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Conflict of Laws

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CONFLICT OF LAWS

James P. George*
Anna K. Teller**

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STATES' and nations' laws 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 conflicts cases from Texas state and federal courts during the Survey period from October 1, 2001, through November 1, 2002. 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 constitutional limits, resulting in the same rules applying to most issues in state and federal courts.¹ The discussion is organized according to conflict of laws categories. For jurisdiction over nonresidents, the categories are the grounds for amenability—consent, forum contacts, and grounds for declining jurisdiction. The choice of law categories reflect the hierarchy of choice of law rules, first statutory, then party choice of law, then the Restatement (Second)'s most-significant-relationship test, followed by miscellaneous issues such as constitutional limits, proof of foreign law, and limitations. The foreign judgments categories are enforcement (according to specific uniform acts) and preclusion (interstate and international).

During the Survey period, forum contests included a variety of jurisdictional assertions over nonresidents in contract, tort and other settings. Jurisdictional theories included a service-of-suit clause construed as consent to amenability,² alter-ego³ and the single-enterprise doctrine,⁴ and cases exploring the boundaries of general jurisdiction (such as jurisdiction based on unrelated banking activity⁵). Jurisdiction was lacking over a Belgian employment law claim,⁶ and a nationwide federal long-arm failed because of a predicate venue provision.⁷ Courts reached opposite results

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

2. See *infra* notes 21-30 and accompanying text.

3. See *infra* notes 38-58 and accompanying text.

4. See *infra* notes 55-56 and accompanying text.

5. See *infra* notes 47-56 and accompanying text.

6. See *infra* notes 21-30 and accompanying text.

7. See *infra* notes 99-112 and accompanying text.

in two internet cases,⁸ discussed retained jurisdiction under the new child custody act,⁹ and issued an unauthorized anti-suit injunction against a Mississippi lawsuit.¹⁰

Choice of law cases affirmed the parties' right to choose their governing law,¹¹ declined to adopt the Restatement's statute of limitations rule,¹² upheld arbitration agreements but strictly construed them to exclude children not subject to the contract,¹³ applied Texas insurance law—the insurable interest doctrine—to several companies' purchase of life insurance policies on Texas employees (and considered the constitutionality given the case's contacts with eight states),¹⁴ reiterated the requirements for proof of foreign law,¹⁵ and applied Texas's new borrowing statute to an asbestosis claim arising in Alaska.¹⁶

Foreign judgments cases discussed the difference between jurisdictional facts and the merits in a jurisdictional challenge to a New Jersey judgment,¹⁷ upheld the validity of English due process,¹⁸ and found the Uniform Foreign Country Money Judgment Recognition Act persuasive in a preclusion case rejecting a non-monetary Mexican judgment.¹⁹

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 contract's forum selection clause), waiver (failing 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 will focus primarily on the issues relating to amenability.

A. CONSENT AND WAIVER

Contracting parties may agree to a forum selection clause designating either 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. 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. Only valid prorogation clauses establish personal jurisdiction, and they are discussed in this sec-

8. See *infra* notes 113-30 and accompanying text.

9. See *infra* notes 138-52 and accompanying text.

10. See *infra* notes 255-65 and accompanying text.

11. See *infra* notes 281-87 and accompanying text.

12. See *infra* notes 288-89 and accompanying text.

13. See *infra* notes 334-45 and accompanying text.

14. See *infra* notes 309-23 and accompanying text.

15. See *infra* notes 434-47 and accompanying text.

16. See *infra* notes 416-23 and accompanying text.

17. See *infra* notes 453-67 and accompanying text.

18. See *infra* notes 468-82 and accompanying text.

19. See *infra* notes 484-507 and accompanying text.

tion. Derogation clauses are discussed below as a grounds for the forum to decline otherwise valid jurisdiction.²⁰

Not all forum selection clauses look alike, and courts may construe them in ways not contemplated, at least by defendant, at the contract's signing. *Ace Insurance Co. v. Zurich American Insurance Co.*,²¹ held that a foreign insurer consented to Texas jurisdiction in the wording of a "service of suit" clause. Ace, a Belgian casualty insurer based in London, reinsured a portion of Zurich American's policy that had been issued to a Houston-based drilling company, Nabors Industries, Inc., and its affiliate Nadrico Saudi, Ltd. Zurich's original policy had a clause titled "Service of Suit Clause (USA)" that read in pertinent part, "[T]he Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States."²² Ace's reinsurance policy incorporated the service-of-suit clause.²³

Nadrico filed a claim when one of its wells blew out in Saudi Arabia. Zurich paid the claim, but Ace refused for lack of timely filing. Zurich sued Ace in a state district court in Houston, which denied Ace's objection to jurisdiction based on the service of suit clause.²⁴ On appeal, Ace argued that it had not consented to personal jurisdiction because the Texas court was not a court of competent jurisdiction as required in the service-of-suit clause. Ace maintained that judicial competence includes both subject-matter and personal jurisdiction, thus disqualifying a Texas court that (apart from the service-of-suit clause) lacked personal jurisdiction (according to Ace). Ace relied on an Indiana case which defined "court of competent jurisdiction" to include personal jurisdiction, citing the Supreme Court's *United States v. Morton* as authority.²⁵ Contrary to Ace's position, however, *Morton*'s discussion of competence was limited to subject matter jurisdiction and did not discuss personal jurisdiction.²⁶

20. See EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 360-71 (2d ed. 1992) [hereinafter SCOLES & HAY]; James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 912-21 (1999) [hereinafter *Parallel Litigation*]. For a discussion of forum derogation clauses, see *infra* notes 184-94 and accompanying text.

21. *Ace Ins. Co. v. Zurich Am. Ins. Co.*, 59 S.W.3d 424 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

22. *Id.* at 426.

23. *Id.*

24. *Id.* at 427. Just prior to this, Ace sued Zurich in England seeking a declaration of nonliability. The English court refused to act on Ace's argument of lack of Texas jurisdiction for lack of evidence that the Texas court lacked competence. *Id.* at 427 (citing *Ace Ins. SA-NV (Formerly) Cigna Ins. Co. of Europe SA-NV v. Zurich Ins. Co. and Zurich Am. Ins. Co.*, [2001] 1 Lloyd's Rep. 618, 630).

25. *Id.* at 428; *George S. May Int'l Co. v. King*, 629 N.E.2d 257, 262 (Ind. Ct. App. 1994) (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)).

26. Examining a federal statute, *Morton* noted that "competent jurisdiction" had been used on occasion to refer to a court's jurisdiction over the defendant's person, but then went on to say that statutory phrases are not construed in isolation and must be read as part of the statute as a whole. After considering the statute as a whole the court held only subject-matter jurisdiction was needed. *Ace*, 59 S.W.3d at 428-29 (discussing *Morton*, 476 U.S. at 828).

Applying *Morton's* reasoning to Ace's argument, the Houston Court of Appeals construed the reinsurance contract. Rules of contract construction, like those of statutory construction, require that the contract be read as a whole to give every clause meaning.²⁷ The court held that Ace's interpretation failed because it would render the service-of-suit clause meaningless—a party subject to a court's personal jurisdiction would have no need to agree to submit to that court.²⁸ Although no Texas cases have construed the effect on personal jurisdiction of service-of-suit clauses, the court cited a Fifth Circuit case and others reaching that conclusion.²⁹

The court's reasoning fails to consider the distinction between amenability and service of process. This service-of-suit clause is conceivably nothing more than an agreement for uncontested receipt of service, and only after a suit has been filed in a court that has personal jurisdiction, subject matter jurisdiction, and venue. The court's construction here renders Ace amenable (that is, subject to personal jurisdiction) in any court in the United States having subject matter jurisdiction for this lawsuit. This necessarily includes all state courts of general subject matter jurisdiction, and all federal courts with diverse parties and claims exceeding \$75,000. That amounts to a lot of courts, and it is unlikely that contracting parties would submit to such broad jurisdictional exposure. In the decision's favor, it can be argued that a party accepting service of process has either consented or waived objections to amenability, but that is not what this clause says. Rather, the clause provides that the underwriters "will submit to the jurisdiction of a Court of competent jurisdiction within the United States."³⁰ While *submit* can have different meanings, when read as a whole with the clause's title—"Service of Suit (USA)"—it is plausible that the clause does nothing more than waive objection to service after a proper suit has been filed in a proper forum. At the very least, the clause is ambiguous. On the other hand, Ace was probably amenable in any event because of Nabors's Houston location and the contract's implicit contemplation that Ace was amenable somewhere in the United States. But that amenability should be established either by an explicit forum selection clause, or by a long-arm statute and due process.

The Survey period had no jurisdictional waiver cases implicating issues of nonresident amenability.

27. *Id.* at 428 (citing *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995); *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378, 382 (Tex. 1985)).

28. *Id.* at 428-29.

29. *Id.* at 429 (citing *McDermott Int'l, Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199, 1206 (5th Cir. 1991); *In re Delta Am. Re Ins. Co.*, 900 F.2d 890, 893 (6th Cir. 1990); *Columbia Cas. Co. v. Bristol-Myers Squibb Co.*, 635 N.Y.S.2d 173, 177 (N.Y. App. Div. 1995)).

