The Uncertainty of Remand in Texas

By Brad E. Brewer and Tyler J. McGuire
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The United States District Courts in Texas continue to issue conflicting opinions regarding the analysis to be used in determining whether a state court petition contains sufficient allegations against a nondiverse defendant to support a motion to remand. The conflict is the result of the implementation of Rule 91a of the Texas Rules of Civil Procedure (TRCP). The issue has important ramifications for the litigants in matters removed to federal court and, unfortunately, the Fifth Circuit has not provided guidance to the District Courts to resolve this conflict.

The avalanche of lawsuits in the past five years seeking insurance coverage for property damage caused by weather events has put a significant strain on Texas state courts. Defendants now regularly seek relief in the form of removal to federal court based on diversity of citizenship, arguing that any nondiverse defendant (typically a local insurance adjuster) has been improperly joined. Naturally, plaintiffs frequently file a motion to remand in response, claiming lack of complete diversity. This process has yielded a glut of opinions from federal district courts analyzing whether the nondiverse defendant has been improperly joined. Often the result of this analysis comes down to the pleading standard used to determine whether the allegations asserted against the nondiverse defendant in the state court petition are sufficient to state a cause of action.

How TRCP 91a May Have Changed the Applicable Pleading Standard

The critical question in Texas remand proceedings has become whether the District Court should apply the lenient Texas “fair notice” pleading standard or the more rigorous test required by federal pleading standards. To understand the genesis of this quandary, the interpretation of the recently enacted TRCP 91a must be considered.

Texas Rule of Civil Procedure 91a became effective on March 1, 2013. The rule was meant to provide a practical way for defendants in Texas state courts to seek early dismissal of frivolous lawsuits.[1] The rule states as follows:

Except in a case brought under the Family Code or a case governed by Chapter 14 of the Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in the law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. The cause of action has no basis in fact if no reasonable person could believe the facts pleaded.[2]

This rule allows Texas defendants to directly seek dismissal of an action based on the insufficiency of the allegations contained in the petition.
Many courts and commentators believe TRCP 91a is Texas’ functional equivalent of Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). Case law resulting from TRCP 91a motion practice consistently relies upon and cites to precedent arising from motions to dismiss pursuant to FRCP 12(b)(6). Of course the federal opinions addressing these motions to dismiss apply the federal pleading standards in determining whether a complaint sufficiently alleges a cause of action against the moving party. The purported equivalent of TRCP 91a and FRCP 12(b)(6) has now led many courts to determine that “the Texas pleading standard has, essentially, been brought into line with the federal pleading standard.” That conclusion in turn has led some federal courts to apply the federal pleading standard in remand proceedings where the court must determine whether a plaintiff has properly alleged a cause of action against a nondiverse defendant.

How the Pleading Standard Affects Remand and Improper Joinder

Generally, defendants base the removal of a state court action on the existence of a federal question or the complete diversity of citizenship between the plaintiffs and defendants. Nearly all removals of insurance disputes in weather-related state court actions are based on diversity of citizenship of the parties. Once removed, the case is often the subject of a motion to remand, wherein the plaintiff seeks the return of the case to state court by arguing the federal court has no jurisdiction. Specifically, plaintiffs often point to the lack of complete diversity of citizenship created by the in-state plaintiff naming a local nondiverse adjuster as a defendant. A common effort to avoid remand is for defendants to argue that a local adjuster was improperly joined, meaning the adjuster-defendant’s citizenship should be ignored for purposes of diversity jurisdiction.

The Fifth Circuit has recognized two grounds upon which a court can find that a defendant was improperly joined: “(1) actual fraud in the pleading of jurisdictional facts or (2) inability of the plaintiff to establish a cause of action against the nondiverse party in state court.” Assuming no fraudulently pled jurisdictional facts, the defendant must demonstrate that “there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.”

To determine whether a plaintiff has a possibility of recovering against the nondiverse or in-state defendant, the court must conduct a “Rule 12(b)(6)-type analysis.” This entails a determination as to whether the allegations made in the state court petition are sufficient to state a cause of action against the nondiverse defendant. The ultimate decision on whether a case should be remanded often depends on which pleading standard the court applies when determining whether the allegations are sufficient.

The Difference in Pleading Standards

Historically, the pleading standards for Texas practice and federal practice differed dramatically. The more lenient Texas pleadings standard is derived from TRCP 45 and 47. The applicable federal standard of pleading is provided by FRCP 8(a)(2). As you will see below, the federal pleading standard allows a judge to ignore general or broadly stated allegations that a judge applying the Texas pleading standard is required to construe liberally. A brief summary of both standards is provided below.
Texas “Fair Notice” Pleading Standard

The test for determining if the allegations in a petition provide fair notice is whether the opposing party can divine from the pleadings the nature and basic issues of the controversy and what testimony will be relevant.[12] A court “must construe the pleading liberally in the pleader’s favor and construe the petition to include all claims that may be reasonably inferred from the language used in the petition, even if the petition does not state all the elements of the claim in question.”[13] It is not necessary to identify the particular acts that give rise to the cause of action.[14]

Federal Pleading Standard

The federal pleading standard requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief,”[15] in order to “give the defendant fair notice of what the claim is and the grounds upon which it rests.”[16] Although a complaint need not contain detailed factual allegations, the “showing” contemplated by FRCP 8(a)(2) requires the plaintiff to do more than simply allege legal conclusions or recite the elements of a cause of action.[17] Thus, while a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings.[18]

