuit "barred by the PLCAA to proceed to trial only to be inevitably reversed on appeal." Requiring Academy to proceed to trial would defeat the substantive right granted it by the PLCAA. The supreme court relied upon its decision in *In re United Services Automobile Association*, where it also had granted mandamus relief from the denial of a summary judgment motion.[58] The court concluded, "Absent mandamus relief, Academy will be obligated to continue defending itself against multiple suits barred by federal law. As in *United Services*, this case presents extraordinary circumstances that warrant such relief."[59]

E. Pleadings as Summary Judgment Proof

While pleadings generally do not qualify as summary judgment proof, the supreme court has held that courts may nonetheless grant summary judgment based on deficiencies in an opposing party's pleadings and parties moving for summary judgment may rely on allegations in an opposing party's pleadings that constitute judicial admissions.[60]

F. Discovery Requests

In law, unlike life, fishing expeditions are a bad thing. The supreme court has re-affirmed its disdain for fishing in discovery in several recent opinions. In the underlying vehicle-collision lawsuit of one recent mandamus, the plaintiffs served five interrogatories on the defendant trucking company, including one that asked for a list of every one of defendant's motor vehicle col-

lision lawsuits for the last ten years (defendants always seem to argue such a request is burdensome, which, in other circumstances, wouldn't seem like the best play). Defendants objected, and the trial court scaled back the request to the last five years of rear-end collisions. Defendants again objected, and the trial court denied the motion to quash. The defendants unsuccessfully sought a writ of mandamus in the court of appeals and then filed a mandamus petition in the supreme court. The plaintiffs then informed defendant that it had withdrawn the offending interrogatory; however, the plaintiffs did not inform the trial court, and its order on discovery stood. The plaintiffs nonetheless moved to dismiss the mandamus petition as moot.[61]

The supreme court held that the dispute was not moot. The court noted that the plaintiffs "have provided no enforceable assurances via a Rule 11 agreement, a binding covenant, or anything else that would provide sufficient certainty that they would not refile the same or similar requests" once the coast was clear. The court held, "Unilateral and unenforceable withdrawal of discovery, without any assurances that the withdrawal is definite, and at the very hour 'appellate courts are looking,' does not moot a discovery dispute." The court then found that the plaintiffs' requests were impermissibly broad.[62]

In another discovery mandamus, the supreme court held that requests were overbroad and "tantamount to a fishing expedition." The plaintiff in the underlying lawsuit had sued UPS and its driver for wrongful death. Post-accident drug testing for the UPS driver was positive for THC and the driver has admitted to using marijuana. To bolster her theory that UPS knowingly failed to properly drug test the driver, knowingly allowed him to drive under the influence of drugs, and knowing failed to comply with its own policies and federal law, plaintiff requested all documentation of all alcohol and drug testing for all commercial vehicle drivers at the same facility for the previous 11 years. After two trips to the court of appeals resulting in the trial court revising its discovery order to limit the requests, UPS filed a mandamus petition in the supreme court.[63]

The supreme court held that the drug-test results for UPS drivers who were neither involved nor implicated in the accident are irrelevant because "they do not make any fact consequential to [plaintiff's] claims more or less probable than it would be without the results."[64]

G. TCPA Procedure

The Texas Supreme Court and the courts of appeals have issued a lot of opinions on the Texas Citizens Participation Act in the last few years. The courts' expansive view of the TCPA led to more defendants pleading this defense and moving to dismiss, which led to more appeals. I only want to discuss one such case because of the procedural issues that are involved.[65] The underlying facts suggest why the Texas legislature reined in the courts in 2019.[66] Plaintiffs attended defendant's seminars on real estate and later sued the defendant for DTPA violations and other related claims. After the defendant filed a Rule 91a motion to dismiss, plaintiffs amended their petition, adding new claims for fraud and fraudulent concealment. The defendant then filed a TCPA dismissal motion, which, on its face, seems a little farfetched. The trial court denied the motion and the defendant filed an interlocutory appeal. The issue on appeal was the effect of the amended petition on the TCPA's requirement to file a motion to dismiss within 60 days after the party is served with the legal action.

The supreme court granted the petition for review to decide, as a matter of first impression, "when amended and supplemental pleadings constitute or assert a new 'legal action' that starts a new sixty-day period for filing a TCPA dismissal motion."[67] The supreme court first outlined previous holdings of the courts of appeal with which it agreed:

> The courts have consistently agreed that an amended or supplemental pleading does not constitute or assert a new legal action if it asserts the same legal claims or causes of action by and against the same parties based on the same essential factual allegations. If, however, the new pleading adds a new party as a claimant or defendant, the courts have agreed that the pleading asserts a new legal action and starts a new sixty-day period to file a dismissal motion, but only as to the claims asserted by or against the new party. And the courts have also consistently agreed that an amended pleading constitutes or asserts a new legal action if it includes new "essential factual allegations" that were not included in the prior pleading, allowing a new sixty-day period to seek dismissal of claims to the extent they are based on those new factual allegations.[68]

The supreme court disagreed with prior courts of appeals decisions that held that an amended petition that asserted a new claim or theory based upon the same essential factual allegations included in a prior petition did not assert a new "legal action." The court instead held that "an amended or supplemental pleading that asserts a new claim involving different elements than a previously asserted claim also asserts a new legal action that triggers a new sixty-day period for filing a motion to dismiss that new claim."[69]

H. Preservation of Error

While denying Browder's petition for review and motion for rehearing, the supreme disapproved the court of appeals' holding that a party also must object after the trial court denies a jury demand to preserve error.[70] The trial court denied Browder's demand for a jury trial because Browder had waived his jury demand by filing it after the bench trial had begun (Browder also disputed when the bench trial had started). The court of appeals affirmed for a different reason: Browder didn't preserve error because he didn't object to the denial of his request when the trial resumed at a later date and he didn't otherwise raise the issue.