30. *Id.* at 426.

B. NONRESIDENT'S FORUM CONTACTS

Three predicates are important in understanding personal jurisdiction over nonresident defendants who have not consented or waived their objections. First, the extraterritorial service must be authorized under a long-arm statute that does not violate due process as defined in the Supreme Court's minimum contacts test.³¹ Second, Texas long-arm statutes apply in both state and federal courts in Texas,³² except where Congress has enacted a federal long-arm statute for a very few federal law claims.³³ In the absence of a federal long-arm statute, parties asserting either federal question or diversity claims in federal courts must use the local state's long-arm statute as a starting point for claims against nonresidents. Third, Texas has a limits-of-due-process long-arm that extends Texas's extraterritorial reach to the limits of the minimum contacts test.³⁴ Accordingly, due process is the only necessary foundation for personal jurisdiction in Texas courts. This is done in two parts, with a contacts inquiry (which may be general³⁵ or specific³⁶), and if a contact exists, a fairness test to determine whether the forum is too inconvenient for the defendant, considering the plaintiff's need for a convenient forum, the forum state's interests, and other factors.³⁷ In spite of due process's dominance, these personal jurisdiction cases are grouped under the long-arm categories.

31. 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 (Vernon 1997), and others are scattered throughout Texas statutes, e.g., TEX. AGRIC. CODE ANN. § 161.132 (Vernon 1982) (violation of certain agricultural statutes); TEX. FAM. CODE ANN. § 6.305 (Vernon 1998) (nonresident respondents in divorce actions); TEX. INS. CODE ANN. § 823.457 (Vernon Supp. 2003) (violations of duties imposed on insurance holding companies).

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

33. See FED. R. CIV. P. 4(k)(1)(D). Examples of federal long-arm statutes include 28 U.S.C. § 2361 (1994) for statutory interpleader, and 15 U.S.C. § 78aa (1997) for claims under the Securities Exchange Act of 1934.

34. See *U-Anchor Adver., Inc.*, 553 S.W.2d at 762.

35. General jurisdiction is based on the nonresident's forum contacts unrelated to plaintiff's claim. These contacts must be "continuous and systematic" and form a strong connection to the forum. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984). *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991).

36. Specific jurisdiction is based on the nonresident's forum contacts related to the plaintiff's claim, through which defendant purposefully availed itself of the benefits and protections of forum law, or could foresee or reasonably anticipate being subjected to personal jurisdiction. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985). A narrower category of specific jurisdiction exists where a nonresident having no forum contacts has placed its product in the stream of commerce knowing that it could find its way to the forum state. See *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987).

37. The fair play and substantial justice test is a five-factor balancing test examining (1) "the burden on the defendant," (2) "the forum state's interests in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) "the shared interests of the several states in furthering fundamental substantive social policies." *Burger King*, 471 U.S. at 477.

1. *The Texas Long-Arm in Commercial Cases*

Two Survey period cases considered alter-ego jurisdiction, based on a related party's Texas contacts. In *BMC Software Belgium, N.V. v. Marchand*,³⁸ Belgian-citizen Marchand was terminated after a year's work for BMC-Software Belgium, N.V. ("BMC-Belgium"), a wholly-owned subsidiary of BMC Software, Inc. ("BMCS"), a Delaware corporation based in Houston. His employment agreement included a promise of stock options, without specifying when they would be offered, and they never were.³⁹ Marchand sued both BMC-Belgium and BMCS in state district court in Houston for breach of contract, fraud, and negligent misrepresentation and declaratory relief. BMC-Belgium contested personal jurisdiction but was denied by the trial court and the court of appeals, which found a basis for both general and specific jurisdiction.

The Texas Supreme Court reversed. Marchand's argument for specific jurisdiction was based on conversations about the stock option, allegedly occurring in Texas between Gerd Ordelheide, a BMC-Belgium director and Max Watson, BMCS's chief executive officer, regarding Marchand's stock options. Marchand argued that this activity met the Texas long-arm requirement as a tort committed in whole or in part in Texas.⁴⁰ The supreme court rejected this, characterizing the Watson-Ordelheide talks as isolated, and holding that Marchand's claim did not arise from anything that was alleged to have happened in Texas. Instead, his claim arose from actions occurring in Europe, or in any event, outside Texas.⁴¹ The court rejected specific jurisdiction without having to address the minimum contacts aspect.

Marchand also alleged general jurisdiction arising from, once again, the Watson-Ordelheide conversations in Texas, and from BMC-Belgium's purchase of products from BMCS. General jurisdiction—the assertion of jurisdiction based on defendants contacts unrelated to plaintiff's claim—requires that the defendant have continuous and systematic contacts with the forum.⁴² The supreme court found these contacts less than the substantial ones required "to meet the more onerous burden of proving gen-

38. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789 (Tex. 2002).

39. Marchand's employment agreement was complicated. On March 29, 1996, Marchand and BMC-Belgium signed a letter agreement stating the terms of Marchand's employment and referencing a "management agreement" that Marchand had presented to BMC-Belgium, which included options on 20,000 shares of BMCS stock, although the agreement did not specify when the options would be granted or when Marchand could exercise them. The management agreement called for BMC-Belgium to hire Procurement, N.V. (of which Marchand was the sole office and director), meaning that Marchand would work for Procurement as an independent contractor rather than directly for BMC-Belgium. Marchand apparently obtained tax advantages under Belgium law under this arrangement. It isn't clear when Marchand (through Procurement) began working for BMC-Belgium, but in July 1997, BMC-Belgium ended the arrangement and discharged Procurement and Marchand. *Id.* at 793.

40. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(2) (Vernon 1997).

41. *Marchand*, 83 S.W.3d at 797-98.

42. *See supra* note 35.

eral jurisdiction."⁴³

Finally, Marchand alleged general jurisdiction over the Belgian subsidiary as alter ego of its Houston-based parent. The standard for alter ego jurisdiction is that "the parent corporation exerts such domination and control over its subsidiary 'that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of jurisdiction'."⁴⁴ Because Marchand had not overcome Texas's presumption of separate entities, this theory failed as well.⁴⁵ The supreme court's reversal of jurisdiction over this Belgian employment dispute may be a close call, but the case is important for its clarification of a courts of appeals split on the standard for reviewing a trial court's denial of a special appearance. Because that issue is not one of conflicts of law, it is not discussed at length here.⁴⁶

*El Puerto De Liverpool v. Servi Mundo Llantero*⁴⁷ is the second alter ego case, exploring what level of banking activity will result in general jurisdiction. El Puerto is a Mexican holding company that, among other things, owns and operates KMart stores in Mexico. Servi Mundo Llantero, S.A. de C.V. had the exclusive right to construct, operate, and manage the retail automotive centers in those KMart stores. After four stores were opened, El Puerto terminated its agreement with Servi Mundo, which then sued El Puerto in Texas. The trial court found El Puerto subject to general jurisdiction in Texas.⁴⁸

On appeal, the Corpus Christi Court of Appeals affirmed the trial court's conclusion with three bases of Texas jurisdiction for this dispute in Mexico. First, El Puerto was subject to general jurisdiction because of its significant banking activity through NationsBank in Dallas. In particular, El Puerto opened a money market investment account as early as 1992 and used it to deposit and withdraw anywhere from ten to several hundreds of millions of U.S. dollars each month. These were sufficiently large transactions to justify converting the account in 1995 in order to lower the transaction fees.⁴⁹ The court was careful to distinguish between mere banking activity and that sufficient to create general jurisdiction. Infrequent use is not enough, nor are mere pass-through accounts, where

43. *Marchand*, 83 S.W.3d at 797 (citing *Helicopteros Nacionales de Columbia, S.A.*, 466 U.S. at 414-15; *Guardian Royal Exch. Assurance Ltd.*, 815 S.W.2d at 228; *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990); *CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996)).

44. *Marchand*, 83 S.W.3d at 798 (quoting *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983), and citing *Conner v. ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 418 (Tex. App.—Houston [14th Dist.] 1997, no writ)).

45. *Id.* at 798-99.

46. The San Antonio Court of Appeals deemed abuse of discretion appropriate because the issue involves both questions of law and fact. *Id.* at 793-94 (citations omitted). Seven other appellate districts have used de novo review, as the First District did in this case. *Id.* at 794. The supreme court held that de novo is the proper standard. *Id.*

47. *El Puerto De Liverpool v. Servi Mundo Llantero*, 82 S.W.3d 622 (Tex. App.—Corpus Christi 2002, pet. dismissed w.o.j.).

48. *Id.* at 637.

