

An Underutilized Tool To Dismiss Meritless Claims In Texas

DECEMBER 18, 2024

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In Texas state court, there are very few options for defendants to escape a suit early in litigation, even for meritless claims.

There is, however, one procedural mechanism that defense attorneys often overlook that can be used to dismiss meritless claims, limit discovery and even provide immediate appellate review. That mechanism is a special appearance.

A special appearance is Texas' equivalent to a motion to dismiss for lack of personal jurisdiction, yet because Texas' test for personal jurisdiction can create overlap between jurisdiction and merits, special appearances can be used in certain cases to dismiss meritless claims.

A recent case from Fort Worth, Texas, highlights the use and benefits of a special appearance to meritless claims. The case, *Hilton Franchise Holding LLC v. Peguero*, involved allegations that Hilton controlled property where a construction worker was killed. Hilton, however, did not actually control the property.^[1]

Rather than going through costly discovery and waiting until summary judgment to get the claims dismissed, Hilton filed a special appearance, asserting that it did not control the property.^[2]

While the Tarrant County District Court overruled Hilton's special appearance, Hilton took advantage of the right to immediate appellate review, and the Texas Court of Appeals for the Second District reversed and rendered judgment in Hilton's favor on Nov. 27. Hilton thus escaped this suit and obtained favorable judgment fairly early in litigation, without having to go through costly discovery.^[3]

Many Texas litigators overlook this useful application of a special appearance by not considering the factual merits of a case when assessing whether to challenge personal jurisdiction. As a result, cases that could have been disposed of quickly end up unnecessarily continuing forward with litigation.

This is not a small oversight either. The difference between dismissing meritless claims at the onset of a case and dismissing them later, through summary judgment or trial, can be millions of dollars in attorney fees and years of litigation that can be disruptive and burdensome.

For this reason, this article will discuss why special appearances are often underutilized by litigants, and how Texas attorneys can use special appearances to obtain quicker and cheaper dismissals for their out-of-state clients.

Normal avenues of dismissal can be costly and ineffective in Texas.

At the outset, it should be noted that the Texas Rules of Civil Procedure are drafted in a way that makes it difficult to dismiss claims in the early stages of litigation. Texas public policy supports providing all citizens access to court to remedy wrongs committed against them.^[4] For this reason, Texas law leans against early dismissal and errs on the side of allowing claims to move forward.

While Texas has a motion to dismiss on the pleadings — a Rule 91a motion^[5] — Texas courts won't grant such a motion unless a plaintiff's petition fails to give fair notice of their claim under Texas' liberal pleading standard^[6] or the petition establishes a clear legal bar, i.e., it affirmatively alleges facts showing that the claim fails.^[7]

It is thus fairly easy for Texas plaintiffs to plead around a Rule 91a motion by including just enough details to allow a defendant to know what their claims are generally about, and not include facts that would undermine the claims.

Additionally, Rule 91a further deters defendants from moving to dismiss through a fee-shifting provision that allows courts to award fees to a plaintiff if a Rule 91a motion is denied.^[8]

Due to the low likelihood of success and the risks associated with Rule 91a motions, Texas litigants' main tool to dismiss meritless claims is often a summary judgment motion.^[9] The Texas rules do not limit when a party can move for summary judgment, so parties technically are free to move as soon as a case is filed.

However, unless a summary judgment motion involves a pure question of law — like interpreting an unambiguous contract^[10] — Texas courts are reluctant to grant summary judgment without allowing a plaintiff to first engage in some discovery.

Indeed, for some summary judgment motions, the Texas rules specifically require an adequate time for discovery to pass before a court can consider the motion.^[11]

Discovery is often expensive and time-consuming,^[12] and absent a fee-shifting agreement or statutory provision, the costs of discovery cannot be recovered from the other side.^[13] Thus, while summary judgment motions may be a viable mechanism to dismiss meritless claims, a defendant will likely incur expensive discovery costs before such a motion will be considered.

Special appearances provide a useful tool for out-of-state defendants to dismiss meritless claims.

A special appearance can provide an additional avenue for out-of-state defendants to dismiss meritless claims, but special appearances are often overlooked by litigants.