The supreme court disagreed with the court of appeals holding on preservation because it conflicted with *Citizens State Bank v. Caney Investments*, 746 S.W.2d 477 (Tex. 1988). The court concluded, "[N]either our procedural rules nor this Court's decisions require a party that has obtained an adverse ruling from the trial court to take the further step of objecting to that ruling to preserve it for appellate review. Once the trial court denied Browder's request for a jury trial, Browder had no choice but to go forward with the bench trial."[71]

I. Declaratory Judgments

The supreme court has further clarified the procedure for recovering under a Underinsured Motorist (UIM) policy. In 2006, the court in *Brainard* held that an underinsured motorist carrier "is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist."[72] The *Brainard* court did not say what form this litigation should take. The supreme court has now held that an insurance carrier's liability for benefits under the UIM policy may be established in a declaratory judgment action. The court further held that the plaintiff may recover attorney's fees under the Uniform Declaratory Judgments Act (UDJA).[73] The dissent argued that a claim for UIM should be brought as a contract claim subject to the attorney's fees provision of Chapter 38. The dissent warned that the majority opinion has opened the way for the UDJA to be used

promiscuously, providing "an avenue for attorney-fee awards not just in UIM cases, but in all tort cases."[74] And all plaintiffs' lawyer said, "From your lips to God's ears."

J. Depositions of Corporate Representatives

After settling with defendant driver, plaintiff next sued his insurer for breach of contract and a declaratory judgment, seeking recovery for his policy's UIM provisions. He also asserted bad-faith and other extracontractual claims. After the plaintiff gave notice of his intent to depose a corporate representative, the insurer filed a motion to quash, arguing that the investigation and evaluation of the claim wasn't probative of any relevant issue and were overbroad. The trial court denied the motion and the court of appeals denied the subsequent petition for writ of mandamus. The supreme court held that "relevance considerations do not categorically foreclose the deposition, although they do inform its scope."[75] The court noted that the insurer was taking an unusual position by arguing the plaintiff "is not entitled to depose the only party defendant in this suit." The court also rejected the insurer's argument that "a lack of personal knowledge necessarily equates to a lack of relevant knowledge."[76] The court did find that some of the noticed topics exceeded the permissible scope of the deposition.

K. Default Judgments

The supreme court issued several opinions overturning default judgments. In the first, the husband in a divorce case defaulted and then filed a motion for new trial. The trial court denied the motion after sustaining a hearsay objection. The court of appeals affirmed on different grounds, concluding that formal defects rendered the husband's affidavit inadmissible. The supreme court reversed and remanded because "the content of husband's affidavit was sufficient to satisfy the *Craddock* standard for obtaining a new trial and was not based on hearsay, and because no formal defects were raised in the trial court (where they might have been cured)."[77]

The second decision underscores the importance of obtaining proper service "by the book" to protect a default judgment from an otherwise inevitable attack. The plaintiff tenant sued its limited partnership landlord. A limited partnership's agents for service of process are its general partner and its registered agent. The plaintiff served a limited partnership employee variously described as its "owner," "president," and "CEO"—but not its general agent nor its registered agent. For a default judgment to withstand direct attack, strict compliance with the rules for service of citation must affirmatively appear on the record. The limited partnership was able to show that there was no evidence that either the general partner or the registered agent was served.[78]

In *Spanton v. Bellah*, the Texas Supreme Court once again construed "strict compliance" with the rules for service of process to mean just that.[79] Bellah sued the Spantons for personal injuries. In her petition she said they could be served at a specific address on "Heather Hills Dr." in Dripping Springs. After several unsuccessful attempts at service, Bellah moved for substituted service. The district court granted the motion, authorizing substituted service by first-class and certified mail and by attaching a copy of the citation and petition to the gate at the specified address on "Heathers Hill," not Heather Hills. The process server filed a return stating he had executed substituted service by posting a copy to the gate and by sending a copy by certified mail at the specified address on "Heather Hills." The court granted the motion for default judgment.

The defendants filed a notice of restrictive appeal. The court of appeals held that the face of the record failed to demonstrate error. It reasoned that the discrepancy between the trial court's order granting substituted service on "Heathers Hill" and the process server's return for "Heather Hills" did not require reversal because strict compliance with the rules for service does not mean "obeisance to the minutest detail." The supreme court disagreed that the discrepancy here could be overlooked: "Because no-answer default judgments are disfavored and because trial courts lack jurisdiction over a defendant who was not properly served with process, we have construed 'strict compliance' to mean just that."[80] The supreme court noted, "Discrepancies in addresses may be mere details when the order authorizes substitute service wherever the defendant could be found or when the defendant is indisputably personally served. But otherwise, this Court has repeatedly held that discrepancies in the defendant's name or address prevent any implication or presumption of proper substitute service." Here, the trial court's order authorized substituted service at a house number on Heathers Hill Drive in Dripping Springs but the return stated that service was executed on Heather Hills Drive. Therefore, the substituted service "did not strictly comply with the trial court's order."[81] If you want to keep a default judgment on appeal, you really need to mind your Heathers and Hills.

