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## Conflict of Laws

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# CONFLICT OF LAWS

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THE laws of states and nations collide when foreign factors appear in a lawsuit. Nonresident 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 Texas state and federal courts during the Survey period from November 1, 2009 through September 30, 2010. The Article excludes cases involving federal-state conflicts; intrastate issues such as subject matter jurisdiction and venue; and 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 con-

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stitutional limits, resulting in similar rules applying to most issues in state and federal courts.<sup>1</sup>

Although no data is readily available to confirm this, Texas is no doubt 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 (Mexico), and its involvement in international shipping. Only California shares these factors, with the partial exception of states bordering Quebec. Texas courts experience every range of conflict-of-laws litigation. In addition to a large number of garden-variety opinions on 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. Recognition and enforcement of interstate and international judgments offer fewer annual examples, possibly a sign of that subject's administrative nature resulting in only a few reported cases.

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. Thus, this article focuses on selective cases due to journal space and author's time.

## I. 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 (failure to make a timely objection), or extraterritorial service of process under a Texas long-arm statute. Because most aspects of notice are purely matters of forum law, this Article focuses primarily on issues relating to amenability.

Oddly, this Survey period produced no significant cases on routine minimum contacts analyses, but three on internet jurisdiction, an unusual case on a will contest, a worthwhile discussion of federal long-arm statutes, and heavy Texas Supreme Court emphasis on enforcing both derogating forum-selection clauses (those pointing to another jurisdiction) and forum non conveniens challenges.

### A. CONSENT AND WAIVER

Contracting parties may agree to a forum-selection clause designating the optional or exclusive site for litigation or arbitration. When a contracting party sues in a designated forum, the clause is said to be a prorogation clause because it supports the forum's jurisdiction over the

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

defendant.<sup>2</sup> When a contracting party sues in a nonselected forum in violation of the contract, the clause is said to be a derogation clause, because it undermines the forum's jurisdiction.<sup>3</sup> Because derogation clauses attack rather than establish jurisdiction, it is discussed in the section on Declining Jurisdiction.<sup>4</sup>

Prorogation clauses tend to be routine because they establish the forum's jurisdiction. *RSR Corp. v. Siegmund*<sup>5</sup> stood out as a contrary example by presenting two forum clauses, one designating Texas and the other Chile. *RSR Corp.* involved a dispute between metal refinery companies. In 2003, Dallas-based RSR executed an agreement with Inppamet, a Chilean corporation, in which RSR would provide training and technical assistance to Inppamet during its production of anodes used in metal refining. That agreement included a confidentiality clause, other restrictive covenants, and a permissive "consent-to-jurisdiction" clause providing that "any action or proceeding arising out of or relating to this Agreement . . . may be heard" by a state or federal court in Dallas, Texas.<sup>6</sup> In 2007, pursuant to the parties' discussion of Inppamet's acquisition by RSR or one of its subsidiaries, they entered two confidentiality agreements, known collectively as "the 2007 Agreements," to allow for due-diligence exchange of information. Unlike the 2003 Agreement, which was limited to RSR and Inppamet, the 2007 Agreements included subsidiaries or affiliates of both RSR and Inppamet. More importantly, the 2007 Agreements provided an exclusive forum clause designating Santiago, Chile.<sup>7</sup>

The contemplated acquisitions never occurred in 2008. RSR and its subsidiary Quemetco sued Inppamet and related parties for breach of the 2003 Agreement, fraud, theft, and other business torts. Defendants moved to dismiss based on the 2007 Agreements' Chilean forum clause. The trial court upheld the 2007 forum clause and dismissed the case.<sup>8</sup> The Dallas Court of Appeals reversed. In careful analysis of competing forum clauses, the court held plaintiffs' claims arose under the 2003 Agreement's covenants and did not relate to the 2007 Agreements' purpose of corporate acquisition.<sup>9</sup> The court agreed with defendants' argument that artful pleading could not circumvent an otherwise binding forum clause, but found plaintiffs' claims were legitimately tied to the 2003 obligations and were not attempts to sue on the 2007 obligations.<sup>10</sup> To reach this conclusion, the court used the "common-sense examination" standard

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2. EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 361 (2d ed. 1992).

3. *Id.*

4. James P. George, *Parallel Litigation*, 51 *BAYLOR L. REV.* 769, 813-49 (1999); see SCOLES & HAY, *supra* note 1, at 360-61. For a discussion of forum derogation clauses, see *infra* Part I.D.1.

5. 309 S.W.3d 686 (Tex. App.—Dallas 2010, no pet.).

6. *Id.* at 694.

7. *Id.* at 694-95.

8. *Id.* at 695-97.

9. *Id.* at 700-05.

10. *Id.* at 703-04.

and placed a restrictive reading on the forum clause derogating Texas jurisdiction.<sup>11</sup> This contrasts, but does not necessarily conflicts with, the Texas Supreme Court's use of the same common-sense standard, during the Survey period to provide expansive readings of foreign forum clauses.<sup>12</sup>

## B. TEXAS LONG-ARM AND MINIMUM CONTACTS

Texas uses "limits-of-due-process" long-arm statutes, meaning the minimum contacts test is the only necessary foundation for personal jurisdiction in Texas.<sup>13</sup> These long-arm statutes also apply in Texas federal courts, except where Congress enacted a federal long-arm statute for certain federal law claims.<sup>14</sup>

### 1. 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>15</sup> The test breaks down Internet use into a spectrum of three areas. One end of the spectrum finds a defendant clearly doing business in a forum based on the defendant's contracts with forum residents; the spectrum's other end involves passive websites and the defendant's unintentional contact with a forum, leading to a lack of jurisdiction.<sup>16</sup> The spectrum's difficult middle involves a forum resident's exchange of information with defendant's host computer, and jurisdiction is based on the level of interactivity and the commercial nature of the information exchanged.<sup>17</sup> The Survey period produced a number of personal jurisdiction opinions in which courts considered internet-based contacts. This Article highlights three noteworthy cases that adeptly analyze the gray areas of the *Zippo* and *Mink* tests.

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11. *Id.* at 700, 704.

12. See *infra* notes 67–69 and accompanying text.

13. See *U-Anchor Adver., Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977). The primary Texas long-arm statutes are found at TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041–.045 (West 2008), and others are scattered throughout Texas statutes. See, e.g., TEX. AGRIC. CODE ANN. § 161.132 (West 2004) (violation of certain agricultural statutes); TEX. FAM. CODE ANN. § 6.305 (West 2006) (nonresident respondents in divorce actions); TEX. INS. CODE ANN. § 823.457 (West 2009) (violations of duties imposed on insurance holding companies).

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

15. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). The Fifth Circuit adopted the *Zippo* test in *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999). Repetitive 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), *remanded sub nom.*, *Doctor v. Pardue*, 186 S.W.3d 4 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

16. *Zippo*, 952 F. Supp. at 1124.

