SOUTH TEXAS LAW REVIEW

VOLUME 46 SUMMER 2005 NUMBER 4

HOUSE BILL 4'S IMPACT ON MULTI-PLAINTIFF JOINDER & INTERVENTION AND ON FORUM NON CONVENIENS

JAMES HOLMES

HOUSE BILL 4'S IMPACT ON MULTI-PLAINTIFF JOINDER & INTERVENTION AND ON FORUM NON CONVENIENS

JAMES HOLMES*

* The author practices commercial litigation at The Schmidt Firm, 8401 North Central Expressway, Suite 880, Dallas, Texas 75225. The author would like to thank Lee Parsley, who had a hand in drafting much of H.B. 4's text, for answering random and various questions about H.B. 4 during this paper's genesis, in the summer of 2003.

I. INTRODUCTION

Shrewd Texas litigators often remark—somewhat cynically—that the three most important ingredients to successful litigation are "location, location, location." That is, the venue ("location") for a particular case largely determines how well the case will go for the

parties involved. Accepting the remark (or joke) at face value, plaintiffs understandably should desire "plaintiff-friendly" venues over "defendant-friendly" venues, and defendants should desire just the opposite.

Whether the "location, location, location" remark has enduring merit is beyond this paper's scope. This paper, however, surveys two bodies of procedural law—multi-plaintiff practice under section 15.003 of the Civil Practice and Remedies Code and the doctrine of forum non conveniens[1] ("FNC")—which have evolved largely because competing plaintiffs' and defendants' attorneys often prepare their cases as though the remark has *great* merit. By their procedural machinations to fix or avoid venue in a particular court, attorneys manifest the common belief that a case's location bears decisively on the case's outcome, and they engender forum shopping, on both sides of the litigation. Plaintiffs' attorneys file multi-plaintiff cases that easily become subject to defendants' challenges that the plaintiffs have no business proceeding together in a single lawsuit in a particular court. On the flip side, defendants' attorneys challenge sensible, efficiency-promoting multi-plaintiff joinders or interventions because they want their clients to avoid a large liability exposure in a particular court. Or, plaintiffs' attorneys file cases in Texas state court when another court, for various reasons, provides a much better forum for resolving the dispute. Alternatively, defendants' attorneys challenge cases pending in Texas state courts when those courts are as capable as any court to resolve the dispute effectively and efficiently.[2]

Section 15.003 and the FNC doctrine provide some regulation of the jockeying among competing plaintiffs' and defendants' attorneys to fix or avoid venue in a particular court. These bodies of procedural law evolved significantly in the 1990s and 2000s through the many Texas cases discussed in this paper. Moreover, H.B. 4 has continued the evolution of these bodies of law.

H.B. 4 made several important changes to section 15.003 and to the FNC doctrine. To understand these changes, a practitioner should know the general background of each of these bodies of procedural law. Therefore, Parts II.A, II.C, II.D, II.E, II.F, II.G, II.H, II.I, II.M, and II.P provide surveys of multi-plaintiff practice under the former section 15.003—giving particular attention to the still-relevant case

1. *See* BLACK'S LAW DICTIONARY 665 (7th ed. 1999) (noting the phrase forum non conveniens is Latin for "an unsuitable court").

2. Many cases discussed throughout this paper provide examples of these foregoing scenarios, in varying degrees and in varying factual settings.

law that H.B. 4 did not render moot. Likewise, Part III.A surveys the common-law FNC doctrine, which H.B. 4 did not alter as much as it expanded in its reach and applicability. These surveys should suffice; a more detailed analysis of historical[3] multi-plaintiff practice in Texas courts and a more detailed analysis of the sizeable case law behind the FNC doctrine are beyond this paper's scope and, moreover, are not necessary for understanding H.B. 4's changes.

First focusing on section 15.003, this paper explains that much of the published case law under the former section 15.003—which remains relevant and authoritative under the new section 15.003—aptly concerns whether plaintiffs in joinder or intervention cases can either independently establish proper venue in the county of suit or otherwise prove their rights to join together under section 15.003.[4] This still-relevant case law constitutes a major focus of this paper's discussion of section 15.003 in general; the law is discussed throughout Parts II.E, II.F, II.G, II.H, II.M, and II.P.

