MULTI-PLAINTIFF CASES UNDER SECTION 15.003: PREPARING, LITIGATING AND CHALLENGING PLAINTIFF JOINDER AND PLAINTIFF INTERVENTION, AND H.B. 4'S AMENDMENTS TO SECTION 15.003

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CHAPTER 1.2

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I. INTRODUCTION

Section 15.003 of the Civil Practice and Remedies Code came into existence in 1995, when the Texas Legislature answered the Texas Supreme Court's implicit request in *Polaris Investment Management Corp. v. Abascal*, 892 S.W.2d 860, 862 (Tex. 1995) (per curiam), 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/intervention in such cases. *See generally Jani-King of Memphis, Inc. v. Yates*, 965 S.W.2d 665, 667 n.3 (Tex. App. – Houston [14th Dist.] 1998, no pet.) (explaining the legislature history behind § 15.003).

The former § 15.003 contained several limitations on appellate review by interlocutory appeal of trial court orders permitting or denying joinder/intervention of plaintiffs. Consequently, much of the published law on the former § 15.003 concerned whether a trial court's order was reviewable on appeal; oftentimes, trial courts signed orders that were *not* appealable under § 15.003's limited interlocutory-appeal provision. Much of the published case law – which remains effective under the new § 15.003 – aptly concerns how 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 § 15.003.[1]

H.B. 4 has made several significant changes to practice under § 15.003. First and foremost, H.B. 4 significantly broadens the scope of interlocutory appeals from trial court orders affecting venue, joinder and/or intervention in multi-plaintiff cases. The new statute also cleans up a few irregularities caused by the former statute's wording.

Below is a survey of the new § 15.003 provisions. When helpful, this Paper will discuss the former § 15.003 provisions, as well as case law construing and applying such provisions, in order to bring insights into the new § 15.003 provisions.

II. THE TEXT OF THE NEW § 15.003.

Below are H.B. 4's amendments to § 15.003, with bracketed and underlined text showing the former § 15.003:

> (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.
>
> [(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
>
> (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.]

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[1] Justice Craig Enoch in several ways lead the Texas Supreme Court's thinking on venue and multi-plaintiff practice under § 15.003. A practitioner making or facing a § 15.003 challenge should read closely Justice Enoch's judicious majority opinion in *Surgitek v. Abel*, 997 S.W.2d 598 (Tex. 1999), concurrence in *American Home Products Corp. v. Clark*, 38 S.W.3d 92 (Tex. 2000), and majority opinion in *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1999) (orig. proceeding).

(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)

[(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) 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.

[(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.]

(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.

(Throughout this Paper, the new § 15.003 will have the citation: § 15.003 (new statute), whereas the former § 15.003 will have the citation: § 15.003 (former statute).)

III. PROCEDURAL MECHANISM FOR CHALLENGING VENUE AND JOINDER OR INTERVENTION UNDER THE NEW § 15.003.

A. 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." TEX. R. CIV. P. 86(1). *See also* TEX. CIV. PRAC. & REM. CODE § 15.063. In such motions, defendants should argue that each plaintiff cannot either independently establish proper venue in the county of suit or satisfy the § 15.003(a)(1)-(4) elements. The motions should seek either (a) to transfer to a county of proper venue those plaintiffs who cannot make the requisite showing under § 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), 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. *See generally Guaranty Fed. Savs. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990) (providing the standards for severing joined claims). 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 § 15.003(a)(1)-(4) elements, then defendants can move to sever and then transfer to another county the latter plaintiffs.

B. For Intervention Cases:

Defendants should challenge plaintiff interventions by way of motions to strike intervention. *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."); *Guaranty Federal*, 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." (citation omitted)).

Also, 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." TEX. R. CIV. P. 86(1). *See also* TEX. CIV. PRAC. & REM. CODE § 15.063. In such motions, defendants should argue that the intervening plaintiffs cannot either independently establish proper venue in the county of suit or satisfy the § 15.003(a)(1)-(4) 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), 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).

