

**Convenience, Comity, Fairness and Efficiency:  
Changes of Forum**

**Karen S. Precella  
Courtney S. Biery  
Haynes and Boone, LLP  
Fort Worth, Texas**

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**KAREN S. PRECELLA**  
HAYNES AND BOONE, LLP  
201 Main Street, Suite 2200, Fort Worth, Texas 76102  
Telephone: 817.347.6600 Fax: 817.347.6650  
E-mail: karen.precella@haynesboone.com

**EMPLOYMENT:**

Haynes and Boone, LLP, Appellate Section, Fort Worth, Texas, 2001-Present, 1991-1996.

Jose, Henry, Brantley & Keltner, LLP, Appellate, Fort Worth, Texas, 1996-2001.

Adjunct Professor, Legal Research and Writing, Texas Wesleyan University School of Law, 1998-1999, 2000-2001.

**BOARD CERTIFIED:**

Civil Appellate Law, Texas Board of Legal Specialization (1996-Present).

**PROFESSIONAL ASSOCIATIONS:**

Admitted—Texas state courts; United States Supreme Court; United States Court of Appeals, Fifth Circuit; United States District Court, Northern District of Texas.

Member—State Bar of Texas, Appellate Section; American Bar Association, Council of Appellate Lawyers; Bar Association of the Fifth Federal Circuit; Tarrant County Bar Association, Appellate Section; College of the State Bar of Texas; Texas Bar Foundation; Eldon B. Mahon Inn of Court (served Associate and Barrister terms); Tarrant County Bar Foundation.

Committees—Chair, State Bar Pattern Jury Charge Committee, PJC IV/Business, Consumer, and Employment (Chair 2006-2009, Vice Chair, 2003-2006, Member, 2001-2009); Co-Chair, Rules and Statutes Subcommittee, Appellate Committee, ABA Litigation Section (2006-Present); Member, State Bar Pattern Jury Charge, Oversight Committee (2003-2005); Director, Tarrant County Bar Association (2007-2008); Chair/Vice-Chair/Secretary, Appellate Section, Tarrant County Bar Association (2004-2007); Chair-Elect, Bylaws Committee, Tarrant County Bar Association (2008-2009); CLE/Brown Bag Seminar Committee, Tarrant County Bar Association (Chair, 2004-2007, Member 2001-2009); Member, Judicial Evaluation Committee, Tarrant County Bar Association (2000-2007); Member, Tarrant County Commissioner's Court, Law Library Committee.

**HONORS:**

Member, American Law Institute (2007-Present).

Best Lawyers in America (2005-2009, annually).

Top 50 Texas Female Lawyers, *Texas Monthly* (2004, 2005, 2008).

Texas Super Lawyer, *Texas Monthly* (2003-2008, annually).

Tarrant County Top Appellate Attorneys, *Fort Worth, Texas, Magazine* (2002-2008, annually).

Recognized for Contributions to CLE, Tarrant County Bar Association (2006).

Best Series of Articles in Local Bar Publication Award, State Bar of Texas (2007)

**EDUCATION:**

Southern Methodist University, J.D., with honors, May 1991.

University of Texas at Arlington, B.S., highest honors, 1979, M.B.A., 1983.

**COURTNEY S. BIERY**  
HAYNES AND BOONE, LLP  
201 Main Street, Suite 2200  
Fort Worth, Texas 76102  
Telephone: 817.347.6600  
Fax: 817.347.6650  
E-mail: courtney.biery@haynesboone.com

**EMPLOYMENT:**

Haynes and Boone, LLP, Business Litigation Section, Fort Worth, Texas, 2003-Present.

**PROFESSIONAL ASSOCIATIONS:**

Admitted—Texas state courts; United States Supreme Court; United States Court of Appeals, Fifth Circuit; United States District Courts, Eastern District of Texas, Northern District of Texas, Southern District of Texas, Western District of Texas.

Member—State Bar of Texas; American Bar Association; Tarrant County Bar Association; Tarrant County Young Lawyers' Association; Board of Directors, Tarrant County Affiliate of Susan G. Komen for the Cure; Eldon B. Mahon Inn of Court, Associate (2004-2006).

**HONORS:**

Rising Star, Texas Super Lawyers Rising Star Edition, *Texas Monthly* (2006-2008, annually).

**EDUCATION:**

Villanova University School of Law, J.D., May 2003.

University of Delaware, B.S., cum laude, degree with distinction, May 2000.

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## Convenience, Comity, Fairness and Efficiency: Changes of Forum

### I. Introduction.

This paper explores several common law and statutory options when faced with a forum that is “inconvenient,” prejudicial or duplicative. The context and standards vary for each option. And the result may differ as well – with relief including dismissal, abatement, stay or transfer. The paper does not provide an exhaustive analysis of each vehicle. Rather, the primary principles and authority for each option are set forth in a basic discussion.

### II. Convenience.

#### A. Non-Texas forum more convenient.

The “forum non conveniens” doctrine allows a court to decline to exercise its jurisdiction when the plaintiff’s choice of forum is inconvenient for witnesses or poses an undue hardship on the defendants. A common example that triggers the doctrine involves accident cases in which an out-of-state plaintiff files a petition in the defendant’s home state but the witnesses and treating physicians reside in the state where the accident occurred. Upon proper motion and proof, a court may dismiss the case in favor of the more convenient forum. First developed at common law, the legislature has now codified the doctrine to dismiss or stay for personal injury and wrongful death cases.

#### 1. Origination of “forum non conveniens.”

Though the term “forum non conveniens” was not used in Texas until 1949, Texas courts began applying the principles underlying the doctrine in the late 1800s. Recognizing the power of a court to refuse to exercise jurisdiction, the Supreme Court of Texas noted in dicta that “where the parties were non-residents and the cause of action originated beyond the limits of the state, [the] facts would justify the court in refusing to entertain jurisdiction.” *Morris v. Missouri Pac. Ry.*, 14 S.W. 228, 230 (Tex. 1890). The Court also took into consideration docket backlog as an important factor bearing on the exercise of jurisdiction “where the plaintiff chooses the jurisdiction as a matter of convenience, and not of necessity.” *Mexican National Railroad v. Jackson*, 33 S.W. 857, 862 (Tex. 1896). The

Texas Supreme Court cited these cases to support the conclusion that the doctrine of forum non conveniens pre-dated a statutory enactment of a corollary provision in 1913. *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 678 (Tex. 1990).

#### 2. Recognition of common law doctrine.

In 1947, the United States Supreme Court soundly confirmed that a state court may apply the doctrine of forum non conveniens in appropriate cases. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947) (citing 1935 case). The Court noted that the “principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized under the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts....But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment” as a plaintiff may be tempted “to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.” *Id.* at 507.

The Court held that the district court did not abuse its discretion in dismissing the suit based on forum non conveniens and set forth factors for the application of forum non conveniens. In that case, a Virginia resident brought an action in federal district court in New York City against a Pennsylvania corporation to recover damages for destruction of plaintiff’s warehouse and its contents in Virginia. *Id.* at 501. The suit’s only connection to New York was that the defendant was qualified to do business there. *Id.* at 503.

The court presupposed that an adequate alternative forum would have jurisdiction over the case. *Id.* at 507. Next, looking to the interests of the litigants, the Court considered the following **private interests**:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of

willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

*Id.* at 508. The Court also considered factors of **public interests:**

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

*Id.* at 508-09.<sup>1</sup> Finding that the private and public interests weighed in favor of dismissing

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<sup>1</sup> “Generally, the public interest factors to be considered are administrative difficulties related to court congestion, burdening the people of a community with jury duty when they have no relation to the litigation, local interest in having localized controversies decided at home, and trying a case in the forum that is at home with the law that governs the case. The private interest considerations generally

the suit, the Court found that the district court properly remitted the plaintiff to the courts of his own community. *Id.* at 512.

