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## Conflict of Laws

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# CONFLICT OF LAWS

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## I. INTRODUCTION

STATES' and nations' laws collide when foreign factors appear in a lawsuit. Non-resident litigants, incidents outside the forum, parallel lawsuits, and judgments from other jurisdictions can create problems with personal jurisdiction, choice of law, and the recognition of foreign judgments. This Article reviews Texas conflict cases from state and federal courts in Texas during the Survey period from November 1, 2010 through October 31, 2011. The Article excludes cases involving (1) federal-state conflicts; (2) intrastate issues, such as subject matter jurisdiction and venue; and (3) conflicts in time, such as the applicability of prior or subsequent law within a state. State and federal cases are discussed together because conflict of laws is mostly a state-law topic, except for a few constitutional limits, resulting in the same rules applying to most issues in state and federal courts.<sup>1</sup>

Although no data is readily available to confirm this, Texas is certainly a primary state in the production of conflict-of-laws precedents. This results not only from its size and population, but also from its placement bordering four states, as well as a civil-law nation, and its involvement in international shipping. Only California shares these factors, with the partial exception of the states bordering Quebec. Texas courts experience every range of conflict-of-laws litigation. In addition to a large number of opinions on the garden-variety examples of personal jurisdiction, Texas courts produce case law every year on Internet-based jurisdiction, prorogating and derogating forum-selection clauses, federal long-arm statutes with nationwide process, international forum non conveniens, parallel litigation, international family-law issues, and private lawsuits against foreign sovereigns. Interstate and international judgment recognition and enforcement offer fewer annual examples—the lack of reported cases on this subject is likely a function of its administrative nature.

Texas state and federal courts provide a fascinating study of conflicts issues every year, but the volume of case law now greatly exceeds this Survey's ability to report on them, a function both of journal space and the authors' time. Accordingly, this Survey's article focuses on selective cases.

## II. FORUM CONTESTS

Asserting jurisdiction over a nonresident defendant requires amenability to Texas jurisdiction and receipt of proper notice. Amenability may be established by consent (usually based on a contract's forum-selection clause), waiver (failing to make a timely objection), or extraterritorial service of process under a Texas long-arm statute. Because most aspects

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1. See RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 649-95 (4th ed. 2001) (for a thorough discussion of the role of federal law in choice-of-law questions).

of notice are purely matters of forum law, this Article will focus primarily on the issues relating to amenability.

## A. JURISDICTIONAL ANALYSES

### 1. *United States Supreme Court Decisions—New Verses to Old Songs*

Although this Survey article focuses on Texas cases, two recent United States Supreme Court decisions merit discussion. After decades of inactivity on personal jurisdiction, the Court issued two jurisdictional opinions in product liability claims against foreign manufacturers. Both opinions appeared on June 27, 2011 and were heralded as new guidelines for specific and general jurisdiction.<sup>2</sup> However, upon closer examination these cases do not change the law.

*J. McIntyre Machinery, Ltd. v. Nicastro* involved a worker's debilitating injury caused allegedly by a metal shearer malfunction.<sup>3</sup> The machine's manufacturer, McIntyre, was an English company, which had an extensive advertising presence throughout the United States, but had no direct sales or delivery contacts with New Jersey, where the injury occurred. The New Jersey Supreme Court held that New Jersey has jurisdiction over a foreign manufacturer "if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey."<sup>4</sup> Reversing that judgment, Justice Kennedy wrote the lead plurality opinion for four justices, which endorsed Justice O'Connor's view from *Asahi Metal Industry Co. v. Superior Court*<sup>5</sup> that stream of commerce was invalid as a stand-alone jurisdictional doctrine, and instead, foreign defendants must have engaged in conduct purposefully directed at the forum.<sup>6</sup> Justices Breyer and Alito concurred with the reversal, but expressly declined to fashion a new rule for stream of commerce jurisdiction because the McIntyre facts were insufficient for making a formulaic pronouncement.<sup>7</sup> A three-justice dissent, led by Justice Ginsburg, argued that the plurality's ruling was inconsistent with decades of precedent, notably the *World-Wide Volkswagen Corp. v. Woodson* ruling in which<sup>8</sup> Justice Ginsburg noted, that the German manufacturer did not object to jurisdiction despite its United States presence resembling McIntyre's.<sup>9</sup> Whatever clarification *McIntyre* may offer, the stream of commerce doctrine remains unchanged from *Asahi* and falls short of precedent because the Court attempted to cure a plurality with another plurality. Nonethe-

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2. See e.g., *Keranos, LLC v. Analog Devices, Inc.*, No. 2:10-CV-207-TJW, 2011 WL 4027427, at \*10 (E.D. Tex. Sept. 12, 2011).

3. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

4. *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 591–92 (N.J. 2010).

5. *Asahi Metal Indus. Co. v. Sup. Ct.*, 480 U.S. 102, 112 (1987).

6. *Nicastro*, 131 S. Ct. at 2786–91 (discussing *Asahi Metal Indus. Co.*, 480 U.S. at 112).

7. *Id.* at 2791–94.

8. *Id.* at 2802–2803.

9. *Id.* at 2794–2804. Both manufacturers directed their contacts toward the United States as an entire market and both sold their products through distributors. *Id.* at 2802 (discussing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)).

less, defendants may find language in *McIntyre* that gives them hope, or at least an argument, that purposeful availment is the singular test for specific jurisdiction.

*Goodyear Dunlop Tires Operations, S.A. v. Brown* is the second Supreme Court opinion, this time a unanimous ruling by *McIntyre*'s lead dissenter, Justice Ginsburg.<sup>10</sup> The case involved a bus rollover in France, allegedly caused by defective tires manufactured in Turkey by a subsidiary of Goodyear Tire and Rubber Company. Two male soccer players from North Carolina died in the accident. Their parents sued in North Carolina under theories of stream of commerce and general jurisdiction, both of which were validated by the trial and appellate courts in North Carolina. The Supreme Court unanimously reversed the lower courts, holding that stream of commerce does not apply when the accident and manufacturing occurred outside the forum and the defendant merely sold products in the forum unrelated to the accident.<sup>11</sup> Paraphrasing *International Shoe Co. v. Washington*,<sup>12</sup> the Court also unanimously rejected the North Carolina court's assertion of general jurisdiction:<sup>13</sup> "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."<sup>14</sup> As with *McIntyre*, the Court provided no new law, stating that "[o]ur 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains '[t]he textbook case of general jurisdiction.'"<sup>15</sup> The Court further emphasized the absence of any new precedent by reference to its only other general jurisdiction ruling: "We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros . . .*"<sup>16</sup> The ruling does, however, provide a useful clarification in the opening and concluding statements by linking general jurisdiction requiring contacts that render defendants essentially at home.<sup>17</sup>

Seven cases during the Survey period cited one or both of the two Supreme Court opinions. Recently retired federal Judge T. John Ward led the way with four opinions, all involving patent infringements. In two cases, Judge Ward merely cited *McIntyre* in deciding jurisdiction,<sup>18</sup> but in

10. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

11. *Id.* at 2851.

12. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

13. *Goodyear*, 131 S. Ct. at 2851.

14. *Id.* (citing *Int'l Shoe Co.*, 326 U.S. at 317).

15. *Id.* at 2856 (quoting *Donahue v. Far E. Air Transp. Corp.*, 652 F.2d 1032, 1037 (D.C. Cir. 1981)).

16. *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984)).

17. "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Id.* at 2851. The Court concluded that "[u]nlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina." *Id.* at 2857.

18. See *Keranos, LLC v. Analog Devices, Inc.*, No. 2:10-CV-207-TJW, 2011 WL 4027427, at \*9-10, (E.D. Tex. Sept. 12, 2011) (jurisdictional ruling stayed pending discov-

the other two he relied on *McIntyre*'s analytical framework.<sup>19</sup> Of the remaining three cases, the most thoroughly analyzed is *Powell v. Profile Design LLC*.<sup>20</sup> When Powell was seriously injured in a bicycle accident, she sued Profile as the designer of the defective part. Profile, in turn, brought a third-party action against five related companies, including the China-based parent. The third-party defendants objected to Texas jurisdiction, and, interestingly, were joined by Powell's objection to their addition to the case. The court quoted language from *McIntyre* and *Goodyear* in finding neither general nor specific jurisdiction over the third-party defendants.<sup>21</sup>

## 2. Consent and Waiver

Contracting parties may agree to a forum-selection clause designating an optional or exclusive site for litigation or arbitration. When a contracting party sues in the designated forum, the clause is said to be a prorogation clause, that is, one supporting the forum's jurisdiction over the defendant.<sup>22</sup> When a contracting party sues in a non-selected forum in violation of the contract, the clause is said to be a derogation clause, that is, one undermining the forum's jurisdiction.<sup>23</sup> Because derogation clauses attack, rather than establish jurisdiction, the topic is discussed in the section on Declining Jurisdiction.<sup>24</sup>

Prorogation clauses establish the forum's jurisdiction, typically making them routine. However, five Survey period cases raise noteworthy interpretation issues. *Crawford v. Lee* provides an interesting semantics discussion of the difference between "courts of Texas" and "courts in Texas."<sup>25</sup> The clause agreed to exclusive jurisdiction of courts in Texas,

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ery); *Bluestone Innovations Texas, L.L.C. v. Formosa Epitaxy Inc.*, 822 F. Supp. 2d 657, 661 (E.D. Tex. 2011) (jurisdiction as to one defendant but not two others).

19. *Brooks & Baker, L.L.C. v. Flambeau, Inc.*, No. 2:10-CV-146-TJW-CE, 2011 WL 4591905 (E.D. Tex. Sept. 30, 2011) (patent infringement case against two Wisconsin entities and two Wisconsin individuals). Plaintiff alleged stream-of-commerce jurisdiction against Flambeau, but citing *McIntyre*'s plurality discussion, the court looked beyond the stream of commerce allegations and found that Flambeau had sufficient contacts with Texas for personal jurisdiction. The court found no jurisdiction against the other three defendants (the corporate defendant for plaintiff's failure to allege alter ego fact and the two individual defendants based on fiduciary shield). Rather than dismiss, the court transferred the case to the Northern District of Ohio. *Id.* at \*6. See also *Dram Techs. LLC v. Am. II Grp., Inc.*, No. 2:10-CV-45-TJW, 2011 WL 4591902, at \*3 (E.D. Tex. Sept. 30, 2011) (discussed the *McIntyre* plurality in finding jurisdiction over the Taiwanese defendant).

20. *Powell v. Profile Design LLC*, 838 F. Supp. 2d 535 (S.D. Tex. 2012).

21. *Id.* at 539–40. The other two cases are *Gonzalez v. Reed-Joseph Int'l Co.* and *Am. Preferred Servs., Inc. v. Harrison*. *Gonzalez v. Reed-Joseph Int'l Co.*, No. 4:11-CV-01094, 2011 WL 5358689, at \*2–3 (S.D. Tex. Nov. 7, 2011) (quotes *McIntyre* standard but bases dismissal on failure to plead sufficient jurisdictional facts); *Am. Preferred Servs., Inc. v. Harrison*, No. 07-11-0065-CV, 2011 WL 4485463, at \*4 (Tex. App.—Amarillo Sept. 28, 2011 no pet.) (quotes *Goodyear* language on general and specific jurisdiction in finding specific jurisdiction against an Indiana financial advisor).

