SUBJECT: Expanding *forum non conveniens* dismissal of out-of-state lawsuits

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 6 ayes — Gray, Hilbert, Bosse, Goodman, Nixon, Zbranek

0 nays

3 absent — Alvarado, Dutton, Roman

SENATE VOTE: On final passage, March 18 — 27-4 (Barrientos, Gallegos, Luna, Truan)

WITNESSES: For — Henry Garrard, Pittsburgh Corning Corporation; David Peeples; Shannon Ratliff, Ralph Wayne, Texas Civil Justice League; Luke Ashley, John Martin, Texas Association of Defense Counsel; Cathy Golden, Greater Dallas Chamber; Robert Howden, National Federation of Independent Business; Robert Kamm, Texas Association of Business and Chambers of Commerce; Michael White, Greater Houston Partnership

Against — Steve Bresnen, Mike Slack, Texas Trial Lawyers Association; Tom Smith, Public Citizen; Dan Lambe, Texas Citizen Action, Barbara Rosenberg; Robert Beatty

On — Anne Ashby; Scott Link

BACKGROUND: The doctrine of *forum non conveniens* allows civil courts to dismiss a lawsuit brought by a citizen of another state or country when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another jurisdiction. In 1993, SB 2 by Montford, et al., enacted by the 73rd Legislature as TEX. CIV. PRAC. & REM. CODE § 71.051, reinstated the doctrine of *forum non conveniens* in Texas after that doctrine had been held inapplicable to personal injury and death cases by the Texas Supreme Court in *Dow Chemical v. Alfaro*, 786 S.W.2d 674 (Tex. 1990).

The *Alfaro* case involved 82 Costa Rican farm workers who sued because they were required to handle pesticides allegedly manufactured by Dow Chemical and Shell Oil. The Supreme Court found that a Texas state district

court could not refuse to hear the case because the Legislature had expressly authorized that all civil suits based on personal injury or death may be tried in Texas no matter who the parties were or where the injury occurred. The 1993 law permits a Texas court to decline to hear the case of a claimant who is not a legal resident of the United States on grounds of *forum non conveniens* "on any conditions that may be just."

To dismiss claims brought by a citizen of another state, however, the court must still make several findings, specified in sec. 71.051(b), and the defendant must agree to numerous conditions, including the waiver of any defense of statute of limitations in the new jurisdiction. Additionally, sec. 71.051(b) does not allow the application of *forum non conveniens* to cases brought under the Federal Employers' Liability Act, the Federal Safety Appliance Act and the Federal Boiler Inspection Act; cases involving air travel originating from or destined for Texas; and cases alleging injury due to asbestos.

DIGEST:

CSSB 220 would allow more permissive application of the doctrine of *forum non conveniens* to suits brought in Texas by residents of other states and would allow the dismissal of suits currently pending in Texas brought by residents of other states or countries alleging injury due to asbestos. CSSB 220 would take immediate effect if finally passed by a two-thirds record vote of the membership of each house.

Personal Injury or Death Claims

CSSB 220 would allow a court to use the doctrine of *forum non conveniens* to dismiss individual claims as well as entire actions brought by residents of other states and other countries. However, the claims that could be dismissed or stayed by a court would include only those claims brought by a plaintiff.

In order to dismiss a claim brought by a resident of another state, the party seeking to dismiss or stay the claim would be required to show:

- an alternative forum existed in which the claim could be tried;
- the alternative forum provided an adequate remedy;

- maintenance of the claim in Texas would work a substantial injustice to the party seeking to dismiss the claim;
- the alternative forum could exercise jurisdiction over the claim;
- the balance of interests, both of the parties and of the state, favored that the action be brought in an alternate forum; and
- the stay or dismissal would not result in duplicative litigation.

If a court found, by a preponderance of the evidence, such claims to be true, the court would then be allowed to set the terms of the stay or dismissal of the claim. If the party who wished to stay or dismiss the action violated the terms of the order, the court would be allowed to withdraw the stay or dismissal order. A request for a stay or dismissal on the grounds of*forum non conveniens* could only be made within six months of the time required for filing the motion to transfer venue. (Motions to transfer venue must be filed before a defendant's answer to a plaintiff's complaints; defendants must file answers to plaintiff's petitions within 20 days of service.) A court could extend any time period at the request of any party upon a showing of good cause.