49. *Id.* at 632.

the account merely serves as a conduit for the funds in transit, to subject the account holder to general jurisdiction.⁵⁰ Likewise, use of an account not directed toward Texas will not create general jurisdiction. For example, a company will not be subject to general jurisdiction if it is a parent company that uses its subsidiary's Texas account to conduct financial and banking transactions, but does not possess an account itself.⁵¹ El Puerto used the account directly to facilitate its business, and not to benefit customers or third parties. Rather than a pass-through account, these transactions included currency exchange, investments, debt service, and other significant activities.⁵² In finding general jurisdiction, however, the court emphasized that it was not the bank activity alone, but El Puerto's totality of contacts.⁵³

The court of appeals also found alter ego jurisdiction through El Puerto's Texas subsidiaries, which include Operadora Liverpool and Servicios Liverpool. Operadora is a Mexican corporation (with 99.9% ownership by El Puerto) whose sole function is to provide services to El Puerto, and it does so by owning stock in its own subsidiaries, which also serve El Puerto. Operadora in turn owns all of Black Pool Trading Company and 99.9% of Distribuidora Liverpool's stock. The remaining shares of Operadora and Distribuidora are held by other companies owned by El Puerto. Distribuidora buys products for retail sale, and Black Pool is a Texas corporation that acts as an "interchange company for importation" for Distribuidora. Servicios Liverpool, El Puerto's other direct subsidiary, provides personnel and the computer systems to this group of organizations. The parties agreed that both Distribuidora and Servicios do business in Texas and would be subject to jurisdiction here, and, of course, Black Pool is incorporated here. When the elements that justify disregarding corporate boundaries were applied, these facts were sufficient to find El Puerto subject to alter ego jurisdiction for its subsidiaries' Texas activities.⁵⁴

The single-enterprise theory was El Puerto's third strike. Based on equity and partnership principles, the theory applies when corporations integrate resources to achieve a common purpose (as in a partnership) rather than operating as separate entities.⁵⁵ Here, the companies share employees, offices, and an accounting system, and four of the five companies share the business name "Liverpool." In addition, one company

50. *Id.* at 631 (quoting *Primera Vista v. Banca Serfin*, 974 S.W.2d 918, 926 (Tex. App.—El Paso 1998, no pet.)).

51. *Preussag Aktiengesellschaft v. Coleman*, 16 S.W.3d 110, 123-24 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), *cert. denied* 536 U.S. 923 (2002).

52. *El Puerto*, 82 S.W.3d at 633.

53. *Id.*

54. "The operative question in a jurisdictional analysis is whether El Puerto's subsidiary corporations are mere divisions or branches of a larger whole, such that the subsidiaries' contacts with Texas should be attributed to El Puerto." *Id.* at 634. The court found no formal barriers between the management of the separate entities and extensive overlapping of officers and directors. *Id.* at 634-36.

55. *Id.* at 636-37.

pays the salary for all the others, and all the companies provide services to each other. El Puerto and Black Pool have directors but no employees, thus forming a functional whole.⁵⁶

Having found general jurisdiction through substantial banking activity, not to mention alter ego subsidiaries, the court of appeals had no trouble with the second portion of minimum contacts—the fair play and substantial justice balancing test that measures the fairness of compelling a non-resident to defend in a forum.⁵⁷ Once the contact is found, the defendant has the burden of showing jurisdiction to be unreasonable; El Puerto could not.⁵⁸

In *Blair Communications v. SES Survey Equipment Services, Inc.*,⁵⁹ the Houston Court of Appeals held that when the entire substance of a contract is performed outside of Texas the contract will not satisfy the minimum contact standard necessary to assert specific jurisdiction, even if the nonresident defendant initiated contract discussions with a Texas resident, subsequently entered into a contract with that resident, and made payments in Texas.⁶⁰

2. *The Texas Long-Arm in Tort Cases*

In *American Type Culture Collection, Inc. v. Coleman*,⁶¹ the Texas Supreme Court held that Texas lacked general jurisdiction over a non-profit research group accused of selling pathogens later used in Iraq's biological and chemical weapons during the Persian Gulf War. In 1994, Marshall Coleman (presumably a Texas resident) filed a class action in Brazoria County on behalf of 1,800 Gulf War veterans alleging that American Type Culture Collection ("ATCC") and eighty-two other defendants sold material, equipment and technology to Iraq that was used to create biological and chemical weapons. The action raised claims of products liability and negligence. ATCC contested jurisdiction.

ATCC is a nonprofit organized under the District of Columbia and principally located in Maryland. It is a research organization and long-term repository for living microorganisms, viruses and cell lines, and sells materials to research institutes and commercial manufacturers in the United States and forty-five other countries. Although it sold products in Texas, the alleged harm did not arise from these Texas sales. Accordingly, plaintiffs' jurisdictional argument rested on general jurisdiction,⁶²

56. *Id.* at 637.

57. *See supra* note 37 for the elements of the fair play and substantial justice test.

58. *El Puerto*, 82 S.W.2d at 638 (citing *In re S.A.V.*, 837 S.W.2d 80, 85 (Tex. 1992); *Guardian Royal*, 815 S.W.2d at 231)). *El Puerto* also moved for rehearing, and for rehearing en banc of this decision based on the Texas Supreme Court's subsequent decision in *Marchand*, 83 S.W.3d 789. The court overruled the motions for rehearing since the decision is in harmony with *BMC*. *Id.* at 638-39. *See supra* notes 37-45.

59. *Blair Communications v. SES Survey Equip. Servs.*, 80 S.W.3d 723 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

60. *Id.*

61. *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801 (Tex. 2002).

62. *Id.* at 807.

found to exist both in the trial court and the court of appeals.⁶³ On supreme court review,⁶⁴ the court considered the following jurisdictional facts: ATCC advertises in national and international journals, and its catalogues are sent only on request; a majority of its sales are made by phone or written orders received in Maryland; ATCC's products are sent F.O.B. Rockville, Maryland, which means that title passes at the designated F.O.B. point;⁶⁵ and Maryland is the site of all invoices and payments.⁶⁶

As for its Texas contacts (at the time of the 1994 lawsuit), ATCC's Texas sales dated back at least eighteen years and accounted for 3.5 percent of its world-wide sales volume and five percent of its United States total, creating approximately \$350,000 in revenue.⁶⁷ ATCC is a repository for Texas researchers seeking microorganism patents, and for the fifteen-to-twenty years prior to this suit, almost 2.7 percent of the 13,000 patents in ATCC's Maryland repository came from Texas residents. For these services, customers shipped materials to Maryland, where ATCC performed all its safe-deposit services. In 1991, ATCC contracted with the University of Texas Southwestern Medical Center to propagate and test cell-lines. ATCC signed that agreement and performed all related services in Maryland.⁶⁸ Over a five-year period, ATCC bought approximately \$378,000 in supplies from thirty-three Texas vendors. Some of the goods were sent F.O.B. Texas. From 1987 to 1994, ATCC personnel attended five conferences in Texas, and in four had an exhibit booth and distributed their publications.⁶⁹

The court of appeals had found that "ATCC's volume of Texas sales was the 'bedrock' fact that supported jurisdiction."⁷⁰ The supreme court disagreed, pointing to a Fifth Circuit case holding that sales exceeding \$72 million that were "F.O.B. Wichita" did not support general jurisdiction.⁷¹ General jurisdiction, the supreme court concluded, is premised on consent, and consent is lacking "[w]hen a nonresident defendant purposefully structures transactions to avoid the benefits and protections of a forum's laws."⁷² The supreme court then analyzed the two leading Su-

63. *Am. Type Culture, Collection, Inc. v. Coleman*, 26 S.W.3d 37 (Tex. App.—Houston [1st Dist.] 2000), *rev'd*, 83 S.W.3d 801 (Tex. 2002).

64. The supreme court had appellate jurisdiction over this interlocutory appeal because of a dissenting opinion in the court of appeals's denial of the petition for en banc rehearing. *Am. Type Culture Collection*, 83 S.W.3d at 805 (citing TEX. GOV'T CODE ANN. §§ 22.001(a)(1) (Vernon 1988) & 22.225(c) (Vernon Supp. 2003)). The same issue arose in *Marchand*, 83 S.W.3d at 793.

65. *Marchand*, 83 S.W.3d at 807 (citing *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996); and 10 WILLISTON ON CONTRACTS, § 1079A, at 94 n.6 (3d ed. 1967)).

66. *Id.*

67. *Id.* at 804-05.

68. *Id.* at 807.

69. *Id.* at 808.

70. *Id.* at 808 (citing *Am. Type Culture Collection*, 26 S.W.3d at 53).

71. *Id.* (citing *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 375-76 (5th Cir. 1987)).