A few years earlier, a Texas court had reached a contrary conclusion, at least in the context of a party authorized to do business in Texas. In *H. Rouw Co. v. Railway Express Agency*, 154 S.W.2d 143 (Tex. Civ. App.—El Paso 1941, writ ref’d), the trial court granted the motion to dismiss based on forum non conveniens of a Delaware corporation authorized to do business in Texas. On appeal, the court reversed and erroneously concluded that domestic corporations and foreign corporations authorized to do business in Texas had an absolute right to sue in Texas, regardless of whether the suit had any connection to Texas. *Id.* at 145. The Texas Supreme Court refused writ and thus adopted the opinion as its own. *Id.*

Years later, the Texas Supreme Court embraced the *Gulf Oil* factors without mentioning *Rouw*. In *Flaiz v. Moore*, 359 S.W.2d 872 (Tex. 1962), the supreme court held that the trial court erred in sustaining respondent’s second plea to the jurisdiction, which claimed Texas courts should not undertake to enforce South Dakota comparative negligence law. *Id.* at 876. Because the respondent failed to attack the trial court’s denial of his first plea on the absence of party contacts with the forum, the Court did not reach the applicability of forum non conveniens. *Id.* at 875. Almost thirty years later, the Texas Supreme Court discussed the history of the doctrine without mentioning *Rouw*. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990),

A few years later, the Texas Supreme Court confronted a case that required that the *Rouw/Gulf Oil* conflict be resolved. See *In re Smith Barney, Inc.*, 975 S.W.2d 593 (Tex. 1998). In that case, after being sued in Texas, Smith Barney, a Delaware corporation with its

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are considered to be the ease of access to proof, the availability and cost of compulsory process, the possibility of viewing the premises, if appropriate, and other practical problems that make trial easy, expeditious, and inexpensive.” *In Gen. Elec. Co.*, 2008 Tex. LEXIS 1002, 52 Tex. Sup. Ct. J. 167 (Dec. 5, 2008) (citing *Gulf Oil*).

principal place of business in New York, moved to dismiss the case based on forum non conveniens. *Id.* at 594-95. The suit’s only connection to Texas was the formation of one of the plaintiffs there. *Id.* Relying on *Rouw*, the trial court denied Smith Barney’s motion to dismiss and the appellate court denied mandamus. *Id.* at 595. In light of *Rouw*, the Texas Supreme Court found that the trial court did not abuse its discretion but overruled *Rouw* and urged the trial court to reconsider. *Id.* at 598.

The Court noted that “[i]t simply makes no sense to allow foreign corporations an absolute right to sue non-residents in Texas courts when individuals have never been accorded the same right. It is fundamentally unfair to burden the people of Texas with the cost of provided courts to hear cases that have no significant connection with the State.” *Id.* at 597-98.

### **3. Statutory forum non conveniens for death and personal injury cases.**

#### **a. Section 71.031 construed as abolishing forum non conveniens.**

In 1990, the Texas Supreme Court addressed the issue of whether a statutory enactment precluded dismissal of a personal injury claim based on forum non conveniens. See *Alfaro*, 786 S.W.2d at 675. Section 71.031 of the Civil Practice and Remedies Code, a recodification of article 4678 (originally enacted in 1913), provided that “an action for damages for the death or personal injury...may be enforced in the courts of this state although the act...takes place in a foreign state or country if...” TEX. CIV. PRAC. & REM. CODE § 71.031 (emphasis added). The issue in *Alfaro* thus was whether the language “may be enforced” permits a trial court to relinquish jurisdiction under the forum non conveniens doctrine.

The plurality held that “the legislature has statutorily abolished the doctrine of forum non conveniens in suits brought under section 71.031 of the Texas Civil Practice and Remedies Code.” *Id.* at 679. In his dissent, Justice Hecht noted: “The rule of forum non conveniens, properly used, does not prohibit a court from entertaining a case it ought to hear. Rather, it protects courts from being compelled to hear cases when doing so would be fundamentally unfair to the

defendants or the public or both.” *Id.* at 707. The dissent recognized that forum non conveniens arises when a court may be a technically proper but nevertheless should decline to exercise its jurisdiction.

#### **b. Section 71.051 enacts statutory forum non conveniens for personal injury and death cases.**

In response to *Alfaro*, in 1993, the legislature enacted section 71.051 of the Civil Practice and Remedies Code, a statutory adoption of the forum non conveniens doctrine for actions for personal injury or wrongful death. Section 71.051 provided the procedural framework and substantive elements that must be met for a defendant to obtain a dismissal based on forum non conveniens. See Appendix A, at 3.

#### **c. Section 71.051 amended in 1997 to address overcrowding by non-resident plaintiffs.**

The statute was amended in 1997 to “address concerns that Texas courts were becoming crowded by personal injury suits brought by non-resident plaintiffs.” *Tullis v. Georgia-Pacific Corp.*, 45 S.W.3d 118, 123 (Tex. App.—Fort Worth 2000, no pet.). Plaintiffs with claims time-barred in other states were using the Texas courts to revive the claims. The 1997 amendments provided that courts may stay or dismiss if the moving party proved by a preponderance of the evidence certain factors derived from *Gulf Oil*. TEX. CIV. PRAC. & REM. CODE § 71.051 (1997).<sup>2</sup>

#### **d. Section 71.051 amended such a court shall dismiss and shall consider the Gulf Oil factors.**

In 2003, the forum non conveniens statute was again amended to eliminate the preponderance of the evidence burden on the movant. TEX. CIV. PRAC. & REM. CODE § 71.051 (2003). Instead, the statute provided that the trial court “may consider” the *Gulf Oil* factors. *Id.* The forum non conveniens statute

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<sup>2</sup> This paper does not address the addition, amendment or repealing of provisions that govern asbestos-related cases.

was last amended in 2005 to *require* trial courts to consider the *Gulf Oil* factors and to dismiss when “the statutory factors weigh in favor of the [suit] being more properly heard in a forum outside Texas.” TEX. CIV. PRAC. & REM. CODE § 71.051 (2005). The 2005 amendments also changed a factor. The provision had precluded dismissal or stay upon a prima facie showing of an act or omission that caused an injury or death that occurred in Texas. The amendment changed the factor to a consideration of the extent to which the injury or death resulted from acts that occurred in Texas. *Id.* This modification was intended to give a trial court more discretion to stay or dismiss a case with little connection to Texas.

The current statute provides in part:

(b) If a court of this state, on written motion of a party, finds that ***in the interest of justice and for the convenience of the parties*** a claim or action to which this section applies would be more properly heard in a forum outside this state, the court ***shall decline to exercise jurisdiction*** under the doctrine of forum non conveniens and ***shall stay or dismiss*** the claim or action. In determining whether to grant a motion to stay or dismiss an action under the doctrine of forum non conveniens, ***the court shall consider*** whether:

(1) an alternate forum exists in which the claim or action may be tried;

(2) ***the alternate forum provides an adequate remedy;***

(3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;

(4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff’s claim;

(5) ***the balance of the private interests of the parties and the public interest of the state*** predominate in favor of the claim or action being brought in an alternate forum, ***which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state;*** and

(6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

*Id.* (emphasis added). Thus, a movant need not prove each factor weighs in favor of dismissal. *In re Gen. Elec. Co.*, 52 Tex. Sup. Ct. J. 167 (Dec. 5, 2008). “To the extent evidence is necessary to support the positions of the parties, the trial court must base its findings and decisions on the weight of the evidence, and is certainly entitled to take into account the presence or absence of evidence as to some issue or position of a party.” *Id.*; *In re Williams Gas Processing Co.*, 2008 Tex. App. LEXIS 701 (Tex. App.—Houston [14th Dist.] Jan. 31, 2008, orig. proceeding) (memo op.) (noting some evidence required to support balancing in favor of transfer). A trial court that grants a motion to stay or dismiss must also set forth specific findings of fact and conclusions of law.” TEX. CIV. PRAC. & REM. CODE § 71.051(f).