CSSB 220 would allow a court to dismiss an action brought by plaintiffs who are Texas residents and non-Texas residents on the grounds of*forum non conveniens* only if the court found that the Texas residents were joined solely for the purpose of obtaining or maintaining jurisdiction in Texas courts.

A court would not be allowed to dismiss or stay a claim on the grounds of *forum non conveniens* if a plaintiff made a prima facie showing that an act or omission that was a proximate or producing cause of the claim occurred in Texas. The prima facie showing would not need to be made by a preponderance of the evidence and could be sufficiently shown by any evidence including affidavits, depositions, or discovery responses regardless of whether such evidence would be admissible at trial.

CSSB 220 would require a resident of a foreign state or country, in order to bring an action for personal injury or death in a Texas court, to commence such actions within the time provided by the laws of the state or country in which the wrongful act or omission took place.

CSSB 220 would apply to claims brought under the federal Employers' Liability Act, the federal Safety Appliance Act, the federal Boiler Inspection Act, or cases involving air travel originating from or destined for Texas commenced on or after January 1, 1999. CSSB 220 would apply to all other personal injury or death claims commenced after the effective date of the act.

Asbestos Claims

CSSB 220 would establish a procedure for dismissal of claims alleging harm caused by exposure to asbestos fibers if the plaintiff was not a Texas resident at the time the claim arose and the claim arose outside the state.

Claims filed on or after January 1, 1997. On a motion of a defendant in any asbestos-related suit brought by an out-of-state plaintiff on or after January 1, 1997, a court would be required to dismiss the claim if a defendant made a stipulation that, for purposes of limitations, the filing of a claim in another forum would relate back to the date the plaintiff filed the claim in Texas.

Claims filed August 1, 1995 - January 1, 1996. A court would be required, on a motion of a defendant, to dismiss an asbestos-related claim brought on or after August 1, 1995, and before January 1, 1996, unless the plaintiff filed a written statement electing to:

- abate the plaintiff's claim for 180 days to afford the plaintiff an opportunity to file a new action in another state, or

- keep the plaintiff's claim in Texas but limit the punitive damages available to the plaintiff to the limits established in SB 28 by Sibley, enacted in 1995. Under SB 28, punitive damages are capped at the greater of two times the amount of economic damages plus up to $750,000 of the amount of noneconomic damages or $200,000.

Any election made by a plaintiff would be binding on all defendants in the plaintiff's claim.

A court could not dismiss or abate a claim until a defendant filed a written stipulation waiving the right to assert a statute of limitations defense in all other states which the claim was not barred by limitations at the time that the plaintiff filed the action in Texas. The written stipulation would allow the limitations period in other states to be tolled at the time that the claim was filed in Texas until the date of dismissal or the end of the abatement period. Defendants would also be required to file a written stipulation stating that if an action were commenced in another state, the plaintiff could elect to rely on the discovery responses already provided and use such responses to the extent permissible under the laws and procedural rules of the other state.

If the claims made by a plaintiff arose both within Texas and in another state, the court would be allowed to sever claims that arose outside of the state. If a plaintiff alleged to be exposed to asbestos fibers in more than one jurisdiction and such a claim were unseverable, the court would be allowed to determine which of the jurisdictions in which exposure was alleged would be the most appropriate forum for the claim, considering the lengths of exposure in each jurisdiction.

CSSB 220 would apply to all asbestos-related claims pending in Texas courts on the effective date of the act in which a trial, new trial, retrial or appeal scheduled after the effective date. Any cases in which a trial was in progress on the effective date of the act would continue under current law.