22. PETER HAY ET AL., *CONFLICT OF LAWS* 534 (5th ed. 2010).

23. *Id.*

24. See *infra* notes 91–94 and accompanying text.

25. *Crawford v. Lee*, No. 3:10-CV-1499-L, 2011 WL 2455658, at \*5 (N.D. Tex. June 20, 2011).

and when the plaintiff filed in federal court the defendant objected that federal courts might be “in Texas” but were not “of Texas.” The court agreed, but nonetheless rejected the defendant’s argument because it reached an absurd result in light of the forum clause’s additional language agreeing to exclusive federal court venue in Texas.<sup>26</sup>

*Financial Casualty & Surety, Inc. v. Mascola* involved dual forum clauses in Texas and New Jersey, and when the plaintiff filed in Texas, the defendant objected to the clause’s ambiguity.<sup>27</sup> The court disagreed and held the clause was permissive and allowed either party to file in either state, but that once filed, the other party had waived any right to object.<sup>28</sup> *Inspirus, L.L.C. v. Egan* carefully examined the contract’s scope and after finding that the plaintiff had properly (but barely) stated a claim arising under the contract, the court also asserted pendent personal jurisdiction over the plaintiff’s related non-contract claims.<sup>29</sup> In *Safety-Kleen Systems, Inc. v. McCoy Freightliner, Inc.*, an action for nonpayment of an oil-spill cleanup in West Virginia, the Texas forum clause withstood the defendant’s objections of fraud and deception, in part because the clause was just above defendant’s signature.<sup>30</sup> *Crithfield v. Boothe* held that Florida resident Crithfield was personally subject to the Texas forum clause because he failed to designate his corporate capacity when signing the contract.<sup>31</sup>

Two Survey period cases noted that forum clauses in arbitration agreements are implied consent to jurisdiction in court actions, even when the arbitration is not pursued; however, one case denied jurisdiction because the clause was illusory.<sup>32</sup>

### 3. Texas Long-Arm and Minimum Contacts

Texas uses “limits-of-due-process” long-arm statutes, meaning that the minimum contacts test is the only necessary foundation for personal jurisdiction in Texas.<sup>33</sup> Texas long-arm statutes also apply in Texas federal

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26. *Id.* at \*4–5.

27. *Fin. Cas. & Sur., Inc. v. Mascola*, No. H-11-0120, 2011 WL 3020934, at \*2 (S.D. Tex. June 22, 2011).

28. *Id.*

29. *Inspirus, L.L.C. v. Egan*, No. 4:11-CV-417-A, 2011 WL 4439603, at \*3–5 (N.D. Tex. Sept. 20, 2011). The court further held that the forum clause did not apply to defendant’s corporation because it was not a party to the contract, and thus dismissed all claims against the corporation. *Id.* at \*6.

30. *Safety-Kleen Sys., Inc. v. McCoy Freightliner, Inc.*, No. 4:10-CV-608, 2011 WL 665812, at \*6–7 (E.D. Tex. Jan. 21, 2011).

31. *Crithfield v. Boothe*, 343 S.W.3d 274, 291 (Tex. App.—Dallas 2011, no pet.).

32. *Am. Gen. Life Ins. Co. v. Rasche*, 273 F.R.D. 391, 395–96 (S.D. Tex. 2011); *Dell Mktg., L.P. v. Incompass IT, Inc.*, 771 F. Supp. 2d 648, 656–57 (W.D. Tex. 2011) (no jurisdiction because of illusory clause).

33. *See U-Anchor Adver., Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977). The primary Texas long-arm statutes are found at sections 17.041–.045 of the Texas Civil Practice and Remedies Code and others are scattered throughout Texas statutes. *TEX. CIV. PRAC. & REM. CODE* §§ 17.041–.045 (West 2008); *e.g.*, *TEX. AGRIC. CODE ANN.* § 161.132 (West 2004) (violation of certain agricultural statutes); *TEX. FAM. CODE ANN.* § 6.305 (West

courts, except where Congress has enacted a federal long-arm statute for certain federal law claims.<sup>34</sup>

The Survey period's most factually complex case is *Dugas Limited Partnership v. Dugas*.<sup>35</sup> *Dugas* dealt with two out-of-state trusts in Kentucky and Florida; two intertwined families, which included some Texas residents, disputed property (both marital and probate) in Texas, Kentucky, and Delaware; an ongoing Kentucky probate; and entity and individual parties in all of those states. The facts are otherwise too complicated for this brief survey. But, in light of the recent *Goodyear* decision, it is worth noting that the appellate majority found general jurisdiction over one defendant, the *Dugas Limited Partnership*, a Delaware limited partnership which was controlled by a general partner based in Tennessee, and had no property or assets in Texas.<sup>36</sup> Justice Walker dissented to that one aspect of the decision, and argued that the majority based its finding of general jurisdiction on a ten-year-old statement in the limited partnership agreement that *Dugas, L.P.* maintained its principal place of business in Aubrey, Texas.<sup>37</sup> The dissent pointed out that despite the principal place of business statement, the limited partnership never had an office in Texas, had no assets in Texas, and the undisputed facts showed that it was a Delaware entity with a general partner based in Tennessee.<sup>38</sup>

*Vendever LLC v. Intermatic Manufacturing Ltd.* illustrates how minimum the contacts can be.<sup>39</sup> *Vendever*, a Nevada company, is the only seller of cotton candy vending machines in the United States. In 2011 it sued defendants based in the United Kingdom for disparagement and unfair trade practices. *Vendever* chose Texas as the forum based on defendants' single sale of machines to a buyer based in Irving, Texas. In denying defendants' objection to Texas jurisdiction, the court stated that "[a]lthough the Complaint alleges only this single contact within the Northern District, the alleged sale demonstrates that Intermatic purposefully directed its activities and contract towards Texas . . . ." <sup>40</sup>

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2006) (nonresident respondents in divorce actions); TEX. INS. CODE ANN. § 823.457 (West 2009) (violations of duties imposed on insurance holding companies).

34. See FED. R. CIV. P. 4(k)(1)(A) (state long-arms in federal court) & FED. R. CIV. P. 4(k)(2)(A)–(B) (federal long-arm statutes). Examples of federal long-arm statutes include 28 U.S.C. § 2361 for statutory interpleader and 15 U.S.C. § 78aa for claims under the Securities Exchange Act of 1934. 28 U.S.C. § 2361 (2006); 15 U.S.C. § 78aa (Supp. 2011).

35. *Dugas Ltd. P'ship v. Dugas*, 341 S.W.3d 504, 508–10, 520–21 (Tex. App.—Fort Worth 2011, pet. granted, judgment vacated w.r.m.).

36. *Id.* at 515.

37. *Id.* at 521 (Walker, J., dissenting).

38. *Id.* at 521–26. A second Survey period case also finds general jurisdiction over two defendants based on facts that might not pass the *Goodyear* standard, although one defendant's jurisdiction is substantiated by a convincing specific jurisdiction analysis. See *Transplace Tex., L.P. v. Higgins*, No. 4:10-CV-428, 2011 WL 623172, at \*8 (E.D. Tex. Jan. 19, 2011).

39. *Vendever LLC v. Intermatic Mfg. Ltd.*, No. 3:11-CV-201-B, 2011 WL 4346324 (N.D. Tex. Sept. 16, 2011).

40. *Id.* at \*3.



*WesternGeco L.L.C. v. Ion Geophysical Corp.*<sup>41</sup> is a pre-*Goodyear* opinion that would likely satisfy the Supreme Court's "at-home" paradigm for general jurisdiction. This was a patent infringement claim in which six of the defendants had related entity structures, four based in Houston and two in Norway. The court denied the Norwegian entities' jurisdictional objection because of their ongoing interactions with their Houston-based entities, one entity listing a Houston address, and their otherwise substantial Texas presence.<sup>42</sup> It is notable, however, that the plaintiff used the Hague Convention to serve process on the two defendants,<sup>43</sup> suggesting either a minimal presence anywhere in the United States, or alternatively an under-the-table Texas presence within the Houston-based entities.

*Vanderbilt Mortgage and Finance, Inc. v. Flores* presents the interesting feature of a post-trial jurisdictional objection.<sup>44</sup> The case began as a lender's mortgage foreclosure against defendants' manufactured homes but expanded to include intervenors Maria and Arturo Trevino who alleged that the plaintiff lender and Clayton Homes, Inc. (a new party) had engaged in wrongful and related torts.<sup>45</sup> Clayton is a Delaware corporation with no offices in Texas and was brought into the case with a RICO claim and its federal long-arm statute based on nationwide contacts rather than Texas contacts.<sup>46</sup> During trial the court dismissed the RICO claim, followed by a jury verdict for the Trevinos and the original defendant homeowners. Clayton filed a post-trial objection to jurisdiction based on the RICO claim's dismissal. The court rejected the Trevino's argument that Clayton had waived a timely objection, but found instead that the court had jurisdiction because all elements of the Texas long-arm statute and due process were satisfied.<sup>47</sup>

*In re Heartland Payment Systems, Inc.* provides a useful discussion of the jurisdiction and choice-of-law problems that can arise in Multi-District Litigation (MDL) cases.<sup>48</sup> When Heartland, a credit-card transaction processor, had its database criminally hacked, several consumers sued for negligence and related claims. The cases in numerous federal districts around the country were transferred to the Southern District of

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41. *WesternGeco L.L.C. v. Ion Geophysical Corp.*, 776 F. Supp. 2d 342 (S.D. Tex. 2011).

42. *Id.* at 348–49, 358–61.

43. *Id.* at 348 (referring to the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361).

44. *Vanderbilt Mortg. & Fin., Inc. v. Flores*, 789 F. Supp. 2d 750 (S.D. Tex. 2011).

45. *Id.* at 756.

46. *Id.* at 765 (referring to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68 (2006), and its long-arm statute, 18 U.S.C. § 1965(d) (2006)). The opinion does not identify Clayton Homes' principal place of business.

47. *Id.* at 765–68.

48. *In re Heartland Payment Sys., Inc.*, No. H-10-171, 2011 WL 1232352 (S.D. Tex. Mar. 31, 2011). The opinion also discusses the choice-of-law difficulties in MDL cases, both with interstate conflicts and federal circuit differences, but held that no such conflicts were apparent in this case. *Id.* at \*4, n.5. MDL is a means of managing pretrial matters in complex disputes filed in multiple federal districts, with the Judicial Panel on MDL determining eligibility under 28 U.S.C. § 1407. 28 U.S.C. § 1407 (2006).

Texas under the MDL statute for pre-trial matters and, after the transfer, several financial institutions brought related claims by filing directly into the MDL consolidated cases.<sup>49</sup> Heartland, a Missouri corporation based in Clayton, Missouri, objected to personal jurisdiction in the Southern District. The court noted that jurisdiction in MDL cases ordinarily traced to the transferor district, that is, if defendant is amenable where originally sued, then defendant is amenable to adjudication of pre-trial matters in the transferor court.<sup>50</sup> That rule did not apply here because the financial institution plaintiffs had filed directly into the MDL case.<sup>51</sup> The financial institution plaintiffs argued that Heartland's objection was merely a tactic delay since it could be sued in a Missouri federal court and then have the action transferred to the Southern District of Texas. However valid that point might be, the court held that jurisdiction could not be based on the anticipation of later-acquired jurisdiction.<sup>52</sup> The court conducted an exhaustive analysis of specific jurisdiction in a variety of cases and concluded that specific jurisdiction for damage to the financial institution plaintiffs' claims could not be based on Heartland's sparse, related contacts in Texas.<sup>53</sup> The court also conducted a brief general jurisdiction analysis, applying the rigid approach, later adopted by the United States Supreme Court, rejecting general jurisdiction as well.<sup>54</sup>

In other decisions, four courts applied the fiduciary shield doctrine;<sup>55</sup> two found pendent personal jurisdiction,<sup>56</sup> one found specific jurisdiction over a New York art dealer for a misrepresentation in a sale to a Houston

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49. *Id.* at \*4.

50. *Id.* at \*3.

51. *Id.* at \*4.

52. *Id.* at \*5.

53. *Id.* at \*5-13.

54. *Id.* at \*14. The court noted that its conclusion of no specific or general jurisdiction did not require dismissal, but instead allowed for wrong-venue transfer to an appropriate federal district from which it could be transferred back to the Southern District of Texas. *Id.* (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007)).

55. The fiduciary shield doctrine is that "an individual's transaction of business within the state solely as a corporate officer does not create personal jurisdiction over that individual though the state has in personam jurisdiction over the corporation." *Stuart v. Spademan*, 772 F.2d 1185, 1197 (5th Cir. 1985). The court in *Crithfield v. Boothe*, rejected the fiduciary shield defense for the Florida director of an investment company because the doctrine does not apply to tortious acts, and because the director signed a contract with a Texas forum clause in his personal capacity and not as a corporate officer. *Crithfield v. Boothe*, 343 S.W.3d 274, 287, 291 (Tex. App.—Dallas 2011, no pet.; *accord* *Transplace Tex., L.P. v. Higgins*, No. 4:10-CV-428, 2011 WL 623172, at \*4 (E.D. Tex. Jan. 19, 2011). In *21st Century Financial Services, Inc. v. Mandelbaum*, the court imposed the fiduciary shield doctrine to exempt defendants who were not subject to the forum clause in an action to enforce an arbitration award against a California bank and its officers. *21st Century Financial Services, Inc. v. Mandelbaum*, No. A-10-CA-803, 2011 WL 3844209, at \*7 (W.D. Tex. Aug. 30, 2011).