If you want to keep a default judgment on appeal, you really need to mind your Heathers and Hills.

IV. Rule 91a Motions to Dismiss

A. Timing of Motion

Rule 91a has a narrow window of availability as it must "be filed within 60 days after the first pleading containing the challenged cause of action is served on the movant."[82] The trial court must rule on the motion to dismiss "within 45 days after the motion is filed."[83] The courts of appeals have held that the "must" language about the timing of the filing of the motion and the court's acting on the motion is merely directory, following Texas Supreme Court precedent that holds "must" is "given a mandatory meaning when followed by a noncompliance penalty."[84]

Because Rule 91a doesn't have a noncompliance penalty, the courts of appeals have concluded both the 60-day filing requirement and the 45-day period for acting on the motion are directory.[85] In *Medfin Manager*, the San Antonio Court of Appeals held that the 45 days the trial court is given to rule isn't jurisdictional. A trial court can still rule on the motion after 45 days. On appeal, a party must show harm.[86] In *Malik*, the First Court of Appeals found the pro se plaintiff waived the argument about the motion's untimeliness because the record didn't establish he had objected to its tardiness.[87]

B. Evidence

Rule 91a.6 says that "the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59."[88] The Texas Supreme Court noted the practical impact of this limitation in assessing the insured's claim breach of the indemnity provision of the policy: "Because this case comes to us on a Rule 91a motion, we may not consider evidence regarding what Farmers' reasons were for non-payment or whether those reasons implicate other policy provisions or legal doctrines that would prevent any liability for breach. . . . The entire policy is not before us because it was neither quoted in Longoria's petition nor attached as an exhibit. On remand, Farmers is free to offer evidence that it did not breach the policy."[89]

In one recent court of appeals case, the defendant filed a Rule 91a motion to dismiss and, alternatively, a motion for summary judgment. The trial court's order stated, "After examining the pleadings, the Court's file and previous holdings, of which the Court took judicial notice, the motions before the Court, including any responses thereto, together with applicable authorities, the Court determined that Defendants Gaines County, Texas, Ken Ketron, and Clint Low are entitled to the relief requested." The court of appeals concluded, "This statement clearly indicates that the trial court considered evidence beyond the pleadings, which it could only do if it granted summary judgment, not a Rule 91a motion."[90] Although the court didn't address the issue of attorney's fees, language like that in an order should wipe out any attorney's fees since the prevailing party may be entitled to attorney's fees for a Rule 91a motion to dismiss, but not for obtaining a summary judgment.

The attorney's fees award is against the party, not the party's attorney. The Dallas Court of Appeals reversed the trial court's award of attorney's fees and costs to the defendant jointly and severally against plaintiffs and their attorney. The court of appeals reasoned that Rule 91a.7 doesn't "expressly state that fees may be awarded against a party's attorney" and attorneys generally aren't liable to the opposing party for representing their client. If the rule intended to allow the award of attorney's fees against an attorney representing a party, the rule would expressly state that intent like Rules 13 and 215.[91]

C. Affirmative Defenses

The Texas Supreme Court has held that Rule 91a "permits motions to dismiss based on affirmative defenses if the allegations, taken as true, together with the inferences reasonably drawn from them, do not entitle the claimants to the relief sought."[92] Some affirmative defenses won't be conclusively established by the facts given in a plaintiff's petition: "Because Rule 91a does not allow consideration of evidence, such defenses are not a proper basis for a motion to dismiss."[93] The Dallas Court of Appeals recently granted mandamus relief over the trial court's failure to grant a motion to dismiss based on the affirmative defense of release.[94] The Fourteenth Court of Appeals reversed the trial court's grant of motion to dismiss based on collateral estoppel and res judicata. The problem with these affirmative defenses is that "evidence is usually required to prove a collateral estoppel or res judicata defense." Moreover, a court can't use judicial notice of prior proceedings because judicial notice is a matter of evidence.[95]

D. Attorney's Fees

Rule 91a originally mandated attorney's fees to the prevailing party.[96] In 2019, the attorney's fees provision was amended and the award is no longer mandatory.[97] The amendments to Rule 91a "apply only to civil actions commenced on or after September 1, 2019."[98] The date the lawsuit was filed may matter. This February, one court appeals quoted the old language because the lawsuit preceded the change to the rule and then said, "Because we have sustained the Housing Authority and the Commissioners' issues, we conclude they are entitled to attorney's fees."[99]

Even before the 2019 change, courts usually didn't award attorney's fees where the dismissal resulted from a plea to the jurisdiction. [100] A defendant calling a plea to the jurisdiction a Rule 91a motion to dismiss doesn't make it so: courts should look to the substance of the motion, not just what the lawyer called it. [101] The *Lexington* court re-affirmed this approach. It treated the Rule 91a motion as a plea to the jurisdiction and upheld the trial court's determination on subject-matter jurisdiction. It then sustained appellant's attack on the award of attorney's fees: "[I]f a trial court lacks jurisdiction to reach the merits, it does not reach a rule 91a motion." That meant the appellees were not prevailing parties on their Rule 91a motion and the trial court erred in awarding attorney's fees.[102]

A party can recover appellate attorney's fees; however, proof of appellate attorney's fees "must be offered in the trial court to provide the fact finder with an opportunity to calculate an award of reasonable and necessary attorney's fees." A request for appellate attorney's fees in the appellate court "comes too late."[103] Rule 91a states, "Any award of costs or fees must be based on evidence."[104] In this post-*El Apple* world, attorneys must be very mindful on presenting sufficient evidence on attorney's fees.[105]

E. Appellate Review

A defendant can seek review of the trial court's denial of a Rule 91a motion by mandamus.[106] A plaintiff can seek review of the grant of a Rule 91a motion by appeal when the granting of the motion results in a final judgment.