The former section 15.003 limited the interlocutory appeals of trial court orders permitting or denying joinder or intervention of multiple plaintiffs. Consequently, much of the published law on the former section 15.003 concerned whether a trial court's order was reviewable on appeal; oftentimes, trial courts signed orders that were *not* appealable under section 15.003's limited interlocutory-appeal provision. Part II.I discusses the former section 15.003's limitations on interlocutory appeals.

Part II.J explores how H.B. 4 significantly broadened the scope of interlocutory appeals from trial court rulings on joinder, intervention, or—now—*general venue issues* in multi-plaintiff cases. This significant broadening of the scope of interlocutory appeals could place more demanding standards for establishing proper venue on plaintiffs in multi-plaintiff cases. It also could impose the burden of numerous interlocutory appeals on various Texas courts of appeals. Moreover, the new multidistrict litigation ("MDL") procedure may cause many

3. Here, "historical" means before 1995—that is, before the first version of section 15.003 began governing multi-plaintiff practice. *See* TEX. CIV. PRAC. & REM. CODE. ANN. § 15.003 (Vernon Supp. 2004–2005).

4. Justice Craig Enoch in several ways led the Texas Supreme Court's thinking on venue and multi-plaintiff practice under section 15.003. *See generally* Am. Home Prods. Corp. v. Clark, 38 S.W.3d 92, 97–98 (Tex. 2000) (Enoch, J., concurring) (noting that "potential mischief is abundant" when a trial court addresses proper joinder); Surgitek v. Abel, 997 S.W.2d 598, 602–03 (Tex. 1999) (discussing the plaintiff's burden of proof in establishing venue); *In re* Masonite Corp., 997 S.W.2d 194, 196–98 (Tex. 1999) (holding a trial court's decision to grant a plaintiffs' transfer of venue is a clear abuse of discretion, requiring interlocutory appeal).

interlocutory appeals under section 15.003 to flow through just a few courts of appeals—those that happen to have an active MDL trial court within their jurisdiction. The new section 15.003 also increases—by one—the types of parties that can make interlocutory appeals, as discussed in Part II.K, and the new statute stays litigation pending an interlocutory appeal, as discussed in Part II.N.

Shifting next to FNC, the paper explains that H.B. 4 purports to change FNC practice only for cases involving personal injuries, wrongful deaths and asbestos-related injuries. Specifically, H.B. 4 incorporates—for U.S.-resident plaintiffs pursuing personal-injury or wrongful-death claims *and* for such plaintiffs who are *not* U.S. residents—a uniform, common-law type FNC analysis under a new subsection 71.051(b) of the Civil Practice and Remedies Code. Also, by eliminating section 71.052 of the code, H.B. 4 effectively makes the same common-law type FNC analysis applicable to asbestos-injury cases. A reader of this paper can skip to the chase and learn exactly how H.B 4 makes these FNC-related changes by reading Parts III.B and III.C. A better understanding, however, of H.B. 4's FNC-related changes will result from first reading Part III.A, which gives a brief overview of the common-law FNC doctrine—which is now more reaching in its applicability because of H.B. 4.[5]

5. The common-law FNC doctrine—with section 71.051's statutory overlay solely for personal-injury and wrongful-death cases—should now apply generally to *all* Texas civil cases. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(h)(2) (Vernon Supp. 2004–2005) (defining "plaintiff" as "a party seeking recovery of damages for personal injury or wrongful death"); *see also* Sarieddine v. Moussa, 820 S.W.2d 837, 841 (Tex. App.—Dallas 1991, writ denied) (stating "we hold that Texas continues to recognize the validity of the theory of forum non conveniens for all cases except those involving personal injury or death"). Since 1993, the Texas Legislature has made the FNC doctrine applicable to cases involving personal injury and death by way of section 71.051 of the Civil Practice and Remedies Code. *See infra* Part III.B; TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(h)(2) (defining "plaintiff"); *see also In re* Smith Barney, Inc., 975 S.W.2d 593, 598 (Tex. 1998) (overruling *H. Rouw Co. v. Railway Express Agency*, which had made FNC inapplicable to cases involving corporations incorporated in Texas and/or having authority to conduct business in Texas).

Therefore, as of September 1, 2003, FNC seems to have general applicability to all civil cases in Texas. The author of this paper could find only one reported case questioning the common-law FNC's general applicability to civil cases. *See* Tex. Comm'r of Ins. v. Aetna Cas. & Sur. Co., 858 S.W.2d 521, 526–28 (Tex. App.—Austin 1993), *vacated*, 866 S.W.2d 606 (Tex. 1993). But this *Aetna* antitrust case should have limited precedential value. *See infra* Part III.A.8.