72. *Id.*

preme Court precedents—*Perkins*⁷³ and *Helicopteros*⁷⁴—finding that these facts far more resembled *Helicopteros*'s denial of general jurisdiction than *Perkins*'s affirmance. ATCC does not advertise in Texas, has no physical presence in Texas, performs no business services in Texas, and carefully constructs its contracts to ensure that it does not benefit from Texas laws.⁷⁵ The court reversed, rendered, and dismissed.⁷⁶

3. Long-Arms in Federal Question Cases

Federal courts face the same limits as state courts in exercising personal jurisdiction over nonresidents—it must be valid under both a long-arm statute and due process. Federal courts ordinarily use the long-arm statute of the state in which they are located, but in a few instances use a federal long-arm statute.

a. Texas Contacts—Federal Question Cases Applying the Texas Long-Arm

*Gonzalez Moreno v. Milk Train, Inc.*⁷⁷ is an action under the Migrant and Seasonal Agricultural Workers Protection Act and related state law claims for failing to disclose various job-related information, failing to pay, and other violations. Plaintiffs are migrant farm workers residing permanently in El Paso County, Texas. Defendant Milk Train is a New York dairy, and defendant AG-Labor Services is a Texas farm labor contracting agency.⁷⁸ In 1999 and 2000, AG recruited and hired plaintiffs from El Paso County to work at the Milk Train's New York dairy. Plaintiffs signed the employment contracts in Texas before going to New York, then returned to Texas in 2001 to sue in El Paso federal court. They alleged that defendants failed to disclose the availability of workers compensation insurance, misrepresented job conditions, failed to comply with the contract's terms regarding work arrangements, failed to pay wages, and failed to provide wage receipts to one plaintiff.⁷⁹ Defendant Milk Train objected to Texas jurisdiction, invoked the contract's forum selection clause, and requested a § 1404 venue transfer.⁸⁰

Plaintiffs alleged specific jurisdiction, based on Milk Train's recruitment through AG. The district court noted that because Texas has a "limits-of-due-process" long-arm, the only necessary inquiry was whether

73. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

74. See *Helicopteros*, 466 U.S. 408 (1984).

75. *Am. Type Culture Collection*, 83 S.W.3d at 810. The court had earlier found that ATCC is not authorized to do business in Texas; does not have officers, distributors, employees, real property or telephone listings in Texas; is neither required or has a registered agent in Texas; does no unsolicited mailing to Texas; does no employee recruitment in Texas; and does not advertise in Texas journals. *Id.* at 807.

76. *Id.* at 810.

77. *Gonzalez Moreno v. Milk Train, Inc.*, 182 F. Supp. 2d 590 (W.D. Tex. 2002).

78. *Id.* at 592.

79. *Id.* State claims included breach of contract, fraud, negligent misrepresentation, and retaliatory discharge.

80. 28 U.S.C. § 1404(a) (2003) is the intra-federal inconvenient forum transfer motion.

due process, that is, minimum contacts, was satisfied.⁸¹ Under specific jurisdiction, the three part test was whether Milk Train had purposefully directed its activities at Texas residents, whether the suit arose from those forum activities, and whether the relation between the defendant, the forum, and the litigation offended “‘traditional conceptions of fair play and substantial justice.’”⁸²

In a similar case, the Fifth Circuit had rejected jurisdiction over Ohio defendants alleged to have violated federal employment laws.⁸³ There, the Ohio defendants’ only Texas contact was one telephone call and one letter advising plaintiffs of the starting date for jobs they had accepted the prior summer in Ohio.⁸⁴ These facts stood in sharp contrast to the instant case, where Milk Train had contacted AG to recruit Texas residents for employment in New York and paid AG a contracting fee for each laborer recruited. Plaintiffs signed the employment contracts in Texas, and Milk Train dictated the terms and conditions. Milk Train paid the recruits’ bus fare to New York and advanced a sixty dollar travel loan.⁸⁵ These allegations, if substantiated, amounted to an intentional tort in Texas, that is, a jurisdictional contact.⁸⁶ After finding the contact, the fundamental fairness test further affirmed jurisdiction. Milk Train had no substantial burden in defending here, Texas had an interest in preventing its citizens from exploitation by out-of-state employers,⁸⁷ and the El Paso-based plaintiffs would be inconvenienced by having to litigate in New York.⁸⁸ The district court denied Milk Train’s objection to jurisdiction and also denied objections regarding a forum selection clause,⁸⁹ improper venue,⁹⁰ and a forum non conveniens transfer.⁹¹

*Freudensprung v. Offshore Technical Services, Inc.*⁹² presents an interesting contrast to *Gonzalez*, with roughly similar facts. This was a Jones Act claim for injuries on a derrick barge off the coast of Lagos, Nigeria. Texas based Offshore Technical Services, Inc. (OTSI) contracted with Willbros West Africa, Inc. (WWA) to supply personnel to work for WWA

81. *Gonzalez Moreno*, 182 F. Supp. 2d at 593 (citing *Schlobom*, 784 S.W.2d at 357, and other cases interpreting the pertinent Texas long-arm statute, TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.045).

82. *Id.* at 593-94 (quoting *Helicopteros*, 466 U.S. at 464, 476-77 and other cases).

83. *Aviles v. Kunkle*, 978 F.2d 201 (5th Cir. 1992) (per curiam).

84. *Id.* at 205.

85. *Gonzalez Moreno*, 182 F. Supp. 2d at 594. The court observed that the Texas long-arm defined Milk Train’s actions as doing business in this state by recruiting “Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.” *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(3) (Vernon 1997)).

86. *Id.* at 594-95 (citing *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999)).

87. *Id.* at 595 (citing *Astorga v. Connleaf, Inc.*, 962 F. Supp. 93, 96 (W.D. Tex. 1996)).

88. The court also analyzed the judicial system’s interest in efficient resolution of controversies and the shared interests of the several states in furthering fundamental substantive social policies, and found them neutral in this case. *Id.* at 595-96 (citing various cases).

89. *Id.* at 596-97; see *infra* notes 189-94 and accompanying text.

90. *Id.* at 597.

91. *Id.* at 597-99.

92. *Freudensprung v. Offshore Tech. Servs., Inc.*, 186 F. Supp. 2d 716 (S.D. Tex. 2002).

in Africa. The agreement required WWA to pay OTSI daily rates for workers, all of whom remained OTSI employees while assigned to WWA. OTSI hired Texas-resident Fred Freudensprung to work aboard a derrick barge owned and operated by WWA. While working with a crew placing large chains in the ocean floor, Freudensprung sustained severe physical and mental injuries when a chain snapped, leaving him unable to work.⁹³ He sued OTSI, WWA, and its alleged parent company, Willbros Group, Inc. Only WWA objected to jurisdiction.

WWA is a Panamanian corporation with its principal place of business in Panama. Plaintiff argued that WWA's contacts with Texas justified both specific and general jurisdiction, but the district court found Fifth Circuit precedent indicating that neither was proper. For specific jurisdiction, the district court noted that although WWA contracted both with plaintiff and OTSI—both Texas residents—that “it is well established that ‘merely contracting with a resident of the forum state is insufficient to subject the nonresident to the forum’s jurisdiction.’”⁹⁴ Moreover, plaintiff was not WWA's employee, but only OTSI's. Plaintiff argued that the contract contemplated arbitration in Houston, but that clause referred to arbitration between WWA and OTSI.⁹⁵ Plaintiff's third argument was that WWA initiated and contemplated a long-term business arrangement with OTSI, but performance would occur in Africa, thus failing to qualify as purposeful availment. In finding specific jurisdiction lacking, the court invoked two cases rejecting Texas jurisdiction where nonresident defendants contracted with Texas residents, continued communications to Texas, and sent money or products to Texas, and, in one case, contemplated the application of Texas law.⁹⁶

Plaintiff's general jurisdiction argument was based only on WWA's parent—WG—a Panamanian corporation based in Houston and significantly active there. As noted elsewhere in this article, the requirement for subjecting a parent or subsidiary corporation to alter ego jurisdiction is severe.⁹⁷ Plaintiff's allegation of two facts failed the test, and finding neither specific nor general contacts, the fundamental fairness test was unnecessary and WWA was dismissed from the suit.⁹⁸

93. *Id.* at 719.

94. *Id.* at 721 (quoting *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986)).

95. *Id.* at 722.

96. See *Holt*, 801 F.2d at 778; *Stuart v. Spademan*, 772 F.2d 1185, 1193-1194 (5th Cir. 1985).

97. See discussion of alter ego jurisdiction in *Marchand* and *El Puerto de Liverpool*, *supra* notes 37-57 and accompanying text.

98. *Freudensprung*, 186 F. Supp. 2d at 724. Plaintiff alleged that WG files a consolidated financial statement that includes WWA's financial information, and that WG files a consolidated tax return reflecting WWA's tax information. This failed the Fifth Circuit's extensive test for alter ego jurisdiction, addressing (1) stock ownership, (2) headquarters sharing, (3) officer and director sharing, (4) corporate formalities, (5) joint accounting, (6) parent's authority over subsidiary's general policy, and (7) subsidiary authority over daily operations. *Id.* at 723 (citing *Hargrave v. Fibreboard*, 710 F.2d 1154, 1160 (5th Cir. 1983)).

b. Nationwide Contacts—Federal Question Cases Applying a Federal Long-Arm

Management Insights, Inc. v. CIC Enterprises, Inc.,⁹⁹ is an example of a federal long-arm restricted by a venue rule. Management Insights, Inc. (MII) is a Texas corporation providing accounting services to Fortune 1000 companies. It sued CIC Enterprises, an Indiana competitor, for violations of the Lanham¹⁰⁰ and Sherman¹⁰¹ Acts, and for state law claims of slander tortious interference with contracts.¹⁰² These claims arose from an alleged telephone conversation between CIC and one of MII's customers in Tennessee, in which CIC's agent allegedly said that MII was discontinuing one of its primary services. CIC objected to Texas jurisdiction. Plaintiff initially argued only for general and specific jurisdiction under what the court termed a "traditional diversity analysis," that is, one asserting personal jurisdiction under the forum state's long-arm statute.¹⁰³ But, plaintiff's Sherman Act claim led to an additional argument under the federal long-arm, which allowed for nationwide service of process—the assertion of personal jurisdiction in a Texas federal court over any defendant having minimum contacts with the nation as a whole.