> ***PRACTICE POINTER*** **For either joinder or intervention cases, defendants should file timely motions to transfer venue that 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) or Rule of Civil Procedure 60 (intervention), 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). In joinder cases, defendants should consider using a motion to sever (*see* TRCPs 41 and 89) and transfer to county of proper venue, if appropriate.**

IV. INDEPENDENTLY ESTABLISHING VENUE.

Under § 15.003, *each* plaintiff in *any* case involving *more than one* plaintiff must "independently of every other plaintiff, establish proper venue," *see* § 15.003(a) (new statute), or satisfy the four elements under § 15.003(a)(1)-(4).

According to past case law on the former § 15.003, each plaintiff typically attempts to establish venue for himself/herself by looking to the general rule for venue, § 15.002(a)(1)-(4) of the Civil Practice and Remedies Code ("CPRC"). Plaintiffs certainly may attempt to establish proper venue for themselves by looking to the general mandatory venue provisions and permissive venue provisions, Subchapters B and C of Chapter 15 to the CPRC, respectively, or mandatory and permissive venue provisions existing outside Chapter 15.

If a plaintiff cannot independently establish venue, that plaintiff must satisfy the four elements of § 15.003(a)(1)-(4). An interesting question would arise if *none* of the plaintiffs could establish proper venue, but all or some of them could satisfy the four elements – that is, can plaintiffs who are able to satisfy the § 15.003(a)(1)-(4) elements keep venue, even though *none* of them is able to establish proper venue? The legislative history behind and structure of § 15.003(a) suppose that at least one plaintiff can establish proper venue. Nonetheless, § 15.003(a)'s express language does not forbid a suit involving multiple plaintiffs who can satisfy § 15.003(a)(1)-(4)'s four elements, but who cannot independently establish proper venue.

> ***PRACTICE POINTER*** **In any multi-plaintiff case, before filing each plaintiff should be ready either to establish proper venue in the county of suit, independently of any other plaintiff, or to satisfy the § 15.003(a)(1)-(4) elements. Collecting the requisite affidavits and documents – before filing – is the best practice, because under TRCP 87(1) plaintiffs might get only 15 days to respond to § 15.003 challenges that accompany motions to transfer venue.**

V. EVEN "ORIGINAL PLAINTIFFS" ARE SUBJECT TO § 15.003'S REQUIREMENTS.

One Texas Court of Appeals held under the former § 15.003 that original plaintiffs to a multi-plaintiff case were not "joining plaintiffs" and, therefore, were not subject to § 15.003's requirements to satisfy the § 15.003(a) elements in the event that they could not establish venue independently of other plaintiffs. *Bristol-Myers Squibb Co. v. Goldston*, 983 S.W.2d 369, 374-375 (Tex. App. – Fort Worth 1998, *pet dism'd by agr.*) Consequently, even if the trial court had *erroneously* concluded that such original plaintiffs had established venue,[2] the defendant could not challenge their ability to satisfy the § 15.003(a)(1)-(4) elements by interlocutory appeal. *Id.* The appellate

[2] For discussion on why an appellate court would not have jurisdiction over this issue in an interlocutory appeal under the former § 15.003, refer to section X below.

court reached the right conclusion, in light of the former § 15.003's *strict* confinements on interlocutory appeals.

The new § 15.003(a)'s first sentence clarifies that *any* plaintiff in a multi-plaintiff case is subject to § 15.003's requirements. That is, any plaintiff in a multi-plaintiff case must either establish proper venue or satisfy the § 15.003(a)(1)-(4) elements, and the ability of each plaintiff to do so is subject to interlocutory appeal. Therefore, courts cannot make distinctions based on whether a plaintiff is "original" or "subsequently joined" or "intervening" – and thereby avoid appellate review for original plaintiffs.