SUPPORTERS SAY:

Because of the *Alfaro* case and the exceptions written into the law to remedy the problems caused by that case, Texas courts have become a dumping ground for the world's legal litter. Texas courts are now deluged with as many as 50,000 pending out-of-state cases. While these cases are brought by persons from another state, it is Texas taxpayers who are required to pay for the courts in which such cases are tried. The traffic of such cases is particularly high among Gulf Coast and South Texas counties. While Texans are required to foot the bill for these out-of-state plaintiffs to use Texas courts, the citizens in the areas burdened with such cases are also being denied access to their own courts because of the backlog of cases filed by those from other states. In order to remedy the problem and stop the importation of lawsuits to Texas, CSSB 220 would strengthen the ability of Texas judges to dismiss claims filed by out-of-state plaintiffs and establish

tools to equitably dispose of a number of cases currently pending in Texas courts that should be tried elsewhere.

The perceived pro-plaintiff orientation of certain Texas courts has been a magnet for out-of-state plaintiffs. In recent years, courts along the Gulf Coast and those in South Texas have been considered to be pro-plaintiff, resulting in a substantial increase in cases filed in those courts. With the liberal venue rules that existed before enactment of SB 32 by Montford in 1995, cases filed against large companies could be filed in nearly any county in Texas because it could be alleged that those companies had a presence in nearly every county. Such rules allowed a heavy concentration of out-of-state claims to be filed in presumably pro-plaintiff counties, increasing the burden on taxpayers in those counties and on Texas litigants who wished to use the court system.

Forum non conveniens is not a new concept, nor is it one without a long history of application in Texas. The statutes that have occupied the time of the courts and the Legislature have only dealt with suits alleging personal injury or death. All other cases have the doctrine of *forum non conveniens* applied to them through common law. CSSB 220 would simply expand the application of the common law doctrine of *forum non conveniens* to personal injury claims made by out-of-state plaintiffs.

Texas courts have also witnessed the revival of a number of cases that would not have been allowed to be brought if the plaintiffs had to file such cases in their own state. The most significant number of these cases have come from Alabama plaintiffs alleging harm from exposure to asbestos. Over 30,000 such cases have been filed in Texas courts compared to only about 6,000 claims brought by Texas residents. Alabama has a two-year statute of limitations for such cases, which means that all such cases must be filed within two years of the last date of exposure to asbestos. Texas law, however, allows a plaintiff to file suit within two years of the development of symptoms or the diagnosis of mesothelioma, asbestosis or other asbestos-related diseases. Because of such rules, Alabama residents have flocked to Texas courts to pursue their claims, even though they could join a suit brought in federal court for asbestos-related claims.

CSSB 220 would place a simple rule on all future claims that such claims would not be proper in Texas if they could not have been brought in the plaintiff's home jurisdiction. This simple rule would put the treatment of Texans and out-of-state claimants on an even level and ensure that every plaintiff follows the law of the jurisdiction in which the injury occurred. Such a change was consistent with federal procedure and the laws of nearly every other state. Those laws ensure that a claim may not be resurrected in another state when it would be dead in the state in which the claim should have been brought.

CSSB 220 would treat plaintiffs in asbestos-related cases fairly, while still relieving the burden these plaintiffs have placed on Texas courts in the last three years. CSSB 220 would not affect any asbestos-related cases commenced in Texas by out-of-state plaintiffs before August 1, 1995. Any cases commenced before that date would likely be far enough along in the course of the case that they should be making their way out of Texas courts very soon.

Claims of asbestos-related plaintiffs who have filed suit from August 1, 1995, to January 1, 1997, the bulk of pending asbestos-related legislation, would be allowed to remain in Texas courts only if they agreed to have punitive damages available to them limited by a Texas law that was enacted before they filed their claims. Such a limitation would be an incentive for these plaintiffs to seek out another forum in which to try their cases. While it would encourage plaintiffs to seek out other forums, if such forums were not available, the plaintiffs could still use Texas courts to pursue their claims. However, they would be limited, just like any Texan injured after enactment of SB 28, to a reasonable amount of punitive damages for their injuries. Such a limitation could likely encourage the settlement of asbestos-related claims pending in Texas courts because it would establish limits on how high punitive damages could go. Often the determination of such damages can delay settlements as plaintiffs wait for a sympathetic jury that will award them millions for the harm done to them.