Plaintiffs seeking review of the granting of a Rule 91a motion to dismiss must be appealing a final judgment. For example, the Dallas Court of Appeals dismissed an appeal where the granted Rule 91a motion had asked for attorney's fees but the judgment didn't address that aspect of the requested relief. The court concluded there wasn't a final judgment that disposed of all parties and claims.[107] Other appeals have been dismissed when the plaintiff sued several defendants but not all the defendants had filed Rule 91 motions to dismiss, leaving several defendants unaccounted for in the trial court's order.[108] In those situations, a plaintiff wanting to appeal the granting of a Rule 91a motion to dismiss should ask the court to sever the dismissed claims from the other claims to render an otherwise interlocutory judgment final and appealable.[109]

The Fort Worth Court of Appeals dismissed an appeal because the order granting the motion to dismiss did not "order, adjudge, or decree anything." The signed order merely said that motion to dismiss "should be granted." The court of appeals noticed that the challenged order lacked decretal language that disposed of the motion and the case and "thus does not appear to be a final judgment for purposes of appeal." The court explained:

> The order before us has no decretal language. It recites that the trial court has reviewed the documents on file and believes Appellees' motion has merit and should be granted, but the order accomplishes nothing. It takes no judicial action. It neither grants nor denies relief on the motion, and it does not dispose of the case. Accordingly, we hold that the order is not a final judgment.[110]

A party is entitled to interlocutory review when a trial court "grants or denies a plea to the jurisdiction by a governmental unit."[111] But in a case where a plea to the jurisdiction by a governmental unit isn't disguised as Rule 91a motion to dismiss, parties won't be entitled to an interlocutory appeal. One Rule 91a movant unsuccessfully petitioned for a permissive appeal from an interlocutory order denying his Rule 91a motion. The court of appeals concluded the plaintiff "did not establish the statutory requirements for a permissive appeal."[112] It seems like asking for a permissive appeal adds a level of difficulty that could be avoided by going the mandamus route.

F. Rule 91a and Pro Se Litigants

While researching this update, I noticed that a seemingly disproportionate number of appeals from Rule 91a dismissals were by pro se litigants.[113] This shouldn't be too surprising. Unrepresented litigants are at a great disadvantage where there is procedural complexity in litigation. In a meta-analysis of published studies of the impact of lawyer representation, sociologist

Rebecca L. Sandefur found "lawyers affect case outcomes less by knowing substantive law than by being familiar with basic procedures." Lawyers "gain an advantage independent of the merits of any particular case, through their greater knowledge of the rules of the game."[114] After the United States Supreme Court announced more stringent pleading requirements in *Twombly* and *Iqbal*, William H. J. Hubbard found that plaintiffs' lawyers in federal courts were able to adapt to the new requirements—there has been no effect for represented plaintiffs, apparently because their lawyers "are consistently able to respond to a motion to dismiss by repleading in greater detail." But there has been "a statistically significant rise in the rate at which courts dismissed cases brought by pro se plaintiffs."[115] The number of pro se appeals of Rule 91a dismissals may reflect a similar phenomenon.

But the beatdown of pro se litigants over formalistic and technical pleading requirements may be waning. In *Li v. Pemberton Park Community Association*, the Texas Supreme Court reviewed its pleading standards for pro se litigants. The court noted that it had said in 1978 that there cannot be "two sets of procedural rules, one for litigants with counsel and the other for litigants representing themselves."[116] But, the court noted, "its more recent cases" have explained that "the application of a procedural rule—particularly one that 'turns on an actor's state of mind'—'may require a different result when the actor is not a lawyer. [This] does not create a separate rule, but recognizes the differences the rule itself contains.'"[117] The court further noted that, "This principle is applicable here, because courts' construction of a party's filings in part 'turns on [a litigant's] state of mind.'"[118] While the court was addressing the pro se litigant's response to a motion for summary judgment, this approach could also apply to Rule 91a dismissals. One court of appeals has reversed a Rule 91a dismissal against a pro se litigant (who also handled the appeal), noting the fair-notice standard governing pleadings and citing *Li*.[119]

V. Responsible Third Parties

A. Unknown Persons

The Texas Supreme Court has clarified when an unknown person may be designated as a responsible third party.[120] The defendant driver moved to designate John Doe as an unknown RTP, which the trial granted. The plaintiff filed a no-evidence and traditional summary-judgment motion, arguing that the defendant did not satisfy the pleadings requirements under Chapter 33 of the Civil Practice and Remedies Code. The trial court denied plaintiff's summary judgment motion and plaintiff unsuccessfully sought mandamus relief in the court of appeals. The plaintiff's luck changed in the Texas Supreme Court, which is a combination of words I don't often use.