Lack of Guidance from the Fifth Circuit

As repeated in several recent District Court opinions, the Fifth Circuit has not directly addressed which pleading standard is to be used in determining whether a plaintiff’s allegations against a nondiverse defendant are sufficient to establish a possibility of recovery.[19] For example, in August of 2015, the Fifth Circuit analyzed a motion to remand in a case involving a breach of contract for failure to pay a consultant’s fees.[20] Once the court reached the issue of which pleading standard it should use to determine whether the plaintiff had established a cause of action against the nondiverse defendant, the court found that the allegations in the petition failed to satisfy the Texas pleading standard. The opinion does not mention TRCP 91a and relies upon three unpublished decisions of the Fifth Circuit, all of which involve lawsuits filed prior to the effective date of TRCP 91a.[21] As shown below, the lack of direction from the Fifth Circuit has yielded inconsistent results in the district courts of Texas.

Recent Decisions by District

The only trend that can be identified for the United States district courts in Texas is inconsistency. Below is a short discussion of relevant cases issued in 2015 and early 2016.

Southern and Western Districts

Courts in the Southern and Western districts have issued five opinions from 2015 to the present that addressed the effect of TRCP 91a on the pleading standard used in the remand context.[22] Both districts consistently held that until told otherwise by the Supreme Court of Texas, the Texas “fair notice” standard would continue to apply to state-court pleadings.[23] The logic of these opinions is similar, if not identical, to the holding in Wooley v. Schaffer from the Houston Court of Appeals. In Wooley, the court acknowledged that the analysis under TRCP 91a paralleled FRCP 12(b)(6), but still applied “the fair notice
pleading standard applicable in Texas to determine whether the allegations of the petition are sufficient to allege a cause of action.”[24]

**Eastern District**

On the other hand, the one Eastern District opinion issued in the same timespan that mentioned TRCP 91a held that the federal pleading standard applied to the remand analysis.[25] The court opined that while TRCP 91a and FRCP 12(b)(6) are not “identical,” the fact that TRCP 91a requires a “12(b)(6)-type analysis” indicated that the court should utilize 12(b)(6) case law and apply the federal pleading standard in assessing a motion to remand.[26]

**Northern District**

Finally, the courts within the Northern District have not taken a consistent approach on this issue. Five decisions issued by judges in the Northern District from 2015 to the present applied the federal pleading standard in ruling on motions to remand.[27] Similar to the Eastern District opinion, these opinions conclude that the federal pleading standard is applicable because TRCP 91a calls for a FRCP 12(b)(6)-type analysis. In other words, “the Texas pleading standard has, essentially, been brought into line with the federal standard.”[28]

However, the other two decisions issued by courts in the Northern District during this time period applied the Texas pleading standard.[29] These opinions reasoned that a FRCP 12(b)(6)-type analysis does not mandate application of the federal pleading standard. Further, “fundamental fairness” should not require state court plaintiffs to anticipate that their lawsuit will be removed, and therefore scrutinized under a more stringent pleading standard.[30]

**Conclusion**

The enactment of TRCP 91a has created confusion among the district courts in Texas on which pleading standard should be used when determining whether a petition contains allegations sufficient to properly plead a cause of action against a nondiverse defendant in the remand context. It does not appear that there will be consistency until the Fifth Circuit rules on this issue. Until then, any advice to a client with regard to the results, or for that matter the analysis, of a motion to remand should be accompanied with an explanation of the uncertainty in federal courts in Texas in this area of the law.

—By Brad E. Brewer and Tyler J. McGuire, Zelle LLP

*Brad Brewer is a partner and Tyler McGuire is an associate in Zelle’s Dallas office.*

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[1] For a thorough discussion of TRCP 91a, see the opus created by Timothy Patton. 33 Rev. Litig. 469 (Summer, 2014).


[5] The three requirements for removal based on diversity are: (1) the parties are of completely diverse citizenship, see 28 U.S.C. §1332(a); (2) none of the properly joined defendants is a citizen of the state in which the case is brought, see 28 U.S.C. §1441(b); and (3) the case involves an amount in controversy of more than $75,000, see 28 U.S.C. §1332(a).


[7] Id.

[8] See id. The Smallwood court also provides an alternative procedure in making the 12(b)(6) analysis, allowing the court to make a summary inquiry “to identify the presence of discrete and undisputed facts that would preclude plaintiff’s recovery against the instate defendant.” This avenue is rarely taken and is not relevant to our discussion.

[9] Id.


[12] Roark v. Allen, 633 S.W.2d 804, 809-10 (Tex. 1982) (stating that the objective of fair notice standard is to provide opposing party and counsel with sufficient information to prepare defense).


[16] Twombly, 550 U.S. at 555 (internal quotation marks and ellipsis omitted).

[17] Id. at 555, 578 n.3.
[18] See Iqbal, 556 U.S. at 679 (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”).


[21] See Michels v. Safeco Ins. Co. of Indiana, 544 F. App’x 535, 538 (5th Cir. 2013); Akerblom v. Ezra Holdings, Ltd., 509 F. App’x 340, 344 (5th Cir. 2013); De La Hoya v. Coldwell Banker Mexico, Inc., 125 F. App’x 533, 537 (5th Cir. 2005).


[23] See Polansky; Garza.


[26] See id.