56. Personal jurisdiction must be present not only for each defendant but for each claim against each defendant. The doctrine of pendent personal jurisdiction allows a court to adjudicate related claims against a defendant once it finds personal jurisdiction over one claim. *See Pension Advisory Grp., Ltd. v. Country Life Ins. Co.*, 771 F. Supp. 2d 680, 695-96 (S.D. Tex. 2011) (pendent personal jurisdiction over contract claim in a patent infringement action); *Inspirus, L.L.C. v. Egan*, No. 4:11-CV-417-A, 2011 WL 4439603, at \*3-5 (N.D. Tex. Sept. 20, 2011).

plaintiff,<sup>57</sup> one denied specific jurisdiction over a Minnesota company,<sup>58</sup> and five dismissed defendants for plaintiff's failure to plead prima facie jurisdictional facts.<sup>59</sup>

#### 4. Internet-Based Jurisdiction

A number of American jurisdictions, including Texas and the Fifth Circuit, apply the *Zippo* sliding scale to assess personal jurisdiction based on Internet contacts.<sup>60</sup> The Survey period produced four cases in which the plaintiffs' jurisdictional arguments were based primarily on the Internet. *Wilkerson v. RSL Funding, L.L.C.* examined internet contacts based on the defendant's use of a third-party-site and found it could not support jurisdiction.<sup>61</sup> *Wilkerson's* daughter, a California resident, won the California state lottery. RSL, a Houston-based company, contacted the daughter by mail and offered to pay her a lump sum in exchange for a portion of her future lottery payments. When *Wilkerson's* daughter had a bad experience dealing with RSL, he posted negative reviews on two websites. *Wilkerson* thought he was posting his reviews on RSL's web-

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57. *Max Protetch, Inc. v. Herrin*, 340 S.W.3d 878, 887, 889 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (contacts included defendant corporation's president making personal trips to Houston to meet with the buyer).

58. *Orix Pub. Fin., LLC v. Lake Cnty. Hous. & Redevelopment Auth.*, No. 3:11-CV-0678-D, 2011 WL 3628958, at \*7–8 (N.D. Tex. Aug. 16, 2011) (plaintiff's unilateral performance of its contractual duties in Texas not enough to support specific jurisdiction over non-resident defendants regarding contract centered in Minnesota).

59. See *Hoffman v. L & M Arts*, 774 F. Supp. 2d 826, 844–45 (N.D. Tex. 2011) (a lawsuit regarding breach of confidentiality agreement at auction in London, insufficient jurisdictional allegations regarding the Sotheby's auctioneer); *Larsen v. Crème de la Crème, Inc.*, No. 4:09-CV-613, 2011 WL 255544, at \*4 (E.D. Tex. Jan. 26, 2011) (in an employment dispute, no prima facie jurisdictional facts over Colorado-based parent corporation regarding its management of local subsidiaries); *Abramov v. Otis Elevator Co.*, No. 3:11-CV-440-D, 2011 WL 5081560, at \*7 (N.D. Tex. Oct. 25, 2011) (insufficient facts for Texas general jurisdiction for injuries sustained in an elevator fall in Caesars Palace in Las Vegas, Nevada); *Robinson v. Castle*, No. H-11-649, 2011 WL 3813292, at \*4 (S.D. Tex. Aug. 29, 2011) (in a dental malpractice action, defendant's post-operative communications with plaintiff after his move to Texas did not support general or specific jurisdiction); *Bazemore v. Edwards*, No. EP-10-CV-0291-FM, 2011 WL 2532785, at \*5 (W.D. Tex. May 18, 2011) (in a prisoner's civil rights action for mistreatment during earlier incarceration in Oklahoma facility, no jurisdiction over prison official).

60. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). The test breaks down Internet use into a spectrum of three areas. One end of the spectrum finds the defendant clearly doing business in the forum based on contracts entered into with forum residents; the spectrum's other end is passive websites not involving the defendant's intentional contact with the forum and not leading to jurisdiction. *Id.* The spectrum's difficult middle involves the forum resident's exchange of information with the defendant's host computer, and jurisdiction is based on the level of interactivity and the commercial nature of the information exchanged. *Id.* The Fifth Circuit adopted the *Zippo* test in *Mink v. AAAA Dev. LLC*. *Mink v. AAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999). Texas appellate courts have used it as well. See, e.g., *Townsend v. Univ. Hosp.—Univ. of Colo.*, 83 S.W.3d 913, 922 (Tex. App.—Texarkana 2002, pet. denied); *Experimental Aircraft Ass'n v. Doctor*, 76 S.W.3d 496, 506–07 (Tex. App.—Houston [14th Dist.] 2002, no pet.), *remanded sub nom.*; *Doctor v. Pardue*, 186 S.W.3d 4 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

61. *Wilkerson v. RSL Funding, L.L.C.*, No. 01-10-01001-CV, 2011 WL 3516147 (Tex. App.—Houston [1st Dist.] Aug. 11, 2011, pet. filed).

site, but in fact he was posting on a Yahoo! page and a Yelp website.<sup>62</sup> RSL sued Wilkerson in Houston, and he objected to jurisdiction.<sup>63</sup> Although the court found the websites to be interactive, it also held defendant's use was passive.<sup>64</sup> Thus, the court found the sliding scale inappropriate to evaluate an individual web user's jurisdictional contacts when the Internet use was directed at third-party websites.<sup>65</sup>

*Tempur-Pedic International, Inc. v. Go Satellite Inc.* illustrates a more basic application of the sliding scale—the finding of personal jurisdiction based on the interactivity of the website.<sup>66</sup> Plaintiffs sued the defendants for trademark violations, under the Lanham Act and Texas law, because they were selling Tempur-Pedic mattresses over the Internet without authorization.<sup>67</sup> Go Satellite admitted its website was interactive; it allowed orders to be placed and communication via live chats and email.<sup>68</sup> Go Satellite, however, had an interesting defense. It claimed that the sales to the Texas-based customers in the underlying suit were manufactured by the plaintiffs to create jurisdiction by hiring a private investigator to purchase a mattress from Go Satellite online.<sup>69</sup> Plaintiffs responded with evidence of at least three other mattresses sold to Texas residents. The defendants' sales agent admitted this fact,<sup>70</sup> compelling the conclusion that the defendants were subject to Texas jurisdiction.<sup>71</sup>

Two other Survey period cases found no jurisdiction based on Internet contacts. *Buckeye Aviation, L.L.C. v. Barrett Performance Aircraft, Inc.*<sup>72</sup> involved a Texas company's suit for breach of warranty relating to the servicing of aircraft engines performed by defendants in Oklahoma. Although the court found that the defendants operated a *Zippo* middle-ground site, the plaintiff's attempt to base jurisdiction on the defendants' website failed because<sup>73</sup> there was no evidence that plaintiff, or any other Texas customer, had made contact through their website.<sup>74</sup> In *Riverside Exports, Inc. v. B.R. Crane & Equipment, LLC* the court deemed the

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62. *Id.* at \*1–2.

63. *Id.* at \*3.

64. *Id.* at \*6. The court noted that the interactive features of Yahoo! and Yelp are the creations of the owners and operators and cannot be imputed to an individual user for the purpose of establishing minimum contacts with Texas. *Id.*

65. *Id.*

66. *Tempur-Pedic Int'l, Inc. v. Go Satellite Inc.*, 758 F. Supp. 2d 366 (N.D. Tex. 2010).

67. *Id.* at 370.

68. *Id.* Go Satellite's website allowed ordering and payment online, offered shipping to Texas, had "live chat" pop-up windows, advertised a toll-free number and email correspondence, and offered shipping anywhere in the forty-eight contiguous states at no extra charge. *Id.*

69. *Id.* at 374–75.

70. *Id.* at 375.

71. *Id.* at 377.

72. *Buckeye Aviation, L.L.C. v. Barrett Performance Aircraft, Inc.*, No. 09-10-00247-CV, 2011 WL 2420987 (Tex. App.—Beaumont 2011, pet. denied) (mem. op.).

73. *Id.* at \*4. Defendant's site provided advertising and information regarding their products, contact information and allowed customers to request additional information as well as price quotes. *Id.*

74. *Id.* at \*8.

website at the far end of the *Zippo* scale, finding it purely informational, and thus, did not support jurisdiction.<sup>75</sup>

### 5. *Federal Long-Arm Statutes and Nationwide Contacts*

Texas long arm statutes apply in both state and federal courts in Texas,<sup>76</sup> except where Congress has enacted a federal long-arm statute<sup>77</sup> or where a foreign defendant lacks jurisdictional contacts with any state but has sufficient contacts with the United States as a whole.<sup>78</sup> Three Survey period cases illustrate these rules, although none are significant for making new law. *KBR Inc. v. Chevedden* is a declaratory judgment action by a corporation that wished to exclude its shareholders' controversial proposal in its proxy materials.<sup>79</sup> Shareholder Chevedden was a California resident who objected to jurisdiction in the action filed in a Houston federal court, even though KBR held its annual meeting there.<sup>80</sup> The court summarily rejected Chevedden's objection because his California residence was all that was necessary to subject him to Congress's nationwide long-arm statute for securities cases.<sup>81</sup>

*In re Enron Corp. Securities Derivative & ERISA Litigation* is an action originally filed in a Tennessee state court against various Enron defendants for fraud and related claims.<sup>82</sup> Enron's bankruptcy directors removed the action to the Middle District of Tennessee, and from there, it was transferred to the Southern District of Texas as an MDL case.<sup>83</sup> Because MDL jurisdiction is derivative of the transferor court's jurisdiction, defendant Andrew Fastow objected that he lacked minimum contacts with Tennessee.<sup>84</sup> The court again summarily rejected this argument based on the bankruptcy statute's nationwide long-arm statute for related-to bankruptcy litigation.<sup>85</sup>

In *Bluestone Innovations Texas, L.L.C. v. Formosa Epitaxy, Inc.* the court rejected Texas-based jurisdiction over all of the three Taiwanese defendants accused of patent infringement,<sup>86</sup> but used the federal long-arm statute in Rule 4(k)(2) to find jurisdiction based on nationwide contacts over one of those defendants.<sup>87</sup> In finding jurisdiction, the court

75. *Riverside Exports, Inc. v. B.R. Crane & Equip., LLC*, 362 S.W.3d 649, 655 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

76. See FED. R. CIV. P. 4(k)(1)(A).

77. See FED. R. CIV. P. 4(k)(1)(C). Examples of federal long arm statutes include 28 U.S.C. § 2361 for statutory interpleader and 15 U.S.C. § 78aa for claims under the Securities Exchange Act of 1934. 28 U.S.C. § 2361 (2006); 15 U.S.C. § 78aa (2006).

78. See FED. R. CIV. P. 4(k)(2).

79. *KBR Inc. v. Chevedden*, 776 F. Supp. 2d 415, 419 (S.D. Tex. 2011).

80. *Id.* at 421.

81. *Id.* at 422–23 (citing to 15 U.S.C. § 78aa (2006)).

82. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, Nos. H-01-3624, H-03-2345, 2011 WL 3516292, at \*1 (S.D. Tex. Aug. 11, 2011).

83. *Id.*

84. *Id.* at \*3.

85. *Id.* (citing 28 U.S.C. § 1334(b) (2006)).

86. *Bluestone Innovations Tex., L.L.C. v. Formosa Epitaxy Inc.*, 822 F. Supp. 2d 657, 662, 655–7 (E.D. Tex. 2011).

87. *Id.* at 664.

stated that the defendant For Epi “delivered its allegedly infringing products into the stream of commerce with the expectation that they would be purchased in the United States.”<sup>88</sup> Because the opinion’s author led Texas in enlightened discussions during this Survey period of *McIntyre* and cited *McIntyre* in this opinion,<sup>89</sup> it is likely that the court’s use of stream of commerce was descriptive rather than a legal reference.

## B. DECLINING JURISDICTION

Even where all jurisdictional elements exist, courts may refrain from litigating cases: involving sovereign foreign governments, contractually directed at other forums, where convenience dictates another forum, and parallel to other litigation.