17. *Id.*

*Jackson v. Hoffman* considers a grey area of website advertising, holding that a non-resident service provider's website and subsequent email correspondence is an insufficient jurisdictional contact.<sup>18</sup> Jackson, a Dallas resident, wanted his 1969 Camaro restored and found Hoffman's Missouri-based restoration service through a "Google" search. After negotiating by email, Jackson had Hoffman retrieve his car from another shop in Missouri.<sup>19</sup> When Hoffman's invoices exceeded initial price estimates and the Camaro was only eighty percent restored, communications broke down and Jackson sued in a Texas state court in Dallas.<sup>20</sup> The parties agreed Hoffman's contacts did not give rise to general jurisdiction and his website was the only Texas contact regarding Jackson's claim.<sup>21</sup> The court noted the only interactive quality of Hoffman's website was contact information, and despite the emails flowing from that, this was passive activity that did not rise to purposeful availment.<sup>22</sup>

The facts in *Kelly Law Firm, P.C. v. An Attorney for You* illustrates the other end of website solicitation, although still within a gray area.<sup>23</sup> Kelly Law Firm is a Houston-based personal injury firm. Calliope Media L.P. (d.b.a. An Attorney for You) is a California internet marketing service that provides leads on clients with mesothelioma or birth defects.<sup>24</sup> Calliope contracted with Kelly to refer potential mesothelioma and birth injury plaintiffs from its websites in exchange for payment.<sup>25</sup> Kelly found the leads insufficient and sued Calliope in Texas.<sup>26</sup> Plaintiff Kelly offered two evidentiary bases to establish Texas long-arm contacts—screen shots of Calliope's website targeting potential legal clients for "attorneys in the state of Texas" and contractual language requiring Calliope to collect information from potential Texas clients to send to Kelly.<sup>27</sup> Applying the same facts to the minimum-contacts requirement, the court noted the potential clients' interactions fell in *Mink's* middle category. Under the *Mink* standard, a site allows users to exchange information with a host computer thus establishing jurisdiction.<sup>28</sup>

*M3Girl Designs LLC v. Purple Mountain Sweaters* rests on a third facet of internet contacts—the third-party payment website and its place on the *Zippo* sliding scale.<sup>29</sup> M3Girl is a Texas company that manufactures and

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18. *Jackson v. Hoffman*, 312 S.W.3d 146, 149 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

19. *Id.* at 150.

20. *Id.*

21. *Id.* at 153.

22. *Id.* at 155. When determining if Hoffman's email communications were sufficient to establish personal jurisdiction, the court noted all of Hoffman's "contacts with Texas were made at the request of appellant [Jackson]." *Id.* at 156.

23. 679 F. Supp. 2d 755 (S.D. Tex. 2009).

24. *Id.* at 757.

25. *Id.* at 758.

26. *Id.*

27. *Id.* at 765–66.

28. *Id.* at 767.

29. NO. 3:09-CV-2334-G, 2010 WL 3699983 (N.D. Tex. Sept. 13, 2010).

sells bottle-cap necklaces.<sup>30</sup> Purple Mountain Sweaters, a sole proprietorship owned by Florida resident Bishop, sells crafts and homemade goods including bottle-cap necklaces.<sup>31</sup> M3Girl sued Bishop in a Texas federal court alleging copyright and trademark infringement for use of the slogan “Snappy Bottle Cap Necklaces,” arguing for Texas jurisdiction based on Bishop’s web presence.<sup>32</sup> The court noted Bishop’s website “allows users to browse products, contact the defendants directly, and order products online using a shopping cart feature,” but requires users to access PayPal to consummate a sale.<sup>33</sup> This activity fell into the middle ground of the *Zippo* sliding scale.<sup>34</sup> When considering that scale in light of defendant’s activities, a crucial shortcoming was that Bishop made only one sale, online or otherwise, to Texas residents.<sup>35</sup> Even though one forum contact can be enough, the court observed “maintenance of a website, even one containing allegedly infringing materials, that is accessible in the forum state is not enough to establish specific jurisdiction.”<sup>36</sup> M3Girl also failed to prove the infringing slogan was present on Bishop’s website when the Texas sale occurred, and even if it was present, the court concluded asserting jurisdiction violates traditional notions of fair play and substantial justice.<sup>37</sup>

## 2. Will Contests

Jurisdictional battles sometimes arise in odd settings. One example is *Walz v. Martinez*,<sup>38</sup> a will contest involving parties in Texas and Mexico. Fernando Martinez Cobo married Irma Walz in 2004 after being diagnosed with prostate cancer. When he died in February 2006, Irma filed a probate action in Bexar County for Fernando’s will dated January 31, 2005. Fernando’s children from two prior marriages, all adults and residents of Mexico, challenged the will’s legitimacy. In addition, Fernando’s Mexico-based company, Construcciones Modernas de Mexico, S.A., filed an action in a Texas district court to block disposition of United States bank accounts.<sup>39</sup>

Irma then brought the instant action against Fernando’s children claiming fraud, conversion, and civil conspiracy. The trial court granted the children’s special appearances and dismissed the claims.<sup>40</sup> Irma appealed, arguing the children had purposefully availed themselves of Texas law by contesting the probate action and bringing the second action regarding funds in the United States as Construcciones shareholders. The

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30. *Id.* at \*1.

31. *Id.*

32. *Id.* at \*2.

33. *Id.* at \*6.

34. *Id.*

35. *Id.* at \*7.

36. *Id.*

37. *Id.*

38. 307 S.W.3d 374 (Tex. App.—San Antonio 2009, no pet.).

39. *Id.* at 377–78.

40. *Id.* at 378–79.

Court of Appeals disagreed. It held that under Texas law, the children's will challenge was not purposeful availment of Texas law because they did not seek an active role in the Texas probate but merely challenged the will's legitimacy.<sup>41</sup> The court further found the lawsuit filed by Construcciones did not implicate the decedent's children even though they were stockholders in the company, and all of Irma's allegations related to events occurring in Mexico.<sup>42</sup>

### C. FEDERAL LONG-ARM STATUTES AND NATIONWIDE CONTACTS

Texas long-arm statutes apply in both Texas state and federal courts<sup>43</sup> except where Congress enacted a federal long-arm statute for certain federal-law claims.<sup>44</sup> This Survey period's only significant federal long-arm case was *Soto v. Vanderbilt Mortgage & Finance, Inc.*,<sup>45</sup> discussing jurisdiction under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The court addressed a question undecided by the Fifth Circuit, although other district courts in the Fifth Circuit have ruled on the question.<sup>46</sup> The lawsuit arose from an alleged "widespread scheme to sell manufactured homes via 'land in lieu transactions.'"<sup>47</sup> Plaintiffs brought claims under both RICO and various Texas consumer laws. Several defendants were based in Texas, but nonresident defendant Clayton Homes objected to personal jurisdiction claiming it was merely a holding company in Delaware with no agents, sales, or contacts in Texas.<sup>48</sup>

In a thorough analysis of federal long-arm and relevant due process concerns, the court found RICO's federal long-arm statute authorized nationwide service of process and accordingly based its jurisdictional calculation on all contacts with the United States, rather than with any one state.<sup>49</sup> Because Clayton Homes conceded its presence in Delaware, the court found it had personal jurisdiction for Ramirez's claim.<sup>50</sup> The court further found it also had pendent personal jurisdiction for plaintiff's related claims under state law based on the federal claim's jurisdiction.<sup>51</sup>

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41. *Id.* at 379–82.

42. *Id.* at 382–83.

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

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

45. No. C-10-66, 2010 WL 1790177 (S.D. Tex. May 3, 2010).

46. *Id.* at \*3.

47. *Id.* at \*1–2. In particular, defendants sold manufactured homes to buyers, but used land owned by someone else as collateral, and forged deeds and other documents to make the sale appear valid. *Id.*

48. *Id.* at \*3.

49. *Id.* at \*3–4.

50. *Id.* at \*5.

51. *Id.* at \*6–7.



#### D. DECLINING JURISDICTION

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

##### 1. *Derogating Forum-Selection Clauses*

The Consent section above discusses forum-selection clauses that establish local jurisdiction;<sup>52</sup> however, different considerations arise when a 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), and instead of justifying a court's retention of the case, derogation clauses require the court to consider declining its otherwise valid jurisdiction. During the Survey period, the Texas Supreme Court issued three opinions reversing lower-court rejections of derogating forum clauses. Interestingly, both the trial court and the court of appeals disregarded the clauses in all three cases and the supreme court reversed without dissent.