Moreover, section 71.051(c) allows courts to set “terms and conditions for staying or dismissing a claim or action” as the interests of justice may require. In other words, courts can condition dismissal on the alternative forum’s acceptance of jurisdiction. *In re Pirelli*, 247 S.W3d at 678. If the alternative forum does not accept jurisdiction, the suit would return to the dismissing court automatically. “Return jurisdiction” clauses such as these are commonly used in federal court and avoid the harsh result of dismissal outside the limitations period. *Id.* Finally, section 71.051 allows for a stay in addition to a dismissal. Thus, if a court stays a suit rather than dismiss it, the original court retains jurisdiction should the alternative court reject the suit. *Id.* at 71.051(c).

**e. Analysis under statutory doctrine.**

The supreme court held in one recent case that the common law doctrine guides the analysis of the “interests of justice” under statutory doctrine, looking to the adequacy of the alternate forum, the private interests and the public interests. *See In re Pirelli*, 247 S.W.3d at 677, citing *Gulf Oil*, 330 U.S. at 507 (conurrence reached same conclusion but on the basis of the enumerated code factors). More recently, the court analyzed a statutory motion using the enumerated factors. *Gen. Elec.*, 52 Tex. Sup. Ct. J. at 167.

The first two factors assess the adequacy of the alternate forum. TEX. CIV. PRAC. & REM. CODE § 71.051 (2005). Courts give little weight to the argument that the substantive law of an alternative forum may be less favorable to the plaintiff. *See Berg v. AMF, Inc.*, 29 S.W.3d 212, 216-17 (Tex. App.—Houston [14th Dist.] 2000, no pet.) “An alternative forum is adequate if the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court.” *Pirelli*, 247 S.W.3d at 678, citing *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 681 (5th Cir. 2003) (internal citations omitted). A forum is adequate if it is one where the claim may be tried and the forum provides an adequate remedy. *Gen. Elec.*, 52 Tex. Sup. Ct. J. at 167.

The next factors relate to whether litigating in Texas does a substantial injustice to defendants and whether the alternate forum has jurisdiction over all defendants. *Id.* Next, the private and public interests balancing of *Gulf Oil* is incorporated into the analysis followed by an assessment of what duplication would result. *Id.* Thus, a motion should follow the specific requirements but incorporate the common law *Gulf Oil* analysis as well.

**f. Denial of statutory forum non conveniens motion generally reviewable by mandamus.**

Because there is no adequate remedy by appeal, a trial court’s denial of a motion to dismiss based on forum non conveniens is generally reviewable by mandamus. *In re Gen. Elec. Co.*, Tex. Sup. Ct. J.167 (Dec. 5, 2008); *In*

*re Pirelli*, 247 S.W.3d 670, 679 (Tex. 2007). The trial court’s ruling is subject to review for clear abuse of discretion. *Pirelli*, 247 S.W.3d at 676.

**4. Common law forum non conveniens for cases other than personal injury and death.**

Some courts have recognized that *Alfaro* addressed personal injury and wrongful death cases only. *See, e.g., Smith Barney*, 975 S.W.2d at 597-98 (*Alfaro* limited the doctrine); *In re Williams Gas Processing Co.*, 2008 Tex. App. LEXIS 701 (Tex. App.—Houston [14th Dist.] Jan. 31, 2008, orig. proceeding) (memo op.) (section 71.051(e) not applicable to breach of gas processing agreement case); *In re GLA*, 195 S.W.3d 787 (Tex. App.—Beaumont 2005, pet. denied) (applying common law doctrine to family law case); *Jones v. Raytheon Aircraft Servs., Inc.*, 120 S.W.3d 40, 44 n.2 (Tex. App.—San Antonio 2003, pet. denied) (*Alfaro* held doctrine not applicable to wrongful death cases and statute applicable to personal injury and wrongful death cases); *Direct Color Servs., Inc. v. Eastman Kodak Co.*, 929 S.W.2d 558 (Tex. App.—Tyler 1996, writ denied) (codification of doctrine in cases involving personal injury and wrongful death); *Autin v. Daniel Bruce Marine, Inc.*, 862 S.W.2d 208 (Tex. App.—Beaumont 1993, no writ) (*Alfaro* abolished doctrine as to death and personal injury actions); *Sarieddine v. Moussa*, 820 S.W.2d 837, 839 (Tex. App.—Dallas 1991, writ denied) (*Alfaro* limited to personal and wrongful death cases).

Other courts simply say that *Alfaro* abolished the common law doctrine of forum non conveniens or that the doctrine has been codified. Those cases, however, involve (at least predominantly) personal injury cases. *See Pirelli*, 247 S.W.3d at 670 (wrongful death suit arising from auto accident in Mexico); *Sewell v. Owens-Corning Fiberglass Corp.*, 2000 Tex. App. LEXIS 5955 (Tex. App.—Dallas Aug. 31, 2000, no pet.) (asbestos case noting *Alfaro* abolished common law doctrine of forum non conveniens). *But cf. Acadian Geophysical Servs., Inc. v. Cameron*, 119 S.W.3d 290 (Tex. App.—Waco 2003, no pet.) (reviewing order refusing to transfer based on “statutory” forum

non conveniens in a breach of employee profit-sharing case).

As noted above, *Alfaro* construed a statutory provision related to personal injury and wrongful death. *See Alfaro*, 786 S.W.2d at 675. As such, the common law doctrine of forum non conveniens appears to survive for dismissing cases not involving personal injury (alongside the statutory personal injury/wrongful death provision). *See generally* 5 William V. Dorsaneo, III, TEXAS LITIGATION GUIDE § 61.30 (2008).

## **B. Texas forum more convenient: statutory transfers.**

### **1. Texas law.**

When faced with a need to transfer between Texas counties (rather than a dismissal or stay in favor of a forum other than Texas), the Civil Practice and Remedies Code provides a statutory transfer mechanism. Section 15.002(b) of the Texas venue statute (added in 1995) provides as follows:

*(b) For the convenience of the parties and witnesses and in the interest of justice, a court may transfer an action from a county of proper venue under this subchapter or Subchapter C to any other county of proper venue on motion of a defendant filed and served concurrently with or before the filing of the answer, where the court finds:*

(1) maintenance of the action in the county of suit would work an *injustice to the movant* considering the movant's economic and personal hardship;

(2) the *balance of interests* of all the parties predominates in favor of the action being brought in the other county; and

(3) the transfer of the action would not work an injustice to any other party.

(c) A court's ruling or decision to grant or deny a transfer under Subsection (b) is *not grounds*

*for appeal or mandamus and is not reversible error.*

TEX. CIV. PRAC. & REM. CODE § 15.002. This provision, like the doctrine of forum non conveniens, recognizes that a plaintiff normally chooses venue but that factors of convenience may dictate that another Texas forum should hear the matter upon motion of the defendant. *Wallace v. Dimon*, 2006 Tex. App. LEXIS 2262 (Tex. App.—Fort Worth March 23, 2006, pet. denied) (15.002(b) not applicable to transfer to county of another state); *Chirboga v. State Farm Mut. Auto. Ins. Co.*, 96 S.W.3d 673, 683 (Tex. App.—Austin 2003, no pet.) (only applicable on motion of defendant).