### 1. Derogating Forum-Selection Clauses

The Consent section above discusses forum-selection clauses that establish local jurisdiction;<sup>90</sup> however, somewhat different considerations arise when the plaintiff sues in a forum contrary to the parties’ earlier choice in a forum-selection clause. These are known as derogation clauses (in regard to that forum). Instead of justifying the court’s retention of the case, derogation clauses require that the court consider declining its otherwise valid jurisdiction over the parties. During the Survey period, Texas courts dismissed three cases filed in Texas in spite of forum clauses designating forums in Germany,<sup>91</sup> Delaware,<sup>92</sup> and Maryland.<sup>93</sup>

### 2. Forum Non Conveniens Dismissals

Forum non conveniens, or inconvenient forum, is a common law objection to jurisdiction based on significant inconvenience to one or more defendants. It is also available by statute in the federal system and in many states for intra-jurisdictional transfers that do not require dismis-

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88. *Id.*

89. *Id.* at 660–61.

90. *See supra* Part I.A.2.

91. *Marinor Assocs. v. M/V Panama Express* was a maritime claim regarding damaged cargo. *Marinor Assocs. V. M/V Panama Express*, No. H-08-1868, 2011 WL 1230158 (S.D. Tex. Mar. 29, 2011). Plaintiff moved to nonsuit its own claim in favor of a parallel case in Germany, citing the mandatory German forum clause, but defendant objected because of its investment in the Texas case. *Id.* at \*1. The court nonetheless allowed the voluntary dismissal. *Id.* at \*3.

92. *Excel Mktg. Solutions, Inc. v. Direct Fin. Solutions, LLC* involved contract and tort claims regarding the social media platforms that served plaintiff’s customers. *Excel Mktg. Solutions, Inc. v. Direct Fin. Solutions, LLC*, No. 3:11-CV-0109-D, 2011 WL 1833022 (N.D. Tex. May 13, 2011). The opinion provides a good discussion of the scope of forum clauses in deciding to dismiss this case in favor of the mandatory Delaware forum clause. *Id.* at \*4–7.

93. *Cotton Patch Café, Inc. v. Micros Sys., Inc.* is a restaurant chain’s action for security breaches against a manufacturer of credit card machines. *Cotton Patch Café, Inc. v. Micros Sys.*, No. 12-10-0030-CV, 2011 WL 743066 (Tex. App.—Tyler Mar. 2, 2011, no pet.) (mem. op.). The court dismissed the case after finding that the contract designation of an exclusive Maryland forum complied with Texas statutory law. *Id.* at \*3–4 (citing TEX. BUS. & COM. CODE ANN. § 273.002 (West 2009)).

sal.<sup>94</sup> Where interstate or international case movement is involved, forum non conveniens is truly jurisdictional because it involves the forum's decline of otherwise-valid jurisdiction, as well as the dismissal of the local case, for re-filing in a distinct forum.

Because intra-federal transfers under section 1404 do not implicate conflicts between states or nations, they are not considered here, even though such transfers may involve significant distances. This Article is limited to inter-jurisdictional forum non conveniens under the common law which is available in state and federal courts in Texas under a two-part test that requires the movant to show the availability of an adequate alternative forum and that a balancing of private and public interests favors transfer.<sup>95</sup>

*Intelligender, LLC v. Soriano*, denied a forum non conveniens dismissal.<sup>96</sup> *Intelligender*, a Texas company that markets gender prediction tests for expectant parents, signed a confidentiality agreement with Farmacias Ahumada, S.A., a Chilean pharmaceutical company with more than 1200 retail outlets in Mexico, Central America, Peru, and Chile.<sup>97</sup> When Farmacias allegedly leaked *Intelligender's* confidential information to Soriano and others, *Intelligender* sued Farmacias for breaching the agreement and the other defendants for unfair trade practices.<sup>98</sup> After *Intelligender* dismissed its claim against Farmacias, defendants brought Farmacias back in as a third party defendant and also filed counterclaims against *Intelligender*.<sup>99</sup> Farmacias then moved for a forum non conveniens dismissal and argued that the action should be litigated in Chile,

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94. 28 U.S.C. § 1404 is the federal statutory provision for inconvenient forum objections seeking transfer to another federal court. 28 U.S.C. § 1404 (2006) Texas law transfers based on convenience under sections 15.002(b) of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (West 2002).

95. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981); *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 424 (5th Cir. 2001). The private factors look to the parties' convenience and include the "relative ease of access to sources of proof; [the] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witness[es]; [the] possibility of view of premises, if . . . appropriate . . . ; and all other practical problems that make trial . . . easy, expeditious and inexpensive." *McLennan*, 245 F.3d at 424 (alterations in original) (quoting *Dickson Marine, Inc. v. Panalpina, Inc.*, 179 F.3d 331, 342 (5th Cir. 1999)). The public factors look to the courts' concerns and the forum state's interests, and include the administrative difficulties flowing from court congestion, the local interest in having localized controversies decided at home, the interest in having the trial of a diversity case in a forum familiar with the law that must govern the action, the avoidance of problems in conflict of laws problems, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* Texas forum non conveniens law is multi-faceted. Section 71.051 of the Texas Civil Practice and Remedies Code applies to personal injury and wrongful death claims. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2008). Common law forum non conveniens, in line with *Gulf Oil Corp. v. Gilbert*, governs all other interstate and international forum convenience issues in Texas state courts. See *In re Smith Barney, Inc.*, 975 S.W.2d 593, 596 (Tex. 1998).

96. *Intelligender, LLC v. Soriano*, No. 2:10-CV-125-TJW, 2011 WL 903342, at \*9 (E.D. Tex. Mar. 15, 2011).

97. *Id.* at \*1.

98. *Id.* at \*2.

99. *Id.*

its home forum.<sup>100</sup> The court summarily denied the motion because the defendants' counterclaims against Intelligender could not be litigated in Chile.<sup>101</sup>

Routine forum non conveniens analyses included dismissals in favor of courts in: (1) Mexico, regarding an oil rig accident in Mexican territorial waters that injured and killed Mexican citizens;<sup>102</sup> (2) England, regarding shareholders' derivative litigation arising from the British Petroleum accident in the Gulf of Mexico;<sup>103</sup> and (3) Florida, regarding a plane crash in Texas but with parties, decedents, and related probate actions all based in Florida.<sup>104</sup>

### III. CHOICE OF LAW

Choosing the applicable substantive law is a question—like personal jurisdiction and judgment enforcement—involving both forum law and constitutional issues. Understanding these issues requires a clear focus on the basic principles. First, choice of law is a question of state law, both in state and federal courts.<sup>105</sup> Second, it is a question of forum state law. *Renvoi*—the practice of using another state's choice-of-law rule—is almost never employed unless the forum state directs it, and even then, the forum state remains in control.<sup>106</sup> Third, the forum state has broad power to make choice-of-law decisions, either legislatively or judicially, subject only to limited constitutional requirements.<sup>107</sup>

Within the forum state's control of choice of law is a hierarchy of rules. At the top are legislative choice-of-law rules, like statutes directing the application of a certain state's laws based on events or people important to the operation of each specific law.<sup>108</sup> Second in the choice-of-law hierarchy is party-controlled choice of law or the choice-of-law clauses in con-

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100. *Id.* at \*3.

101. *Id.* at \*9, where the court used one paragraph to reject Farmacias's motion.

102. *Dominguez v. Gulf Coast Marine & Assocs., Inc.*, No. 9:08-CV-200, 2011 WL 1526973, (E.D. Tex. Apr. 20, 2011).

103. *In re BP S'holder Derivative Litig.*, No. 4:10-CV-3447, 2011 WL 4345209 (S.D. Tex. Sept. 15, 2011).

104. *Schippers v. Mazak Props., Inc.*, 350 S.W.3d 294 (Tex. App.—San Antonio July 13, 2011, pet. denied).

105. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941).

106. The Restatement (Second) creates a presumption against *renvoi* except for limited circumstances. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971). Although commentators defend the limited use of *renvoi*, they acknowledge its general lack of acceptance in the United States except in limited circumstances, usually found in statutes directing the use of *renvoi*. *See* HAY, *supra* note 23, at 162–68; WEINTRAUB, *supra* note 1, at 88–94. Texas law provides for *renvoi* in the Texas Business and Commerce Code. TEX. BUS. & COM. CODE ANN. §§ 1.105 & 2.402(b) (West 2009), 4.102(b) (West 2002 & Supp. 2011), 8.106 & 9.103 (West 2011). For federal courts, *Klaxon* reiterates the forum state's control of choice of law. *Klaxon*, 313 U.S. at 496–97.

107. *See infra* note 114 and accompanying text.

108. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1), cmt. a (1971); *see e.g.*, *Owens Corning v. Carter*, 997 S.W.2d 560, 564 (Tex. 1999) (applying an earlier version of the Texas wrongful death statute, requiring that the court “apply the rules of substantive law that are appropriate under the facts of the case”) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031).



tracts, which control unless public policy dictates otherwise.<sup>109</sup> Third, in the hierarchy, is the common law, now controlled in Texas by the most significant relationship test of the Restatement (Second) of Conflict of Laws.<sup>110</sup> This Survey article is organized according to this hierarchy: statutory choice-of-law, followed by choice-of-law clauses, and concluding with choice of law under the most significant relationship test. Special issues such as constitutional limitations are discussed in the following section. This grouping of cases results in a discussion that mixes Texas Supreme Court opinions with those of Texas intermediate appellate courts, federal district courts, and the Fifth Circuit. In spite of this mix, readers should note that because choice-of-law is a state law issue, the only binding opinions are those of the Texas Supreme Court.<sup>111</sup>

#### A. LEGISLATIVE JURISDICTION

Legislative jurisdiction imposes two limits on the application of any given law. One is the limit within the law itself, or what territorial range was this law intended to have. Common law, emanating from courts rather than legislatures, did not have a built-in limit other than the older concept of *lex locus* at a time when laws were deemed territorial. However, statutes often have an intended range, and that is the first limit of legislative jurisdiction—the range imposed by the lawmaker.

Within the United States, the second limit on a law's range is imposed by the United States Constitution. Similar to the due process limitation on state long-arm statutes,<sup>112</sup> the Constitution imposes limits on a state's ability to choose the governing law in its courts. Unlike the limits on state long-arm statutes (which arise only under the due process clause), choice-of-law limits arise under several doctrines: due process, requiring a reasonable connection between the dispute and the governing law; full faith and credit, requiring the choice-of-law analysis to consider the interests of other affected states; and to a lesser extent, equal protection, privileges and immunities, the commerce clause, and the contract clause.<sup>113</sup>

109. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (allowing contracting parties to choose a governing law, within defined limits). Texas has adopted § 187. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677–78 (Tex. 1990).

110. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (listing the seven balancing factors for the most significant relationship test).

111. The exception is when a federal court rules on a constitutional issue, such as legislative jurisdiction or full faith and credit, or federal questions such as foreign sovereign immunity. See, e.g., *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 680 (Tex. 2004) (legislative jurisdiction).

112. See *supra* notes 3–17 and accompanying text.

113. The due process clause is the primary limit on state choice-of-law rules, requiring a reasonable or at least minimal connection between the dispute and the law being applied. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 807 (1985); *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930); *Compaq Computer Corp.*, 135 S.W.3d at 680; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 and comments following; see also HAY, *supra* note 23, at 175–203; WEINTRAUB, *supra* note 1, at 585–648; James P. George, *Choice of Law: A Guide for Texas Attorneys*, 25 TEX. TECH. L. REV. 833, 844–46 (1994). Choice-of-law limits under full faith and credit are now questionable after *Franchise Tax Bd. of Cal. v. Hyatt*, Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488 (2003). In addition to these two limits,

Constitutional problems most often occur when a state court chooses its own law in questionable circumstances. But the inappropriate choice of law is not the only conceivable constitutional issue, and even when choosing foreign law, courts must apply choice-of-law rules with an eye towards constitutional limitations.