*In re ADM Investor Services, Inc.*<sup>53</sup> involved an elderly plaintiff's claim for fraud, negligence, and breach of fiduciary duty arising from commodities trading. In 2001, Jetta Prescott contracted with commodities trader ADM with the provision that ADM could close out and collect any deficit from broker/guarantor Texas Trading when Prescott's deficit reached \$50,000. In 2004, her deficit exceeded \$57,000. ADM closed the account and collected from Texas Trading. In turn, Texas Trading's CEO Charles Dawson sued Prescott in Hopkins County, Texas, seeking reimbursement.<sup>54</sup>

Prescott then sued both ADM and Texas Trading, filed in Rains County rather than Hopkins County, and ignored ADM contract's designation of Illinois as a forum invocable at ADM's discretion. After Texas Trading moved to transfer venue to Hopkins County, ADM filed its answer and a motion to dismiss because of its right to elect the Illinois forum. With the motion to dismiss, ADM also moved in the alternative to change venue to Hopkins County. ADM did nothing further and Texas Trading set its motion to transfer venue for hearing. ADM then gave notice it would not attend the venue transfer hearing to avoid waiving of its motion to dismiss. The trial court granted Texas Trading's motion to transfer to Hopkins County, but later denied ADM's motion to dismiss. ADM sought mandamus relief, which the court of appeals denied on the grounds that ADM waived its Illinois forum option.<sup>55</sup>

The supreme court reversed, holding Texas law presumed against forum-clause waivers, and ADM's pursuit of alternative defenses, along

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52. *See supra* Part I.A.

53. 304 S.W.3d 371 (Tex. 2010).

54. *Id.* at 373.

55. *Id.*

with its dilatory objection, did not amount to waiver.<sup>56</sup> The supreme court further rejected Prescott's claim that her age—nearing eighty—and her poor health made an Illinois forum severely prejudicial to her claims.<sup>57</sup> The supreme court noted she had not substantiated that claim and allowing unsupported claims of hardship would render forum clauses “practically useless.”<sup>58</sup>

The Texas Supreme Court reached the same conclusion—no waiver from dilatory forum challenges—in the second case, *In re Laibe Corp.*<sup>59</sup> This lawsuit arose from Laibe's sale of a drilling rig to Texas-based Jackson Drilling Services, L.P. Jackson “had problems with the rig and sued Laibe in Wise County,” contrary to the contract's designation of state or federal courts in Marion County, Indiana as having exclusive jurisdiction.<sup>60</sup> Laibe lost its forum challenge at both the trial and appellate levels.<sup>61</sup> The supreme court reversed, finding: (1) the forum clause's absence in the initial sales agreement was cured by its inclusion in the invoice along with a merger clause combining both documents into one contract;<sup>62</sup> (2) Jackson's argument that the Indiana forum was inconvenient was unpersuasive;<sup>63</sup> and (3) Laibe's two-month delay in seeking mandamus relief from the trial court's denial of its motion to dismiss did not waive its right to enforce the forum clause.<sup>64</sup>

*In re Lisa Laser USA, Inc.*<sup>65</sup> dealt with an expansive interpretation of a restrictive forum clause regarding both the claims and parties to which it applied. HealthTronics, Inc. is a Georgia corporation based in Texas. In 2005, HealthTronics signed an exclusive distribution agreement with Lisa USA for American distribution of certain products made by Lisa USA's parent, Lisa Germany.<sup>66</sup> In 2008, Lisa USA notified HealthTronics it was in default of their agreement because it was not using its best efforts to market the products. HealthTronics denied default and argued Lisa Laser had breached on several points and was now competing directly with HealthTronics in violation of their agreement. HealthTronics then sued Lisa USA and Lisa Germany in Travis County. Lisa USA moved to dismiss based on the agreement's exclusive forum clause pointing to Alameda County, California. As with the two preceding Survey period cases, defendant's motion failed in both the trial court and the court of

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56. *Id.* at 374–75.

57. *Id.* at 375.

58. *Id.* at 375–76. The court reached the same conclusion regarding to Prescott's claim of inconvenience at having to pursue two alleged tortfeasors in different states. *Id.* at 375.

59. 307 S.W.3d 314 (Tex. 2010).

60. *Id.* at 315–16.

61. *Id.*

62. *Id.* at 316–17.

63. *Id.* at 317–18. This finding echoed the court's similar finding in *In re ADM Inveitor Services, Inc.* that plaintiff failed to substantiate her claim of ill health, and allowing unsubstantiated arguments would render forum clauses useless. See *supra* note 58 and accompanying text.

64. *Id.* at 318.

65. 310 S.W.3d 880 (Tex. 2010).

66. *Id.* at 881.

appeals.<sup>67</sup>

The Texas Supreme Court reversed and ordered dismissal.<sup>68</sup> It first rejected HealthTronics's argument that the forum clause related only to "sales by Seller . . . to HealthTronic," and not to claims based on the parties' relationships.<sup>69</sup> This argument was based on the forum clause's placement in Exhibit F of the distribution agreement and related wording that arguably narrowed the clause's focus. The supreme court held that forum clause interpretation required a "common-sense examination" of the entire agreement and claims in the instant case.<sup>70</sup> Applying that standard, the supreme court deemed the forum clause's reference to "this Agreement" as applying to the parties' entire agreement rather than the immediate language surrounding the forum clause.<sup>71</sup> HealthTronics also argued the forum clause did not govern its action against parent corporation Lisa Germany because the latter was not mentioned in the exhibit containing the clause. The supreme court noted Lisa Germany was logically omitted from Exhibit F because sales did not occur between it and HealthTronics, but also that the larger Distribution Agreement, which Lisa Germany was a party, specifically incorporated Exhibit F's terms by reference.<sup>72</sup>

Reviewing the supreme court's action on forum clauses in this Survey period, it is notable that the supreme court reversed lower court decisions in all three cases rejecting clauses based on their ambiguity or restrictive wording. In so doing, the supreme court signaled a more expansive Texas practice of enforcing forum clauses designating foreign forums, calling for expansive interpretation of these clauses as to enforcement waivers, and drafting uncertainties as to parties and claims.

*International Metal Sales, Inc. v. Global Steel Corp.*<sup>73</sup> is an unreported case from the Austin Court of Appeals that addresses an issue worthy of reporting. International Metal Sales (IMS) and defendant Global Steel were both steel-product distributors and conducted business with each other since the 1990s. When IMS sued Global Steel in Williamson County over issues of product quality and financial dealings, Global moved to dismiss based on an exclusive forum clause requiring all litigation to be brought in state or federal courts in Pennsylvania. That clause was not part of any agreement between the parties, and neither IMS nor Kimberly Lerch, IMS's sale employee, had signed anything approving the clause. Instead, it only appeared on the back of invoices sent to IMS for

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67. *Id.* at 882–83.

68. *Id.* at 887.

69. *Id.* at 884.

70. *Id.*

71. *Id.* at 884–86.

72. *Id.* at 886–87. Noting HealthTronics would have to accept the terms of the contract it was enforcing against Lisa Germany, the court noted "a plaintiff 'cannot both have his contract and defeat it too.'" *Id.* at 886 (quoting *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005)).

73. No. 03-07-00172-CV, 2010 WL 1170218 (Tex. App.—Austin Mar. 24, 2010, pet. denied).

payment of steel shipments. The trial court honored the clause and dismissed IMS's lawsuit.<sup>74</sup>

The court of appeals reversed after meticulous analysis of contract formation under UCC Article 2.<sup>75</sup> The court concluded the forum clause was not binding because it only appeared in post-formation documents, was never agreed to by IMS, and IMS's failure to object to the invoices was not assent to altering the contract. In reaching this decision, the court made important distinctions between formation and post formation issues, and the equally important conclusion that silence is not a basis for a forum clause.<sup>76</sup>

## 2. *Forum Non Conveniens Dismissals*

Forum non conveniens, or inconvenient forum, is an old 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 intrajurisdictional transfers not requiring dismissal.<sup>77</sup> Where interstate or international case movement is involved, forum non conveniens is truly jurisdictional because it involves a forum's declining of otherwise-valid jurisdiction, as well as dismissal of the local case, for refiling in a distinct forum.