II. H.B. 4'S IMPACT ON MULTI-PLAINTIFF JOINDER AND INTERVENTION

A. *The Origin of Section 15.003 of the Civil Practice and Remedies Code*

Section 15.003 of the Civil Practice and Remedies Code came into existence in 1995,[6] when the Texas Legislature answered the Texas Supreme Court's implicit request in *Polaris Investment Management Corp. v. Abascal*[7] for procedural mechanisms that (1) prevent plaintiffs who cannot establish proper venue in a county of suit from joining or intervening with plaintiffs who can and (2) provide appellate review of trial court decisions permitting or denying joinder or intervention in such cases.[8] The Texas legislation made the old section 15.003 effective as of August 28, 1995, and section 15.003 in its old or new form has governed venue issues in multi-plaintiff cases for all cases filed after that date.

B. *The Text of the New Section 15.003*

Following is the current section 15.003, as amended by H.B. 4:

> (a) In a suit in which there is more than one plaintiff, whether the plaintiffs are included by joinder, by intervention, because the lawsuit was begun by more than one plaintiff, or otherwise, each plaintiff must, independently of every other plaintiff, establish proper venue. If a plaintiff cannot independently establish proper venue, that plaintiff's part of the suit, including all of that plaintiff's claims and causes of action, must be transferred to a county of proper venue or dismissed, as is appropriate, unless that plaintiff, independently of every other plaintiff, establishes that:
>
> (1) joinder of that plaintiff or intervention in the suit by that plaintiff is proper under the Texas Rules of Civil Procedure;
>
> (2) maintaining venue as to that plaintiff in the county of suit does not unfairly prejudice another party to the suit;
>
> (3) there is an essential need to have that plaintiff's claim tried in the county in which the suit is pending; and
>
> (4) the county in which the suit is pending is a fair and convenient venue for that plaintiff and all persons against whom the suit is brought.
>
> (b) An interlocutory appeal may be taken of a trial court's determination under Subsection (a) that:
>
> (1) a plaintiff did or did not independently establish proper venue; or
>
> (2) a plaintiff that did not independently establish proper venue did or did not establish the items prescribed by Subsections (a)(1)–(4)
>
> (c) An interlocutory appeal permitted by Subsection (b) must be taken to the court of appeals district in which the trial court is located under the procedures established for interlocutory appeals. The appeal may be taken by a party that is affected by the trial court's determination under Subsection (a). The court of appeals shall:
>
> (1) determine whether the trial court's order is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evidence standard; and
>
> (2) render judgment not later than the 120th day after the date the appeal is perfected.
>
> (d) An interlocutory appeal under Subsection (b) has the effect of staying the commencement of trial in the trial court pending resolution of the appeal.[9]

6. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 ("Added by Acts 1995, 74th Leg., ch. 138, § 1, eff. Aug. 28, 1995. Amended by Acts 2003, 78th Leg., ch. 204, § 3.03, eff. Sept. 1, 2003.").

7. 892 S.W.2d 860, 862 (Tex. 1995).

8. *See* Jani-King of Memphis, Inc. v. Yates, 965 S.W.2d 665, 667 n.3 (Tex. App.—Houston [14th Dist.] 1998, no pet.) The court explained the legislative history behind then-current section 15.003:

> Senator John Montford, author of the Senate bill that eventually became § 15.003, explained one of the purposes of the legislation was "to eliminate the practice of finding a plaintiff with legitimate venue and then piggybacking 100s [sic] of plaintiffs onto a lawsuit [when they] do not have proper venue or any legitimate connection with the county."

Id.

9. TEX. CIV. PRAC. & REM. CODE ANN. § 15.003. The current statute replaces the following language:

> (a) In a suit where more than one plaintiff is joined each plaintiff must, independently of any other plaintiff, establish proper venue. Any person who is unable to establish proper venue may not join or maintain venue for the suit as a plaintiff unless the person, independently of any other plaintiff, establishes that:
>
> (1) joinder or intervention in the suit is proper under the Texas Rules of Civil Procedure;
>
> (2) maintaining venue in the county of suit does not unfairly prejudice another party to the suit;
>
> (3) there is an essential need to have the person's claim tried in the county in which the suit is pending; and