The district court disposed of the state law claims by finding that (1) CIC's post-filing telephone call to Texas could not be considered as a basis for personal jurisdiction,¹⁰⁴ and (2) CIC's pre-lawsuit telephone call to Tennessee allegedly causing damage in Texas failed the effects test.¹⁰⁵ For general jurisdiction, plaintiff alleged continuous and systematic contacts arising from (1) MII's (probably should be CIC's) relevant Texas clients, (2) CIC's operation of a complaint line for Carl's Junior restaurants, some in Texas, (3) CIC's president's interaction with the Texas members of a tax-related trade association, (4) plaintiff's (probably should be defendant's) contacts with a federal agency in Dallas and state agency in Austin regarding the certification of CIC's clients' eligibility for a federal program, and (5) CIC's website, accessible by Texas residents.¹⁰⁶ These were not enough—CIC had "virtually no connection to Texas," amounting to "single or isolated items of activities."¹⁰⁷

99. *Mgmt. Insights, Inc. v. CIC Enter., Inc.*, 194 F. Supp. 2d 520 (N.D. Tex. 2001).

100. 15 U.S.C. § 1125 (1997).

101. 15 U.S.C. § 1 (1997).

102. *Mgmt. Insights*, 194 F. Supp. 2d at 521.

103. *Id.* at 522-23.

104. *Id.* at 525 (citing *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 n.1 (5th Cir. 1990)).

105. *Id.* at 525-26 (citing *BeautiControl, Inc. v. Burditt*, No. 3:01CV0744-M, 2001 WL 1149360, at *12 (N.D. Tex. 2001), and distinguishing *Calder v. Jones*, 465 U.S. 783 (1984) in that MII failed to show that CIC purposefully aimed its alleged tortious activity at Texas).

106. *Id.* at 526. Plaintiff's arguments (1) and (4) may be confusing, and the opinion does not clarify why plaintiff's relevant contacts in Texas would subject an Indiana defendant to Texas jurisdiction. This may be related to the nature of defamation claims, where plaintiff must establish the local effect, but that would seem to only support specific jurisdiction and not general jurisdiction. On the other hand, the court's discussion of government contacts suggests that plaintiff alleged CIC's contacts, not its own. *Id.* at 528-30.

107. *Id.* at 527 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

The antitrust claim required a different analysis. Sherman Act claims are subject to the federal venue and long-arm provisions of section 12 of the Clayton Act, providing that:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.¹⁰⁸

Plaintiff argued that the statute's venue clause is not a prerequisite to its long arm clause, and of course, the defendant argued that it was. Just as they were split, so are the circuits. In the Ninth Circuit, the Clayton Act's venue provision is optional and may be supplanted by the general venue provision in 28 U.S.C. § 1391.¹⁰⁹ The opposite is true in the Second Circuit and D.C. Circuit, where a suit must be filed in a federal district where the defendant corporation resides or does business, before the nationwide service of process clause is considered.¹¹⁰ This court agreed with the Second and D.C. Circuits, and accordingly found that because of plaintiff's misplaced venue (in a district where CIC neither resided, was found, nor did sufficient business¹¹¹), the nationwide contacts provision did not apply, leaving no basis for jurisdiction under any of plaintiff's claims.¹¹²

4. Internet Jurisdiction

Two Survey period cases reached opposite results in evaluating internet activities as a basis for general jurisdiction. *Experimental Aircraft Ass'n, Inc. v. Doctor*¹¹³ is an action for personal injury occurring at an air show in Wisconsin. Laird Doctor became a quadriplegic when his aircraft collided with another aircraft piloted by defendant Howard Pardue at the annual convention of The Experimental Aircraft Association, Inc., ("EAA"), held that year in Oshkosh, Wisconsin. Doctor and Pardue are both from Texas. EAA's location is not mentioned, but it is not from Texas. The trial court denied EAA's jurisdictional objection, holding that it had waived its special appearance by filing an Agreed Motion for Continuance, and that EAA was subject to both specific and general jurisdiction.¹¹⁴

108. 15 U.S.C. § 22 (1997).

109. *Mgmt. Insights*, 194 F. Supp. 2d at 530 (citing *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989)).

110. *Id.* at 530-31 (citing *GTE New Media Servs., Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000); *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961)).

111. *Id.* at 532-33 (noting that being "found" and "transacting business" required "a substantial business activity . . . with continuity of character, regularity, contemporaneous with the service and not looking toward the cessation of business." *Daniel v. Am. Bd. of Emergency Med.*, 988 F. Supp. 127, 260 (W.D.N.Y. 1997)).

112. *Id.* at 533.

113. *Experimental Aircraft Ass'n, Inc. v. Doctor*, 76 S.W.3d 496 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

114. *Id.* at 501-02.

On appeal, the Houston Court of Appeals held first that EAA did not waive its jurisdictional challenge.¹¹⁵ Turning to specific jurisdiction, the court found that EAA had no related contacts in Texas, and that it had not underwritten Pardue's performance in Wisconsin simply by reimbursing his fuel expenses. Pardue was a volunteer, and "[b]ecause the accident in question occurred outside the state of Texas and the relationship between EAA and Pardue did not rise to the level of an employment contract, no evidence supports the trial court's finding of specific jurisdiction."¹¹⁶ But, the general jurisdiction analysis produced the opposite result. EAA had 9,000 Texas members, and because association membership is a contract, "EAA thus has contractual agreements with nearly 9000 separate Texas residents,"¹¹⁷ resulting in approximately \$350,000 in Texas dues revenue in 1999.¹¹⁸ EAA argued a Pennsylvania precedent that declined jurisdiction over a nonresident trade association with one member in the state (two percent) generating less than \$8,000 in dues income. The court distinguished this as factually inapposite, referring to the comparably large membership list and dues from Texas.¹¹⁹

In addition to Texas members, EAA marketed itself in Texas (1) by holding an annual event known as the Southwest Regional Fly-In; (2) by selling products in Texas, and (3) its website.¹²⁰ Considering the website, the court recited the sliding scale used to evaluate internet contacts.

At one extreme are entities clearly doing business over the internet by entering contracts and repeatedly transmitting computer files. This results in jurisdiction in any state where that activity occurs.¹²¹ At the other extreme are passive web sites that merely post information on the internet, and here, personal jurisdiction would not be appropriate.¹²² In the middle are interactive websites that allow an exchange of information between a potential customer and the host computer; courts evaluate these cases on "the level of interactivity and the commercial nature of the exchange of information."¹²³

EAA was in the middle with an interactive site containing search capabilities and an online shop with email purchasing capacity. The site has hyperlinks to publicize EAA aviation events, as well as hyperlinks to local chapters. The site promotes member benefits and allows joining by email. Based on this, the court concluded that EAA's interactive commercial website was "a significant factor in support of personal jurisdic-

115. *Id.* at 502 (citing *Dawson-Austin v. Austin*, 968 S.W.2d 319 (Tex. 1998)).

116. *Id.* at 505.

117. *Id.*

118. *Id.* at 506.

119. *Id.*

120. *Id.*

121. *Id.* (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265-66 (6th Cir. 1996)).

122. *Id.* at 506-07 (citing *Zippo*, 952 F. Supp. at 1124; *Weber v. Jolly Hotels*, 977 F. Supp. 327, 334 (D.N.J. 1997)).

123. *Id.* at 507 (citing *Zippo*, 952 F. Supp. at 1124).

tion.”¹²⁴ Combined with EAA’s other marketing efforts in Texas and the annual aviation show, and the relative fairness of requiring EAA to defend in Texas,¹²⁵ the court found sufficient continuous and systematic contacts to uphold the trial court’s finding of general jurisdiction.¹²⁶

*Townsend v. University Hospital-University of Colorado*¹²⁷ reached the opposite result in a case where plaintiffs attempted general jurisdiction over Colorado doctors and a hospital based for a patient’s death there. Julia Townsend Olivares was admitted to a Mesquite hospital for shortness of breath and coughing up blood, and a doctor there recommended that she be airlifted to University Hospital in Denver, for care in its Pulmonary Hypertension Center. She died there one week later. Her husband and parents sued in Texas, naming the Mesquite doctor, the Colorado doctors, and the hospital. The trial court sustained the Colorado defendants’ objection to jurisdiction, and the Texarkana Court of Appeals affirmed. As to the Colorado defendants, the court found no specific jurisdiction in that they had no relevant contacts with Texas and all pertinent facts occurred in Colorado.¹²⁸ The court of appeals also rejected plaintiff’s argument that the Mesquite doctor who recommended transfer (and who had formerly worked at the Colorado hospital) was an agent for the Colorado defendants.¹²⁹

Plaintiffs also argued that the Colorado defendants’ website subjected them to general jurisdiction in Texas. Applying the internet’s sliding jurisdictional scale, the court found that none of the Colorado doctors advertised on the website, which only had contact information and was not used to conduct business. Because contact and product information alone is not sufficient,¹³⁰ the court concluded that none of the defendants was conducting business in Texas.