Intra-federal transfers under 28 U.S.C. § 1404 are not considered here because they do not implicate conflicts between states or nations, even though these transfers may involve significant distances. This Article is limited to common law interjurisdictional forum non conveniens available in Texas state and federal courts under the same two-part test requiring a movant to show availability of an adequate alternative forum and a balancing of private and public interests favoring transfer.<sup>78</sup>

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74. *Id.* at \*1–2.

75. *Id.* at \*5–9 (interpreting TEX. BUS. & COM. CODE ANN. §§ 2.204–2.207 (West 2009)).

76. *Id.* at \*10–12.

77. 28 U.S.C.A. § 1404 (2006) is the federal statutory provision for inconvenient forum objections seeking transfer to another federal court. Texas law provides for in-state venue transfers based on convenience. See TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (West 2002).

78. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 424 (5th Cir. 2001). The private factors look to 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, witnesses; [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 338, 342 (5th Cir. 1999)). The public factors look to courts' concerns and a 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 . . . ; and the unfairness of burdening citizens in an unrelated forum with jury duty.'" *Id.* Texas forum non conveniens law is multi-faceted. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2008). The Texas statute applies to personal injury and wrongful death claims. Common-law forum non conveniens, in line with *Gulf Oil Corp. v. Gil-*

In *Quixtar Inc. v. Signature Management Team, LLC*,<sup>79</sup> the Texas Supreme Court clarified important presumptions in forum non conveniens practice and linked Texas law to long-time common law precedent articulated by the United States Supreme Court. Respondent Signature Management Team (Team) filed an action against defendant Quixtar in Collin County alleging various business torts. Team is a Michigan-based Nevada corporation, and Quixtar is a Michigan-based Virginia corporation and the successor entity to Amway Corporation. Team engaged in motivational training and sold its materials to vendors (known as Independent Business Owners or IBOs) of Quixtar products. The dispute arose in Michigan over Quixtar's complaint that Team-affiliated IBOs were promoting improper and possibly illegal sales practices that would harm Quixtar. In response, Quixtar terminated its agreements with those IBOs, resulting in Team and its affiliated IBOs filing lawsuits around the country seeking injunctive relief against Quixtar's termination and damages. Although other courts declined injunctive relief, the district court in Collin County granted it.<sup>80</sup>

Pointing out both parties are based in Michigan, Quixtar moved for a forum non conveniens dismissal and conceded plaintiff could refile in Michigan.<sup>81</sup> The trial court granted Quixtar's dismissal motion but the Dallas Court of Appeals reversed, concluding factors pointing to Michigan litigation were not enough to overcome plaintiff's right to choose the forum.<sup>82</sup> The Texas Supreme Court reversed the appellate decision, emphasizing the presumption favoring plaintiff's choice of forum is less for nonresident plaintiffs.<sup>83</sup> Specifically, the supreme court held a "defendant's 'heavy burden' applies with 'less force' when plaintiff is a nonresident."<sup>84</sup>

*In re Enesco Offshore International Co.*<sup>85</sup> involved the death of an Australian citizen working for an Australian company on a Singapore rig owned by Dallas companies. Decedent's wife filed two lawsuits, the first against her husband's employer Total Marine Services ("TMS") in Australia, and the second against the Dallas-based owners of the drilling rig (collectively referred to here as "ENSCO"). ENSCO moved for a forum non conveniens dismissal citing abundance of relevant evidence in Singapore and Australia contrasted with relatively sparse evidence in Dallas,

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*bert*, 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).

79. 315 S.W.3d 28 (Tex. 2010).

80. *Id.* at 29–30.

81. Quixtar argued the witnesses were primarily located in Michigan and the expense of obtaining their testimony by deposition, or alternatively their attendance in Texas, compelled litigation in Michigan. *Id.* at 34.

82. See *Signature Mgmt. Team, LLC v. Quixtar, Inc.*, 281 S.W.3d 666, 674 (Tex. App.—Dallas 2009), *rev'd*, 315 S.W.3d 28 (Tex. 2010), discussed at James P. George, Wm. Frank Carroll & Stephanie K. Marshall, *Conflict of Laws*, 63 SMU L. REV. 455, 467 (2010).

83. *Quixtar, Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 35 (Tex. 2010).

84. *Id.* at 32 (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007), *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981), and other cases).

85. 311 S.W.3d 921 (Tex. 2010).

and the convenience of presenting that evidence if Singapore or Australia was the forum. The district court denied the motion and the Dallas Court of Appeals denied mandamus relief. The Texas Supreme Court reversed, rejecting plaintiff's argument that defendants were required to demonstrate the superior convenience of a single foreign forum instead of the "amalgamated" convenience of multiple foreign jurisdictions.<sup>86</sup> The supreme court additionally cited the importance of choice of law in a forum non conveniens analysis and the likelihood that Singapore or Australia would provide the governing law here.<sup>87</sup>

## II. CHOICE OF LAW

Like personal jurisdiction and judgment enforcement, applicable substantive law is a question involving both forum law and constitutional issues. Understanding these issues requires a clear focus on basic principles. First, choice of law is a question of state law in both state and federal courts.<sup>88</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 a forum state directs it, and even then, the forum state remains in control.<sup>89</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>90</sup>

Within the forum state's control is a hierarchy of choice-of-law rules. At the top are legislative choice-of-law statutes directing application of a certain state's laws, based on events or people important to operation of each specific law.<sup>91</sup> Second in choice-of-law hierarchy is party controlled choice of law where choice-of-law clauses in contracts control unless pub-

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86. *Id.* at 924–25.

87. *Id.* at 928.

88. See *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941).

89. 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 use of *renvoi*. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 134–39 (3d ed. 2000); Weintraub, *supra* note 1, at 88–94. Texas law provides for *renvoi* in TEX. BUS. & COM. CODE ANN. §§ 1.105, 2.402(b), 4.102(b), 8.106, 9.103 (West 2009). For federal courts, *Klaxon* reiterates a forum state's control of choice of law. *Klaxon*, 313 U.S. at 497.

90. 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 law being applied. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799 (1985); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407 (1930); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 680 (Tex. 2004); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 and comments following; SCOLES ET AL., *supra* note 89, at 145–76; Weintraub, *supra* note 1, at 585–648. Choice-of-law limits under full faith and credit are now questionable after *Franchise Tax Board of Cal. v. Hyatt*, 538 U.S. 488 (2003).

91. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) & cmt. a; 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 a 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 (West 2008) (as amended in 1997 with the same wording as this provision)).

lic policy dictates otherwise.<sup>92</sup> Third in the hierarchy is common law, now controlled in Texas by the most significant relationship test of the Restatement (Second) of Conflict of Laws.<sup>93</sup> This Survey article is organized according to this hierarchy, that is, statutory choice of law, followed by choice-of-law clauses, and concludes with choice of law under the most significant relationship test. Special issues like constitutional limitations are discussed in the following section. This case grouping results in a discussion that mixes Texas Supreme Court opinions with those of Texas intermediate appellate courts, federal district courts, and the Fifth Circuit. Despite 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>94</sup>

#### A. STATUTORY CHOICE-OF-LAW RULES

The Survey period offered two notable cases, one involving the corporate affairs doctrine and the second involving bankruptcy exemption under state law. *Phillips v. United Heritage Corp.*<sup>95</sup> was an action by a Utah securities corporation against the officers and directors of Black Sea Investments, Inc., a securities entity in the Turks and Caicos Islands. Plaintiffs previously obtained a judgment against Black Sea, and now sought to pierce the veil and enforce the judgment against Black Sea's officers and directors. The trial court instructed the jury to apply Texas law regarding veil piercing, and as a result, the jury found against Black Sea's officers and directors.<sup>96</sup> The court of appeals reversed. Noting the corporate affairs doctrine applies the law of a foreign corporation's originating jurisdiction to govern shareholders' liability for corporate debts, in a case of first impression the court extended the doctrine to cover non-shareholder officers and directors,<sup>97</sup> under which the veil could

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92. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1988) ((Law of the State Chosen by the Parties) 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).

93. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971), listing seven balancing factors: (a) needs of interstate and international systems, (b) relevant policies of the forum, (c) relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) protection of justified expectations, (e) 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. 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 (Second).

94. 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.*, 135 S.W.3d at 680 (Tex. 2004) (legislative jurisdiction).

95. 319 S.W.3d 156 (Tex. App.—Waco 2010, no pet.); see also *In re Park Cent. Global Litig.*, No. 3:09-CV-0765-M, 2010 WL 3119403 (N.D. Tex. 2010) (a more routine application of the corporate affairs doctrine applying Delaware law to Delaware entities and Texas law to Texas entities in a class action for investment fraud).

96. *Phillips*, 319 S.W.3d at 159–60.

97. *Id.* at 163.

not be pierced.<sup>98</sup>

*In re Garrett*<sup>99</sup> provides an excellent discussion of split case law regarding the Bankruptcy Code's choice-of-law rule for state-law judgment exemption. In this case, a Chapter 7 bankruptcy trustee objected to exemptions claimed by Texas-resident debtors based on their prior residency in North Carolina. The Bankruptcy Code allows debtors to claim exemptions under the "[s]tate or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding . . . ." <sup>100</sup> The debtors had moved from North Carolina to Texas a few months before filing for bankruptcy. The trustee rejected their exemptions under North Carolina law based on that state's restriction of judgment exemptions to people residing in North Carolina and express exclusion of any extraterritorial effect.<sup>101</sup> The court discussed the split case law and then explored every angle of bankruptcy law as well as broader preemption policies, concluding the minority opinion, that Congress intended to preempt inconsistent state restrictions with the language allowing a 730 day look-back, was correct.<sup>102</sup>

## B. 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 Restatement's<sup>103</sup> most significant relationship test.<sup>104</sup>

### 1. Contracts With Choice-of-Law Clauses

Texas law and the Restatement permit contracting parties to choose a governing law,<sup>105</sup> as reflected in six Survey-period cases—two bearing discussion and four notable for litigant's failed arguments. *Vexas, LLC v. Hill Enterprises, LLC* involved a claim arising from independent contrac-

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98. *Id.* at 167–68.

99. 429 B.R. 220 (S.D. Tex. 2010), *amended and superseded by*, 4325 B.R. 434 (S.D. Tex. 2010).

100. *Id.* at 223 (citing 11 U.S.C. § 522(b)(3)(A) (West 2010)).

101. *Id.* at 222–24.

102. *Id.* at 224–41; *see also In re Arrendondo-Smith*, 436 B.R. 412 (S.D. Tex. 2010) (California permitted extraterritorial application of its exemption law).

103. Embodiment of the most significant relationship test involves seven factors balanced according to needs of the particular case. They are: "(a) [T]he 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 and varies from case to case. *Id.* at cmt. c. In a larger sense, the most significant relationship test includes other choice-of-law sections throughout the Restatement.

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

105. *See DeSantis*, 793 S.W.2d at 677; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).



tor agreements between companies screening urine specimens.<sup>106</sup> While the original contracting parties were from Texas, the disputed agreements had California choice-of-law clauses. Defendants objected to plaintiffs' pleadings under California law, arguing all the contracting parties "are Texas entities with no substantial relationship to California."<sup>107</sup> The court noted all parties agreed to the provision selecting California law and conducted a thorough Restatement analysis looking for any exception invalidating the contract's designation. The court concluded no exceptions applied and California law governed the contract dispute.<sup>108</sup>

Space does not allow a full discussion here, but readers are referred to this opinion for a textbook discussion of contract and tort choice of law considerations. The court's tort discussion concluded California law applied because the underlying claim was about the existence, ownership, and protection of trade secrets of intervening plaintiff Millennium, a California entity based in San Diego.<sup>109</sup>

In *Wynne v. American Express Co.*,<sup>110</sup> plaintiff-card member Wynne sued American Express for deceptive trade practices regarding its advertised no-spending-limits. He brought the claim under Texas law in a Texas court despite the credit card agreement's arbitration clause and designation of Utah law. Wynne did not directly dispute the choice of Utah law (and thus could have waived any objection), but the court nonetheless analyzed the conflict before concluding Utah law governed and it compelled arbitration.<sup>111</sup>

Because this dispute sounded under the Uniform Commercial Code, the court could have simply relied on the relevant statutory provision approving contractual choices of law bearing a reasonable relationship to the transaction.<sup>112</sup> The court went further instead, choosing to analyze "reasonable relationship" under the Restatement's guidelines. It noted that American Express was located in Utah, the cardholder agreement was entered into in Utah, and the account was held in Utah.<sup>113</sup> The court further ensured the application of Utah law was not contrary to a fundamental policy of Texas, holding plaintiff failed to demonstrate the agreement's violation of either Texas or Utah law.<sup>114</sup>

Four opinions rejected reliance on, or challenges to, choice-of-law clauses based on the challenger's inadequate briefing or pleading.<sup>115</sup>

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106. No. A-09-CA-791-SS, 2010 WL 3655850, at \*1 (W.D. Tex. Sept. 13, 2010).

107. *Id.*

108. *Id.* at \*3.

109. *Id.* at \*3-4 (applying RESTATEMENT (SECOND) § 6 (the most significant relationship test) and § 145 (the basic tort principle)).

110. No. 2:09-CV-00260-TJW, 2010 WL 3860362 (E.D. Tex. Sept. 30, 2010).

111. *Id.* at \*3-4.

112. *Id.* at \*3 (citing TEX. BUS. & COMM. CODE ANN. § 1.301(a) (West 2009)).

113. *Id.*

114. *Id.* at \*5.

115. See *Drummond Am., LLC v. Share Corp.*, 692 F. Supp. 2d 650 (E.D. Tex. 2010) (neither party invoked the contract's choice of Illinois law and thus conceded to Texas law); *Schlumberger Tech. Corp. v. Turnkey E & P Inc.*, No. H-09-0522, 2009 WL 5220648 (S.D. Tex. Dec. 30, 2009) (inferring Canada-based Turnkey is concession that Texas law

## 2. *Contracts Without Choice-of-Law Clauses*

The Survey period produced two-and-a-half opinions regarding law governing contracts missing choice of law designations. *Contractor's Source Inc. v. Hanes Companies, Inc.* involves an action to recover consequential damages resulting from defendants' alleged defective products.<sup>116</sup> Plaintiff Contractor's is a Houston-based company that manufactures woven fabrics. It bought "silt fence fabric" in a series of purchases from defendant Hanes, a company with an ambiguous principal location in Dallas or North Carolina.<sup>117</sup> Contractor's sued for breach of contract, alleging Hanes's defective products resulted in lost customers and future business; Hanes denied the breach and affirmatively defended their underlying agreement precluded recovery of consequential damages because of a clause appearing on some, invoices.<sup>118</sup>

Plaintiff asserted its claims under Texas law. Defendant argued for North Carolina law, but suggested to the court it was likely a false conflict because the issue was governed by the Uniform Commercial Code.<sup>119</sup> The court rejected the false conflict possibility noting verification required a difficult assessment of both states' UCC case law.<sup>120</sup> Instead the court conducted a Restatement analysis under both the general contracts section and the most significant relationship test.<sup>121</sup> The court's initial analysis did not produce a clear result<sup>122</sup> so the court inquired further into the contacts' qualitative value, which favored Texas.<sup>123</sup> Because the court indulged that further qualitative inquiry, *Contractor's Source* is a valuable example guide for attorneys and judges applying the nuances of the Restatement's sometimes open-ended factors.