C. *Procedural Mechanism for Challenging Venue and Joinder or Intervention Under the New Section 15.003*

1. *For Joinder Cases*

Defendants should challenge multiple plaintiffs' joinder by way of motions to transfer venue under Rule of Civil Procedure 86(1), which are due "prior to or concurrently with any other plea, pleading or motion except a special appearance motion."[10] In such motions, defendants should argue that each plaintiff cannot either independently establish proper venue in the county of suit or satisfy the subsection 15.003(a) elements. The motions should seek either (a) to transfer to a county of proper venue those plaintiffs who cannot make the requisite showing under section 15.003 or (b) to dismiss them if no such county exists. Also, to avoid any waiver arguments, the motions to transfer venue should urge *all* arguments available to defendants under Rule of Civil Procedure 86(1) (motion to transfer venue), Rule of Civil Procedure 40 (permissive joinder of parties), and section 15.063 of the Civil Practice and Remedies Code (transfer of venue), as well as section 15.003 of the Civil Practice and Remedies Code (multiple plaintiffs and intervening plaintiffs).

For subsequent plaintiffs, joined by amended petition, defendants should make the same sort of motions to transfer venue, which must be filed before or concurrently with defendants' responsive pleadings to the amended petition joining the new plaintiffs.

If appropriate, defendants can move to sever certain plaintiffs from the case, thereby transferring some to another county and leaving others in the county of original suit, pursuant to Rules of Civil Procedure 41 and 89.[11] For instance, if some of the plaintiffs can establish proper venue in the county of original suit, but others cannot do so and cannot satisfy the subsection 15.003(a) elements, then defendants can move to sever and then transfer to another county the latter plaintiffs.

2. *For Intervention Cases*

Defendants should challenge plaintiff interventions by way of motions to strike intervention.[12] Moreover, defendants should challenge plaintiff interventions by way of motions to transfer venue under Rule of Civil Procedure 86(1), which are due "prior to or concurrently with any other plea, pleading or motion except a special appearance motion."[13] In such motions, defendants should argue that the intervening plaintiffs cannot either independently establish proper venue in the county of suit or satisfy the subsection 15.003(a) elements. Also, to avoid any waiver arguments, the motions to transfer venue should urge *all* arguments available to defendants under Rule of Civil Procedure 86(1) (motion to transfer venue), Rule of Civil Procedure 60 (intervention), and section 15.063 of the Civil Practice and Remedies Code (transfer of venue), as well as section 15.003 of the Civil Practice and Remedies Code (multiple plaintiffs

(4) the county in which the suit is pending is a fair and convenient venue for the person seeking to join in or maintain venue for the suit and the persons against whom the suit is brought.

(b) A person may not intervene or join in a pending suit as a plaintiff unless the person, independently of any other plaintiff:

(1) establishes proper venue for the county in which the suit is pending; or

(2) satisfies the requirements of Subdivisions (1) through (4) of Subsection (a).

(c) Any person seeking intervention or joinder, who is unable to independently establish proper venue, or a party opposing intervention or joinder of such a person may contest the decision of the trial court allowing or denying intervention or joinder by taking an interlocutory appeal to the court of appeals district in which the trial court is located under the procedures established for interlocutory appeals. The appeal must be perfected not later than the 20th day after the date the trial court signs the order denying or allowing the intervention or joinder. The court of appeals shall:

(1) determine whether the joinder or intervention is proper based on an independent determination from the record and not under either an abuse of discretion or substantial evidence standard; and

(2) render its decision not later than the 120th day after the date the appeal is perfected by the complaining party.

Act of May 8, 1995, 74th Leg., R.S., ch. 137, 1995 Tex. Gen. Laws 978, 979 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 15.003) [hereinafter Former section 15.003].

10. TEX. R. CIV. P. 86(1); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 15.063 (requiring a motion be "filed and served concurrently with or before the filing of the answer").

11. *See In re* Masonite Corp., 997 S.W.2d 194, 197 (Tex. 1999) (directing the transfer of severed plaintiffs to the county of proper venue); *see also* Guar. Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 658 (Tex. 1990) (providing the standards for severing joined claims).

12. *See* TEX. R. CIV. P. 60 ("Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party."); *see also Guar. Fed. Sav. Bank*, 793 S.W.2d at 657 ("An intervenor is not required to secure the court's permission to intervene; the party who opposed the intervention has the burden to challenge it by a motion to strike.").

13. TEX. R. CIV. P. 86(1); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 15.063 (Vernon 2002) (requiring a motion be "filed and served concurrently with or before the filing of the answer").