VI. PROVING THE FOUR ELEMENTS UNDER § 15.003(A)(1)-(4).

A plaintiff who cannot independently establish proper venue must satisfy – that is, bear the burdens of proof and persuasion on – § 15.003(a)(1)-(4)'s four elements in order to maintain the purported joinder or intervention. Little published case law exists on the first, second and fourth elements under § 15.003(a)(1)-(4). Substantial case law – mostly bad for plaintiffs – exists on the third element, the "essential need" element. The next section of this Paper focuses on the third element, because it alone typically determines whether a plaintiff can satisfy § 15.003(a)(1)-(4)'s elements.

A. First Element:

The plaintiffs seeking to establish joinder under § 15.003(a)(1) must establish permissive joinder under Rule of Civil Procedure 40. *Smith v. Adair*, 96 S.W.3d 700, 705 (Tex. App. – Texarkana 2003, pet. denied). Alternatively, such plaintiffs must establish necessary-party joinder under Rule of Civil Procedure 39.

In *Blalock Prescription Ctr., Inc. v. Lopez-Guerra*, 986 S.W.2d 658, 663-64 (Tex. App. – Corpus Christi 1998, no pet.), the Corpus Christi Court of Appeals, while construing § 15.003(a)(1), construed Rule 40 as follows:

> . . . The Texas [permissive joinder] rule is equivalent to the federal rule, and extensive federal caselaw applies the "logical relationship" test in determining if joinder is proper. When considering whether a counterclaim is compulsory, Texas courts have applied the "logical relationship" test to determine if a claim arises out of the same transaction or occurrence. Under this test, a transaction is flexible, comprehending a series of many occurrences logically related to one another. To arise from the same transaction, *at least some of the facts must be relevant to both claims*.
>
> Texas courts have also addressed the question of "same transaction or occurrence" in the context of consolidation. To consolidate cases, a trial court must determine whether the actions *relate to substantially the same transaction, occurrence, subject matter, or question*, and whether they are *so related that evidence presented will be material, relevant, and admissible in each case*. Although cases may involve common issues of law, if they each stem from distinct factual scenarios that would tend to confuse or prejudice the jury, consolidation may not be proper. [Citations omitted and emphasis added.]

As for determining whether a plaintiff is "necessary" under Rule 39, the Texas Supreme Court has explained that "there is no arbitrary standard or precise formula for determining whether a particular person falls within [Rule 39's] provisions." *Cooper v. Texas Gulf Indus.*, 513 S.W.2d 200, 204 (Tex. 1974). However, the Court has advised trial courts to consider "the extent to which an absent party may be prejudiced [if not allowed to join], the extent to which protective provisions may be made in the judgment, and whether in equity and good conscience the action should proceed or be dismissed [in the absence of the party]." *Id.* at 204 (quoting from *Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102, 88 S. Ct. 733 (1968)). Also, these "factors mentioned . . . which a judge may consider are not exclusive." *Id.*

The plaintiffs seeking to intervene under § 15.003(a)(1) may intervene pursuant to Rule of Civil Procedure 60. *Guaranty Federal Savings Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990), provides the following standards for plaintiff intervention under Rule 60:

> [U]nder Rule 60, a person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof. The interest asserted by the intervenor may be legal or equitable. Although the trial court has broad discretion in determining whether an intervention should be stricken, it is an abuse of discretion to strike a plea in intervention if (1) the intervenor meets the above test, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor's interest. [Citations omitted.]

Little case law is likely ever to arise under this first element of § 15.003(a); if the plaintiffs seeking joinder/intervention barely satisfy the Rule 40, Rule 39 or 60 standards, they are highly unlikely to satisfy the "essential need" element (discussed in section VII below).

B. Second Element:

The plaintiffs seeking to establish joinder or intervention under § 15.003 must prove that the proposed joinder/intervention does not unfairly prejudice another party. Case law has not prescribed a certain standard or formula for this second element; therefore, what constitutes unfair prejudice to the party opposing joinder/intervention will develop on a case by case basis.