When a motion is based in whole or in part on section 15.002(b), an order on that motion that is granted based on that section or that does not state its ground is not reviewable by an appellate court. *See Garza v. Garcia*, 137 S.W.3d 36, 37 (Tex. 2004); *Jackson v. Neal*, 2009 Tex. App. LEXIS 370 (Tex. App.—Corpus Christi Jan. 22, 2009, no pet. h.) (memo op.). Adding the words “granted for convenience” may make a venue order beyond review. *Garza*, 137 S.W.3d at 39. And, when section 15.002(b) is sufficiently invoked, “it is irrelevant whether a transfer for convenience is supported by any record evidence.” *Trend Offset Printing Servs., Inc. v. Collin County Community College Dist.*, 249 S.W.3d 429 (Tex. 2008).

The absolute discretion afforded the trial court results in few opinions analyzing what makes such a motion successful. The provisions, however, mirror the forum non conveniens principles. As such, the *Gulf Oil* factors outlined above should provide guidance for such motions.

### **2. Federal law.**

Federal law contains a similar provision. The general venue statute controls a plaintiff's choice of venue. 28 U.S.C. § 1391. But defendants can move to transfer venue to another district for convenience:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any

28 U.S.C. § 1404(a).

Section 1404(a) allows courts to transfer a case to another federal venue “more convenient to the parties, the witnesses, and the trial of the case.” *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 313 (5th Cir. 2008) (en banc), *petition for cert. filed*, (U.S. Dec. 9, 2008) (No. 08-754). Because a district court must transfer to another district court and cannot dismiss a case under § 1404(a), transfers under the federal venue transfer statute require a lesser showing of inconvenience than state forum non conveniens law. *Id.* Nonetheless, the movant must show “good cause” by clearly demonstrating that a transfer is for the convenience of parties and witnesses, in the interest of justice. *Id.* at 315. If a movant cannot show good cause, the plaintiff’s choice of forum is respected. *Id.*

Federal courts have adopted the *Gulf Oil* factors when making a transfer decision based on convenience. *Id.* at 314 n.9. In *Volkswagen*, the Fifth Circuit reviewed the district court’s denial of a section 1404(a) motion filed by a defendant car manufacturer to transfer venue from the Marshall Division of the Eastern District of Texas to the Dallas Division of the Northern District of Texas where the car accident had occurred. *Id.* at 307. Considering the *Gulf Oil* factors, the majority of a 10-7 en banc Fifth Circuit panel decided (1) the refusal to transfer was reviewable by mandamus and (2) the public and private interests required transfer to Dallas Division:

- All of the documents and physical evidence relating to the accident are located in the Dallas Division, as is the collision site. *Id.* at 316.
- [T]he non-party witnesses located in the city where the collision occurred are outside the Eastern District’s subpoena power for deposition” and “any trial subpoenas for these witnesses to travel more than 100 miles would be subject to motions to quash. *Id.*
- [I]t would be more convenient for [the witnesses] if this case is tried in the Dallas Division, as the Marshall

Division is 155 miles from Dallas. Witnesses not only suffer monetary costs, but also the personal costs associated with being away from work, family, and community. *Id.* at 317.

- [T]he accident occurred in the Dallas Division, the witnesses to the accident live and are employed in the Dallas Division, Dallas police and paramedics responded and took action, the Volkswagen Golf was purchased in Dallas County, the wreckage and all other evidence are located in Dallas County, two of the three plaintiffs live in the Dallas Division (the third lives in Kansas), not one of the plaintiffs has ever lived in the Marshall Division, and the third-party defendant lives in the Dallas Division. In short, there is no relevant factual connection to the Marshall Division. *Id.* at 317-18.

The Fifth Circuit held that “the district court’s provided rationale that the citizens of Marshall have an interest in this product liability case because the product is available in Marshall...eviscerates the public interest...factor” analysis and “could apply virtually to any judicial district or division in the United States.” *Id.* at 318. Because of the “extensive connections” between the Dallas Division and the parties, witnesses and facts of the case, the Fifth Circuit granted mandamus and directed transfer to the Dallas Division. *Volkswagen*, 545 F.3d at 319.

Unlike the Texas provision, which precludes review of a decision to grant or deny a request to transfer for convenience reasons, the federal provision contains no such shield. 28 U.S.C. § 1404(a). As such, a strong disagreement arose between the majority and dissent over the availability to review the transfer decision by mandamus. The dissent would have left the case with the Marshall division – where the plaintiffs resided and where the residents had an interest in the product defects allegedly at issue. *Id.* at 322-23.

The district court that refused the transfer has become known in recent years as the “rocket docket” for patent infringement cases. As such, commentators have questioned whether the

*Volkswagen* opinion will impact the filing of such cases in or transfer of cases from that division. See, e.g., *Patent Bar Eyes Venue Transfers*, Litigation News, American Bar Association (Winter 2009), at 4. Regardless, the Fifth Circuit may have signaled some willingness to expand its interlocutory review of incidental rulings when necessary to reach rulings of the courts in its district that evade “meaningful” review on appeal.

### III. Comity.

#### A. Dominant jurisdiction between counties.

When suit would be proper in more than one Texas county, the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other courts. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988) (citing *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974); *V.D. Anderson Co. v. Young*, 128 Tex. 631, 636, 101 S.W.2d 798, 800 (1937); *Cleveland v. Ward*, 116 Tex. 1, 19, 285 S.W. 1063, 1070 (1926)); see also *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005) (dominant jurisdiction inapplicable if venue not proper in both suits). “As long as the forum is a proper one, it is the plaintiff’s privilege to choose the forum.” *Wyatt*, 760 S.W.2d at 248 (citing *Mutual Sav. & Loan Ass’n v. Earnest*, 582 S.W.2d 534, 535 (Tex. Civ. App.—Texarkana 1979, no writ). “Defendants are simply not at liberty to decline to do battle in the forum chosen by the plaintiff.” *Id.*

Dominant jurisdiction “is based on the principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues.” *Id.* Although less frequently triggered, the doctrine also may apply to appellate courts. *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 139 (Tex. 1995); see also *Capenhart v. State*, S.W.3d 814, 815 (Tex. App.—Texarkana 2008, no pet.).

#### 1. Abatement.

The Texas Supreme Court has “at times indicated that the second-filed suit should be dismissed, see *Mower v. Boyer*, 811 S.W.2d 560, 563 n.2 (Tex. 1991); *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974); *Cleveland v. Ward*, 116 Tex. 1, 285 S.W. 1063 (Tex. 1926), while on at least one occasion [it] indicated that

it should merely be abated pending disposition of the first suit. See *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988).” *Miles*, 914 S.W.2d at 139.<sup>3</sup>

More recently, the court noted: “Case law as well as rule amendments have contributed to the trend away from the common-law plea to the jurisdiction. For example, we have held that a complaint based on dominant jurisdiction in another court must be raised by plea in abatement in the second court, or it is waived. Again, though this complaint could be characterized as a plea to the jurisdiction, a more specific motion and procedure has rendered the common-law term obsolete.” *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 240 (Tex. 2004) (citing *Wyatt* and *Mower*); see also *Perry v. Del Rio*, 66 S.W.3d 239, 258 (Tex. 2001) (“the court with the first case that was ripe when filed has dominant jurisdiction and should proceed immediately to trial, and the other cases should be abated”).