The supreme court carefully reviewed the requirements for designating an "unknown person" as an RTP under section 33.004. While regular RTP's are to be designated by defendants 60 days before trial, defendants must initiate the process for designating an unknown RTP by alleging "not later than 60 days after the filing of the defendant's original answer" that "an unknown person committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit."[121] The trial court must grant the motion to designate the unknown RTP if:

> (1) the court determines that the defendant has pleaded facts sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal;
> (2) the defendant has stated in the answer all identifying characteristics of the unknown person, known at the time of the answer; and
> (3) the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.[122]

The supreme court held that the defendant driver did not meet the subsection (j) predicate requirements because it had waited nearly two years and nine months before it first alleged in its second amended answer that an unknown person cause the accident, and it did not allege that John Doe committed any criminal act. [123] The defendant driver had argued that subsection (j) was not the exclusive means for designating an unknown person as an RTP. The court disagreed because "Subsection (j) is the only subsection that addresses the requirements for designating an 'unknown' person as a responsible third party, and it expressly provides that it applies '[n]otwithstanding' any other provision.[124]

The court also held that mandamus was an appropriate remedy, citing two of its opinions involving the designation of RPT's where it had granted petitions for mandamus. [125] Since the trial court abused its discretion, the issue was whether there was an adequate remedy by appeal. Following *Dawson*, the court held that "an ordinary appeal would be inadequate to protect the rights of a *plaintiff* when the trial court erroneously *grants* a defendant's belated motion for leave to designate a time-barred responsible third party."[126] The court concluded that "mandamus was appropriate to protect a plaintiff's right 'to not have to try her case against an empty chair' when the defendant fails to timely designate a third party."[127]

B. Time-Barred Responsible Third Parties

The empty chair argument is a reminder of the recurring problem with RTP's: defendants can reduce their liability by blaming a third party, but plaintiffs often cannot recover from that party. [128] The statute initially allowed a plaintiff to sue a designated RTP after limitations had run. That was too doctrinally weird and the statute was amended to generally allow the designation of time-barred RTP's. However,

> A defendant may not designate a person as a responsible third party with respect to a claimant's cause of action after the applicable limitations period on the cause of action has expired with respect to the responsible third party if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party under the Texas Rules of Civil Procedure. [129]

Theoretically, the amendment would allow plaintiffs to sue timely disclosed RTP's directly once defendants disclose those potential RTP's. Practically, since most plaintiffs wait until the last minute to file suit, disclosures will almost always come too late.

In 2020, the Texas Supreme Court granted mandamus relief when the trial court denied a timely filed motion to designate an RTP.[130] The plaintiff was injured by the door of a construction trailer. Mobile Mini owned the trailer but had leased it to Nolana Self Storage. At the time of the accident, Nolana's contractor, Anar Construction, had exclusive control of the trailer. Nineteen days before limitations ran on tort claims arising from the accident, plaintiff sued Anar and Mobile Mini but not Nolana. The plaintiff served requests for disclosures with his petition. Mobile Mini timely filed an answer and timely served its discovery responses; however, both were due after the two-year limitations period had run. Mobile Mini identified Nolana as a potential RTP. Plaintiff subsequently amended his petition to add Nolana as a defendant; the next day Mobile Mini moved to designate Nolana as an RTP. The trial court ruled that the plaintiff's

tort claims against Nolana were time-barred. The plaintiff and Nolana then objected to Mobile Mini's motion to designate, arguing that Nolana could not be an RTP "once the limitations had expired."[131] The trial court agreed, denying Mobile Mini's request to designate Nolana. The court of appeals denied Mobile Mini's mandamus petition. The supreme court held that Mobile Mini was entitled to mandamus relief because (1) the trial court abused its discretion in denying the motion to designate and (2) Mobile Mini lacked an adequate remedy by appeal.[132]

The plaintiff, in essence, argued that Mobile Mini's "disclosure of Nolana as a responsible third party was not timely for section 33.004(d) purposes, even though Mobile Mini served its discovery responses within the time required by the Texas Rules of Civil Procedure, because Mobile Mini could have made the disclosure earlier than the due date."[133] The supreme court rejected this argument, holding the disclosure was timely under the rules. Mobile Mini "was not obligated to disclose potentially responsible third parties until its discovery responses were due."[134] The courts of appeals have also faced similar fact patterns and have held similarly, both before and after *Mobile Mini* was issued.[135]

The caselaw is pretty clear: plaintiffs' lawyers who wait until the last minute to file their lawsuits are the authors of their own misfortune. As the supreme court noted in *Mobile Mini*, "Mobile Mini's failure to disclose Nolana's identity before limitations expired was the natural consequence" of the plaintiff waiting "to file suit until limitations were nearing terminus…. Plaintiffs who wait until days before limitations expire to file suit do so at their peril." [136]

In another decision, the supreme court found the "applicable limitations period" language inapplicable, allowing defendants to designate the plaintiff's employer as a RTP more than five years after the injury to plaintiff. The defendants sought to designate the employer 62 days before the third trial setting and more than five years after the injury. The supreme court held that the designation 62 days before the trial setting, following *In re Coppola*, 535 S.W.3d 506 (Tex. 2017). And the designation wasn't filed after the applicable limitations period because there was no applicable limitations period against the plaintiff's employer—plaintiff's exclusive remedy against his subscriber employer would have been workers' compensation.[137]