Texas attorneys often ignore the merits of a plaintiff's claims when assessing personal jurisdiction and considering whether to challenge personal jurisdiction. This reasoning is based on a misunderstanding of Texas case law holding that a defendant cannot defeat personal jurisdiction by showing that a plaintiff's claims lack merit.^[14]

While it is true that a defendant cannot defeat personal jurisdiction simply by showing the merits of a plaintiff's claim fails, if a defendant is not subject to general personal jurisdiction in Texas — i.e., they are not domiciled in Texas — that defendant may be able to defeat personal jurisdiction by showing that the facts needed to establish liability against the defendant do not exist.^[15]

Specifically, the Texas Supreme Court's test for specific jurisdiction is whether there is a substantial connection between a defendant's contacts with the state of Texas and the operative facts of a litigation.^[16] The operative facts of a litigation are those facts that will be the focus of trial to prove liability.^[17]

This means that to defeat personal jurisdiction, out-of-state defendants can show that the facts necessary to prove liability — i.e., the operative facts — did not occur, even though arguments about lack-of-liability facts normally go to the merits of a claim and not personal jurisdiction.

For instance, in a product liability case, a defendant that did not design, manufacture or sell the product at issue can defeat personal jurisdiction by showing that it did not sell, design or manufacture the product at issue.^[18]

Similarly, in a case involving third-party criminal conduct, a defendant can defeat personal jurisdiction by showing that it did not control the property where the crime occurred, since Texas requires a plaintiff to prove that a defendant controlled the property where a crime occurred before imposing liability for failure to prevent that crime.^[19]

Finally, in a fraudulent transfer case, a defendant can defeat personal jurisdiction by showing that there was, in fact, no actual transfer of assets from one party to another.^[20]

At first glance, each of these arguments appears to address the merits of the plaintiffs' claims rather than jurisdiction. Yet, because Texas' specific jurisdiction test focuses on operative facts — again, the facts necessary to show liability — there is often overlap between the merits and jurisdiction.

And while personal jurisdiction cannot be defeated simply by showing that a plaintiff's claims lack merit, it is completely permissible to attack a fact to overcome personal jurisdiction, even though attacking the fact may also show a lack of merit.^[21]

Thus, for essentially the same reasons each of the claims above lack merit, the courts in those cases also lack personal jurisdiction and should dismiss the claims early in litigation for lack of personal jurisdiction.

Special appearances also provide additional protections that make them more efficient and effective than Rule 91a or summary judgment motions.

First, a defendant can use a special appearance to limit discovery and avoid the associated costs. Once a defendant files a special appearance, discovery should be limited to jurisdictional issues that are relevant to resolving the special appearance.^[22]

Second, in attacking jurisdiction, a defendant is not bound by a plaintiff's allegations, but rather is allowed to attack and contradict a plaintiff's allegations with evidence.^[23]

Third, unlike summary judgment,^[24] the Texas rules provide an automatic right to immediate interlocutory appeal if a trial court denies a special appearance.^[25] Thus, if a defendant believes a trial court wrongfully denied a special appearance, it can immediately appeal that denial rather than incurring all of the costs associated with litigation and appealing after trial.

Finally, Texas judges are often more inclined to grant special appearances than motions for summary judgment because the dismissal is without prejudice to refiling in a different jurisdiction.^[26]

However, from our experience, if a Texas court grants a special appearance based on a claim being factually meritless, plaintiffs are unlikely to refile in a different state because they have already had one court find that their claims are essentially meritless.

Accordingly, special appearances provide a useful — albeit often overlooked — tool for out-of-state defendants to escape meritless claims early in litigation, and Texas litigants should be more willing to use this tool to seek early dismissal for claims brought against out-of-state defendants.

[1] Hilton Franchise Holding LLC v. Peguero , No. 02-24-00222-CV, 2024 Tex. App. LEXIS 8297, at *3 (Tex. App.—Fort Worth Nov. 27, 2024, no pet. h.).

[2] Id. at *5-6.

[3] Id. at *26.

[4] TEX. CONST. art. I, § 13; *Middleton v. Tex. Power & Light Co.*, 185 SW. 556, 560 (Tex. 1916).

[5] Tex. R. Civ. P. 91a.

[6] *In re Estate of Savana*, 529 SW.3d 587, 592 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (“The fair-notice standard is relatively liberal. The test for determining whether a petition provides fair notice is whether ‘the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.’” (citations omitted)).

[7] *In re RNDC Tex. LLC*, No. 05-18-00555-CV, 2018 Tex. App. LEXIS 4186, at *3 (Tex. App.—Dallas June 11, 2018, no pet.).

[8] Tex. R. Civ. P. 91a.7 (allowing courts to “award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action”).

[9] Tex. R. Civ. P. 166a.