Thus, recent opinions conclude: “A motion to abate is the proper procedure for asserting a claim of dominant jurisdiction.” *French v. Gilbert*, 2008 Tex. App. LEXIS 8884 (Tex. App.—Houston [1st Dist.] Nov. 26, 2008, no pet.) (memo op., citing *Tovias v. Wildwood Props. P’ship, L.P.*, 67 S.W.3d 527, 529 (Tex. App.—Houston [1st Dist.] 2002, no pet.)). The abatement pleading generally includes supporting proof, although an evidentiary hearing may sometimes be held. *French*, 2008

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<sup>3</sup> This multi-forum posture also may raise the issue of an anti-suit injunction – an issue beyond the scope of this paper. In short, the Texas Supreme Court observed in *Golden Rule Insurance Co. v. Harper* that an “anti-suit injunction is appropriate in four instances. These were: 1) to address a threat to the court’s jurisdiction; 2) to prevent the evasion of important public policy; 3) to prevent a multiplicity of suits; or 4) to protect a party from vexatious or harassing litigation.” 925 S.W.2d 649, 651 (Tex. 1996). Moreover, the party seeking the injunction must show that “a clear equity demands” the injunction. *Id.* In these circumstances, “Texas state courts have the power to restrain persons from proceeding with suits filed in other courts of this state.” *Fleming v. Ahumada*, 193 S.W.3d 704, 713 (Tex. App.—Corpus Christi 2006, no pet.) (citing *Gannon v. Payne*, 706 S.W.3d 304, 305 (Tex. 1986)).

Tex. App. LEXIS 8884 (noting no reporter’s record or mention of evidentiary hearing and conducting review based on evidence accompanying the motion).

Similarly, “[i]n the appellate context, [the court held] abatement is the more appropriate remedy. [It] will protect the second appellant’s right to proceed in its chosen forum if at any time it becomes apparent that the appellant filed the first appeal merely as a sham, with no intent to prosecute the appeal. If for some reason the second appellant desires a transfer to protect a point of error that was not properly raised as a cross-point in the first appeal, the second appellant may make an appropriate motion to [the supreme court].” *Miles*, 914 S.W.2d at 139.

## 2. Exceptions.

“There are three exceptions to the rule of *Cleveland v. Ward* that the court where suit is first filed acquires dominant jurisdiction: (1) [c]onduct by a party that estops him from asserting prior active jurisdiction; (2) lack of persons to be joined if feasible, or the power to bring them before the court; and (3) lack of intent to prosecute the first lawsuit.” *Wyatt*, 760 S.W.2d at 248.<sup>4</sup> Additionally, an untimely plea may result in waiver. *Id.*

Thus, “[t]he first-filed rule admits of exceptions when its justifications fail, as when the first court does not have the full matter before it, or when conferring dominant jurisdiction on the first court will delay or even prevent a prompt and full adjudication, or when the race to the courthouse was unfairly run.” *Perry*, 66 S.W.3d at 258. But the granting of a plea in abatement in a later-filed suit is “mandatory” when “an inherent interrelation of the subject matter exists in two pending

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<sup>4</sup> “[T]he mere fact that a second court is the first to rule on a plea in abatement does not estop the proponent of the plea from continuing to assert the dominant jurisdiction of the court where the action was first filed, nor does it vest the second court with dominant jurisdiction. To acquire dominant jurisdiction under the estoppel exception, the second court must also resolve the issue of estoppel against the proponent of the plea in its ruling.” *Henry v. McMichael (In re Henry)*, 2008 Tex. App. LEXIS 7334, 11-12 (Tex. App. Houston [1st Dist.], Oct. 2, 2008, no pet. h.) (citing *Curtis*, 511 S.W.2d at 267).

lawsuits.” *Wyatt*, 760 S.W.2d at 247. It is “not required that the exact issues and all the parties be included in the first action before the second is filed, provided that the claim in the first suit may be amended to bring in all necessary and proper parties and issues.” *Id.* “In determining whether an inherent interrelationship exists, courts should be guided by the rule governing persons to be joined if feasible and the compulsory counterclaim rule.” *Id.* Even if not inherently interrelated, a court may grant an abatement for comity and convenience reasons. *Dolenz*, 620 S.W.2d at 575.

## 3. Mandamus review.

The Texas Supreme Court has held that mandamus relief is appropriate when one court interferes with another court’s jurisdiction, including dominant jurisdiction. *In re Swepi, L.P.*, 85 S.W.3d 800, 809 (Tex. 2002) (citing and quoting “*Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974) (“If the second court...attempts to interfere with the prior action, this court has the power to act by mandamus or other appropriate writ to settle the conflict of jurisdiction.”); *Perry v. Del Rio*, 66 S.W.3d 239, 258 (Tex. 2001) (mandamus relief appropriate when one court actively interfered with the dominant jurisdiction of another court by setting its case for trial at the same date and time); *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985) (mandamus relief was proper in *Curtis* because one court actively interfered with the jurisdiction of the other court by enjoining the court from proceeding”).

## B. Interstate comity.

“Texas should extend comity by recognizing the laws and judicial decisions of other states unless (1) the foreign state declines to extend comity to Texas or sister states under the same or similar circumstances, or (2) the foreign statute produces a result in violation of Texas’ own legitimate public policy. *Hawsey*, 934 S.W.2d at 726 (citing *K.D.F.*, 878 S.W.2d at 594-95).” *N.M. v. Caudle*, 108 S.W.3d 319, 321-322 (Tex. App.—Tyler 2002, pet. denied).

Comity should stay or dismiss an action when necessary to protect interstate comity. Permitting an action to go forward, particularly when the first-filed suit is pending in a proper

forum, creates the risk of inconsistent rulings, wastes judicial resources, and enables forum-shopping. See *In re AutoNation, Inc.*, 228 S.W.3d 663, 667-68 (Tex. 2007), noting –

Our federal system benefits from a measure of state-to-state comity, which, while not a constitutional obligation, is ‘a principle of mutual convenience whereby one state or jurisdiction will give effect to the laws and judicial decisions of another.’ When a matter is first filed in another state, the general rule is that Texas courts stay the later-filed proceeding pending adjudication of the first suit.

*Id.* at 670.

The responsibility of determining the constitutionality of another state’s laws generally rests with the other state. *Caudle*, 108 S.W.3d at 321-322. Thus, the risk of damage to interstate comity is particularly acute when the other state’s law applies and resolution may impact that state’s policies. See *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 686 (Tex. 2006) (Texas courts should abstain from determining issues that impact the policy of another state); *AutoNation*, 228 S.W.3d at 670.

When these risks exist, a litigant may ask that the court “honor[] the principles of interstate comity,” defer to the concurrent action, and dismiss or stay the Texas action. *AutoNation*, 228 S.W.3d at 670.

#### IV. Fair Trial.

Section 15.063 of the Civil Practice and Remedies Code and Rules of Civil Procedure 257-261 address another forum problem that may arise. Even if venue is proper, if a fair and impartial trial cannot be had or if other sufficient cause necessitates it, a case may be removed from the plaintiff’s chosen venue. In such cases, upon motion and proof, transfer to another court, usually in the same or adjoining district, may or shall be required.