The only asbestos-related plaintiffs whose cases would likely be barred from being brought in Texas courts are those that have been commenced this year, after plaintiff's attorney's were placed on notice that the Legislature was considering limiting such suits. That notice encouraged a significant

amount of cases to be filed in the hopes of "getting in under the wire" and ensuring the out-of-state plaintiff had a place in line in Texas courts. CSSB 220 would simply apply the law that would be applied to all plaintiffs after enactment of this legislation to those plaintiffs that have commenced actions this year. Unless a claim would have been proper in the plaintiff's own jurisdiction, Texas courts would not be burdened such claims simply because Texas calculates its statutes of limitations differently.

While some plaintiffs complain that if their claims in Texas courts are dismissed, they might not survive long enough to have their cases heard in another forum, because of the onslaught of asbestos-related claims in Texas, it is just as likely that such plaintiffs would not have the opportunity to try their cases in Texas if nothing changed. However, without CSSB 220, a number of Texas residents, claiming both asbestos and nonasbestos- related injuries, may not live to see their cases come to trial because of the backlog caused by out-of-state plaintiffs.

Companies considering relocating to or remaining in Texas must take into account the imported lawsuit burden they could avoid by locating in some other state that refuses to allow imported lawsuits. The cost of paying for nearly 50,000 out-of-state claims is a substantial burden to businesses who are considering starting up or relocating to Texas. Such companies must also consider that their location in Texas would allow more suits against them in Texas courts even though such suits should be better handled in other states' courts.

Giving courts more authority to reject out-of-state lawsuits would re-align Texas with a majority of other states that have identical or very similar requirements to the federal system for using *forum non conveniens*. Currently 33 states use the federal *forum non conveniens* criteria, including California, Florida, Illinois, Michigan and New York. The federal standards let judges decide "what makes sense" in a particular case when determining whether an out-of-state claim should be dismissed.

CSSB 220 would actually provide more protections to out-of-state claimants than would federal law or the laws of some other states. Under federal procedure, a motion for a stay or dismissal on grounds of *forum non conveniens* may be brought at any time; under CSSB 220, such a motion

would have to be filed within 200 days of the filing of a suit. Under federal procedure, once the case is transferred to another court, the transferring court loses all jurisdiction; CSSB 220 would allow the transferring Texas court to retain continuing jurisdiction to enforce the transfer of such cases. Federal procedure allows the judge to transfer a case for the convenience of parties or in the interest of justice; CSSB 220 would set out six factors the court would have to weigh, including the adequacy and availability of an alternate forum.

CSSB 220 would allow courts to provide limitations or conditions on the stay or dismissal of a claim brought by an out-of-state claimant. Most likely such conditions would include the defendant's waiver of objections to jurisdiction, venue and limitations in the alternate forum. The court could also provide that discovery commenced in Texas be applicable in the alternate forum. CSSB 220 would give courts the flexibility to construct such orders to meet the needs of the parties in the transfer of such cases and ensure that the rights of each party are adequately protected if the court determined that the case should be tried in another forum.

CSSB 220 would not result in the dismissal of cases brought by residents of Texas unless those residents were joined solely for the purpose of establishing venue in Texas or were brought concerning claims related to asbestos exposure that occurred in other states. A court would not be allowed to stay or dismiss a claim based on an act or omission that occurred in Texas.

OPPONENTS SAY:

CSSB 220 is a special interest bill designed to benefit large interstate companies and particularly companies who manufactured asbestos. Such companies, like Dow Chemical in the *Alfaro* case, may conduct a large portion of their business in Texas, but they would prefer to move cases to another state just to get away from the perceived plaintiff's slant of Texas courts and juries. Other companies like Owens Corning and other asbestos manufacturers, which currently have more than 30,000 asbestos-related claims pending against them, would use CSSB 220 to ensure that such claims were dismissed or delayed until the plaintiffs die from the diseases caused by exposure to asbestos.

CSSB 220 would affect the rights of Texas citizens to bring claims in Texas courts. The dismissal of asbestos-related claims could force Texas residents to have their case moved to another state if they were not Texas residents at the time the exposure to asbestos occurred. While such dismissals might be proper if the person moved to Texas solely to pursue a claim, CSSB 220 would affect the rights all persons injured by exposure to asbestos without regard to where the live and pay taxes now.

