

**TEXAS LAW ON FORUM NON CONVENIENS
AND H.B. 4'S CHANGES TO IT**

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CHAPTER 1.1

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"FORUM NON CONVENIENS" "An Inappropriate Court"

I. INTRODUCTION.

H.B. 4 purports to change *forum non conveniens* ("FNC") practice only for cases involving personal injuries, wrongful deaths and asbestos-related injuries. Specifically, H.B. 4 incorporates the common-law FNC doctrine in order to govern cases involving non-U.S. resident plaintiffs and U.S. resident plaintiffs, and H.B. 4 effectively makes the common-law FNC doctrine applicable to asbestos-injury cases. These changes occur by way of a new § 71.051(b) in the CPRC ("CPRC") and the elimination of § 71.052.

If you wish to skip to the chase and read exactly how H.B. 4 makes these changes, go to sections III and IV below; however, you will probably better understand H.B. 4's changes after reading a little about the common-law FNC doctrine.

PRACTICE POINTER The common-law doctrine – with § 71.051's statutory overlay solely for personal-injury and wrongful-death cases – should now apply generally to all Texas civil cases.¹

¹ In 1991, the Dallas Court of Appeals correctly held that "Texas continues to recognize the validity of the theory of forum non conveniens for all cases except those involving personal injury or death." *Sarieddine v. Moussa*, 820 S.W.2d 837, 841 (Tex. App. – Dallas 1991, writ denied). As explained in section III below, since 1993 the Texas Legislature has made the FNC doctrine (in a statutory form) applicable to cases involving personal injury and death by way of § 71.051 of the CPRC. Also, in 1998 the Texas Supreme Court's *In re Smith Barney*, 975 S.W.2d 593 (Tex. 1998) (orig. proceeding), overruled a 1941 "writ ref'd" case that had made FNC inapplicable to cases involving corporations incorporated in Texas and/or having authority to conduct business in Texas.

Therefore, as of September 1, 2003, FNC seems to have general applicability to all civil cases in Texas. The author of this paper could find only one reported case – *Texas Commissioner of Insurance v. Aetna Casualty & Surety Co.*, 858 S.W.2d 521 (Tex. App. – Austin) (per curiam), writ *dism'd by agr. & judgment set aside*, 866 S.W.2d 606 (Tex. 1993) – that questions FNC's general applicability to civil cases. But this *Aetna* antitrust case should have limited precedential value. See Section II.H below.

II. TEXAS "COMMON LAW" FNC.

Texas has developed a comprehensive FNC doctrine by borrowing from United States Supreme Court precedents and by then refining the borrowed principles in several Texas Supreme Court opinions in the 1990s – principally, *In re Smith Barney, Inc.*, 975 S.W.2d 593 (Tex. 1998) (orig. proceeding); and Justice Nathan Hecht's dissent in *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990).

A. FNC's Origins.

FNC originated in the common law of Scotland. *American Dredging Co. v. Miller*, 510 U.S. 443, 449, 114 S. Ct. 981, 986 (1994). Later, English and then American courts began using the doctrine. *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 676 (Tex. 1990). FNC became part of the Texas common law in the late 1800s. *Id.* at 677.

B. When Does FNC Arise, and How Does a Defendant Make an FNC Challenge?

Defendants make FNC challenges when the chosen forum is so inconvenient or inappropriate in relation to another forum (in another state court or foreign country) that the trial court should decline to exercise jurisdiction and should either dismiss or stay the case, *even though* a trial court has jurisdiction over the parties and subject matter, and even though the general venue provisions permit venue. Most often, defendants make FNC challenges when the case has only a tangential factual connection with the chosen forum, but a much stronger factual connection with the competing forum in another state or foreign country. See *American Dredging Co. v. Miller*, 510 U.S. 443, 453, 114 S. Ct. 981, 988 (1994) ("At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined."); *In re Smith Barney, Inc.*, 975 S.W.2d 593, 596 (Tex. 1998) (orig. proceeding) ("The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947))); *Exxon Corp. v. Choo*, 881 S.W.2d 301, 302 n.2 (Tex. 1994) ("Before a court may invoke forum non conveniens, the court must find that it has jurisdiction over the defendant." (citation omitted)).

PRACTICE POINTER Defendants typically make FNC challenges only when a trial court has jurisdiction (subject-matter and personal) and proper venue according to a venue statute; if the trial court lacks jurisdiction and/or venue,

defendants should challenge jurisdiction and/or venue before or contemporaneously with making an FNC challenge.

PRACTICE POINTER Defendants making FNC challenges under the common law should file motions to dismiss or stay that incorporate the principles and arguments discussed in section II of this Paper. Defendants making FNC challenges under § 71.051 (see section III below) should file motions to dismiss or stay that incorporate the principles and arguments discussed in section II of this Paper and should pay careful attention to § 71.051's procedural requirements (i.e., § 71.051(d) (timing of motion and notice of hearing), § 71.051(e) (Texas-residency exception) and § 71.051(f) (causation exception and types of proof therefore)).