5. *In Rem Jurisdiction*

The Survey period had no in rem cases involving property in Texas and implicating other jurisdictions. It did, however, have one case in which a Texas court of appeals rejected a Mexican court’s assertion of in rem jurisdiction in a dispute involving a house in Acapulco. In *Brosseau v. Ranzau*,¹³¹ the Beaumont Court of Appeals held that it had jurisdiction to decide ownership of one share of stock in a Canadian corporation known simply as “80451,” whose sole function was the ownership of a

124. *Id.*

125. The court held that EAA “had not demonstrated that it would be put to a substantial burden in order to defend itself in this forum.” *Id.* at 508. The court further pointed out that EAA has over fifty chapters in the state and thirteen agents traveling on their behalf. *Id.*

126. *Id.*

127. *Townsend v. Univ. Hosp.-Univ. of Colo.*, 83 S.W.3d 913 (Tex. App.—Texarkana 2002, pet. denied).

128. *Id.* at 920-21.

129. *Id.* at 921.

130. *Id.* at 922 (citing *Mink v. AAAA Dev. L.L.C.*, 190 F.3d 333, 336 (5th Cir. 1999)).

131. *Brosseau v. Ranzau*, 81 S.W.3d 381 (Tex. App.—Beaumont 2002, pet. denied).

house in Acapulco, Mexico known as Casa T. The court of appeals denied preclusive effect to the resulting Mexican judgment and characterized the dispute as involving personal property, based on the corporation the parties had created to own Casa T. This case is discussed further in the Preclusion section.¹³²

6. Status Jurisdiction

Status jurisdiction is a special category recognizing a state's authority to adjudicate issues such as marital status, parental custody, and mental competence. It is often characterized as subject matter jurisdiction but turns on amenability factors such as contacts with the forum state. Competence determinations do not often implicate interstate issues, and marital status litigation still tends to tolerate parallel suits in different states and countries. The pervasive problem exists with child custody determinations—both original and modifications—where conflicting judgments and parental abduction create problems. The solution has been legislation in the form of uniform acts or treaties designed to choose a single custody forum that other states will respect. Domestically, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)¹³³ and the federal Parental Kidnapping Prevention Act (PKPA)¹³⁴ seek to establish unitary child custody jurisdiction and apply full faith and credit to those decisions. Internationally, the UCCJEA governs both jurisdictional disputes and decree enforcement,¹³⁵ and is joined by the International Child Abduction Remedies Act¹³⁶ (“ICARA,” the United States version of the Hague Convention on Child Abduction¹³⁷), which seeks the return of children taken both within the United States and across international borders in violation of valid custody orders. These Acts often involve judgment enforcement and preclusion, but are discussed here because they also involve questions of status jurisdiction.

a. Interstate Custody Disputes

The Survey period produced four interstate UCCJEA decisions, two construing the Act's recently-revised concept of retained jurisdiction after the child has moved to another state. The Texarkana Court of Appeals was the first to apply the new rule in *In re Bellamy*.¹³⁸ Cindy and Dan Bellamy divorced, unaware of Cindy's pregnancy with Danielle. Although Dan became active with Danielle from birth, he apparently did

132. See *infra* notes 482-507 and accompanying text.

133. TEX. FAM. COD. ANN. §§ 152.101-.317 (Vernon 2002).

134. 28 U.S.C. § 1738A (1994).

135. TEX. FAM. CODE ANN. § 152.105 (Vernon 2002). The PKPA does not apply to child custody conflicts with foreign countries.

136. 42 U.S.C. §§ 11601-11610 (1995).

137. Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. 11670, 1343 U.N.T.S. 89, 19 I.L.M. 1501-15 (1980) (entered into force Dec. 1, 1983) [hereinafter Hague Convention].

138. *In re Bellamy*, 67 S.W.3d 482 (Tex. App.—Texarkana 2002, no pet.)

not pay child support and, in 1996, the Texas Attorney General sought to change that by filing suit in Cass County to declare Dan the father and require child support. The court complied and awarded the parents joint custody with Cindy as the primary possessor.¹³⁹ In 2000, the Attorney General sued Dan again, this time to increase child support. Dan counter-petitioned to modify custody, and when the Attorney General nonsuited, only Dan's claim remained. Although it is unclear when Cindy and Danielle moved, at this point they had lived in Louisiana for some time, clearly more than the six months necessary to establish a new home state. Cindy accordingly asked the Texas court to decline custody jurisdiction over the now-nonresident Danielle. Instead, the court of appeals awarded Dan primary possession and the sole right to determine residence, but continued both parents as joint managing conservators.¹⁴⁰ Cindy appealed her jurisdictional objection, claiming Louisiana as home state and arguing alternatively that Texas either had to decline jurisdiction because it was no longer the home state, or that it had a less significant connection than Louisiana under the new UCCJEA.¹⁴¹

Texas law is contradictory on the retention of child custody jurisdiction when the home state changes. Under section 155.003 of the Texas Family Code, which existed prior to the UCCJEA and has not been repealed, Texas loses custody jurisdiction when it is no longer the child's home state,¹⁴² defined by the child living in a state with a parent or a person acting as parent for at least six months.¹⁴³ But the new UCCJEA provides that once establishing original jurisdiction, Texas retains jurisdiction as long as it has a significant connection with the child.¹⁴⁴ The court of appeals ruled that the newer section 152.202 had priority over section 155.003 (thus ruling against Cindy's argument that Texas necessarily lost jurisdiction. But, Cindy still had an argument that under section 152.202, Texas had too little continuing connection to Danielle. The court of appeals again disagreed. Although Danielle lived in Louisiana, she attended school in Texas and lived only a few miles from her maternal grandparents' home in Texas. In addition, the court found a strong personal relationship between Danielle and her father, stepmother and stepbrothers in Texas, and other evidence of a continuing connection here.¹⁴⁵

*In re McCormick*¹⁴⁶ reiterated *Bellamy*'s conclusion in a case where the father and child had not yet established a new home state in Kansas. Dale McCormick and Sharlet Wilks divorced in Parmer County in 1995, with Sharlet named managing conservator of their son, Levi. But in September 2000, Levi began living with his father Dale in Clovis, New Mex-

139. *Id.* at 483.

140. *Id.*

141. *Id.* at 483, 485.

142. TEX. FAM. CODE ANN. § 155.003(b)(1) (Vernon 2002).

143. TEX. FAM. CODE ANN. § 152.102(7) (Vernon 2002).

144. *Id.* § 152.202.

145. *Bellamy*, 67 S.W.3d at 485.

146. *In re McCormick*, 87 S.W.3d 746 (Tex. App.—Amarillo 2002, no pet.).

ico, only a few miles from Parmer County. On Sept. 19, 2000, the Amarillo Court of Appeals entered a temporary restraining order directing Sharlet not to remove Levi from Dale's possession, and on October 19, Dale was named managing conservator with the right to establish Levi's primary residence. In September 2001, Dale and Levi moved to Kansas.¹⁴⁷

Sharlet asked the Texas court to modify custody again and re-name her as managing conservator. Dale responded with a plea to jurisdiction seeking to have the custody forum changed to Kansas under the UCCJEA,¹⁴⁸ making Cindy Bellamy's argument under section 152.202 that Texas should decline ongoing custody jurisdiction because Levi had a new home state and no longer had a significant connection to Texas.¹⁴⁹ The trial court disagreed and retained jurisdiction. The court of appeals affirmed, based on Sharlet's continuing presence in Texas and several other factors relating to Dale's New Mexico residence and problems apparent in his move to Kansas.¹⁵⁰ The court reached this decision in spite of Levi's now-strong connection to Kansas, where he lived across the street from Dale's parents and within forty miles of Dale's extended family. Levi had also engaged in predictable activities there and was active in both school and church programs.¹⁵¹ The decision here illustrates the new UCCJEA's strong preference for the original forum—the connective strength of the new home state does not compel the original forum to decline jurisdiction, and while the original forum has discretion to decline if it finds that another state has a more significant connection to the child, the original forum is the sole authority determining the issue as long as the child, or either parent, or any person acting as parent remains in Texas.¹⁵²

*In re Brilliant*¹⁵³ involved a less-than-six-month residence in Texas that, nonetheless, led to jurisdiction. The mother, father, and child were residents of Massachusetts who relocated to Texas. The mother—Kristen Fox—conceived Kaylee Lynn-Marie Brilliant in 1998, while still in high school in Massachusetts, and never married the father, Reginald (Regi)

147. *Id.* at 748.