Four cases during the Survey period dealt with legislative limits. *Cottonwood Financial Ltd. v. Cash Store Financial Services, Inc.* dealt with both self-imposed and constitutional limits.<sup>114</sup> This was a trademark case considering the extraterritorial application of the Lanham Act. Texas-based Cottonwood operates payday lender services in seven states including Texas, using the trade name “Cash Store.”<sup>115</sup> Canada-based Cash Store Financial Services, Inc. (CSFS) provides the same service in Canada, Australia, and the United Kingdom, originally using the names “B & B Capital” and “Rentcash,” but switching to “The Cash Store” around 2001.<sup>116</sup> Both lenders operated independently and without interference until CSFS expanded its activities into the United States, including attracting American investors, and in 2010 registering in the New York Stock Exchange as “The Cash Store Financial Services, Inc.”<sup>117</sup>

Responding to those activities, Cottonwood sued in a Dallas federal court for trademark infringement and related violations of Texas law.<sup>118</sup> In ruling on Cottonwood’s motion for a temporary injunction, the court noted both Congressional intent and the constitutional basis for the Lanham Act’s extraterritorial application.<sup>119</sup> The court further noted that Cottonwood did not seek to restrain CSFS’s use of the mark outside of the United States.<sup>120</sup> Ironically, the scope of Cottonwood’s relief was limited not by the law’s territorial range, but by Cottonwood’s failure to state a claim under the Lanham Act, leading the court to dismiss the federal claim.<sup>121</sup> The court then ruled that Cottonwood had stated a claim for trademark dilution under Texas law, which allowed it to retain supplemental jurisdiction<sup>122</sup> and, accordingly, issue a limited injunction on CSFS’s use of “The Cash Store” within the United States.<sup>123</sup>

The court’s ruling leaves open the question of the territorial range of Texas law. The court observed in a footnote that there could be choice-of-law issues involved in the nationwide application of Texas law but held under Texas’s most significant relationship test, Texas law would apply.<sup>124</sup>

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international law also imposes a reasonable connection limit on choice of law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402–04 (1987).

114. *Cottonwood Fin. Ltd. v. Cash Fin. Servs., Inc.*, 778 F. Supp. 2d 726 (N.D. Tex. 2011).

115. *Id.* at 730.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 735.

120. *Id.* at 733, 735 n.7.

121. *Id.* at 740.

122. *Id.*

123. *Id.* at 740–41.

124. *Id.* at 760, n.55.

This ignores the additional test under due process as explained by the Supreme Court in *Phillips Petroleum Co. v. Shutts*, which reversed the Kansas Supreme Court's decision to apply Kansas law extraterritorially.<sup>125</sup> That is not to say that *Phillips* would bar the nationwide application of Texas law here, but merely to say that further examination is needed.

Three other cases considered only the first limit, legislative intent. *In re Fernandez* was an appeal from a bankruptcy court on the issue of homestead exemption, specifically whether the debtor, now living in Texas, could claim an exemption under Nevada law.<sup>126</sup> The bankruptcy court ruled against the debtor on an analysis that exemption laws could never be applied extraterritorially.<sup>127</sup> The district court reversed, noting that case law had developed three approaches on this question: (1) exemption laws could never be applied extraterritorially (which the court observed was unique to the bankruptcy court from which this appeal came); (2) federal law intended to allow extraterritorial application if the state law also intended that; and (3) federal law gave state exemptions extraterritorial effect regardless of the state's intention.<sup>128</sup> The district court adopted the second ground and then turned to the question of whether Nevada intended its exemption law to be applied to Texas property, which it answered in the affirmative.<sup>129</sup> In another Survey period case, the Fifth Circuit Court of Appeals reached the opposite result, not on Congressional intent, but on the point that Florida did not intend for its exemption law to apply outside of Florida.<sup>130</sup> *Abecassis v. Wyatt* offered a quick conclusion in dismissing private claims under the Anti-Terrorism Act because it did not apply to foreign entities engaged in financial transactions with the Iraqi government.<sup>131</sup>

## B. STATUTORY CHOICE-OF-LAW RULES

Statutory choice-of-law rules, especially those dictating the application of forum law, express a public policy interest about governing law. These statutory directives should be applied no matter what the parties plead. Seven Survey period cases illustrate the courts' careful adherence even where the parties conceded Texas law's application, going out of their way to note the mandate that Texas law applied apart from the claims raised by the parties.<sup>132</sup>

Three of the cases involved a federal statutory choice of law and are

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125. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 822–23 (1985).

126. *In re Fernandez*, No. EP-11-CV-123-KC, 2011 WL 3423373 (W.D. Tex. Aug. 5, 2011).

127. *In re Fernandez*, 445 B.R. 790, 795 (Bankr. W.D. Tex. 2011).

128. *Fernandez*, 2011 WL 3423373, at \*6.

129. *Id.* at \*22–27.

130. *In re Camp*, 631 F.3d 757, 760 (5th Cir. 2011).

131. *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 648 (S.D. Tex. 2011).

132. See *supra* notes 113–132 and accompanying text.

discussed in the Legislative Jurisdiction section above.<sup>133</sup> The remaining four cases involved the Texas Insurance Code's directive that any insurance policy payable to a citizen or inhabitant of Texas by an insurance company doing business in Texas be governed by Texas law.<sup>134</sup>

*Zurich American Insurance Co. v. Vitus Marine, LLC* denied the application of Texas law.<sup>135</sup> The dispute involved an insurer that denied coverage for repairs made to defective welds on barges. The barges were constructed in Houston, although the opinion is unclear as to where the repairs occurred. The barge owners made a claim on the policy, but the insurer won the race to the courthouse, filing a declaratory judgment action in a Houston federal court a few hours before the claimants filed in a federal court in Washington state.<sup>136</sup> The Houston federal court granted claimants' request for an inconvenient forum transfer, finding that the bulk of public and private interest factors favored the Washington forum, and rejecting the insurer's argument that the Texas Insurance Code's statutory directive governed because the payee on the policy was not a Texas resident.<sup>137</sup> The other three cases all involved insurers' alleged breach of the duty to defend in varied fact patterns, all holding Texas law applicable under the statute.<sup>138</sup>

### C. CHOICE OF LAW CLAUSES IN CONTRACTS

Texas law and the Restatement permit contracting parties to choose a governing law,<sup>139</sup> which is reflected in twenty-three Survey-period cases. Seventeen of those cases involve courts' summary acquiescence to the parties' choice of law with little or no analysis, a judicial practice which the authors have not seen before, at least not to this degree.<sup>140</sup> Courts

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133. *See id.*

134. Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same.

TEX. INS. CODE ANN. art. 21.42 (West 2009).

135. *Zurich Am. Ins. Co. v. Vitus Marine, LLC*, No. H-11-3022, 2011 WL 4972025, at \*4 (S.D. Tex. Oct. 19, 2011).

136. *Id.* at \*1.

137. *Id.* at \*3.

138. *Simmons v. Liberty Mut. Fire Ins. Co.*, 420 Fed. App'x 388, 390 (5th Cir. 2011) (per curiam) (breach of duty to defend in a sales agent dispute with Quixtar, formerly known as Amway); *Millis Dev. & Constr., Inc. v. Am. First Lloyd's Ins. Co.*, 809 F. Supp. 2d 616, 625 (S.D. Tex. 2011) (action by co-insurer on duty to defend in personal injury lawsuit); *Sigma Marble & Granite-Houston, Inc., v. Amerisure Mut. Ins. Co.*, No. H-09-3942, 2010 WL 5464257, at \*4 (S.D. Tex. Dec. 28, 2010) (commercial general liability insurance, breach of duty to defend plaintiff for disputes related to plaintiff's renovation work on a Houston hotel).

139. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

140. The seventeen, on file with the author, comprise three cases from the Fifth Circuit Court of Appeals, cases from the Northern, Southern, and Eastern Districts of Texas, and

arguably can take such action where the parties do not object, and courts are entitled to take judicial notice of sister-state law.<sup>141</sup> The Restatement, however, makes it clear that parties' contractual choices of law do not control if another state has a more significant relationship to the dispute.<sup>142</sup> In a 2006 per curiam opinion, the Fifth Circuit noted the need to conduct an analysis rather than accepting the parties' concession: "[A] federal court has an obligation to apply the forum state's choice-of-law rules even if the parties are in agreement as to the controlling law."<sup>143</sup> That court further held that "[u]nder Texas choice-of-law principles, contractual choice-of-law clauses are given effect if the law chosen by the parties (1) has a reasonable relationship to the parties and the chosen state and (2) is not contrary to a fundamental policy of the state."<sup>144</sup> The Southern District's Judge Hughes, in an opinion rendered during this Survey period, provided a more accurate statement for the second element of that test: "[T]he parties' choice of law applies unless its application is contrary to the laws of a state with a materially greater interest in the transaction."<sup>145</sup> That means the parties' chosen state must bear a reasonable relationship to the dispute, and the application of the chosen state's law must not override a fundamental policy of any state (forum or otherwise) which has a more significant relationship to the parties or the dispute.

Along with the seventeen, the Survey period produced six good analytical examples of choice-of-law clauses and one, *Quicksilver Resources, Inc. v. Eagle Drilling, LLC*<sup>146</sup> which left out the forum public policy consideration, but was otherwise a well-done choice-of-law analysis. *Quicksilver* was a dispute between an oil exploration company and a drilling company whose interactions included both Texas and Oklahoma. As the relationship deteriorated, Quicksilver sued Eagle on contract, fraud, and negligence claims. Eagle counterclaimed on the contract and added related claims of tortious interference, false light, invasion of privacy, and other claims, and then added Quicksilver's officers, directors, and employees as third party defendants on the same tort claims.<sup>147</sup> In an earlier opinion in the case, the court had ruled that the contract's Oklahoma

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one case from a Texas court of appeals, indicating that this is primarily a federal and not a state practice. Appellate courts have jurisdiction only on the points raised on appeal, but a court's statement that "[t]he parties agree that, pursuant to the choice-of-law provision of the Lease, Ohio law governs . . . indicates that the issue was not considered at the trial court." *Alameda Mall, L.P. v. Shoe Show, Inc.*, 649 F.3d 389, 392 (5th Cir. 2011).

141. See FED. R. CIV. P. 44.1; TEX. R. EVID. 202.

142. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (1971).

143. *Provident Fin., Inc. v. Strategic Energy L.L.C.*, 404 Fed. App'x 835, 839 n.5 (5th Cir. 2010) (per curiam) (citing *Caton v. Leach Corp.*, 896 F.2d 939, 942 (5th Cir. 1990)).

144. *Id.* at 839 (citing *Int'l Interests, L.P. v. Hardy*, 448 F.3d 303, 306-07 (5th Cir. 2006)).

145. *Griffin v. BAC Home Loans Servicing, LP*, No. H-09-03842, 2011 WL 675285, at \*1 (S.D. Tex. Feb. 16, 2011) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971)).

146. *Quicksilver Res., Inc. v. Eagle Drilling, LLC*, 792 F. Supp. 2d 948, 951-57 (S.D. Tex. 2011).

147. *Id.* at 951-54.

choice-of-law clause was valid and governed the contract claims.<sup>148</sup> When addressing which law governed the various tort claims, the court did a thorough review of Texas case law on the application of choice-of-law clauses to tort claims. Noting the clause's reference to the parties' relationship rather than the contract, the court held that the clause was sufficiently broad to cover the range of contract and tort claims between the companies.<sup>149</sup> What is missing is a consideration of Oklahoma law overriding the fundamental policy of another state, in this case Texas. Assuming that the court's prior order on the contract claims did such an analysis, that order does not cover the public policy concerns that might occur with the tort claims.

The six Survey period cases with appropriate contract clause analysis include a variety of fact patterns, including a Texas probate in which Michigan law governed the right of survivorship to decedent's employee-investment plan;<sup>150</sup> a personal injury claim arising in Texas with Maryland law governing the indemnity claim;<sup>151</sup> a non-compete agreement for performance in Texas governed by Illinois law;<sup>152</sup> the breach of a software licensing agreement governed by Ohio law, while Texas law applied to the tort claims;<sup>153</sup> and—in a more complex analysis—a federal claim for overtime pay where federal law governed, with deference to the contract's chosen Texas law.<sup>154</sup>

#### D. THE MOST SIGNIFICANT RELATIONSHIP TEST

In the absence of a statutory choice-of-law rule or an effective choice-of-law clause, Texas courts apply the most significant relationship test<sup>155</sup> from the Restatement.<sup>156</sup>

##### 1. Contract-Based Claims

The Survey period produced only two contract cases not involving a valid choice-of-law clause. *Premier Tierra Holdings, Inc. v. Ticor Title*

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148. *Id.* at 952.

149. *Id.* at 952–53.