[10] *Safeco Lloyds Ins. Co. v. Allstate Ins. Co.*, 308 SW.3d 49, 53 (Tex. App.—San Antonio 2009, no pet.) (“When a controversy can be resolved by proper construction of an unambiguous contract, summary judgment is appropriate.”).

[11] Tex. R. Civ. P. 166a(i).

[12] *In re State Farm Lloyds*, 520 SW.3d 595, 610 (Tex. 2017) (recognizing that “e-discovery is very expensive and quite complicated”).

[13] *Allstate Ins. Co. v. Irwin*, 627 SW.3d 263, 271 (Tex. 2021) (“Texas courts have long required parties to bear their own attorney’s fees under the American Rule by prohibiting fee awards unless specifically provided by contract or statute.”).

[14] *Glatty v. CMS Viron Corp.*, 177 SW.3d 438, 449 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (“Ultimate tort liability is not a jurisdictional fact; the merits of claims are not at issue during a special appearance; and the proof necessary to show personal jurisdiction is only that the purposeful act was committed in Texas.”).

[15] General personal jurisdiction is established if a defendant’s contacts with the State of Texas are so continuous and systematic that the defendant is subject to jurisdiction in Texas regardless of what claim is asserted against them. See *BMC Software Belg., N.V. v. Marchand*, 83 SW.3d 789, 796 (Tex. 2002). For corporate defendants, this normally requires the defendant’s place of incorporation or personal place of business be located in Texas. See *Chevron Bangl. Block Twelve Ltd. v. Baldwin*, No. 01-17-00303-CV, 2017 Tex. App. LEXIS 11391, at *6 (Tex. App.—Houston [1st Dist.] Dec. 7, 2017, no pet.). If a defendant is subject to general personal jurisdiction in Texas, it will not be able to use a special appearance to seek early dismissal in the way discussed in this article.

[16] *Moki Mac River Expeditions v. Drugg*, 221 SW.3d 569 (Tex. 2007).

[17] *Fifth Third Bank v. Ericsson Inc.*, No. 05-19-00759-CV, 2020 Tex. App. LEXIS 5998, at *7 (Tex. App.—Dallas July 29, 2020, pet. denied).

[18] *Assa Abloy AB v. Damian*, No. 03-21-00598-CV, 2023 Tex. App. LEXIS 2074, at *25 (Tex. App.—Austin Mar. 30, 2023, no pet. h.).

[19] *MetroPCS Tex. LLC v. Amiri*, No. 05-22-00188-CV, 2022 Tex. App. LEXIS 8095, at *19 (Tex. App.—Dallas Nov. 1, 2022, no pet. h.).

[20] *APR Energy Holdings LTD v. Forge Group Power PTY LTD*, Order Sustaining Forge Group Power PTY LTD’s Special Appearance, Cause No. 2016-46548 (Harris Cnty., Tex., Dist. Ct., Feb. 27, 2017).

[21] *Nichols v. Bridges*, 163 SW.3d 776, 783 (Tex. App.—Texarkana 2005, no pet.) (“The fact that the showing of an absence of the factual basis for exercise of jurisdiction also tends to show the absence of liability is irrelevant.”).

[22] *In re Stanton*, No. 05-17-00834-CV, 2017 Tex. App. LEXIS 8184, at *2 (Tex. App.—Dallas Aug. 24, 2017, no pet.) (“Rule 120a requires discovery be limited to matters relevant to jurisdiction prior to a ruling on a special appearance.”).

[23] *Kelly v. Gen. Interior Constr. Inc.*, 301 SW.3d 653, 655 (Tex. 2010) (“Factually, the defendant can present evidence that it has no contacts with Texas, effectively disproving the plaintiff’s allegations.”).

[24] *Citizens Nat’l Bank of Tex. v. Dall. ATM Mgmt. Servs.*, No. 07-08-0011-CV, 2009 Tex. App. LEXIS 5423, at *1-3 (Tex. App.—Amarillo July 15, 2009, no pet.) (“As a general rule, appellate courts do not have jurisdiction to review on appeal the denial of summary judgment.”).

[25] Tex. Civ. Prac. & Rem. Code § 51.014(a)(7).

[26] Julian v. Cadence McShane Constr. Co. LLC , No. 01-15-00465-CV, 2015 Tex. App. LEXIS 11490, at *22 (Tex. App. Nov. 5, 2015, no pet.) (granting special appearance and dismissing claim without prejudice).

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