#### A. Section 15.063 impartial trial transfer.

A plaintiff chooses venue by filing suit in a county. See *In re Team Rocket*, 256 S.W.3d 257, 259 (Tex. 2008). Section 15.063 of the Civil Practice and Remedies Code provides for a motion to transfer venue to be filed concurrently with or before an answer when venue is improper, an impartial trial is not possible or on agreement of the parties. TEX. CIV. PRAC. & REM. CODE § 15.063;<sup>5</sup> TEX. R. CIV. P. 85-89. Few cases address the substance of a motion under this provision, perhaps because the issue arises later in the context of a Rule 257 motion.

#### B. Rule 257 change of venue for cause.

##### 1. When Rule 257 applies.

Rule 257 provides as follows:

A change of venue may be granted in civil causes upon motion of either party, *supported by his own affidavit and the affidavit of at least three credible persons, residents of the county* in which the suit is pending, for any following cause:

- (a) That there exists in the county where the suit is pending so great a prejudice against him that he cannot obtain a fair and impartial trial.

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<sup>5</sup> Section 15.063 provides as follows:

The court, on motion filed and served concurrently with or before the filing of the answer, shall transfer an action to another county of proper venue if:

- (1) the county in which the action is pending is not a proper county as provided by this chapter;
- (2) an impartial trial cannot be had in the county in which the action is pending; or
- (3) written consent of the parties to transfer to any other county is filed at any time.

TEX. CIV. PRAC. & REM. CODE § 15.063.

(b) That there is a combination against him instigated by influential persons, by reason of which he cannot expect a fair and impartial trial.

(c) That an impartial trial cannot be had in the county where the action is pending.

(d) For other sufficient cause to be determined by the court.

TEX. R. CIV. P. 257 (emphasis added). One court noted that the prejudice need not be related solely to the matter to be tried; rather, under (a) and (c), the issue is whether a fair and impartial trial cannot be had (for any reason). *Palacios v. Ramos*, 2006 Tex. App. LEXIS 1180 (Tex. App.—San Antonio, Feb. 15, 2006, no pet.). Nor is the provision meant to be a defensive mechanism to support maintenance of venue in a county. *See, e.g., Jackson v. Neal*, 2009 Tex. App. LEXIS 370 (Tex. App.—Corpus Christi Jan. 22, 2009, no pet. h.) (memo op.) (Rule 257 language used by plaintiff to argue against transfer of venue under section 15.002).

## 2. Procedural requirements.

Rule 258 provides as follows:

Where such motion to transfer venue is **duly made**, it **shall be granted**, **unless** the credibility of those making such application, or their means of knowledge or the truth of the facts set out in said application are **attacked by the affidavit of a credible person**; when thus attacked, **the issue thus formed shall be tried by the judge**; and the application either granted or refused. **Reasonable discovery** in support of, or in opposition to, the application shall be permitted, and such discovery as is relevant, including deposition testimony on file, may be attached to, or incorporated by reference in, the affidavit of a party, a

witness, or an attorney who has knowledge of such discovery.

TEX. R. CIV. P. 258 (emphasis added).

While the Rule states no deadline for the motion, there may be some point beyond which it will not be considered duly made. *Lone Star Steel Co. v. Scott*, 759 S.W.2d 144, 157-58 (Tex. App.—Texarkana 1988, writ denied) (concurring justice would have found motion untimely made when party announced ready for trial and then filed motion to transfer venue on first day of trial without leave of court).<sup>6</sup>

The procedural requirements of Rules 257 and 258 must be followed strictly. Transfer is mandatory absent a challenge by opposing affidavits. *Lone Star Steel*, 759 S.W.2d at 157-58; *see also TXI Transp. Co. v. Hughes*, 224 S.W.3d 870, 893 (Tex. App.—Fort Worth 2007, pet. granted) (“shall be granted” unless opposing party attacks facts in motion or supporting affidavits). Denial for failure to comply with the procedural requirements is within the trial court’s discretion. *In re E. Tex. Med. Ctr.*, 154 S.W.3d 933 (Tex. App.—Tyler 2005, orig. proceeding). An insufficient number of affidavits or affidavits that fail to provide the affiant’s county of residence could support denial of the motion. *Id.* (although movants filed new affidavits before denial of transfer

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<sup>6</sup> Section 15.063 exists in addition to Rules 257-261. Rule 87(5) expressly provides that a second venue motion will not be heard unless based on “grounds that an impartial trial cannot be had under Rules 257-259.” TEX. R. CIV. P. 87(5). In a concurring opinion, Justice Gonzalez also noted that section 15.063 was not the exclusive circumstance under which transfer for an impartial forum could arise. *Union Carbide Corp. v. Moye*, 798 S.W.2d 792 (Tex. 1990) (Gonzalez, J., concurring). Instead, local prejudice may arise or become evident after the filing of the suit and answer. *Id.* No change has been made to Rules 85 or 257-261 (or 15.063) since the 1985 venue amendments. Moreover, unlike section 15.063, Rule 257 contains grounds other than “impartial trial” as the basis for “removal.” TEX. R. CIV. P. 257. Proper venue determinations and fair and impartial forums thus are separate determinations. *Union Carbide*, 798 S.W.2d 792. As such, the “duly made” provision in Rule 258 should control timing of the motion to transfer venue on grounds set forth in Rule 257.

order signed, court held failure to show judge knew affidavits on file before ruling did not adequately present the issue for review). If the motion is challenged by proper affidavit, the trial court must try the issue and may grant or deny the request. *Id.*

Under the Rule, the motion cannot be heard without allowing the opposing party a reasonable opportunity for discovery. The forty-five day period from Rule 87 may apply. See *City of La Grange v. McBee*, 923 S.W.2d 89 (Tex. App.—Houston [1st Dist.] 1996, writ denied). That may be particularly true given that the local prejudice facts will have not been developed in ordinary discovery.

If denied, such error in refusing to transfer might be subject to a harmless error rule. *Lone Star Steel*, 759 S.W.2d at 157-58 (majority holding harmless error when all panel members denied any bias or prejudice arising from company layoffs, disputes over retirement policies or any other reasons). Cf. *City of Abilene v. Downs*, 367 S.W.2d 153, 155-56 (Tex. 1963). Moreover, one judge's decision of denial indicated consideration was premature until the actual panel was surveyed to determine prejudice, which is not dissimilar to the harmless error analysis. *First Heights Bank v. Gutierrez*, 852 S.W.2d 596, 619-20 (Tex. App.—Corpus Christi 1993, writ denied). Once granted, the decision is reviewed for abuse of discretion. *Palacios*, 2006 Tex. App. LEXIS 1180; see also *TXI*, 224 S.W.3d at 893.

### 3. Proof requirements.

Evidence apparently can be considered at the "trial by judge." See *Palacios*, 2006 Tex. App. LEXIS 1180 (admitting 14 articles from newspapers in county discussing allegations against defendant wherein county auditor made statements regarding issues in suit). And the burden of proof appears to rest on the movant. *TXI*, 224 S.W.3d at 893.

In one case, the opposing party had attacked the credibility of the movant's affiants, but at the hearing, the parties did not object to the judge's decision to rule based on the affidavits. *Hallmark v. Wetz*, 2005 Tex. App. LEXIS 2559 (Tex. App.—San Antonio 2005, no pet.). As a result, there was no evidence confirming the credibility of the witness's

affidavits, and the court of appeals found no abuse of discretion in the denial of the motion. *Id.*

Similarly, affidavits without confirming testimony at the hearing may not suffice to challenge a motion to transfer. *Robertson v. Robertson*, 382 S.W.2d 945 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.). But cf. *Union Carbide Corp. v. Moyer*, 798 S.W.2d 792 (Tex. 1990) (Hecht, J., concurring) (noting that in ordinary venue hearing trial court should be allowed but not required to hear live testimony if necessary to resolve issues before it). Refusal to transfer in the face of conflicting evidence may not show an abuse of discretion. *TXI*, 224 S.W.3d at 894.