150. *McKeehan v. McKeehan*, 355 S.W.3d 282, 284 (Tex. App.—Austin 2011, no pet.).

151. *CMA-CGM (Am.) Inc. v. Empire Truck Lines, Inc.*, No. 01-10-00077-CV, 2011 WL 1631961, at \*2 (Tex. App.—Houston [1st Dist.] April 28, 2011, no pet.) (mem. op.).

152. *Johnson Serv. Grp., Inc. v. France*, 763 F. Supp. 2d 819, 825 (N.D. Tex. 2011).

153. *Fagan Holdings, Inc. v. Thinkware, Inc.*, 750 F. Supp. 2d 820, 825 (S.D. Tex. 2010).

154. *Champion v. ADT Sec. Servs., Inc.*, No. 2:08-CV-417-TJW, 2010 WL 4736908, at \*3 (E.D. Tex. Nov. 16, 2010).

155. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 678 (Tex. 1990).

156. The embodiment of the most significant relationship test is seven factors to be balanced according to the needs of the particular case. They are: “(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). This listing is not by priority, which varies from case to case. *Id.* at cmt. c. In a larger sense, the most significant relationship test includes the other choice-of-law sections throughout the Restatement.

*Insurance Co. of Florida* is a claim for breach of diligence in curing title defects regarding property in Florida.<sup>157</sup> Premier argued that Texas law controlled and that it was much the same as Florida law. The court disagreed, noting the silence of Florida law on crucial issues. The court then conducted a straightforward, one-paragraph analysis under Restatement section 188 with no mention of the most significant relationship test in section 6, although section 6 would likely support the court's choice of Florida law.<sup>158</sup> The court relied on the absence of on-point Florida law to interpret the contract with its own language and denied the defendant's motion for summary judgment.<sup>159</sup>

*Pride Transportation v. Continental Casualty Co.*<sup>160</sup> illustrates a federal court's use of the transferor state's choice-of-law rule after an inconvenient forum transfer from a federal court in Utah. The transferee Texas federal court applied Utah's choice-of-law rule to a claim of inadequate legal defense related to an automobile accident in Texas, holding that Texas law governed—which is no surprise since the Texas contacts also dictated venue transfer to Texas.<sup>161</sup>

## 2. Commercial Torts

In *City of Clinton, Arkansas v. Pilgrim's Pride Corp.*,<sup>162</sup> the city sued Pilgrim's Pride in bankruptcy court for closing its facility in Clinton, alleging fraud in order to manipulate commodity prices. The action arose in Arkansas, but Clinton had to file in the bankruptcy court in Texas, from which it was withdrawn and transferred to a district court that dismissed the claims.<sup>163</sup> On appeal, the court bypassed the apparent choice-of-law issue and held that Clinton did not state a claim under Arkansas law, allowing for dismissal without needing to assess the conflicts question.<sup>164</sup>

Choice of law ordinarily resolves substantive issues, but in *Northview Christian Church, Inc. v. Monolithic Constructors, Inc.*, the court had to use a Restatement analysis to resolve what is usually considered a procedural issue—the joinder of third party defendants.<sup>165</sup> The plaintiff was an Alabama church that engaged a number of contractors to design and construct two dome-shaped church buildings in Dothan, Alabama. At the project's conclusion, the church was unhappy with the results and filed suit in a federal court in Dallas based on Texas being the home of two of the defendants.<sup>166</sup> When the defendants moved to designate a new party,

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157. *Premier Tierra Holdings, Inc. v. Ticor Title Ins. Co. of Fla.*, No. 4:09-CV-02872, 2011 WL 2313206, at \*1 (S.D. Tex. June 9, 2011).

158. *Id.* at \*2.

159. *Id.* at \*8–9.

160. *Pride Transp. V. Cont'l Cas. Co.*, 804 F. Supp. 2d 520, 527 (N.D. Tex. 2011).

161. *Id.*

162. *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, 632 F.3d 148, 151 (5th Cir. 2010).

163. *Id.*

164. *Id.* at 153–57, 153 n.2.

165. *Northview Christian Church, Inc. v. Monolithic Constructors, Inc.*, No. 3:09-CV-00655-M, 2011 WL 4485419, at \*1 (N.D. Tex. Sept. 28, 2011).

166. *Id.* at \*1–2.

Saliba Construction, as a responsible third party, the plaintiff objected on the grounds that Alabama law did not allow such joinder. The court characterized the issue as one of substantive law, based on the viability of the third party claims under the controlling substantive law, which called for the application of the Restatement's basic tort claim analyses under sections 6 and 145. Examining those factors, the court concluded Alabama law controlled, and accordingly, denied defendants' motion to join responsible third parties.<sup>167</sup>

*Quicksilver Resources, Inc. v. Eagle Drilling, LLC* is an oil patch dispute reported above in the Contractual Choice-of-Law Clause section.<sup>168</sup> After determining that the parties' choice of Oklahoma law governed both the contract and tort claims between the companies, the court still had to consider the related tort claims against the individual defendants who were not subject to the choice-of-law clause.<sup>169</sup> In spite of its too-brief analysis of the choice-of-law clause, the court performed a textbook analysis of the extra-clause claims. Specifically, the court identified material conflicts between Oklahoma and Texas law on the claims against Quicksilver's individual parties.<sup>170</sup> The court further analyzed under the Restatement and found Oklahoma law governed Eagle's false representation claim against the individual defendants, but Texas law applied to Eagle's claims of tortious interference, conspiracy, and false light invasion of privacy against the individual defendants.<sup>171</sup>

Two bankruptcy cases applied the Restatement's tort principles to adverse claims regarding fraudulent transfers in the failure of a European power plant<sup>172</sup> and a garden variety of claims in debtors' joint actions against a billing services company.<sup>173</sup>

### 3. Non-Commercial Torts

*Black v. Toys R Us—Delaware, Inc.*<sup>174</sup> offers the Survey period's most instructive opinion on using the Restatement. The Blacks bought a Bumbo Seat at defendant's store in North Carolina and subsequently moved to California. While in California, the child fell out of the seat and struck her head, causing a serious injury. Under doctor's advice, the

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167. *Id.* at \*2–3.

168. *Quicksilver Res., Inc. v. Eagle Drilling, LLC*, 792 F. Supp. 2d 948, 950–51 (S.D. Tex. 2011).

169. *Id.* at 951.

170. *Id.* at 954.

171. In addition to Restatement (Second) section 6 (the most significant relationship test), the court applied sections 145 (the basic tort principle) & 148 (fraud and misrepresentation). *Id.* at 953–57.

172. *See MC Asset Recovery, LLC v. Commerzbank AG*, 441 B.R. 791, 805 (Bankr. N.D. Tex. 2010) (using section 145 to conclude that Georgia law negated plaintiff's claim for avoiding pre-petition transfers, applying Texas law to the negligence and misrepresentation claims, and Georgia law to the contract claims).

173. *See Reed v. Carecentric Nat'l, LLC (In re Soporex, Inc.)*, 446 B.R. 750, 761–62 (Bankr. N.D. Tex. 2011).

174. *Black v. Toys R US—Del., Inc.*, No. 4:08-CV-3315, 2010 WL 4702344 (S.D. Tex. Nov. 10, 2010).



mother had to awaken the child every two or three hours over the next few days to prevent a coma. While doing this, the mother was twenty weeks pregnant with twins and went into pre-mature labor and lost the twins.<sup>175</sup> The Blacks sued in a Houston federal court (the opinion does not explain why, but perhaps another residential change). The defendants argued for the application of North Carolina law which barred recovery for contributory negligence, unlike California law, which applied a comparative fault standard. In the most thorough choice-of-law analysis in this Survey period, the court analyzed the fact under seven Restatement sections,<sup>176</sup> yielding a discussion too long to report here. The court concluded that California law controlled, based primarily on the location of the accident<sup>177</sup> and the fact that North Carolina's contributory negligence doctrine was intended to protect North Carolina manufacturers, and none of the defendants were based in North Carolina.<sup>178</sup>

*Enterprise Products Partners, L.P. v. Mitchell* was an action for wrongful death, personal injury, and property damage arising from a ruptured liquid propane pipeline in Mississippi.<sup>179</sup> Plaintiffs sued in state court in Houston, naming two corporate defendants based in Houston. The defendants moved for the application of Mississippi law, which has a \$1 million damage cap on non-economic injuries. The court of appeals affirmed the trial court's choice of Texas law. The court applied the Restatement (Second) sections 6, 145, 146, and 175 and concluded that the Mississippi damage cap was designed to attract businesses to Mississippi, the rupture could have occurred anywhere along the pipeline's 1300 mile length, and the defendants had little presence in Mississippi other than the portion of their pipeline.<sup>180</sup>

*Figueroa v. Williams* is a horrific fact pattern involving the death of illegal immigrants from Mexico and Honduras who were smuggled across the border in the back of a truck trailer that was abandoned at a gas station in Victoria, Texas, with the occupants locked inside.<sup>181</sup> After the truck driver was convicted of homicide,<sup>182</sup> the decedents' families brought claims against the truck manufacturer and owner for wrongful death and related claims under Texas law. Analyzing the facts under Restatement sections 6 and 145, the court concluded that the laws of the

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175. *Id.* at \*1.

176. In addition to Restatement (Second) sections 6 and 145, the court analyzed sections 146 (personal injuries), 147 (injuries to tangible things), 148 (fraud and misrepresentation), *id.*, (tortious character of conduct), and 164 (contributory fault). *Id.* at \*8, 11, 12, 14. The court noted that the Texas Supreme Court has not adopted all of these sections but nonetheless found them persuasive. *Id.* at \*11.

177. *Id.* at \*9–10.

178. *Id.* at \*16.

179. *Enter. Prods. Partners, L.P. v. Mitchell*, 340 S.W.3d 476 (Tex. App.—Houston [1st Dist.] 2011, pet. granted).

180. *Id.* at 480–82.

181. *Figueroa v. Williams*, Nos. V-05-56 through V-05-62, 2010 WL 5387599 (S.D. Tex. Dec. 17, 2010).

182. *See United States v. Williams*, 610 F.3d 271, 275 (5th Cir. 2010).

victims' domiciles—Mexico and Honduras—should govern the assessment of damages.<sup>183</sup>

#### E. ADMIRALTY AND MARITIME CLAIMS

*SLS Shipbuilding Co. v. Ionia Management S.A.* raised the interesting question of which law governs claim characterization.<sup>184</sup> This was an action to enforce an English arbitration award for breach of contract in the building of three ships. SLS filed the follow-up action in a Houston federal court seeking to seize defendant's unrelated property in satisfaction of the English award.<sup>185</sup> Defendant Ionia objected, arguing that the seized property was unattachable under applicable federal maritime law; SLS responded that English law governed the identity of property that could satisfy the English award.<sup>186</sup> This raised a deeper choice-of-law issue as to whether the seizure was a maritime claim or merely execution on an English judgment. The court held that federal common law governed claim characterization and did not allow for the seizure of a ship pursuant to the breach of a contract for building other ships.<sup>187</sup>

*Marinor Associates v. M/V Panama Express* was a claim for lost cargo involving a complicated choice-of-law clause<sup>188</sup> with provisions designating the law of Germany, Singapore, the United States, and the Hague-Visby Rules as alternatives.<sup>189</sup> In a detailed and careful analysis, the court held that United States law governed the loss of cargo carried below deck, and the Hague-Visby Rules governed the loss of cargo carried on deck.<sup>190</sup>

Other Survey period cases illustrated the adjacent state rule<sup>191</sup> and the correlating maritime law function of choosing between conflicting adjacent states.<sup>192</sup>

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183. *Figueroa*, 2010 WL 5387599, at \*4–10.

184. *SLS Shipbuilding Co. v. Ionia Mgmt. S.A.*, No. H-11-271, 2011 WL 2652365 (S.D. Tex. July 5, 2011).

185. *Id.* at \*1

186. *Id.*

187. *Id.* at \*2–4.

188. *Marinor Assocs. v. M/V Panama Express*, No. H-08-1868, 2011 WL 710616, at \*9 (S.D. Tex. Feb. 18, 2011).

189. The original treaty is the 1924 International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels, 25 August 1924. The Hague-Visby Rules include the amendments of the Brussels Protocol of 1968, Brussels, 23 February 1968.

190. *Mariner Assocs.*, 2011 WL 710616, at \*9–11.