148. *Id.*

149. TEX. FAM. CODE ANN. § 152.202 (Vernon 2002).

150. The court cited Dale's earlier nearby residence in Clovis; Dale's failure to give Sharlet notice of his move to Kansas; the less-than-six-month presence in Kansas at the time of the Texas filing (on this point the court referred to *Bellamy's* recent decision that the UCCJEA had priority over Tex. Fam. Code § 155.003; see 87 S.W.3d at 750 (citing *Bellamy*, 67 S.W.3d at 484)); the domestic abuse complaint filed by Dale's current wife when they were still living in Clovis; Dale's mental disorder; Dale's having hidden Levi from Sharlet; and Dale's failure to keep Levi's appointments with the court-ordered counselor. *Bellamy*, 87 S.W.3d at 749-51.

151. *Id.* at 750.

152. TEX. FAM. CODE ANN. § 152.202 provides that either a Texas court or a court of another state may modify an original Texas custody order if such court "determines that the child, the child's parents, and any person acting as parent do not presently reside in this state." *Id.* § 152.202(a)(2). In all other instances, Texas retains exclusive jurisdiction. *Id.* § 152.202(a).

153. *In re Brilliant*, 86 S.W.3d 680 (Tex. App.—El Paso 2002, no pet.).

Brilliant. When Kristen was six months pregnant, Regi returned to his home in El Paso while Kristen stayed in Massachusetts to finish high school. She and Kaylee then joined Regi in El Paso. When Kristen soon decided to return to Massachusetts, Regi obtained a temporary restraining order prohibiting Kaylee's removal from Texas and asking for her custody. Although properly served, Kristen took Kaylee back to Massachusetts.¹⁵⁴

Kristen filed a plea to jurisdiction to the El Paso action but defaulted when she failed to appear at a hearing.¹⁵⁵ The court of appeals reversed and found that while the default should be set aside for lack of notice to Kristen, Texas did have child custody jurisdiction.¹⁵⁶ Although Kaylee had not lived in Texas the required six months at the time of Regi's initial filing, Texas nonetheless had priority jurisdiction over Massachusetts because all concerned parties had left Massachusetts and relocated to Texas when the El Paso action was filed.¹⁵⁷ Kristen argued that her Texas presence was temporary, but the court disagreed based on her signing the lease in El Paso and filling out job applications.¹⁵⁸

In an unpublished UCCJEA opinion, the San Antonio Court of Appeals held that a mother's appeal of the denial of a protective order in Texas was mooted by a California court's assertion of child custody jurisdiction. *Kovatch v. Juarez*¹⁵⁹ was an application for protective order that Jennifer Kovatch filed after fleeing from California to San Antonio, seeking to restrain Francisco Juarez from bothering her or her two children. The trial court issued a temporary restraining order and set a hearing date for a protective order. Francisco contested personal jurisdiction, arguing that he had never lived in Texas, had not been served with process here, and had committed no wrongful act here.¹⁶⁰ Jennifer argued that the UCCJEA's temporary emergency jurisdiction provisions applied,¹⁶¹ but the trial court disagreed when Francisco testified that he had filed a paternity and custody suit in California and that a hearing had been set.¹⁶² The court of appeals affirmed, finding the case moot based on Jennifer's return to California after the trial court's denial. The court found that the need for any such relief now was speculative.¹⁶³

154. *Id.* at 683.

155. *Id.*

156. *Id.* at 693.

157. *Id.* at 689-92.

158. *Id.* at 689-90.

159. *Kovatch v. Juarez*, No. 04-01-00477-CV (Tex. App.—San Antonio May 22, 2002, no pet.) (not designated for publication), 2002 WL 1021645.

160. *Id.* at *1.

161. TEX. FAM. CODE ANN. § 152.204(a) (Vernon 2002).

162. *Kovatch*, 2002 WL 1021645, at *1.

163. *Id.* (citing *Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229 (Tex. 1993) (no authority to render advisory opinions); *FDIC v. Nueces County*, 886 S.W.2d 766, 767 (Tex. 1994) (actual controversy must exist); *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) (must be a live controversy)).

b. International Custody Disputes

In re Calderon-Garza demonstrated the UCCJEA's international dimension.¹⁶⁴ The case began in medical school in Guadalajara in 1997, where Veronica Maria Calderon-Garza met Medhi Farshad Derambakhsh. Veronica became pregnant in April 2000, and in January 2001, traveled to her parents' home in El Paso, Texas, where Diego Andres Calderon was born on January 27. Veronica did not dispute that Medhi was the father, but refused to sign the paternity acknowledgment he had requested. She left El Paso to return to Guadalajara, and the next day Medhi filed a paternity action in an El Paso court.¹⁶⁵ After being served by substituted service, Veronica objected to her own personal jurisdiction and to the court's subject matter jurisdiction over Diego. The associate judge sustained her objections and dismissed, but the district court disagreed and found jurisdiction over mother and child.¹⁶⁶

On appeal, the issue was whether Texas was Diego's home state. Jurisdiction in Texas required that Texas be the home state on the date of the commencement of the proceeding, a date by which mother and child had returned to Guadalajara. But, "home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding."¹⁶⁷ Moreover, for children under six months old, "home state" is "the state in which the child lived from birth with a parent or a person acting as parent."¹⁶⁸ Thus, there was a statutory conflict—was Diego's home state where he lived on the date of the filing (Mexico), or for the period immediately preceding it (Texas)? The court construed these sentences to mean that "in order to determine a child's home state on a particular date, we must ask where the child lived immediately before that date."¹⁶⁹ With this interpretation, the court had no problem affirming that Texas was Diego's home state on the date the father filed his paternity action, because he had lived here from birth and had not established a home state elsewhere at that point.¹⁷⁰ The court also found that whether the mother was amenable or not, Diego's custody could be decided here.¹⁷¹

164. *In re Calderon-Garza*, 81 S.W.3d 899 (Tex. App.—El Paso 2002, no pet.). At the outset of its analysis of this Texas-Mexico conflict, the court of appeals stated that the UCCJEA has "international application to child custody proceedings and determinations of other countries; thus Mexico will be treated as if it were a state of the United States for purposes of applying the Act." *Id.* at 902 (citing TEX. FAM. CODE ANN. § 152.105; also citing SAMPSON & TIDAL, TEXAS FAMILY CODE ANN. § 152.105, Commissioners' Comment p. 472 (2001)).

165. *Id.* at 901.

166. *Id.*

167. *Id.* at 902 (quoting TEX. FAM. CODE ANN. § 152.201 (Vernon Supp. 2002)).

168. *Id.* (quoting TEX. FAM. CODE ANN. § 152.102(7) (Vernon Supp. 2002)).

169. *Id.* at 903.

170. *Id.* at 903-04.

171. *Id.*

The Survey period also produced one Hague Convention, or ICARA case. For this case discussion, "Hague Convention" will be used for the treaty's broader application in several countries, and "ICARA" will be used for specific references to the treaty's United States version. *Velez v. Mitsak*¹⁷² involved a mother's abduction of a child from Spain to Texas in violation of an Italian custody order. Maria Esperanza Velez and Charles Mitsak are U.S. citizens who taught in Europe with the United States Department of Defense. Their common law marital status is unclear. Ezra Mitsak was born in 1997, in El Paso, Texas (the mother's home), and the parents thereafter worked and lived together in Spain. They separated in early 1999, and the mother moved with Ezra from Spain to Italy. Charles claimed ignorance of their whereabouts, but Maria alleged he knew that she had been transferred to Italy. The mother also alleged that Charles had abused Ezra and her.¹⁷³

Charles filed for Ezra's custody in a Spanish court, which, interestingly, gave custody to Maria, although she was unaware of it until much later.¹⁷⁴ Immediately after the Spanish custody decision, Charles filed a Hague Convention request in an Italian court and obtained an order for Ezra's return to Spain. It is unclear why Charles would seek to enforce a Spanish decree that did not award him custody, but this may be explained by Maria's allegation that Charles obtained the Italian order by fraud.¹⁷⁵ This was further clouded by Charles's contention that the first Spanish decree had been vacated, and Maria's contention that she was seeking to overturn the Italian order and pursuing further action in Spain.¹⁷⁶

Following the Italian decree favoring Charles, Maria left Italy with Ezra for Mexico, where Charles filed another Hague request for Ezra's return.¹⁷⁷ Maria and Ezra then returned to El Paso and Charles followed with yet another Hague request, filed under ICARA. In the El Paso claim, Charles did not allege an outright custody right but merely right of access.¹⁷⁸ The El Paso trial court found in Charles's favor in spite of Maria's argument that Charles had obtained the Italian order by fraud, and now submitted erroneous translations.¹⁷⁹ The trial court based its decision on a misreading of ICARA and on a letter from the United States Central Authority advising of Spain's request for the child's return.¹⁸⁰

172. *Valez v. Mitsak*, 89 S.W.3d 73 (Tex. App.—El Paso 2002), *rev'd on other grounds and remanded*, 89 S.W.3d 84.