### 4. Appropriate districts for removal.

Rule 259 ("To What County") provides as follows:

If the motion under Rule 257 is granted, the cause shall be removed:

- (a) If from a district court, to any county of proper venue in the same or an adjoining district;
- (b) If from a county court, to any adjoining county of proper venue;
- (c) If (a) or (b) are not applicable, to any county of proper venue;
- (d) If a county of proper venue (other than the county of suit) cannot be found, then if from

- (1) A district court, to any county in the same or an adjoining district or to any district where an impartial trial can be had;

- (2) A county court, to any adjoining county or to any district where an impartial trial can be had; but the parties may agree that venue shall be changed to some other county, and the order of the court shall conform to such agreement.

TEX. R. CIV. P. 259 (emphasis added).

If the mandatory provisions of section 15.011 of the Civil Practice and Remedies Code make venue mandatory in the county of suit (i.e., a suit involving a recovery for damages to real

property), Rule 259(a) may not apply because the transfer could not be to a county of proper venue. *See Dorchester Gas Producing Co. v. Harlow Corp.*, 743 S.W.2d 243, 253-54 (Tex. App.—Amarillo 1987, writ dismissed by agreement) (transfer from Gray County to Lubbock County under 259(d) not abuse of discretion because it was county where impartial trial could be had). Instead, according to one court, Rule 259(d)(1) would apply and any transfer would be to any county in the same or adjoining district where an impartial trial could be had. *Id.* That is, the court rejected the movant’s argument on appeal that if an impartial trial could not be had in the mandatory venue county, other venue provisions could create “proper venue.” *Id.* While it is not clear from the formatting, Rule 259(d)(2) allowing the parties agree to some other county should apply whether transfer if from a district or county court. Section 15.063 likewise indicates that parties can agree at any time to transfer to another county. TEX. CIV. PRAC. & REM. CODE § 15.063(3). Finally, objection to transfer to a county other than the one requested or believed proper should be made while there is time for correction. *Dorchester Gas*, 743 S.W.2d at 253-54 (no objection to county of transfer until motion for new trial was too late).

A trial court is given discretion in making the determination as to where to transfer the case. *Dorchester*, 743 S.W.2d at 253-54. Appropriate affidavits should be compiled to establish one or more of the grounds listed in Rule 257 for transfer out a district court to an appropriate court authorized by Rule 259.

## **V. Convenience and Efficiency: Pre-trial Consolidation of Multidistrict Litigation**

### **A. State court.**

The multidistrict litigation rules and statutes provide another mechanism by which parties can address convenience and efficiency issues related to cases brought in multiple forums. TEX. R. JUD. ADMIN. 13.3(a)(1)-(2); *see* TEX. GOV’T CODE §§ 74.162(1)-(2); 74.163(2). Enacted in 2003, sections 74.161-.164 of the Texas Government Code allow for the appointment by the chief justice of the Supreme Court of a judicial panel on multidistrict litigation (consisting of five active court of appeals judges or administrative judges) (the

“Panel”) to transfer civil actions “involving one or more common questions of fact pending in the same or different constitutional courts, county courts at law, probate courts, or district courts to any district court for consolidated or coordinated pretrial proceedings, including summary judgment or other dispositive motions, but not for trial on the merits.” TEX. GOV’T CODE § 74.162.

The Panel may transfer related cases to a single pretrial court if (i) the cases involve a “common question or questions of fact” and (ii) a “transfer would be for the convenience of the parties and witnesses and would promote the just and efficient conduct of the cases.” TEX. R. JUD. ADMIN. 13.3(a)(1)-(2); *see* TEX. GOV’T CODE §§ 74.162(1)-(2); 74.163(2). The purpose of the Rule 13 multidistrict litigation procedure is “to provide a pretrial process that will allow cases with common questions of fact to proceed efficiently toward trial.” *In re Silica Prods. Liability Litig.*, 216 S.W.3d 87, 88 (Tex. M.D.L. Panel 2006) (“*Silica II*”); *In re Vanderbilt Mortgage & Fin., Inc.*, 166 S.W.3d 12, 14 (Tex. M.D.L. Panel 2005). The panel has previously explained that coordinated multidistrict litigation also promotes consistent judicial rulings and fosters agreements between counsel. *In re Silica Prods. Liability Litig.*, 166 S.W.3d 3, 6 (Tex. M.D.L. Panel 2004) (“*Silica I*”).

Rule 13’s common-fact inquiry is “not limited to pure questions of historical fact; it extends to mixed questions of law and fact.” *Id.* (“[T]here are common issues in these cases: discovery, venue and forum non conveniens, the “sophisticated user” doctrine, *Robinson-Havner* challenges to expert testimony, the sufficiency of warnings, and other issues concerning common worksites, product identification, and the validity of the diagnosis and screening process”). The Panel has recognized that common fact issues exist when multiple plaintiffs allege the same factual background to support the same cause of action. *See In re Looper*, No. 06-1010, 2007 Tex. LEXIS 637, at \*2 (Tex. M.D.L. Panel 2007) (oil-and-gas leases involved “near[ly] identical...detailed factual pleadings”); *In re DaimlerChrysler AG CLK430 Litig.*, 216 S.W.3d 81, 82 (Tex. M.D.L. Panel 2006) (common factual allegations supported transfer).

Regardless of the nature of the injury, cases that arise from one common event may involve common issues of fact and be related. *In re Deep S. Crane & Rigging Co.*, No. 08-0725, 2008 Tex. LEXIS 1143, at \*3-4 (Tex. M.D.L. Panel Dec. 9, 2008); *In re Cano Petroleum, Inc.*, No. 07-0593, 2008 Tex. LEXIS 196, at \*1 (Tex. M.D.L. Panel Apr. 2, 2008). That individual plaintiffs suffer different damages will not alone prevent the Panel from granting transfer to a pretrial court. *Id.* “On balance it makes sense to have one judge handle the pretrial phase of [related cases] arising from a common disaster, giving consistent, unified treatment to the common issues and individualized treatment to the issues that are different. To hold otherwise would in effect require separate pretrial treatment of mass disaster cases whenever there is damage to both property and person.” *In re Cano Petroleum, Inc.*, No. 07-0593, 2008 Tex. LEXIS 196, at \*3.

In evaluating the convenience factor, the Panel “seeks to prevent the occurrence of problems in the future.” *Silica I*, 166 S.W.3d at 5. A movant need not prove “that witnesses...have already been inconvenienced.” *Id.* Rather, the Panel “looks ahead and focuses on whether transferring cases to a pretrial judge would serve the convenience of parties and witnesses by preventing inconvenience in the future.” *Id.* When “witnesses and parties...find themselves involved in several related cases,” it is more convenient “to litigate in one pretrial court instead of several.” *Id.*

MDL pretrial case management is designed “to ensure the expeditious resolution of each case and the just and efficient conduct of the litigation as a whole.” TEX. R. JUD. ADMIN. 13.6(c). The pretrial court may “determine whether severance, consolidation, or coordination with other actions is desirable and whether identification of separable triable portions of the case is desirable.” TEX. R. JUD. ADMIN. 13.6(c)(2). Similarly, the pre-trial court will determine matters of joinder, venue and trial preparation and can set aside or modify any ruling of the original court. TEX. R. JUD. ADMIN. 13.6(b). “[O]nce the pretrial proceedings have been completed to such a degree that the purposes of the transfer have been fulfilled or no longer apply,” the pretrial

court may order remand of one or more cases to their original trial court. TEX. R. JUD. ADMIN. 13.7.