For instance, in *Teco-Westinghouse Motor Co. v. Gonzalez*, 54 S.W.3d 910 (Tex. App. – Corpus Christi 2001, no pet.), the Corpus Christi Court of Appeals held that a defendant would not suffer unfair prejudice from an out-of-county plaintiff joining with an in-county plaintiff. The Court reasoned that the defendant already had to defend the lawsuit by the in-county plaintiff – which involved the same claims and same witnesses as the lawsuit by the out-of-county plaintiff. *Id*. at 915. And, in *Blalock Prescription Ctr., Inc. v. Lopez-Guerra*, 986 S.W.2d 658 (Tex. App. – Corpus Christi 1998, no pet.), the Corpus Christi Court held that affidavit testimony that the proposed joinder "will not work an injustice" to a corporate defendant, as well as testimony on the relative costs of airfares, car rentals, and lodging for trial in the county of original suit and an alternate county, "failed to establish that no defendant would be unfairly prejudiced if venue was maintained in Hidalgo County." *Id*. at 664.

C. Fourth Element:

The plaintiffs seeking to establish joinder or intervention under § 15.003 must prove that "the county [of original suit] is a fair and convenient venue for that plaintiff and all persons against whom the suit is brought." As with the second element, case law has not prescribed a certain standard or formula for this fourth element; therefore, what constitutes unfair prejudice to the party opposing joinder/intervention will develop on a case by case basis. However, the proof relating to the second element may serve as the proof for the fourth element. One Texas appellate court has consistently "held that evidence establishing absence of unfair prejudice will generally establish fairness and convenience." *Blalock Prescription Ctr., Inc. v. Lopez-Guerra*, 986 S.W.2d 658, 665 (Tex. App. – Corpus Christi 1998, no pet.).

VII. § 15.003(A)'S THIRD ELEMENT: GRAPPLING WITH *SURGITEK*'S "ESSENTIAL NEED" STANDARD.

In *Surgitek v. Abel*, 997 S.W.2d 598, 604 (Tex. 1999), the Texas Supreme Court construed the third element – § 15.003(a)(3)'s "essential need" element – to impose a "very high" burden on plaintiffs. The *Surgitek* Court required a plaintiff to show that the proposed joinder/intervention is "essential" – that is, "indispensably necessary" and "necessary, such that one cannot do without it." *Id.* Moreover, a plaintiff must show that the proposed joinder/intervention is essential as defined "*in the county in which the suit is pending*" and *not* merely essential as defined apart from that county, or essential as defined in some general way. *Id.*

Applying the *Surgitek* "essential need" standard, courts of appeals have generally held that plaintiffs *cannot* satisfy the "essential need" element.

- For instance, a purported intervening plaintiff's claims to need "the use of a common investigator" with the original plaintiff, to need to "pool[] resources" with the original plaintiff, to litigate "common facts and issues" with the original plaintiff, and to work with the original plaintiff regarding "the location of witnesses across the country" failed to satisfy the "essential need" element in *Ramirez v. Collier, Shannon, Scott, PLLC*, – S.W.3d – , 2003 WL 22146385 at *8 (Tex. App. – Houston [1st Dist.] Sept. 11, 2003, no pet. h.). The *Ramirez* Court held that "the desire to pool resources against common defendants and experts is not enough to establish essential need." *Id*. at *8. *See also Surgitek*, 997 S.W.2d at 604 (holding that "'the need [among plaintiffs seeking joinder] to pool resources against common experts and issues' . . . is not enough" to show "essential need"); *Teco-Westinghouse Motor Co. v. Gonzalez*, 54 S.W.3d 910, 917 (Tex. App. – Corpus Christi 2001, no pet.) ("We acknowledge that the need to pool resources is insufficient to establish essential need." (citations omitted)); *American Home Prods. v. Bernal*, 5 S.W.3d 344, 348 (Tex. App. – Corpus Christi 1999, no pet.) (same).

- A purported joining plaintiff's sworn testimony that "his lawyers [would] have to do twice the work and the division of labor would cause him to lose the full attention of his attorneys"; "his expert witnesses would have to duplicate their efforts"; "his witnesses live[d] in [the] County [of original suit]"; and "if this case [was] tried in two separate venues, the first to finish might cause collateral estoppel to apply" did not show "essential need"