*Specialties of Mexico, Inc. v. Masterfoods USA* demonstrates the use of choice-of-law analyses in a federal motion to dismiss for failure to state a

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governed because Turnkey disputed the contract's validity but cited only Texas case law); *Paradigm Oil, Inc. v. Retamco Operating, Inc.* No. 04-09-00230-CV, 2010 WL 3406302 (Tex. App.—San Antonio Aug. 31, 2010, pet. filed) (rejecting Paradigm's objection to attorney fees under Texas law instead of contractually-designated California law for Paradigm's failure to request judicial notice of California law earlier in the case); *Boss Hoss Cycles of Hous., L.L.C. v. Wells Fargo Bank, N.A.*, No. 14-08-00648-CV, 2010 WL 307955 (Tex. App.—Houston [14th Dist.] Jan. 26, 2010, no pet.) (mem. op.) (citing Boss Hoss's inadequate briefing as grounds for rejecting its challenge to the trial court's application of Missouri law).

116. No. 09-cv-0069, 2009 WL 6443116, at \*1 (S.D. Tex. Dec. 29, 2009).

117. After noting the uncertainty the court concluded Hanes had its principal place of business in North Carolina. *Id.* at \*3 n.6.

118. *Id.* at \*1–2.

119. *Id.* at \*2 n.4. The opinion is silent here on to which UCC sections are implicated but later analyzes the provisions under several sections of UCC Article 2. *Id.* at \*5–9.

120. *Id.*

121. *Id.* at \*2–3, \*3 n.5. The general contract section includes (a) the place of the contracting, (b) the place of negotiation, (c) the place of performance, (d) the location of the contract's subject matter, and (e) the parties' domicile, residence, nationality, place of incorporation, and place of business. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188. For the factors in the most significant relationship test, see *supra* note 92.

122. *Id.* at \*3.

123. The court found Texas contacts were superior and Texas had a greater interest in the case's resolution. *Id.* at \*3–5.

claim.<sup>124</sup> Plaintiff Specialties is a Texas corporation located in Laredo. Masterfoods is a Delaware corporation owned by Mars, Inc. Both have related or sub-entities in Mexico, and the dispute concerned various agreements regarding resale and distribution of candy in Mexico.<sup>125</sup> Plaintiff brought contract claims under Texas law and tort claims under Texas and Mexican law. The court applied factors from both the Restatement's contracts and tort sections to conclude Texas law governed all the claims and then dismissed all claims except fraud and negligent misrepresentation.<sup>126</sup>

In a similar vein, *McFadin v. Gerber*<sup>127</sup> used a clipped choice-of-law analysis to support a jurisdictional conclusion. The McFadins are a husband and wife team who produce custom handbags. They sued three of their sales representatives for selling knock-off versions of their product. The McFadins are from Texas and the Gerbers (another married couple) covered sales territories in the Rocky Mountain states and were based in Denver.<sup>128</sup> In declining Texas jurisdiction over the Gerbers, the court noted plaintiffs traveled to Colorado to set up the relationship, the contract appeared to have been formed in Colorado, and under Restatement (Second) § 188, Colorado law governed the contract.<sup>129</sup>

### 3. Commercial Torts

*Hoffart v. Wiggins*<sup>130</sup> involved a pro se lawsuit alleging a fraudulent investment scheme, brought by seventy-six-year-old Sylvester Hoffart on his own behalf and as his wife's guardian. Defendants, family members in Oregon, persuaded the Hoffarts in 1981 to entrust their life savings exceeding \$200,000 with the defendants who would invest it at a guaranteed return of 8.5% annually. Plaintiff alleged by 1985 defendants had converted the money to their own use. The Hoffarts demanded the money's return and unsuccessfully complained to police in Oregon. Over several years defendants returned portions of the money and had returned half by November 2004 but no more afterward.<sup>131</sup>

In 2005, the Hoffarts hired two attorneys and sued the Oregon defendants in Liberty County, Texas, but Mr. Hoffart eventually fired the attorneys and the case was dismissed.<sup>132</sup> In 2006, the Hoffarts hired an

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124. No. L-09-88, 2010 WL 2488031 (S.D. Tex. June 14, 2010).

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

126. *Id.* at \*5, \*12.

127. 587 F.3d 753 (5th Cir. 2009).

128. *Id.* at 756-57.

129. *Id.* at 760 n.19. The court affirmed jurisdiction over another defendant with better Texas contacts. *Id.* at 763.

130. No. 1:08-CV-46, 2010 WL 816915 (E.D. Tex. Jan. 30, 2010), *adopted in part, rejected in part*, No. 1:08-CV-46, 2010 WL 816863 (E.D. Tex. Mar. 3, 2010), *aff'd in part, vacated in part*, No. 10-40209, 2010 WL 5416802 (5th Cir. Dec. 22, 2010). This portion of the case is taken from the federal magistrate judge's recommendation limited to the portion the district court later adopted. *See id.* at \*1-16. The district court rejected the magistrate judge's recommendation on the issue of preclusion.

131. *Id.* at \*2.

132. *Id.* at \*3.

Oregon lawyer to bring claims under Oregon's elder-abuse statute, which they lost on summary judgment, and breach of contract, which they lost in jury trial. The Oregon Court of Appeals reversed the summary judgment, but the Hoffarts fired their lawyer and voluntarily dismissed that action and obtained a dismissal without prejudice, which is important for the Texas court's preclusion ruling.<sup>133</sup>

In 2008, Mr. Hoffart sued in federal court in Beaumont, bringing claims again under the Oregon elder-abuse statute and a claim of identity theft under the federal Fair Credit Reporting Act. In the event Oregon law did not apply, Mr. Hoffart brought alternative claims under Texas law for breach of fiduciary duty, forgery, fraud, constructive trust, unjust enrichment, and promissory estoppel, but no claim for breach of contract. The federal district court dismissed the Fair Credit identity theft claims and then considered which state's law governed the other claims.<sup>134</sup>

The federal magistrate judge conducted a particularly thorough choice-of-law analysis, applying Restatement (Second) section 148 for fraud, section 221 for restitution, section 145 for the general tort claims, and section 6 for the overriding most significant relationship test. The court analyzed the available facts for each claim and noted a difficult conclusion because both states had significant connections to the parties and underlying events.<sup>135</sup> The court held Texas law governed, then turned to the remaining issues of limitations and preclusion. As to limitations, the court dismissed Texas claims with two-year limitation periods and retained those with four-year periods.<sup>136</sup> This Article's Judgments section discusses the preclusion issue.<sup>137</sup> The opinion bears reading not only for the court's thorough application of multiple Restatement sections, but also for the court's careful patience in dealing with a pro se plaintiff's case.