#### **B. Federal court.**

The federal courts also have multi-district litigation procedures. Like the state court procedures, those provisions relate to pretrial consolidation with a remand at the “conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.” *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (language of provision did not support pre-trial judge transferring case to himself to conduct trial). Although any detailed discussion of the numerous cases construing these provisions is beyond the scope of this paper, the following sets out the general rules of that process:

#### **§ 1407. Multidistrict litigation**

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, that the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title [28 USCS §§ 291 et seq.]. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by--

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 [28 USCS § 1404] or subsection (f) of this section, the

judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act [15 USCS § 15c].

28 U.S.C.A. § 1407.

## VI. Summary

Several questions may help determine the best approach when faced with forum issues. Issues of waiver – the many variations of which are not all addressed in this paper – may arise with each approach. Thus, care should be taken to ensure that the forum issue is raised timely, in the right manner, and seeks appropriate relief.

***Is it an issue of proper venue?*** Look to the venue rules and statutes to determine whether a motion to transfer venue is appropriate.

***Is it an issue of a more convenient forum outside of Texas?*** If the case involves personal injury or wrongful death, look to the forum non conveniens doctrine codified in section 71.051 to request a dismissal or stay. If other than an injury or death case, consider the common law doctrine of forum nonconveniens to request a dismissal.

***Is it an issue of a more convenient forum within Texas for a single suit?*** In state court, consider section 15.002(b) to request a transfer to another court of proper venue. Consider including, if appropriate, a convenience request in combination with other bases to transfer venue. In federal court, consider section 1404(a) to request a transfer to another district or division where it may have been brought.

***Is it an issue of duplicative suits in multiple forums?*** If in two Texas courts, consider a motion to abate the second-filed suit in favor of the first-filed suit where the court holds dominant jurisdiction. If in Texas and another forum, consider a motion to dismiss or stay based on comity.

***Is it an issue of seeking a fair trial?*** If evident upon filing, consider including section 15.063(2) as a basis in a motion to transfer venue. If the basis for the motion becomes evident after discovery, consider Rules 257-261

to request a transfer to an appropriate venue where a fair trial can be had.

***Is it an issue of inconvenient and duplicative forums in Texas for multiple suits?***

Consider whether the state multidistrict litigation procedures apply and whether pretrial consolidation makes sense. Federal law likewise provides extensive multidistrict litigation procedures codified at 28 U.S.C.A. § 1407.

## APPENDIX A

### TEX. CIV. PRAC. & REM. CODE § 71.051 (2005). FORUM NON CONVENIENS.

(a) Repealed by Acts 2003, 78th Leg., ch. 204, Sec. 3.09.

(b) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action. In determining whether to grant a motion to stay or dismiss an action under the doctrine of forum non conveniens, the court shall consider whether:

- (1) an alternate forum exists in which the claim or action may be tried;
- (2) the alternate forum provides an adequate remedy;
- (3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
- (4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
- (5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and
- (6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

(c) The court may set terms and conditions for staying or dismissing a claim or action under this section as the interests of justice may require, giving due regard to the rights of the parties to the claim or action. If a moving party violates a term or condition of a stay or dismissal, the court shall withdraw the order staying or dismissing the claim or action and proceed as if the order had never been issued. Notwithstanding any other law, the court shall have continuing jurisdiction for purposes of this subsection.

(d) A request for stay or dismissal under this section is timely if it is filed not later than 180 days after the time required for filing a motion to transfer venue of the claim or action. The court may rule on a motion filed under this section only after a hearing with notice to all parties not less than 21 days before the date specified for the hearing. The court shall afford all of the parties ample opportunity to obtain discovery of information relevant to the motion prior to a hearing on a motion under this section. The moving party shall have the responsibility to request and obtain a hearing on such motion at a reasonable time prior to commencement of the trial, and in no case shall the hearing be held less than 30 days prior to trial.

(e) The court may not stay or dismiss a plaintiff's claim under Subsection (b) if the plaintiff is a legal resident of this state. If an action involves both plaintiffs who are legal residents of this state and plaintiffs who are not, the court may not stay or dismiss the action under Subsection (b) if the plaintiffs who are legal residents of this state are properly joined in the action and the action arose out of a single occurrence. The court shall dismiss a claim under Subsection (b) if the court finds by a preponderance of the evidence that a party was joined solely for the purpose of obtaining or maintaining jurisdiction in this state and the party's claim would be more properly heard in a forum outside this state.

(f) A court that grants a motion to stay or dismiss an action under the doctrine of forum non conveniens shall set forth specific findings of fact and conclusions of law.

(g) Any time limit established by this section may be extended by the court at the request of any party for good cause shown.

(h) In this section:

- (1) “Legal resident” means an individual who intends the specified political subdivision to be his permanent residence and who intends to return to the specified political subdivision despite temporary residence elsewhere or despite temporary absences, without regard to the individual’s country of citizenship or national origin. The term does not include an individual who adopts a residence in the specified political subdivision in bad faith for purposes of avoiding the application of this section.
- (2) “Plaintiff” means a party seeking recovery of damages for personal injury or wrongful death. In a cause of action in which a party seeks recovery of damages for personal injury to or the wrongful death of another person, “plaintiff” includes both that other person and the party seeking such recovery. The term does not include a counterclaimant, cross-claimant, or third-party plaintiff or a person who is assigned a cause of action for personal injury, or who accepts an appointment as a personal representative in a wrongful death action, in bad faith for purposes of affecting in any way the application of this section.

(i) This section applies to actions for personal injury or wrongful death. This section shall govern the courts of this state in determining issues under the doctrine of forum non conveniens in the actions to which it applies, notwithstanding Section 71.031(a) or any other law.

**TEX. CIV. PRAC. & REM. CODE § 71.051 (1997). FORUM NON CONVENIENS.**

- (a) With respect to a claimant who is not a legal resident of the United States, if a court of this state, on written motion of a party, finds that in the interest of justice an action to which this section applies would be more properly heard in a forum outside this state, the court may decline to exercise jurisdiction under the doctrine of forum non conveniens and may stay or dismiss the action in whole or in part on any conditions that may be just.
- (b) With respect to a claimant who is a legal resident of the United States, on written motion of a party, an action to which this section applies may be stayed or dismissed in whole or in part under the doctrine of forum non conveniens if the party seeking to stay or dismiss the action proves by a preponderance of the evidence that:
  - (1) a forum outside this state is a more appropriate forum that:
    - (A) offers a remedy for the causes of action brought by a party to which this section applies;
    - (B) as a result of the submission of the parties or otherwise, can exercise jurisdiction over all parties and claims properly joined in the action by the claimant; and
    - (C) would provide a place of trial that is fair, reasonable, and convenient to the parties;
  - (2) maintenance of the action in the courts of this state would work a substantial injustice to the moving party and the balance of the private interests of all the parties and the public interest of the state predominates in favor of the action being brought in the other forum; and
  - (3) the stay or dismissal would not, in reasonable probability, result in unreasonable duplication or proliferation of litigation.
- (f) A court may not stay or dismiss an action pursuant to Subsection (b):
  - \*\*\*
  - (2) if a party opposing the motion under Subsection (b) alleges and makes a prima facie showing that an act or omission that was a proximate or producing cause of the injury or death occurred in this state...
    - \*\*\*
  - (5) in an action in which it is alleged that harm was caused by exposure to asbestos fibers.