C. Motions to Strike

Once an RTP has been designated and after adequate time for discovery, a party can move to strike the designation because "there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. The court shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damage."[138] It's been a mixed bag on appellate review of grants and denials of motions to strike.[139]

D. Contribution and the Jury Charge

The Dallas Court of Appeals issued a very instructive opinion on what's needed in the jury charge for a contribution claim.[140] Ziehl, the driver of a vehicle, sued bus company and bus driver for his injuries. The bus driver sued Ziehl and his employer in another county; that lawsuit was consolidated with Ziehl's lawsuit in Dallas County. Ziehl's injured passengers then intervened in the Dallas County lawsuit. The case went to trial. The charge contained a comparative fault question; the jury determined the bus driver was 65% responsible and Ziehl was 35% responsible. The final judgment said the bus company and driver were entitled to contribution from Ziehl for 35% of all amounts awarded to Ziehl's passengers. On appeal, Ziehl argued that the charge was improper because jury had to determine each contribution defendant's percentage of responsibility. The bus company argued that the comparative fault question served both as a proportionate responsibility question for Ziehl's claims as a plaintiff and as a separate determination of responsibility for contribution. The wording of the statute directly contradicted the bus company's argument. Section 33.016 (c) states:

> The trier of fact shall determine as a separate issue or finding of fact the percentage of responsibility with respect to each contribution defendant and these findings shall be solely for purposes of this section and Section 33.015 and not as a part of the percentages of responsibility determined under Section 33.003. Only the percentage of responsibility of each defendant and contribution defendant shall be included in this determination.[141]

The court of appeals concluded that the Legislature's using "shall" three times in subsection 33.016(c) meant something:

> [T]he Legislature specifically and clearly imposed an obligation on the trier of fact to make a separate finding of the percentage of responsibility for each contribution defendant. The finding must be solely for the purpose of section 33.016 and cannot be part of the percentage of responsibility determined pursuant to section 33.003. Additionally, the statute requires that only the defendant and contribution defendant be included in this percentage of responsibility determination.[142]

Here, the bus company didn't ask for an instruction on section 33.016 (c) and the jury wasn't asked to make a determination on contribution. The statute specifically says that the comparative fault determination under section 33.003 can't be used when making the section 33.016 determination. The court concluded that the theory of recovery was waived and the bus company wasn't entitled to contribution because "the statute makes the question mandatory and the question was neither requested nor given."[143] After the bus company petitioned for review, the parties settled.

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1 Tex. R. Civ. P. 106.
2 Act of May 27, 2019, 86th Leg., R.S., Ch. 606 (S.B. 891), Sec. 10.04 (a).
3 Tex. R. Civ. P. 106.
4 Tex. R. Civ. P. 106 Cmt.
5 *Id.*
6 Sarah A. Nicolas, Anne M. Johnson, & Keenon L. Wooten, *Rules Update*, State Bar of Texas, 13th Annual Damages in Civil Litigation Course (Feb. 25, 2021).
7 *Fortunato v. Chase Bank USA, N.A.*, 2012 WL 2086950 (S.D.N.Y. June 7, 2012).
8 FED. R. CIV. P. 4(F)(3).
9 *Osio v. Maduro Moros*, 2021 WL 1564359 (S.D. Fla. April 21, 2021).
10 *Id.*
11 *Id.*
12 *Id.* (citing *Federal Trade Commission v. PCCare247 Inc.*, 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013) (where the court permitted service via Facebook "to backstop the service upon each defendant at his, or its, known email address," and "not as the sole method of service").
13 *Capturion Network, LLC v. Liantronics, LLC*, 2021 WL 2697368 (S.D. Miss. June 30, 2021).
14 525 F. Supp.3d 518 (S.D. N.Y. 2021).
15 *Id.* at 525; *see also Convergen Energy LLC v. Brooks,* 2020 WL 4038353 (S.D.N.Y. July 17, 2020) (service by email approved for one defendant where plaintiffs showed it was reasonably calculated to notify that defendant of the lawsuit but denied for another defendant where plaintiffs failed to provide an email address or show that email was likely to reach that defendant).
16 *Parsons v. Shenzen Fest Technology Co., Ltd.*, 2021 WL 767620 (N.D. Ill. Feb. 26, 2021). In another federal district court case, the court allowed substituted service, ordering "substituted service by a variety of means: email, service by publication in three different newspapers, service by first class mail to all known addresses, service by first-class mail on Defendant Baca's mother, service by first-class mail on Charla Hicks, and notice by text message to Defendants' previously used phone." In subsequently granting a default judgment, the court found that the defendants had actual notice of the lawsuit as defendant Baca responded by text indicating receipt of the text from plaintiff notifying him of the lawsuit. *Viacom Int'l Inc. v. Baca*, 2018 WL 6003539 (D.N.M. Nov. 15, 2018).
17 Act of May 26, 2019, 86th Leg., R.S., Ch. 696 (S.B. 2342), Sec. 1.
18 Tex. R. Civ. P. 169 Cmt.
19 Tex. R. Civ. P. 47(c).
20 *Id.*
21 Tex. R. Civ. P. 169 (a)(1) (2013) (emphasis added).
22 Tex. R. Civ. P. 169 (a)(1).
23 Tex. R. Civ. P. 169(a)(2) (2013).
24 *See*, *e.g.*, Tex. Estates Code §§ 53.107, 1053.105.
25 Tex. R. Civ. P. 190.2 (b)(1) (2013).
26 Tex. R. Civ. P. 190.2 (b)(1).
27 Tex. R. Civ. P. 190.2 (b)(2) (2013).
28 Tex. R. Civ. P. 190.2 (b)(2).
29 Tex. R. Civ. P. 190 Cmt.
30 Tex. R. Civ. P. 194 Cmt. ("Rule 194 is amended based on Federal Rule of Civil Procedure 26(a) to require disclosure of basic discovery automatically, without awaiting a discovery request.").
31 Tex. R. Civ. P. 194.1 (a).
32 Tex. R. Civ. P. 194.1(b).
33 Tex. R. Civ. P. 194.2(b).
34 *See, e.g.,* Tex. R. Civ. P. 196.2.
35 Tex. R. Civ. P. 194.2-194.4.
36 Tex. R. Civ. P. 194.2(b)(6).
37 Tex. R. Civ. P. 194 Cmt.
38 Tex. R. Civ. P. 195.5.
39 Tex. R. Civ. P. 195.5(d).
40 Tex. R. Civ. P. 194.4(a).
41 Tex. R. Civ. P. 194.4(b).
42 Tex. R. Civ. P. 190.2(b)(1).
43 Tex. R. Civ. P. 190.3(b)(1).
44 Tex. R. Civ. P. 99(b).
45 Tex. R. Civ. P. 99(c) (emphasis added).
46 *Primate Construction, Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam).
47 *Luciano v. SprayFoamPolymers.Com, LLC*, 625 S.W.3d 1, 6 (Tex. 2021) (quoting *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1022 (2021)).
48 *Id.* at 10.
49 141 S. Ct. at 1026.
50 *Grassroots Leadership, Inc. v. Texas Dep't Fam. & Protect. Servs.,* No. 19-0092 (Tex. June 17, 2022) (per curiam).
51 *Id.* at *2-3 (citing *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190 (2021).
52 *Draughon v. Johnson*, 631 S.W.3d 81 (Tex. 2021).
53 *Id.* at 85-86.
54 *Id.* at 87.
55 *Id.* at 88-89.
56 *Id.* at 97 (dissenting op.).
57 *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021).
58 *In re United Services Automobile Ass'n*, 307 S.W.3d 299 (Tex. 2010) (orig. proceeding).
59 *In re Academy, Ltd.*, 625 S.W.3d at 36.
60 *Weekley Homes, LLC v. Paniagua*, No. 21-0197 (Tex. June 17, 2022) (per curiam); *Energen Res. Corp. v. Wallace*, 642 S.W.3d 502, 508-09 (Tex. 2022); *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 818-20 (Tex. 2021).