*Northern Marine Underwriters, LTD v. FBI Express, Inc.* is an example of tort choice of law applied in a commercial case underwritten by a contact where the plaintiff and defendant were not contracting parties.<sup>138</sup> Northern Marine is a British company that insured Richard Haworth, Ltd, another British company. Richard Haworth hired FBI Express to transport rolls of fabric from South Carolina to San Pedro, Cholula Puebla, Mexico. FBI was a shipping broker and had hired a Texas-based shipper, JAMCO.<sup>139</sup> When the second shipment was hijacked in Mexico, Northern Marine brought a subrogee action in federal court in Houston claiming FBI had secondary liability. Northern Marine's claims were based on federal statute, federal common law, and alternatively, Mexican

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133. *Id.*

134. *Id.* at \*3–6.

135. The court also commented on the Restatement's lack of mechanical precision. *Id.* at \*7 (as if any multi-factor balancing tests offers that precision).

136. *Id.* at \*10–15.

137. See *infra* notes 156–73 and accompanying text.

138. 697 F. Supp. 2d 695 (S.D. Tex. 2009).

139. *Id.* at 698–99.

law. Defendant FBI argued Texas law controlled.<sup>140</sup> The court was thus faced with choosing the governing law for a British insurer's claims against a California shipping broker, for claims arising from a Texas shipper's loss of a British customer's goods in a shipment from South Carolina to Mexico, where the loss was in Mexico. The court quickly found no center to the parties' relationship.<sup>141</sup> The court rested its conclusion that Texas law governed because FBI traveled to Laredo to inspect the shipper's facilities before hiring them and Texas was the final place of opportunity to implement security measures prior to entry into Mexico.<sup>142</sup>

*Berry v. Bryan Cave LLP*<sup>143</sup> was a multi-district litigation case regarding fraud in issuance of life insurance policies used in defined benefit plans. This case provides an excellent discussion of several mass-litigation issues including the law governing MDL transfers and application of multiple states' laws in class action cases. The court declined a full choice-of-law analysis because the facts were not yet developed, but did question plaintiffs' premise that Arizona law governs all claims based on the court's reference to the third factor in the most significant relationship test.<sup>144</sup>

#### 4. Non-Commercial Torts

The Survey period included three noteworthy choice-of-law opinions involving non-commercial torts in a non-class action setting. *Enterprise Products Partners, L.P. v. Mitchell*<sup>145</sup> offers an especially thorough analysis regarding a Mississippi pipeline explosion and the balancing of public policies leading to application of Texas law. In 2007, a liquid propane pipeline exploded near Carmichael, Mississippi, creating a gas cloud that ignited into a fireball killing nearby residents. Their survivors and other victims sued in Harris County, Texas, alleging negligence and other claims against Enterprise and Dixie Pipeline Company, Delaware corporations based in Houston. Because of the victims' Mississippi domicile and the accident's location, defendants moved for application of Mississippi's \$1 million damage cap on non-economic damages arguing Mississippi had the strongest interest because of the victims' Mississippi domicile and the accident's location. All parties agreed Texas law governed the remaining issues. The trial court ruled Texas law governed all damages claims and defendants took an interlocutory appeal.<sup>146</sup>

The court of appeals affirmed, applying the Restatement's section on

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140. *Id.* at 700–02.

141. *Id.* at 702.

142. *Id.* at 702–03.

143. No. 3:08-CV-2035-B, MDL No. 1983, 2010 WL 1904885 (N.D. Tex. May 11, 2010).

144. *Id.* at \*3–4. See also companion opinion in the same action, *Berry v. Bryan Cave LLP*, No. 3:08-CV-2035-B, MDL No. 1983, 2010 WL 1946264 (N.D. Tex. May 11, 2010).

145. No. 01-09-00653-CV, 2010 WL 3294243 (Tex. App.—Houston [1st Dist.] Aug. 19, 2010, no pet.), *abrogated by* 2011 WL 693700 (Tex. App.—Houston [1st Dist.] Feb. 10, 2011, pet. filed).

146. *Id.* at \*1.

general torts and most significant relationship test.<sup>147</sup> The court greatly examined underlying policies behind the conflicting Texas and Mississippi laws, concluding because the Mississippi explosion was fortuitous—it could have happened anywhere along the pipeline’s 1,300 mile span—Texas had a stronger interest in regulating its own companies.<sup>148</sup> The court further found Mississippi’s tort-reform policy of ending “the state’s hell-hole reputation and attract[ing] more business” was not implicated because the pipeline was built in the 1960s with no reliance on Mississippi’s tort-reform policies.<sup>149</sup>

*McLead v. L-3 Communications Vertex Aerospace, L.L.C.*, involving a motion to designate the United States and U.S. Army as responsible non-parties in a case concerning a helicopter crash in Iraq killing fourteen American servicemen, briefly discusses the role of choice of law in consideration of a motion to designate.<sup>150</sup>

### C. PROCEDURAL ISSUES

The Survey period produced four instructive applications of the general rule that forum law governs procedure, which also demonstrated that substance–procedure distinction may be difficult. In *In re Lisa Laser USA, Inc.*,<sup>151</sup> a defendant argued the contract section containing a forum clause and choice-of-law clause (both designating California) required the forum clause be interpreted under California law. Although the court ultimately enforced the forum clause and dismissed the case, it rejected this argument because it found the availability of mandamus relief was a matter of procedure and necessarily governed by forum law.<sup>152</sup> A federal district court in Texas quoted federal precedent for the opposite result finding a forum clause’s validity is a matter of state contract law and thus substantive law.<sup>153</sup>

*Pillsbury Winthrop Shaw Pittman, LLP v. Brown Sims, P.C.*<sup>154</sup> was a miscellaneous action (tangential to other litigation) in a Houston federal court seeking to quash a subpoena related to discovery in a Florida federal case. The court held that although federal law governed the procedural elements, the issue of privilege is substantive and governed by either Texas or Florida privilege law; the court also found a false conflict and applied Texas law.<sup>155</sup> *Midwest Medical Supply Co., L.L.C. v. Wingert* held that while plaintiff’s entitlement to attorney fees in a contract action was a matter of substantive law governed by the parties’ chosen Missouri

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147. *Id.* at \*2–4.

148. *Id.* at \*3.

149. *Id.* at \*4.

150. No. C-08-264, 2010 WL 143715 (S.D. Tex. Jan. 8, 2010).

151. 310 S.W.3d 880 (Tex. 2010).

152. *Id.* at 883 n.2.

153. See *Valero Mktg. & Supply Co., v. Baldwin Contracting Co.*, No. H-09-2957, 2010 WL 1068105, at \*2 (S.D. Tex. Mar. 19, 2010).

154. No. 4:09-mc-365, 2010 WL 56045 (S.D. Tex. Jan. 6, 2010).

155. *Id.* at \*3–4.

law, forum law governed recovery of costs.<sup>156</sup>

### III. FOREIGN JUDGMENTS

Foreign judgments from other states and countries create Texas conflict-of-laws issues in two ways: (1) local enforcement, and (2) preclusive effect on local lawsuits. Texas recognizes two methods of enforcing foreign judgments: the common-law method using foreign judgment basis for a local lawsuit,<sup>157</sup> and since 1981, the more direct procedure under the two uniform judgments acts.<sup>158</sup> Section 36.007 of the Texas Civil Practice and Remedies Code expressly reserves the enforcement right of non-monetary judgments under traditional, non-statutory standards,<sup>159</sup> along with similar acts for arbitration awards,<sup>160</sup> child custody,<sup>161</sup> and child support.<sup>162</sup> Federal judgments may be enforced in any other federal district as local judgments<sup>163</sup> or as sister-state judgments in Texas state courts.

The Survey period's most notable foreign-judgment analysis involved

156. 317 S.W.3d 530 (Tex. App.—Dallas 2010, no pet.).

157. The underlying mandate for common-law enforcement is the Full Faith and Credit Clause of the United States Constitution, U.S. CONST. art. IV, § 1, and its statutory counterpart, 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).

