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January 20, 2005

The Honorable Wallace Jefferson
Chief Justice, Supreme Court
Supreme Court Building
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Re: Proposed Changes to Rules 93 and 94, Texas Rules of Civil Procedure

Dear Justice Jefferson:

Enclosed are proposed rule changes to Rules 93 and 94 TRCP which have been approved for submission to the Supreme Court by the State Bar Court Rules Committee.

By copy of this letter, I am forwarding copies of these proposed rule changes to Justice Hecht and to Charles Babcock, Chairman of the Supreme Court Advisory Committee. The Court Rules Committee would appreciate the Supreme Court giving consideration to these proposed rule changes.

Sincerely,



O. C. Hamilton, Jr., Chair
Court Rules Committee

OCH/ea

Enclosures

xc w/Enclosures:

The Honorable Nathan Hecht
Justice, Supreme Court of Texas
Supreme Court Building
P.O. Box 12248, Capitol Station
Austin, Texas 78711

Charles Babcock
901 Main Street
Dallas, Texas 75202-3748

STATE BAR OF TEXAS
COMMITTEE ON COURT RULES
REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

I. Exact Wording of Existing Rule

Rule 93 Certain Pleas to Be Verified

A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit.

1. That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.
2. That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.
3. That there is another suit pending in this State between the same parties involving the same claim.
4. That there is a defect of parties, plaintiff or defendant.
5. A denial of partnership as alleged in any pleading as to any party to the suit.
6. That any party alleged in any pleading to be a corporation is not incorporated as alleged.
7. Denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit shall be sufficient if it states that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority. In the absence of such a sworn plea, the instrument shall be received in evidence as fully proved.
8. A denial of the genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee and in the absence of such a sworn plea, the indorsement or assignment thereof shall be held as fully proved. The denial required by this subdivision of the rule may be made upon information and belief.
9. That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part.
10. A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit.

III. Brief Statement of Reasons for Requested Changes and Advantages to be Served by Them:

Except in specific situations, identified in other rules (e.g. sworn accounts) verification of pleadings adds little value to either the substance or form of the information contained therein. Verification adds cost and inconvenience to the pleader, particularly where the individual verifying the pleading is located remotely and/or the verification must be obtained on short notice.

Concepts such as legal capacity, lack or failure of consideration and usury are, in the main, beyond the common knowledge of laymen. Further, asking individuals uneducated in those matters to swear to the truth of dilutes the meaning of the verification in specific and of all verifications in general and technically subjects the affiant to civil or criminal penalties for false swearing.

The committee also notes that the agencies and procedures described in paragraph 13 of the rule (appeals from the Industrial Accident Board) either no longer exist or no longer exist by names set forth in the rule.

However, the committee finds that a responding party should be required to give specific notice of many of the defenses set out in Rule 93 (i.e. they should not be assumed in a general denial) and those defenses are proposed to be incorporated into the existing Rule 94.

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9. That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part.
10. A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit.

11. That a contract sued upon is usurious. Unless such plea is filed, no evidence of usurious interest as a defense shall be received.

12. That notice and proof of loss or claim for damage has not been given as alleged. Unless such plea is filed such notice and proof shall be presumed and no evidence to the contrary shall be admitted. A denial of such notice or such proof shall be made specifically and with particularity.

13. In the trial of any case appealed to the court from the Industrial Accident Board the following, if pleaded, shall be presumed to be true as pleaded and have been done and filed in legal time and manner, unless denied by verified pleadings:

- (a) Notice of injury.
- (b) Claim for Compensation.
- (c) Award of the Board.
- (d) Notice of intention not to abide by the award of the Board.
- (e) Filing of suit to set aside the award.
- (f) That the insurance company alleged to have been the carrier of the workers' compensation insurance at the time of the alleged injury was in fact the carrier thereof.
- (g) That there was good cause for not filing claim with the Industrial Accident Board within the one year period provided by statute.
- (h) Wage rate.

A denial of any of the matters set forth in subdivisions (a) or (g) of paragraph 13 may be made on information and belief.

Any such denial may be made in original or amended pleadings; but if in amended pleadings the same must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them, must be proved.

14. That a party plaintiff or defendant is not doing business under an assumed name or trade name as alleged.

15. In the trial of any case brought against an automobile insurance company by an insured under the provisions of an insurance policy in force providing protection against uninsured motorists, an allegation that the insured has complied with all the terms of the policy as a condition precedent to bringing the suit shall be presumed to be true unless denied by verified pleadings which may be upon information and belief.

16. Any other matter required by statute to be pleaded under oath.

II. Proposed Rule

Deleted.

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However, the committee finds that a responding party should be required to give specific notice of many of the defenses set out in Rule 93 (i.e. they should not be assumed in a general denial) and those defenses are proposed to be incorporated into the existing Rule 94.