61 *In re Contract Freighters, Inc.,* No. 21-0134 (Tex. June 17, 2022) (per curiam).
62 *Id.* at *2.
63 *In re UPS Ground Freight, Inc.,* No. 20-0827 (Tex. June 17, 2022) (per curiam).
64 *Id.* at *3.
65 *Montelongo v. Abrea*, 622 S.W.3d 290 (Tex. 2021).
66 *See James W. Walker & Benjamin L. Wallen, Reining in the Texas Citizens Participation Act, 83* Tex. B. J. 234 (April 2020).
67 *Montelongo v. Abrea,* 622 S.W.3d at 295.
68 *Id*. at 296-297.
69 *Id.* at 301.
70 *Browder v. Moree,* No. 21-0691 (Tex. June 24, 2022) (per curiam) (op. on reh'g).
71 *Id.* at *2.
72 *Brainard v. Trinity Universal Ins. Co.,* 216 S.W.3d 809, 818 (Tex. 2006).
73 *Allstate Ins. Co. v. Irwin,* 627 S.W.3d 263, 270-271 (Tex. 2021).
74 *Id.* at 277 (dissenting op.)
75 *In re USAA Gen'l Indemnity Co.,* 624 S.W.3d 782, 790 (Tex. 2021) (orig. proceeding).
76 *Id.* at 791.
77 *In re Sandoval,* 619 S.W. 3d 716, 719-720 (Tex. 2021) (per curiam).
78 *WWLC Investment, L.P. v. Miraki,* 624 S.W.3d 796 (Tex. 2021) (per curiam).
79 *Spanton v. Bellah,* 612 S.W.3d 314 (Tex. 2020) (per curiam).
80 *Id.* at 316 (citations omitted).
81 *Id.* at 317-318.
82 Tex. R. Civ. P. 91a.3.
83 *Id.*
84 *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).
85 *Malik v. GEICO Advantage Ins. Co*., No. 01-19-00489-CV (Tex. App.—Houston [1st Dist.] April 15, 2021, pet. denied) (mem. op.); *Medfin Manager, LLC v. Stone*, 613 S.W.3d 624 (Tex. App.—San Antonio 2020, rule 57.3 motion filed).
86 *Medfin Manager, LLC v. Stone,* 613 S.W.3d at 628-629.
87 *Malik v. GEICO Advantage Ins. Co.* at *5.
88 Tex. R. Civ. P. 91a.6.
89 *In re Farmers Texas County Mutual Ins. Co*., 621 S.W.3d 261, 272 (Tex. 2021) (citations omitted).
90 *Klassen v. Gaines County*, No. 11-19-00266-CV (Tex. App.—Eastland July 15, 2021, no pet.) (mem. op.).
91 *Envision Realty Group, LLC v. Chen*, No. 05-18-00613-CV (Tex. App.—Dallas March 5, 2020, no pet.) (mem. op.).
92 *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020).
93 *Id.*
94 *In re Commercial Credit Group Inc.,* No. 05-21-00115-CV (Tex. App.—Dallas May 11, 2021, orig. proceeding) (mem. op.).
95 *Reynolds v. Quantlab Trading Partners US*, 608 S.W.3d 549, 556-557 (Tex. App.—Houston 4th Dist.] 2021, no pet.).
96 Tex. R. Civ. P. 91a (2013) ("the court *must award* the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court").
97 Tex. R. Civ. P. 91a ("the court *may award* the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court").
98 Texas Supreme Court, Final Approval of Amendments to Texas Rule of Civil Procedure 91a.7, Misc. Docket No. 19-9108 (Nov. 12, 2019).
99 *Edinburg Housing Authority v. Ramirez*, No. 13-19-00269-CV (Tex. App.—Corpus Christi Feb. 25, 2021, no pet.) (mem. op.).
100 *Dallas County Republican Party v. Dallas County Democratic Party*, No. 05-18-00916-CV (Tex. App.—Dallas Aug. 26, 2019, pet denied) (mem. op.); *but see Edinburg Housing Authority v. Ramirez*, No. 13-19-00269-CV (Tex. App.—Corpus Christi Feb. 25, 2021, no pet.) (mem. op.).
101 *Lexington v. Treece*, No. 01-17-00228-CV (Tex. App.—Houston [1st Dist.] July 13, 2021, pet. filed) (mem. op).
102 *Id.* at *19.
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104 Tex. R. Civ. P. 91a.
105 *See* Mark E. Steiner, *Will* El Apple *Today Keep Attorney's Fees Away*?, 19 Journal of Consumer and Commercial Law 114 (2016), *trashed by, Rohrmoos Venture v. UTSW DVA Healthcare*, 578 S.W. 3d 469, 499-500 (Tex. 2019).
106 *In re Farmers Tex. County Mut. Ins*., 621 S.W.3d 261, 266 (Tex. 2021) (orig. proceeding); *In re Houston Astros, LLC*, No. 14-20-00769 (Tex. App.—Houston [14th Dist.] July 15, 2021, orig. proceeding) (per curiam) (mem. op.); *In re Commercial Credit Group, Inc*., No. 05-21-00115-CV (Tex. App.—Dallas May 11, 2021, orig. proceeding) (mem. op.).
107 *Day Invest. Group, LLC v. Dauch,* No. 05-20-00625-CV (Tex. App.—Dallas April 19, 2021, no pet.) (mem. op.).
108 *See, e.g., Tamborello v. Town of Highland Park*, No. 05-20-00755-CV (Tex. App.—Dallas April 20, 2021, no pet.) (mem. op.); *Gettings v. Goosehead Ins. Agency*, No. 02-21-00012-CV (Tex. App.—Fort Worth March 11, 2021, no pet.) (per curiam) (mem. op.).
109 *See Tamborello v. Town of Highland Park* at *1.
110 *Shetewy v. Mediation Inst. of North Texas, LLC*, 624 S.W.3d 285, 288 (Tex. App.—Fort Worth 2021, no pet.).
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112 *Bird v. Anderson*, No. 03-21-00140 (Tex. App.—Austin June 24, 2021, pet. denied) (mem. op.).
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117 *Id.* at 706 (quoting *Wheeler v. Green,* 157 S.W.3d 439, 444 (Tex. 2005)).
118 *Id.*
119 *Minor v. Diverse Facility Solutions, Inc.,* No. 04-20-00526-CV (Tex. App.—San Antonio Nov. 10, 2021, no pet.) (mem. op.).
120 *In re Gonzales*, 619 S.W. 3d 259 (Tex. 2021).
121 Tex. Civ. Prac. & Rem. Code §33.004(j).