C. Procedural vs. Substantive Law.

Courts treat FNC as a procedural – not substantive – rule of law. See *Exxon Corp.*, 881 S.W.2d at 306 n.9 (“Under most circumstances, *forum non conveniens* is a procedural tool and not a substantive rule of law; usually federal *forum non conveniens* may not preempt the *forum non conveniens* analysis of a state court.” (citing *American Dredging*, 510 U.S. at 453, 114 S. Ct. at 988)).

D. The Governing Standards for the FNC Analysis.

1. An “Available” and “Adequate” Alternate Forum Must Exist.

Texas courts apply the following multi-part test for determining FNC challenges:

There are several steps in conducting forum non conveniens analysis. *First*, there must be a determination that *an alternative forum exists*, because the doctrine presumes that at least two forums are available to the plaintiff to pursue the claim. The alternative forum element has two components, that is, *an alternative forum must be available and adequate*. An exception to the general rule that the defendant bears the burden on all elements of forum non conveniens is that, once the defendant establishes that an “available” forum exists, the plaintiff must prove that the available forum is not adequate.

....

... A forum is “available” when the entire case and all the parties can come within the jurisdiction of that forum. Once the moving party establishes that an available forum exists, the burden is on the plaintiff to prove that the available forum is not adequate. A forum is considered “adequate” when the parties will not be deprived of all remedies or treated unfairly.

Direct Color Servs. v. Eastman Kodak Co., 929 S.W.2d 558, 563-64 (Tex. App. – Tyler 1996, writ denied) (emphasis added). See also *Sarieddine v. Moussa*, 820 S.W.2d 837, 841-42 (Tex. App. – Dallas 1991, writ denied); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 265 n.22 (1981) (“Ordinarily, th[e] [availability] requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction.”).

Therefore, under the first part of an FNC challenge, the defendant bears the burden of proving that an alternate forum is “available” (as defined above) and if the defendant meets that burden, the plaintiff then bears the burden of proving that the alternative forum is not “adequate” (as defined above). Once a trial court determines that an alternate forum is both “available” and “adequate,” it may proceed to the remainder of the FNC challenge. See *Sarieddine*, 820 S.W.2d at 842.

In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981), the United States held that even when an alternate forum’s law is *less* favorable for plaintiff than the chosen (American) forum’s law – which is typically the case – “[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.” *Id.*, at 247, 261. However, the Court acknowledged that “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.” *Id.* at 254, 265. See also *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1227 (3d Cir. 1995) (holding that because the “Indian legal system has a tremendous backlog of cases – so great that it could take up to a quarter of a century to resolve th[e] litigation if it were filed in India” – an “adequate” alternate forum did not exist in India).

Certain federal courts are paying heightened attention to whether alternate forums in foreign countries are truly adequate to redress plaintiffs’ injuries. For instance, in recent mass tort litigation arising from the experimental use of a pharmaceutical drug in Nigeria, the Second Circuit instructed a District Court to determine whether the foreign alternate forum

(i.e., a Nigerian court) was hopelessly corrupt and, consequently, inadequate to remedy the plaintiffs' personal injury claims. See *Abdullahi v. Pfizer, Inc.*, No. 01 CIV. 8118, 2002 WL 31082956, at *9 (S.D.N.Y. Sept. 17, 2002) (holding that "conclusory allegations of corruption or bias on the part of the foreign forum will not prevent a dismissal on forum non conveniens grounds" because the alternate forum is allegedly inadequate), *rev'd*, Nos. 02-9223 (L), 02-9303(XAP), 2003 WL 22317923, at *3-*4 (2d Cir. Oct. 8, 2003) (holding that evidence of the dismissal of a parallel action pending in an alternate forum may tend to show such forum is corrupt and, therefore, "inadequate").

2. The Gulf Oil Private-Interest and Public-Interest Factors.

"The second and third steps [of an FNC challenge] are to weigh the private and public interest factors to be considered by the court in determining whether the doctrine of forum non conveniens should be applied." *Direct Color*, 929 S.W.2d at 563. And, "[t]he burden of establishing that the balance [of the private and public interest factors] strongly favors dismissal lies necessarily with the defendant." *Sarieddine*, 820 S.W.2d at 842.

The Texas Supreme Court has expressly "embraced"² the private-interest and public-interest factors from *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947). Accordingly, a trial court facing an FNC motion should review the following oft-cited language from *Gulf Oil*:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. 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.* The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not

necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. *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.*

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509, 67 S. Ct. 839, 843 (1947) (emphasis added).

