SUBJECT: Notifying the attorney general of legal actions challenging Texas law

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Hunter, Alonzo, Branch, Hartnett, Madden, Martinez, Woolley

0 nays

4 absent — Hughes, Jackson, Leibowitz, Lewis

WITNESSES: For — None

Against — Ed Heimlich, Informed Citizens

On — James Ho, Office of the Attorney General

BACKGROUND: Civil Practice and Remedies Code, sec. 37.006(b) requires a party to a suit seeking declaratory relief to serve a copy of the proceedings on the attorney general of Texas if the suit alleges that a statute, ordinance, or franchise of the state is unconstitutional. The state may intervene in these types of lawsuits to submit evidence and arguments on any question of the validity of the challenged statute, ordinance, or franchise.

DIGEST: HB 4293 would require a party to an action, suit, or proceeding challenging the constitutional validity of a state statute or rule adopted by a state agency to give written notice of the challenge to the attorney general if the state, state agency, or a state officer or employee was not currently a party to the legal action challenging the statute or rule's legitimacy. The bill also would require written notice to the attorney general if an action, suit, or proceeding included an amicus curiae ("friend of the court") brief challenging the legitimacy of a state statute or rule adopted by a state agency.

HB 4293 would require a challenging party to give written notice to the attorney general if, in an action, suit or proceeding, the party or amicus curiae asserted that a state statute or rule conflicted with:

- the constitution of the United States or the constitution of Texas;
- federal law or was preempted by federal law; or

- a state statute, if the action challenged a rule of a state agency.

The notice required by HB 4293 would have to identify:

- the challenged statute or rule;
- the nature of the challenge;
- the court in which the challenge was pending; and
- the style and number of the action, suit, or proceeding in which the challenge is pending.

HB 4293 would require the challenging party to send the notice to the attorney general by certified or registered mail or by e-mail to an address designated by the attorney general. The party would have to send the notice at the time the party filed the pleading or other document. The party also would have to file the notice in the court in which the challenge was asserted.

If a party or amicus curiae failed to give the required notice to the attorney general, HB 4293 would require the court in which the challenge was asserted to give notice to the attorney general. The court-issued notice would have to comply with the same requirements as a notice given by a party.

A court could not sustain a challenge to a state statute or state agency rule until the attorney general had received notice of the challenge. The court still could reject a challenge to a state statute or rule if it chose, even if the attorney general had not received notice.

A court would have to grant a motion by the state to intervene in any action, suit, or proceeding involving a challenge to a state statute or agency rule if the motion was filed within 60 days after the date the attorney general received notice. The state could present admissible evidence and submit briefing and argument on the validity of the challenged statute or rule.

The bill would specify that its provisions regarding constitutional challenges to the validity of state statutes or rules and the state's intervention in such challenges would not constitute a waiver of the state's sovereign immunity.

The bill would define "state agency" to mean a board, commission, department, office, court, or other agency that:

- was in the executive or judicial branch of this state's government;
- was created by the state Constitution or state statute; and
- had statewide jurisdiction.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2009. It would apply only to a pleading or other document filed in an action, suit, or proceeding on or after the effective date.

SUPPORTERS SAY:

HB 4293 would make the attorney general aware of constitutional challenges to state statutes and rules in state courts when the state was not a party to the challenge. Currently, federal law requires notice of challenges to Texas statutes raised in federal court. This bill simply would require the same notice when a party challenged state law in state courts. Although a more limited version of this requirement exists in the Uniform Declaratory Judgments Act, HB 4293 would broaden the scope of the notice requirement to include actions beyond those seeking declaratory relief.

With no anticipated fiscal impact upon the state, HB 4293 would clarify the existing notification requirement and provide a catch-all mechanism for informing the attorney general of any action challenging a state law or rule in state courts. The proposed notification requirement would be similar to notification requirements in many other states.

OPPONENTS SAY:

HB 4293 would allow courts to bar or delay valid constitutional challenges on a procedural technicality based on a party's inadvertent failure to notify the attorney general of the challenge. By allowing a judge to reject, but not sustain, a suit challenging the constitutional validity of a state law or rule, HB 4293 could delay legal relief and impose unnecessary litigation expenses on the filing party.

NOTES:

The companion bill, SB 1162 by Hegar, was considered in a public hearing in the Senate State Affairs Committee on April 20 and left pending.