While generally unfair to out-of-state claimants, CSSB 220 would be particularly biased against claimants suing for asbestos-related injuries. CSSB 220 would allow the dismissal of pending cases on the grounds of *forum non conveniens*. CSSB 220 would establish three classes of asbestos-related claimants based on when they commenced their actions in Texas courts. Those who have commenced actions in 1997 would have their claims dismissed outright. Those who brought their cases between August 1, 1995, and January 1, 1997, would be forced to accept a limitation on damages in order to proceed in Texas courts. Only those plaintiffs who brought actions before August 1, 1995, would be allowed to continue their claims.

Plaintiffs who filed suit after January 1, 1997, would in nearly all cases, have their claims dismissed entirely. CSSB 220 would provide that in order to dismiss a case, the defendant would have to stipulate that, for purposes of limitations, the date the case was filed in Texas could be considered the date the case was filed in the alternate jurisdiction. Those claims that have been brought to Texas because of the short statutes of limitation in other states, primarily Alabama and Ohio, would be prevented from filing their cases in those courts because the limitations period in those states ran out long before these cases were filed in Texas. While such plaintiffs could join a pending federal case in Philadelphia, that case is currently backlogged with over 50,000 claims. With the mortality rate of asbestosis and mesothelioma, the two primary diseases related to exposure to asbestos, plaintiffs whose claims would be transferred to the end of that case load would almost certainly die before their case even came to court. While Texas may have over 30,000 such cases, they are spread out among a number of courts, and many are combined with other cases, providing for additional efficiency.

CSSB 220 would force plaintiffs who filed claims between August 1, 1995, and January 1, 1997, to move to another forum or be forced to have their available damages limited. CSSB 220 would essentially apply SB 28 by Sibley, enacted in 1995, to such cases and limit the amount of punitive damages available. Such a condition clearly would not have any relationship to the burden imposed on Texas courts by these cases, but merely serve to benefit asbestos manufacturers who have been sued during this time period.

The punitive damages cap in SB 28 was never meant to be applied to any cause of action that accrued before September 1, 1995. Most of the causes of action of asbestos-related litigation accrued in the 1960s and 1970s when these individuals were exposed to asbestos. It is only because asbestos exposure takes so long to manifest itself as harmful that so many claimants are barred from bringing actions until well after some states' limitations periods have run. The nature of asbestos-related injuries, however, often occurring after the manufacturers of such substances knew of the dangers of asbestos, are exactly the kind of cases to which punitive damages, which are damages designed to punish for grossly negligent conduct, should apply.

CSSB 220 would also drastically affect the rights of plaintiffs to bring other, nonasbestos-related, claims in Texas when barred by statutes of limitation in their home country or state. The application of statutes of limitation in Texas has helped to ensure that Texans are able to be compensated for harms done to them, even if such harms are not manifested immediately after the negligent act causing the harm. However, out-of-state claimants would no longer be allowed to sue in Texas courts using Texas statutes of limitation. Essentially, the language of CSSB 220 allowing a court to balance the interests of the party and of the state would have no bearing on such claims, and they would be barred without any determination of whether the denial of the right to bring suit in this state were just.

CSSB 220 would also limit the right of an out-of-state plaintiff to sue a Texas company in Texas. As long as the cause of action occurred in another state, a Texas company could use CSSB 220 to ask that such cases be stayed or dismissed and moved to the state in which the injury occurred. General rules of venue allow claims to be brought in the jurisdiction of the defendant's residence, but CSSB 220 would allow that rule to be overridden

if the cause of action occurred elsewhere. It can hardly be argued that such lawsuits unfairly burden Texas courts because the defendant resides in Texas and, presumably, pays taxes to support such courts.

A suit filed in a Texas court by definition affects Texas because of personal jurisdiction requirements. In order to establish personal jurisdiction, a party must either appear in court, be a resident of the state or have sufficient contacts with the state as defined by constitutional doctrine. In order to have the constitutional "minimum contacts" required:

- the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in Texas;
- the cause of action must arise from, or be connected with, that action or transaction, and
- the assumption of jurisdiction by the state must not offend traditional notions of fair play and substantial justice.