The *Gulf Oil* factors are not inflexible shibboleths; practitioners should paraphrase them, adapt them, add to them, and discard them as appropriate for particular cases. The core *Gulf Oil* factors are best summarized by these inquiries:

Private Interest Factors

- (1) Does the alternate forum have greater access to the evidence? (If so, this factor counts in favor of letting the alternate forum decide the case.)
- (2) Does the alternate forum have greater subpoena power for compelling unwilling witnesses to participate in the litigation, and can it do so more cost effectively? (If so, these factors count in favor of letting the alternate forum decide the case.)
- (3) If the case requires viewing the premises, can the parties better view the premises by litigating in the alternate forum? (If so, this factor counts in favor of letting the alternate forum decide the case.)

² See *In re Smith Barney, Inc.*, 975 S.W.2d 593, 596 (Tex. 1998) ("[The Texas Supreme Court] embraced *Gulf Oil*'s analysis long ago in *Flaiz v. Moore*[,] [359 S.W.2d 872, 874 (Tex. 1962)].").

- (4) Can the chosen forum effectively enforce a judgment? (If not, this factor counts in favor of letting the alternate forum decide the case.)
- (5) What other practical problems make litigating in the alternate forum more practical than the chosen forum?

Public Interest Factors

- (1) What administrative difficulties could arise for the chosen forum? More specifically, will its docket become congested? (If so, this factor counts in favor of letting the alternate forum decide the case.)
- (2) Will the chosen forum impose jury duty on people having no relation to the litigation? (If so, this factor counts in favor of letting the alternate forum decide the case.)
- (3) If the case concerns public policy, which forum is closer to the policy concerned? (If the chosen forum would be determining policy for another state or country, this factor counts in favor of letting the alternate forum decide the case.)
- (4) Will the chosen forum have to grapple with foreign law or another state's law, and will it have to work through complex issues involving conflicts of law? (If so, this factor counts in favor of letting the alternate forum decide the case.)

Texas courts construe FNC challenges against defendants making them: "The doctrine rests on a strong presumption in favor of the plaintiff's choice of forum, a presumption which a defendant may overcome *only when* the private and public interest factors *clearly* point toward trial in the alternative forum." *Truong v. Vuong*, 105 S.W.3d 312, 316 (Tex. App. – Houston [14th Dist.] 2003, no pet. h.) (emphasis added).³ This strong presumption favoring the plaintiff's chosen forum becomes even stronger when a *Texas-resident* plaintiff has chosen his/her home forum. *See id.* at 316 ("A court should give greater deference to a plaintiff's choice of forum when the plaintiff has chosen its home forum." (citation omitted)). As mentioned earlier, the defendant making the FNC challenge bears the burden of proving that the

private and public factors weigh in favor of staying or dismissing the case. *See Sarriddine*, 820 S.W.2d at 842.

PRACTICE POINTER Plaintiffs opposing FNC challenges should stress that defendants bear the burdens of proof and persuasion on whether an alternate forum is "available" and whether the private-interest and public-interest factors weigh in favor of staying or dismissing the case. Plaintiffs should stress that defendants' burden on the private-interest and public-interest factors is an especially high burden when a plaintiff has chosen his/her home forum and when a plaintiff has chosen the forum for legitimate means. Defendants, on the other hand, should force plaintiffs to prove that an alternate forum is not "adequate" if defendants have proven it to be "available." Also, defendants should argue that their burden on the private-interest and public-interest factors is lessened when a plaintiff has not chosen his/her home forum or when a plaintiff is not a U.S. citizen or U.S. resident. *See Piper Aircraft* discussion in section II.E below.

E. Refining the *Gulf Oil* Factors.

In the 1980s and 1990s, several Texas Supreme Court and United States Supreme Court cases have addressed the *Gulf Oil* factors. A practitioner should bear in mind these cases' principles when arguing the *Gulf Oil* factors – either as a defendant challenging venue, or as a plaintiff attempting to hold venue.

First, at least one Texas Supreme Court Justice has observed that "[t]he relative importance of private factors as compared with public factors may have shifted since *Gulf Oil*" because of the "[e]ase of travel and communication, availability of evidence by videotape and facsimile transmission, and other technological advances The public factors, however, deserve the same consideration now as when *Gulf Oil* was written." *See Dow Chemical*, 786 S.W.2d at 708 (Hecht, J., dissenting).

Second, four of the seven Supreme Court Justices deciding *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981), held that a U.S. resident or U.S. citizen choosing his/her "home forum" is entitled to *greater deference* under an FNC analysis than a foreign plaintiff. 454 U.S. at 255-56, 102 S. Ct. at 266. Texas courts have adopted this slim-majority holding from *Piper Aircraft*, thereby giving heightened protections to Texas-resident plaintiffs facing common-law FNC challenges. *See Truong v. Vuong*, 105 S.W.3d 312, 316 (Tex. App. – Houston [14th Dist.]

