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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 94 Affirmative Defenses

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

II. Proposed Rule

Rule 94 Specific Pleadings and Affirmative Defenses

1. In pleading to a preceding pleading, in order to put the matter in issue, a party must specifically plead or deny, as appropriate, that:

- (a) A party lacks legal capacity to sue or be sued [93(1)].
- (b) A party is not entitled to recover in the capacity in which it sues or is not liable in the capacity in which it is sued.[93(2)].
- (c) There is another suit pending in this State between the same parties involving the same or similar claim [93(3)].
- (d) There is a defect of parties, plaintiff or defendant [93(4)]
- (e) A party does not use an assumed or trade name as alleged, is not organized as alleged, or is not qualified to do business in this state [93(5,6,14)].
- (f) An instrument, upon which any claim is founded and which is not alleged to have been lost or destroyed, was not executed by the party or on its authority as alleged [93(7)].
- (g) An indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee is not genuine [93(8)].

(h) Notice and proof of loss or claim for damage has not been given as alleged. A denial of notice or proof shall be made specifically and with particularity [93(12)], and

(i) An insured under an automobile policy providing for protection against uninsured motorists has not complied with specified terms of the policy as a condition precedent to bringing suit against the insurance carrier [93(15)].

2. In the absence of a specific pleading required by sub-parts 1(f) or (g) above, the instrument or indorsement shall be received in evidence as fully proved. In the absence of a specific pleading required by sub-parts 1(h) or (i), an allegation of notice or proof of loss or compliance with the terms of the policy shall be deemed true.

3. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure or lack of consideration [93(9)], fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, usury [93(11)], waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

*Editor's Notes: Bracketed text is intended only for reference to former Rule 93 provisions and not for inclusion in the revised rule. Underlined items copied from Rule 93. Double underline indicates new text.*

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

While the utility of verified pleadings is questioned, the committee believes that notice of certain issues formerly included in Rule 93 remains important. Further, the continuation of a presumption of the truth of certain allegations in the claimant's pleading, where a responding party fails to deny otherwise, serves the purpose of judicial economy.

Former Rules Rule 93 (9 & 11), upon which the responding party bears the burdens of pleading and proof are now included in sub-part 3 along with the original Rule 94 affirmative defenses.

Former Rule 93(9) is excluded as it is duplicative of the requirements of Rule 185. Former Rule 93(13) is excluded as this procedure is no longer in use. Former Rule 93(16) is excluded as unnecessary and duplicative of other law or rules.