191. *Great Lakes Reinsurance (UK) PLC v. Tico Time Marine LLC*, No. 4:10-CV-2060, 2011 WL 1044154, at \*3–5 (S.D. Tex. Mar. 16, 2011) (using maritime choice-of-law rules to choose New York over Texas law on a bad faith insurance claim).

192. Two Survey period cases used the maritime law's adjacent state rule that the law of the adjacent state is a surrogate of federal common law. *Samson Contour Energy E&P, LLC v. LEAM Drilling Systems, Inc.* rejected the rule in a personal injury and indemnification case, holding that maritime law prevailed over Louisiana law because the drilling platform was inextricably intertwined with maritime activities. *Samson Contour Energy E&P, LLC v. LEAM Drilling Systems, Inc.*, No. 4:10-00671, 2010 WL 5092966, at \*5–6 (S.D. Tex. Dec. 7, 2010). As a predicate, the court also held that the federal Outer Continental Shelf Lands Act overrode the parties' contractual choice of Oklahoma law. *Id.* at \*2–3. The court cited the federal act by name only, but its citation is 43 U.S.C.

## F. ENTITY INTERNAL RELATIONS

*Experian Information Solutions, Inc., v. Lexington Allen, L.P.* was a commercial lease dispute in which the landlord sued the tenant for payment on property improvements.<sup>193</sup> When the tenant responded that it had insufficient funds to pay, the landlord argued that the tenant was the alter ego of its Delaware parent entity. Although Texas law governed the primary claims, the court applied Delaware law to the alter ego issue, citing the Texas choice-of-law rule that veil piercing is governed by the law of the state of incorporation.<sup>194</sup>

*Valdez v. Capital Management Services, L.P.* was a consumer's action for identity theft and related debt collection violations.<sup>195</sup> For the plaintiff's claim that an additional defendant was in a joint venture with the lead defendant, the court applied Delaware law to determine the joint venture's existence.<sup>196</sup> The court also applied Restatement (Second) of Conflict of Laws section 291 to issues of the duties of principal and agent.<sup>197</sup>

*Alert 24 Security, LLC v. Tyco International, Ltd.* used the state-of-incorporation rule along with traditional Restatement analysis to determine personal jurisdiction,<sup>198</sup> and three courts applied the internal affairs doctrine calling for the application of the law of incorporation.<sup>199</sup>

## G. OTHER CHOICE-OF-LAW ISSUES

Survey period cases dealt with a number of other choice-of-law issues, including the primary analytical steps, such as false conflicts,<sup>200</sup> pleading

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§§ 1301–1356a (2009). See *Energy XXI, GoM, LLC, v. New Tech Eng'g, L.P.*, No. H-10-00110, 2011 WL 11197 (S.D. Tex. Jan. 3, 2011) (adjacent state rule adopting Louisiana law in defective product claim regarding oil drilling) (example of adjacent state rule's application).

193. *Experian Info. Solutions, Inc. v. Lexington Allen L.P.*, No. 4:10-CV-144, 2011 WL 1627115, at \*1–2 (E.D. Tex. Apr. 7, 2011).

194. *Id.* at \*2–3 n.2 (citing *Weaver v. Kellog*, 216 B.R. 563, 585 (S.D. Tex. 1997)).

195. *Valdez v. Capital Mgmt. Servs., L.P.*, No. B:09-246, 2010 WL 4643272, at \*1 (S.D. Tex. Nov. 16, 2010).

196. *Id.* at \*8.

197. *Id.* at \*9.

198. *Alert 24 Sec., LLC v. Tyco Int'l, Ltd.*, 823 F. Supp. 2d 589, 597–97 (S.D. Tex. Oct. 18, 2011).

199. See *In re Noram Res., Ins.*, No. 08-38222, 2011 WL 5357895, at \*5–6 (Bankr. S.D. Tex. Nov. 7, 2011) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 30 (1971)) (applying Canadian law to the trustee's allegations that corporate officers breached their duty of care); *In re Skyport Global Comm., Inc. v. CenturyTel, Inc.* (*In re Skyport Global Commc'ns, Inc.*, No. 10-03150, 2011 WL 111427, at \*15 (Bankr. S.D. Tex. Jan. 13, 2011) (applying Delaware law to the predecessor corporation and Texas law to the successor); *U.S. Bank, Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 817 F. Supp. 2d 934, 942 (N.D. Tex. 2011) (applying Delaware law to claims of directors' fiduciary breaches).

200. Defining a clear, outcome-changing difference between the forum's and the foreign law is the first step in conducting a choice-of-law analysis, and the absence of a clear conflict should result in the application of forum law. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. i (1971); *id.* at § 186 cmt. c & illus. 2 (demonstrating that where there is no difference between the law of the place of contract formation and the law of the place of performance, the two can be treated as one state); see also *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 838 (1985) (Stevens, J., concurring in part and dissenting in

and proof of foreign law;<sup>201</sup> and the substance and procedure distinctions, with its heavy presumption that forum procedure governs.<sup>202</sup> Other cases discussed statutes of limitation,<sup>203</sup> federal venue transfers,<sup>204</sup> workers'

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part). The Survey period produced five false-conflict cases on varied facts patterns. *Marquis v. Omniguide, Inc.*, No. 3:09-CV-2092-D, 2011 WL 321112, at \*8 n.5 (N.D. Tex. Jan. 28, 2011) (an employment discrimination suit in which both parties pleaded under Texas law and ignored the contract's choice of Massachusetts law, with the court taking the cautionary step of verifying it was a false conflict); *accord* 1993 GF P'ship v. Simmons & Co. Int'l, No. 14-09-00268-CV, 2010 WL 4514277, at \*9 n.15 (Tex. App.—Houston [14th Dist.] Nov. 9, 2010, no pet.) (mem. op.); *Hiller v. Meritage Homes of Texas, LLC*, No. 4:09-CV-4036, 2011 WL 1232065, at \*4 n.5 (S.D. Tex. Mar. 31, 2011) (no conflict between Arizona and Texas law concerning the ability to arbitrate an employment discrimination claim arising from a contract designating Arizona law); *Flagship Credit Corp. v. Indian Harbor Ins. Co.*, No. H-10-3616, 2011 WL 1638638, at \*3 (S.D. Tex. Apr. 29, 2011) (no conflict between Pennsylvania and Texas law on the insurability of punitive damages in regard to a related Pennsylvania lawsuit) *rev'd in part & vacated in part*, No. 11-20408, 2012 WL 2299484 (5th Cir. June 15, 2012) (per curiam); *Regions Equip. Fin. Corp. v. AT 2400*, Official No. 530775, 640 F.3d 124, 127-28 (5th Cir. 2011) (no conflict between Alabama and federal maritime law on the issue of promissory notes' "entire agreement" clause disallowing side agreements).

201. *Tokio Marine & Nichido Fire Ins. Co. v. M/V Sophie Rickmers* explains the requirements under Federal Rule of Civil Procedure 44.1 for pleading and proving Japanese law in a maritime cargo loss case in the Pacific Ocean. *Tokio Marine & Nichido Fire Ins. Co. v. M/V Sophie Rickmers*, No. H-09-886, 2011 WL 2970821, at \*3 (S.D. Tex. July 21, 2011).

202. The Survey period produced one example—but it is unusual because it involved the forum's use of another state's procedural law. *Tau Kappa Epsilon v. USA Bus Charter, Inc.* is an action by University of Texas students against an Arizona bus charterer over transportation problems traveling to the Texas–OU game in Dallas in 2008. *Tau Kappa Epsilon v. USA Bus Charter, Inc.*, No. 03-10-00768-CV, 2011 WL 3250598, at \*3 (Tex. App.—Austin July 28, 2011, pet. denied) (mem. op.). When plaintiffs ignored the contract's arbitration clause and sued in Texas, defendant's Arizona lawyer assumed Texas law provided the same ten-day notice of entry of default as did Arizona law. Defendant's lawyer was wrong and had to file a motion for new trial to set aside the default. The court of appeals affirmed the Texas trial court's grant of a new trial, applying the Arizona default notice rule in holding defendant's lawyer had made a good faith mistake of law in not responding timely to the Texas suit. *Id.* (citing ARIZ. R. CIV. P. 55(a)).

203. *Damian v. Bell Helicopter Textron, Inc.* was a wrongful death suit arising from a helicopter crash in Panama. *Damian v. Bell Helicopter Textron, Inc.*, 352 S.W.3d 124, 138–39 (Tex. App.—Fort Worth 2011, pet. denied). The court applied the Texas wrongful death statute's limitation rule, which calls for the shorter period of Texas law or the accident's situs. Nonetheless, the plaintiff's action prevailed because Panama's one-year period was tolled under Panama law by the related criminal investigation into the accident. *Id.* *Cypress/Spanish Fort I, L.P. v. Professional Service Industries, Inc.* was a business tort action related to construction of a shopping center in Alabama. *Cypress/Spanish Fort I, L.P. v. Professional Service Industries, Inc.*, 814 F. Supp. 2d 698, 704 (N.D. Tex. 2011) The court ignored the contract's choice of Alabama law and characterized the limitations issue as procedural. *Id.* at 708–09. Invoking the rule that the forum applies its own procedure, the court denied defendant's motion to dismiss. *Id.* The court rejected the application of Restatement (Second) of Conflict of Laws which applies the most significant relationship test to limitations issues, noting that the Texas Supreme Court had yet to adopt it. *Id.* at 709. *Daybreak Express, Inc. v. Lexington Insurance Co.* applied the same rule that limitations are procedural, and did so in an instance of a federal claim being litigated in state court (applying a Texas limitation period to a federal claim because the federal law was silent). *Daybreak Express, Inc. v. Lexington Insurance Co.*, 342 S.W.3d 795 (Tex. App.—Houston [14th Dist.] 2011, pet. filed)

204. Although this Survey article does not cover intra-jurisdictional venue transfers in the Forum Contest section, four Survey period cases provided examples of choice of law affecting the public factors discussion in forum transfers. See *Zurich Am. Ins. Co. v. Vitus Marine, LLC*, No. H-11-3022, 2011 WL 4972025, at \*3 (S.D. Tex. Oct. 19, 2011) (Washing-

compensation,<sup>205</sup> arbitration,<sup>206</sup> and *renvoi*.<sup>207</sup>

#### IV. FOREIGN JUDGMENTS

Foreign judgments from other states and countries create Texas conflict-of-laws issues in two ways: (1) their local enforcement and (2) their preclusive effect on local lawsuits. The Survey period did not offer any notable preclusion opinions, but there are several judgment-enforcement cases worth mentioning.

Texas recognizes two methods of enforcing foreign judgments: the common law method, using the foreign judgment as the basis for a local lawsuit,<sup>208</sup> and, since 1981, the more direct procedure under the two uniform judgments acts.<sup>209</sup> Section 36.007 of the Texas Civil Practice and

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ton law likely to govern insurance coverage dispute regarding defective welds in barge equipment); *Sweet v. Indianapolis Jet Ctr., Inc.*, No. SA-10-CV-1039-XR, 2011 WL 2518862, at \*2 (W.D. Tex. June 22, 2011) (unclear whether Texas or Indiana law will govern, but Indiana federal court will have no trouble applying either); *Blitz USA, Inc., v. Liberty Surplus Ins. Corp.*, No. 3:11-CV-0034-G, 2011 WL 1602718, at \*4 (N.D. Tex. Apr. 27, 2011) (most likely that Oklahoma law will govern insurance dispute regarding failure to defend on commercial general liability policy); *Wells Fargo Bank, N.A. v. Bank of Am., N.A.*, No. 3:10-CV-1825-L, 2010 WL 5287538, at \*5 (N.D. Tex. Dec. 23, 2010) (New York law likely governs dispute regarding commercial mortgage-backed securities).

205. *Johnson v. TDS Erectors, Inc.* is a *per curiam* opinion upholding the trial court's summary judgment for defendant, dismissing the wrongful death claim on the grounds it was governed by Arkansas workers compensation law. *Johnson v. TDS Erectors, Inc.*, 426 Fed. App'x 241, 241 (5th Cir. 2011) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (the general tort principle) & 184 (conflict rule for abolition of personal injury or wrongful death claim by workers' compensation scheme) (1971) ).