³ *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-509, 67 S. Ct. 839, 843 (1947) ("But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

2003, n.p.h.) (“A court should give greater deference to a plaintiff’s choice of forum when the plaintiff has chosen its home forum.” (citation omitted)).

Other Texas Supreme Court cases have applied and refined the *Gulf Oil* factors in specialized contexts, and practitioners (especially maritime and admiralty practitioners) should be aware of these cases. *See Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 424, 434-35 (Tex. 1999) (holding that common law FNC could apply to a maritime and admiralty case involving a German “who resided in Brazil [and] was injured while working on a mobile offshore drilling vessel . . . in Trinidad[,] [and who] sued his employer, whose principal offices were in Texas”); *In re Smith Barney, Inc.*, 975 S.W.2d 593, 598-99 (Tex. 1998) (orig. proceeding) (holding that a corporate plaintiff – incorporated in Texas, but having minimal contacts with Texas – did not have “an absolute right” to circumvent the FNC doctrine and “sue non-residents in Texas” in a case “hav[ing] no significant connection with the State”); *Exxon Corp. v. Choo*, 881 S.W.2d 301, 305-06 (Tex. 1994) (holding that the federal FNC doctrine did *not* preempt the Texas FNC doctrine in a Texas-court action under the Jones Act and maritime law).

PRACTICE POINTER Finally, Plaintiffs opposing FNC challenges will find support for their arguments in the scholarly concurrence by Justice Lloyd Doggett in *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 680-89 (Tex. 1990). Likewise, defendants pursuing FNC challenges will find support for their arguments in the insightful, carefully structured dissent by Justice Nathan Hecht in *Dow Chemical*, 786 S.W.2d at 702-08.

F. Trial Court Procedural Considerations.

Case law allows for a broad array of evidence for making or opposing an FNC challenge. One Texas appellate court has recently explained the kinds of evidentiary proof necessary for showing the private interest factors: “Detailed affidavits identifying the witnesses defendants will call at trial and the testimony they would present *are not necessary*. A party’s affidavit indicating who it would call to testify in the alternative forum and the roles of those persons in the incident giving rise to the litigation may suffice. Nevertheless, defendants must provide the trial court with enough information to balance the parties’ interests.” *Truong v. Vuong*, 105 S.W.3d 312, 317-18 (Tex. App. – Houston [14th Dist.] 2003, n.p.h.) (emphasis added) (citing *Piper Aircraft*, 454 U.S. at 258 & 249 n.27, 102 S. Ct. at 267 & n.27). The same court observed that a defendant making an FNC challenge should present some “evidence” in support

of the public interest factors. *Id.* at 318. Presumably, the kinds of permissible evidence for the public-interest factors would mirror those for the private-interest factors.

See also Vaz Borralho v. Keydril Co., 696 F.2d 379, 386 (5th Cir. 1983) (“In determining [FNC and venue-transfer] motions, the district court may consider affidavits submitted by both parties, interrogatories, and depositions.”), *overruled on other grounds by In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987); TEX. CIV. PRAC. & REM. CODE § 71.051(f) (allowing “affidavits, deposition testimony, discovery responses, or other verified evidence” for the “prima facie showing that an act or omission that was a proximate or producing cause of the injury or death occurred in [Texas]”).

PRACTICE POINTER Following federal practice, practitioners making or facing FNC challenges should use a wide array of evidentiary materials: affidavits, deposition transcripts, interrogatory answers, admissions, documents, demonstratives, verified pleadings and live testimony.

G. Appellate Considerations.

Texas appellate courts review trial court decision to deny or grant an FNC motion under an abuse of discretion standard. *See In re Smith Barney, Inc.*, 975 S.W.2d 593, 598-600 (Tex. 1998) (orig. proceeding). One Texas appellate court has succinctly described this standard as follows:

We review the trial court’s decision under an abuse of discretion standard. The test for abuse of discretion is not whether in the opinion of this court the facts present an appropriate case for the trial court’s actions; rather, the test is whether the trial court acted without reference to any guiding rules and principals. . . . The mere fact a trial court may decide a matter within its discretionary authority in a different manner than an appellate court in a similar circumstance, does not demonstrate an abuse of discretion has occurred. The burden of proof rests on the appellant asserting abuse of discretion to overcome the presumption that the action of the trial court was justified.

Truong v. Vuong, 105 S.W.3d 312, 316 (Tex. App. – Houston [14th Dist.] 2003, n.p.h.) (citations omitted). *See also Tullis v. Georgia-Pacific Corp.*, 45 S.W.3d 118, 121 (Tex. App. – Fort Worth 2000, no pet.); *Berg v. AMF Inc.*, 29 S.W.3d 212, 215 (Tex. App. – Houston [14th Dist.] 2000, no pet.).