122 *Id.*
123 *In re Gonzales*, 619 S.W. 3d at 262.
124 *Id.* at 262-263.
125 *Id.* at 264-265 (citing *In re Dawson*, 550 S.W.3d 625 (Tex. 2018) (orig. proceeding); *In re Coppola*, 535 S. W. 3d 506 (Tex. 2017) (orig. proceeding)).
126 *Id*. at 265 (citing *Dawson*, 550 S.W.3d at 630).
127 *Id.* at 265 (quoting *Dawson*, 550 S.W.3d at 629).
128 *See id.* at 264.
129 Tex. Civ. Prac. & Rem. Code §33.004(d).
130 *In re Mobile Mini, Inc.*, 596 S.W. 3d 781 (Tex. 2020) (per curiam).
131 *Id.* at 783.
132 *Id.*
133 *Id*. at 784.
134 *Id.*
135 *See, e.g., In re VC PalmsWestheimer*, 615 S.W.3d 655 (Tex. App.—Houston [1st Dist.] 2020, orig. proceeding); *In re Bertrand*, 602 S.W.3d 691 (Tex. App.—Fort Worth 2020, orig. proceeding); *In re MAF Indus.*, No. 13-20-00255-CV (Tex. App.—Corpus Christi Oct. 19, 2020, orig. proceeding) (mem. op.); *Sanchez v. Castillo*, No. 05-18-01033-CV (Tex. App.—Dallas March 4, 2020, no pet.) (mem. op.).
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