206. Arbitration agreements can have important choice-of-law functions not only in the choice of governing law, but also in the choice of arbitration rules. *In re Olshan Foundation Repair Co., LLC* involved several contracts with varying language in the arbitration clauses. *In re Olshan Foundation Repair Co., LLC*, 328 S.W.3d 883, 889–90 (Tex. 2010). The Texas Supreme Court held that the clauses in one set of foundation-repair contracts failed to preclude the Federal Arbitration Act which preempted the possibility of the Texas Arbitration Act's application, while the clause in another contract required the parties to submit to binding arbitration under the Texas Act. Similar issues arose in other Texas cases. *See, e.g.*, *BDO Seidman, LLP, v. J.A. Green Dev. Corp.*, 327 S.W.3d 852, 859 (Tex. App.—Dallas 2010, no pet.) (contract's arbitration clause designating New York law was insufficient to preempt the Federal Arbitration Act); *Denver City Energy Assocs., L.P., v. Golden Spread Elec. Coop., Inc.*, 340 S.W.3d 538, 542 n.2 (Tex. App.—Amarillo 2011, pet. filed) (arbitration clause insufficiently specific to preempt the Federal Arbitration Act).

207. *Renvoi* is the practice of applying another state's entire law including its choice-of-law rule. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971). In *Garriott v. NCsoft Corp.* the district court had ruled that the parties' choice-of-law agreement required the application of Korean law, including its choice-of-law rule, which in turn pointed to Texas law to govern the award of attorney fees. *Garriott v. NCsoft Corp.*, 661 F.3d 243, 250 (5th Cir. 2011). Defendant appealed instead, asserting Korean substantive law should be applied to limit the attorney fee award. The Fifth Circuit declined to conduct a choice-of-law analysis, finding a false conflict between Korea and Texas law.

208. The underlying mandate for the common law enforcement is the full faith and credit clause of the United States Constitution and its statutory counterpart. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2006). The Uniform Enforcement of Foreign Judgments Act specifically reserves the common law method as an alternative. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (West 2008).

209. Sister-state judgments are enforced under the Uniform Enforcement of Foreign Judgments Act (UEFJA). TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001–003 (West 2008), 35.004 (West Supp. 2011), 35.005–008 (West 2008). Foreign-country judgments for

Remedies Code expressly reserves the right of enforcement of non-monetary judgments under traditional, non-statutory standards,<sup>210</sup> along with similar acts for arbitration awards,<sup>211</sup> child custody,<sup>212</sup> and child support.<sup>213</sup> Federal judgments may be enforced in any other federal district courts as local judgments,<sup>214</sup> but may also be enforced as sister-state judgments in Texas state courts.

*Carter v. Cline* shows the importance of both, proper filing and timely objections, as well as the court's power to assess the foreign judgment beyond its labeling.<sup>215</sup> Carter, a Texas resident, contracted to buy a home in Little Rock, Arkansas, from the Clines. When Carter later withdrew from the deal, the Clines sued Carter in an Arkansas court, and Carter, in turn, sued the realtors. The Clines won a jury verdict for \$42,500, and Carter won a verdict for \$30,000 against the realtors. The Clines then domesticated the Arkansas judgment in Harris County but failed to file a certificate of authenticity as required by Texas law, although it was later corrected. The Arkansas court then issued an attorney's fees order in the Clines' favor for \$86,266, which the Clines also domesticated in Texas. Carter had notice of these domestications but never objected. Meanwhile, in Arkansas, the realtors were granted a new trial against Carter, which raised doubts about the finality of the earlier orders. The Clines severed their case in the Arkansas court and had a new judgment issued that consolidated the damages and attorney's fees at \$127,766.00, although they never filed it in the Texas court.<sup>216</sup>

Carter did nothing to defend himself in Texas until the Clines garnished his bank account. Carter then objected on several grounds, including the apparent interlocutory nature of the Arkansas judgments, the Clines' failure to file the certificate of authenticity contemporaneously with the judgment, and the failure to file the later severed judgment.<sup>217</sup> The trial court denied Carter's objections and the appellate court affirmed, holding that the Arkansas orders satisfied the facial finality standard, and to the extent the Clines did not follow proper filing procedures, Carter had waived his objections by acquiescing at the domestication stage.<sup>218</sup>

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money are enforced under the Uniform Foreign Country Money-Judgments Recognition Act (UFCMJRA). TEX. CIV. PRAC. & REM. CODE ANN. § 36.001-.008 (West 2008).

210. TEX. CIV. PRAC. & REM. CODE ANN. § 36.008 (West 2008); see generally *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (comity as discretionary grounds for recognizing and enforcing foreign-country judgments).

211. See Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006); Texas International Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 172.082(f) (West 2011).

212. TEX. FAM. CODE ANN. § 152.303 (West 2008).

213. *Id.* § 159.601.

214. See 28 U.S.C. § 1963 (2006).

215. *Carter v. Cline*, No. 03-10-00855-CV, 2011 WL 4924214 (Tex. App.—Austin Oct. 13, 2011, no pet.) (mem. op.).

216. *Id.* at \*1-3.

217. Carter objected that the Arkansas judgment was labeled "Jury Verdict Judgment," and because it did not express finality was merely an interlocutory judgment incapable of enforcement under the UEFJA. *Id.* at \*3.

218. *Id.* at \*5-9.

*Counsel Financial Services, L.L.C. v. Leibowitz* provides a second example of proper defense techniques.<sup>219</sup> Leibowitz is a Texas lawyer who borrowed \$5 million from Counsel, a New York lender. When Leibowitz failed to pay, Counsel obtained a judgment in New York, which Leibowitz unsuccessfully appealed. When Counsel domesticated the New York judgment in Bexar County, Leibowitz was granted a motion for new trial because the trial court refused enforcement. The San Antonio Court of Appeals reversed and rendered judgment in Counsel's favor.<sup>220</sup>

To collect, Counsel intervened in a personal injury lawsuit in Hidalgo County, seeking to attach the attorney's fees of the victorious plaintiff's lawyer, Leibowitz, who responded by asking the Hidalgo district court to enjoin Counsel from pursuing collection efforts in Texas. Characterizing Counsel's intervention as vexatious and harassing, the court granted the injunction.<sup>221</sup> The appellate court reversed, ruling that the Hidalgo district court lacked jurisdiction to interfere with the Bexar County district court's domesticated judgment.<sup>222</sup> Although this ruling mooted the rest of the case, the court also noted that the vexatious-and-harassing standard for anti-suit injunctions required multiple litigation, not this single intervention.<sup>223</sup>

In two other UEFJA cases, Texas courts of appeal accepted and rejected Oklahoma judgments in family law matters. *In re Guardianship of Parker* was the ongoing litigation between a sister and brother competing for guardian status for their mother.<sup>224</sup> After a Texas court appointed the sister, her brother obtained a contrary order from an Oklahoma court. The court of appeals affirmed the trial court's rejection of the Oklahoma order, holding that even though the Oklahoma order was properly filed under the UEFJA, it did not have to be given effect because enforcement measures do not travel with the sister-state judgment, guardianship orders are subject to revision, and Texas has adopted specific measures for foreign guardianship orders—which the petitioner had ignored.<sup>225</sup>

*In re Marriage of Dalton* involved a couple who separated in Oklahoma in 2006 purely for the purpose of protecting the family's assets from the husband's business setbacks.<sup>226</sup> In spite of the Oklahoma court's detailed order, the couple continued to live together and moved to Texas in 2008. But in December 2008, the husband filed for divorce. In response, the wife wanted the Texas court to recognize the Oklahoma order.<sup>227</sup> The

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219. *Counsel Fin. Servs., L.L.C. v. Leibowitz*, No. 13-10-00200-CV, 2011 WL 2652158 (Tex. App.—Corpus Christi July 1, 2011, pet. denied) (mem. op.).

220. *Id.* at \*1–2.

221. *Id.* at \*2–4.

222. *Id.* at \*8.

223. *Id.* at \*12–13.

224. *In re Guardianship of Parker*, 329 S.W.3d 97 (Tex. App.—Amarillo 2010, pet. denied).

225. *Id.* at 100–103.

226. *In re Marriage of Dalton*, 348 S.W.3d 290 (Tex. App.—Tyler 2011, no pet.).

227. *Id.* at 292–93.

trial court refused, but the court of appeals reversed and rendered, holding that it was a proper foreign judgment entitled to enforcement under the UEFJA.<sup>228</sup>

The Survey period produced two considerations of foreign-country judgments, one a money judgment enforcement and the other a child custody matter under the Hague Convention. In *Diamond Offshore (Bermuda), Ltd. v. Haaksman* a Texas court of appeals rejected enforcement of a Dutch judgment that was obtained in violation of a forum-selection clause.<sup>229</sup> When Diamond Offshore gave notice of ceasing operations in the North Sea, offering jobs on other drilling sites to Quinn and McCartney. Instead, Quinn and McCartney sued in the Netherlands in violation of their employment contracts' exclusive Bermuda forum clause. They successfully domesticated the Dutch judgment in Texas, and Diamond Offshore appealed on the grounds that the judgment was obtained in violation of the employment contracts' exclusive Bermuda forum clause.<sup>230</sup> The court of appeals reversed and held that the judgment was unrecognizable under the Texas Uniform Foreign Country Money Judgments Recognition Act ("UFCMJRA").<sup>231</sup> A thorough dissent pointed out that the court's grounds were discretionary under the UFCMJRA and that because Diamond Offshore had not raised the forum clause issue in the Netherlands, it should not be allowed in Texas.<sup>232</sup>

*Livanos v. Livanos* provides a good discussion of the intricacies of international custody enforcement, the interaction of the Hague Convention with domestic laws, and the need for strict adherence to procedural steps.<sup>233</sup> *Livanos* was a lengthy battle (as is the case in many international custody cases) over the mother's illegal child-snatching of her young son, involving courts in Greece, Maryland, and Texas. After the mother did not appear at two hearings in Fort Bend County, the Texas court issued a default order against her for the child's return to Greece and \$68,300 in attorney's fees.<sup>234</sup> The court of appeals reversed because the father had not proven strict compliance with the applicable notice provisions.<sup>235</sup>

## V. CONCLUSION

Following the United States Supreme Court opinions<sup>236</sup> in July 2011, many Texas courts needed to reassess their calculations of personal jurisdiction under the stream-of-commerce and general jurisdiction doctrines.

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228. *Id.* at 294–98.

229. *Diamond Offshore (Bermuda), Ltd. v. Haaksman*, 355 S.W.3d 842 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

230. *Id.* at 844–45.

231. *Id.* at 847–49.

232. *Id.* at 856–57 (Frost, J., dissenting).

233. *Livanos v. Livanos*, 333 S.W.3d 868 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

234. *Id.* at 870–73.

235. *Id.* at 874–81.

236. *See supra* notes 3–32 and accompanying text.



Although the United States Supreme Court merely clarified existing law, those clarifications compel a narrower standard than some Texas courts now apply.

In other areas, the Survey period showed continued trends highlighted by a diverse subject matter that finds new focuses from year to year. This period included four legislative jurisdiction cases (some years have none),<sup>237</sup> six choice-of-law analyses applying the corporate affairs doctrine,<sup>238</sup> three useful discussions of choice of law and jurisdiction in Multi-District Litigation,<sup>239</sup> and a noteworthy discussion of the law controlling bankruptcy exemptions.<sup>240</sup> Texas courts continued a cautionary approach in finding personal jurisdiction based solely on internet contacts<sup>241</sup> and in providing a Texas forum for non-commercial tort claims connected in part to other states.<sup>242</sup>

One aberration—we hope not a trend—is the number of Texas courts accepting choice-of-law clauses without consideration of whether the chosen law contradicts the public policy of a state with a stronger relationship to the claim.<sup>243</sup> In spite of that one aberration, this Survey period's cases continue to show an increased sophistication in applying the many aspects of Restatement analysis.

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237. See *supra* notes 113–132 and accompanying text.

238. See *supra* notes 194–200 and accompanying text.

239. See *supra* notes 49–55, 83–86, 104 and accompanying text.

240. See *supra* notes 127–132 and accompanying text.

241. Texas courts approved internet jurisdiction in one case and rejected it in three others.

242. The Survey period reported two cases based on torts and both were dismissed on forum non conveniens grounds, with none of the cases in the long-arm section dealing with non-commercial torts. The choice of law section shows similar results, with twenty-nine cases dealing with interstate contract disputes and only three cases dealing with non-commercial torts.

243. See *supra* notes 141–146 and accompanying text.