158. Sister-state judgments are enforced under the Uniform Enforcement of Foreign Judgments Act (UEFJA). TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001–.008 (West 2008). The Act requires (1) the judgment creditor to file a copy of the judgment authenticated under federal or Texas law, and (2) notice to be sent to the judgment debtor from the clerk or the judgment creditor. *Id.* §§ 35.003–.005. The judgment debtor may (1) move to stay enforcement if grounds exist under Texas law or the rendering state, and (2) challenge enforcement along traditional full faith and credit grounds such as rendering a state's lack of personal or subject matter jurisdiction. *Id.* §§ 35.006, 35.003. Foreign-country judgments for money are enforced under the Uniform Foreign Country Money-Judgments Recognition Act (UFCMJRA). TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001–.008 (West 2008). Like the UEFJA, the UFCMJRA requires the judgment creditor to file a copy of the foreign-country judgment previously authenticated under federal or Texas law, with notice to the debtor provided either by the clerk or the creditor. *Id.* §§ 36.0041–.0043. The judgment debtor has thirty days to challenge enforcement, or sixty days if “domiciled in a foreign country,” with a twenty-day extension available for good cause. *Id.* at § 36.0044. Unlike the UEFJA, the UFCMJRA explicitly states ten grounds for non-recognition—three mandatory and seven discretionary. *Id.* § 36.005. Briefly stated, the mandatory grounds are (1) lack of an impartial tribunal, (2) lack of personal jurisdiction, and (3) lack of subject matter jurisdiction. *Id.* § 36.005(a). Discretionary grounds for non-recognition are the foreign action (1) involved inadequate notice, (2) “was obtained by fraud,” (3) violates Texas public policy, (4) is contrary to another final judgment, (5) is contrary to the parties' agreement (for example, a contrary forum selection clause), (6) was in an inconvenient forum, and (7) is not from a country granting reciprocal enforcement rights. *Id.* § 36.005(b). The UFCMJRA also provides for stays. *Id.* § 36.007.

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

160. *See generally* Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006); Texas International Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 172.082(f) (West 2005).

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

162. *Id.* § 159.601.

163. *See* 28 U.S.C. § 1963 (2006).

preclusion and not judgment enforcement. *Hoffart v. Wiggins*<sup>164</sup> involved an elderly Texas couple who sued in Oregon and Texas to recover investment funds allegedly converted by family members. As discussed in the Choice-Of-Law section, the Hoffarts (1) sued in Texas but voluntarily dismissed, (2) then sued in Oregon where they lost both a breach-of-contract claim in jury trial and an Oregon statutory claim on summary judgment, (3) then sued in federal court in Texas, limiting their claims to various tort theories along with a federal claim that the court dismissed.<sup>165</sup> Defendants argued the Oregon judgment precluded the third lawsuit in Texas. The federal magistrate judge concluded the Texas claims were not barred because they were raised in Oregon.<sup>166</sup> The federal district court rejected this part of the federal magistrate judge's recommendation, ruling instead that the claims were barred.<sup>167</sup> The court noted that contrary to defendants' brief, Oregon law rather than federal law, governed the preclusive effect.<sup>168</sup> Oregon uses the transactional test where final judgment bars relitigation of any claim raised or potentially joined because it arose from the same transaction.<sup>169</sup> The Hoffarts' tort claims clearly arose from the same investment setting as their Oregon claims and were thus barred.<sup>170</sup> The court's analysis of the Hoffarts' jury loss on their contract claim is valid as far as it goes. The opinion fails to consider, however, the Oregon statutory claim, which the Hoffarts lost on a summary judgment but reversed on appeal. Thereafter, the Hoffarts obtained a dismissal of the Oregon claim without prejudice.<sup>171</sup> The record is unclear as to that claim's further viability in Oregon, but leaves open the possibility the Oregon statutory claim could be litigated at the time the Texas action was filed, and with that litigation the Hoffarts could join related claims. That late joinder is unlikely, but not impossible. At any rate, the Oregon appellate court's revival of the Oregon statutory claim may have impaired the Oregon's judgment's finality, thus undoing preclusion in the Texas federal action.<sup>172</sup>

Two Texas cases routinely enforced sister-state judgments under the UEFJA, both pointing out that properly filed sister-state judgments are final in Texas, thus rejecting the defendant's motion for new trial<sup>173</sup> and

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164. No. 1:08-CV-46, 2010 WL 816863 (E.D. Tex. Mar. 3), *adopting in part, rejecting in part*, No. 1:08-CV-46, 2010 WL 816915 (E.D. Tex. Jan. 30), *aff'd in part, vacated in part*, No. 10-40209, 2010 WE 5416802 (5th Cir. Dec. 22, 2010).

165. See *supra* notes 130–36 and accompanying text.

166. Hoffart, 2010 WL 816915, at \*15.

167. *Id.* at \*4.

168. *Id.* at \*3.

169. *Id.*

170. *Id.* at \*3–4.

171. *Id.* at \*1 n.2.

172. The court notes finality as an element of preclusion under Oregon law and assumes its existence from the final judgment on the contract claim. *Id.* at \*3. The court additionally cites an Oregon case on this point, *Cogan v. City of Beaverton*, but that case does not address the point here. See 226 Or. App. 381, 203 P.3d 303, 308 (Or. Ct. App. 2009).

173. *Counsel Fin. Servs., L.L.C. v. David McQuade Leibowitz, P.C.*, 311 S.W.3d 45 (Tex. App.—San Antonio 2010, pet. denied).



various other frivolous challenges.<sup>174</sup>

#### IV. CONCLUSION

Unlike most Survey periods when choice-of-law cases dominate, 2010 is forum contests with five Texas Supreme Court cases favoring foreign forums over plaintiffs' choice of a Texas forum. Three opinions rested on derogating forum-selection clauses, that is, clauses designating a foreign forum that plaintiff defied in choosing to file in Texas. Although it might be assumed defiant plaintiffs should routinely lose their choice of forum in such instances, these cases are noteworthy for the court's two holdings that defendants' dilatory challenges did not waive the clause, and in the third for the court's expansive reading of an ambiguous clause. Adding to this, two Texas Supreme Court cases granted forum-non-conveniens dismissals in favor of foreign forums. While these five opinions may be nothing more than an adjudication of facts in front of the court, they may also signal a trend disfavoring a local forum in interstate and international disputes. This possibility is underscored by the fact the supreme court reversed well-reasoned opinions by the courts of appeal in all five cases.

In addition to this possible doctrinal development presuming against a Texas forum, the Survey period offered many routine conflicts opinions demonstrating important fact settings and analyses that will prove valuable to attorneys facing choice-of-law questions. Three noteworthy internet cases reached different results while applying the test accurately, with one addressing the internet contact being a third-party payment site. Well-reasoned choice-of-law opinions demonstrated the corporate affairs doctrine, bankruptcy choice of law, grounds for disallowing a choice-of-law clause, inadequate assertion of choice-of-law arguments, and a number of other valuable tactical points. The foreign judgments category offered one compelling preclusion case instructing accurately on several points of interstate preclusion and state-federal preclusion.

Collectively, the conflict-of-laws cases in this Survey period illustrate Texas courts' ongoing judicial skill in difficult doctrines,<sup>175</sup> a general alignment with national doctrine, and possible exception of the Texas Supreme Court's tendency to decline a Texas forum.

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174. *Diesel Injection Sales and Serv. v. Diesel Heads and Parts Serv., Inc.*, No. 13-09-289-CV, 2010 WL 1254605 (Tex. App.—Corpus Christi Apr. 1, 2010, no pet.).

175. This was not always true. See generally James P. George, *Conflicts and Faulty Analysis: Judicial Misapplication of the Most Significant Relationship Test*, 23 REV. LITIG. 489 (2004).