Clearly, defendants must have taken some actions in Texas in order even to be brought to court because jurisdiction must be established before all other issues. Why should someone who does business in the state not be subject to being sued in Texas?

CSSB 220 would allow the severance of claims brought together in one suit if one claim met the test for transfer to another jurisdiction and another claim did not. Such a severance would result, if not in duplicative litigation, at least more costly and more inconvenient litigation. The purpose of*forum non conveniens* is to provide for the convenience of the parties, and it would be very difficult to show that pursuing one claim in one state and another claim in another state is convenient for the parties when the claims could be joined together in the same suit.

The purpose of *forum non conveniens* doctrine — just as the name implies — is to allow for the convenience of the parties. However, today it is very hard to argue, except in a few cases, that it would be overly burdensome to try a case anywhere in the United States. The technologies of jet travel, fax machines, and satellite video conferencing, to name a few, make it just as easy to try a case in one state as another. Texas should not be burdened with

cases that bear no relationship to the state, but neither should it refuse to hear the case of a U.S. citizen without ensuring the protection of the rights of that citizen, as required by the current law. Section 71.051(b), as currently written, simply seeks to protect the plaintiff's rights by ensuring that a dismissal on the grounds of *forum non conveniens* will not, in effect, be a complete dismissal of the case.

Allowing courts to use *forum non conveniens* to dismiss more out-of-state cases would not produce any savings to Texas taxpayers. No court would cease operating, yet CSSB 220 would likely result in an increased backlog of cases in Texas courts as defendants in such cases file motions for dismissal. Any motions that are granted would most likely be appealed.

OTHER OPPONENTS SAY:

CSSB 220 would impose additional confusing and procedurally complex burdens on the use of the doctrine of *forum non conveniens* to dismiss out-of-state claims. The Senate-passed version would have simply allowed for an application of the common law doctrine of *forum non conveniens*, returning Texas courts to the standards used and applied before the *Alfaro* decision. The broader standards and questions posed to a judge by CSSB 220 would likely lead to unnecessary appeals of the cases dismissed under this legislation.

The Senate-passed version of SB 220 also would have allowed dismissal of pending claims that arose from all exceptions to *forum non conveniens* law added by SB 2 in 1993; CSSB 220 would limit dismissal of such claims to asbestos-related litigation. Such a difference would mean that a number of pending suits that should have not been filed but for the exceptions granted in SB 2 would be allowed to continue to clog up Texas courts and burden Texas taxpayers.

NOTES:

The Senate-passed version of SB 220 would have eliminated the distinction between dismissals of suits brought by residents of foreign counties and those brought by residents of other states, allowing dismissal on the grounds of *forum non conveniens* on any condition that may be just. Courts would have been prohibited from dismissing suits brought by persons who were residents of Texas at the time the cause of action arose. SB 220 would have required the abatement of pending claims of out-of-state plaintiffs for claims arising out of state that were brought under the Federal Employers' Liability

Act, the Federal Safety Appliance Act and the Federal Boiler Inspection Act, cases involving air travel originating from or destined for Texas, and cases alleging injury due to asbestos. After the one-year abatement period, the court would have been required to dismiss the claims if the defendant filed a written stipulation waiving rights to object to a new claim brought in another forum. In order to abate such claims, defendants would have been required to file such motions before September 1, 1998. A court would not have been allowed to dismiss a claim based on asbestos-related injuries diagnosed before January 16, 1997, and for which a trial was scheduled, as of the effective date of the bill, to commence on or before March 2, 1998.

In 1995 two bills, HB 2916 and HB 2917, both by Duncan, proposed making the standards for applying *forum non conveniens* more permissive and removing the exception for asbestos cases. Neither bill was reported from committee.

SB 400 by Wentworth, enacted in 1995, limited the exception to *forum non conveniens* to air transportation suits in which the harm was caused by air transportation *operated* in Texas and not those suits in which the air transportation was designed, manufactured, sold, maintained, repaired or inspected in Texas.