173. *Id.* at 75.

174. *Id.*

175. *Id.* On the other hand, the father may simply have been seeking to enforce his possessory rights, as he sought in the El Paso case.

176. *Id.*

177. *Id.*

178. *Id.* at 75-76.

179. *Id.* at 77.

180. The Hague Convention uses the concept of a "central authority" in each signatory country. See Hague Convention, *supra* note 136, arts. 6 & 7. See also 42 U.S.C.A. § 11606 (1995 & Supp. 2003) for the United States's ICARA version. These central authorities are instructed to cooperate to achieve the Convention's goals by (1) discovering the child's whereabouts; (2) preventing further harm to the child; (3) securing the child's voluntary

The trial court thus ruled for Charles without hearing evidence on Maria's objections.

The El Paso Court of Appeals reversed. It found that the trial court erred both in its summary proceeding and in giving the Italian decree full faith and credit. The court of appeals noted the confusion in the Hague Convention's implementing legislation in the United States, in which it requires that "[f]ull faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of *any other such court*."¹⁸¹ The trial court had applied this provision to find that courts in the United States owed full faith and credit to foreign custody decrees, but the court of appeals concluded that *any other such court* referred only to courts in the United States, and that foreign custody decrees were entitled only to comity.¹⁸² And while comity might nonetheless be sufficient to honor the Italian decree, it did not compel a summary proceeding that cut off the mother's right to challenge underlying fraud in the Italian decree.¹⁸³ The court accordingly reversed the trial court's enforcement of the foreign decree and remanded for a new hearing, recognizing that although Charles and Ezra had left Texas, these errors required addressing.¹⁸⁴

C. REASONS FOR DECLINING OTHERWISE VALID JURISDICTION

Even where all jurisdictional elements exist, courts may refrain from litigating cases contractually structured for other forums, or that would be better brought in another forum, that are currently being litigated in another court, or that have reached final judgment in another forum. These instances may be broadly grouped in three settings: (1) forum selection clauses that derogate from Texas jurisdiction, (2) forum non conveniens motions, and (3) parallel lawsuits leading to possible transfer, stay, or antisuit injunction.

1. Derogating Forum Selection Clauses

The Consent section above discusses forum selection clauses that *establish* local jurisdiction.¹⁸⁵ Somewhat different considerations arise when the plaintiff sues in a forum contrary to the parties' earlier choice in a

and amicable return, (4) exchanging information, (5) providing information regarding that state's custody laws, (6) providing legal assistance, if necessary; and (7) informing other contracting states of any obstacles. Hague Convention, *supra* note 136, art. 6 & 7. This function does not circumvent any party's due process rights, or any other rights to challenge foreign custody decrees.

181. 42 U.S.C. § 11603(g) (1995) (emphasis added), *quoted in Velez*, 89 S.W.3d at 81.

182. The court drew authority from Ibarra's legislative history, *see* 89 S.W.3d at 81-82 (citing H.R. Rep. No. 10-525, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 386, 393-94). The court also referred to RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 98 cmt. b, for the proposition that foreign country judgments are not entitled to full faith and credit. *Velez*, 89 S.W.3d at 82.

183. *Id.* at 83.

184. *Id.* at 84.

185. *See supra* notes 20-29, especially the sources cited in note 20.

forum selection clause. These are known as derogation clauses (in regard to that forum), and instead of justifying the court's retention of the case, require the court to consider declining its otherwise valid jurisdiction over the parties. Two Texas federal courts rejected derogation clauses in the Survey period.

In *Psarros v. Avior Shipping, Inc.*,¹⁸⁶ the court rejected the forum clause in a seaman's employment contract because his action was for personal injury and the forum clause's language was directed only to tort. Specifically, the forum clause stated that "[i]t is mandatory that any disagreement arising from the enforcement of this contract will be resolved in the Greek Courts, explicitly excluding the Seaman from seeking recourse in the Courts of the U.S.A. or in the Courts of any other country besides Greece."¹⁸⁷ As more fully discussed below,¹⁸⁸ Psarros was severely injured while his ship was docking in the Port of Houston, and his resulting claim was against several defendants located in the United States and Panama. The only connection to Greece was that it was plaintiff's home, where he was hired and where he recuperated. In rejecting the forum clause, the court stated that "when a forum selection clause is limited to matters of contract interpretation or enforcement alone, it is inapplicable to litigation arising from torts committed in the course of the contractual relationship."¹⁸⁹

In *Gonzalez-Moreno v. Milk Train, Inc.*,¹⁹⁰ the district court rejected a forum selection clause as statutorily unenforceable. This was an action by farm workers from El Paso who had been hired to work at a New York dairy. They sued in federal court in El Paso under the Migrant and Seasonal Agricultural Workers Protection Act (AWPA),¹⁹¹ with related state law claims regarding fraud and breach of contract. Their contracts had a clause requiring suits arising on the contract to be brought in New York. Although the Fifth Circuit has not yet decided whether a forum clause should be analyzed as (1) a limit to personal jurisdiction, (2) a venue designation, or (3) a foundation for a motion for forum non conveniens transfer,¹⁹² the question was unnecessary because this clause was barred

186. *Psarros v. Avior Shipping, Inc.*, 192 F. Supp. 2d 751 (S.D. Tex. 2002).

187. *Id.* at 752.

188. See *infra* notes 241-52 and accompanying text.

189. *Psarros*, 192 F. Supp. 2d at 753-54 (citing *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 222 (5th Cir. 1988) (*Marinechance* quotation omitted); and *Manetti-Farrow v. Gucci Am.*, 858 F.2d 509, 514 (9th Cir. 1988) (*Manetti-Farrow* quotation omitted)).

190. *Gonzalez-Moreno v. Milk Train, Inc.*, 182 F. Supp. 2d 590 (W.D. Tex. 2002).

191. 29 U.S.C. §§ 1801-1872 (1999).

192. *Gonzalez-Moreno*, 182 F. Supp. 2d at 597 (citing *Haynsworth v. The Corp.*, 121 F.3d 956, 961 (5th Cir. 1997)). Characterizing a forum clause as a matter of personal jurisdiction, venue, or forum non conveniens may depend in part on whether the clause is being used to establish the forum's jurisdiction (a prorogation clause), or defeat it (a derogation clause). Derogation clauses (those pointing to another forum) are often treated as matters of venue or forum non conveniens because they require no jurisdictional analysis, but instead merely construe the validity of the forum clause. See *Parallel Litigation*, *supra* note 20 at 912-38. On the other hand, prorogation clauses (affirming a nonresident's amenability to the instant forum) require an analysis not only of the clause's validity and meaning,

by federal law. Specifically, the AWPAs provides that “[a]greements by employees purporting to waive or modify their rights under this chapter shall be void as contrary to public policy.”¹⁹³ Instead, the AWPAs allows migrant workers to sue in “any district in the United States having jurisdiction of the parties.”¹⁹⁴ The court accordingly rejected defendant’s forum clause objection.¹⁹⁵

2. *Forum Non Conveniens Dismissals*

Forum non conveniens, or inconvenient forum, is an old common law objection to jurisdiction that now is also available by statutes such as 28 U.S.C. § 1404 for intra-jurisdictional transfers based on convenience.¹⁹⁶ Because intra-jurisdictional transfers do not implicate conflicts between states or nations, they are not considered here. This article is limited to common law inter-jurisdictional forum non conveniens, available in state and federal courts in Texas under the same two-part test requiring movant to show the availability of an adequate alternative forum, and that a balancing of private and public interests favors transfer.¹⁹⁷

The Survey period produced five noteworthy forum non conveniens decisions, two considering the important issue of the foreign forum’s adequacy, and three involving car accidents in Mexico (including two Firestone claims). The first case is from the Fifth Circuit and considers important questions about the foreign remedy’s adequacy. *Gonzalez v.*

but of it’s legal ability to create personal jurisdiction in the absence of other contacts. If this explanation seems to draw distinctions where there are none, see Alexander Proudfoot Co. World Headquarters, L.P. v. Thayer, 877 F.2d 912, 916 (11th Cir. 1989). See also *Parallel Litigation*, *supra* note 20 at 938-41.

193. 29 U.S.C. § 1856 (1999).

194. *Id.* at § 1854(a).

195. *Gonzalez-Moreno*, 182 F. Supp. 2d at 596-97.

196. 28 U.S.C. § 1404 is the federal statutory provision for inconvenient forum objections seeking transfer to another federal court. 28 U.S.C.A. § 1404 (West 1993 & Supp. 2002). Texas law provides for in-state venue transfers based on convenience under TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (Vernon 2002).

197. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 423-24 (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 the attendance of unwilling witnesses, and the cost of obtaining their attendance; the possibility of viewing the premises, if appropriate; and all other practical problems that make the trial easy, expeditious, and inexpensive. *McLennan*, 245 F.3d at 424. 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 unnecessary conflict of laws problems . . . and the unfairness of burdening citizens in an unrelated forum with jury duty.” *Id.* (quoting *Dickinson Marine, Inc. v. Panalpina, Inc.*, 179 F.3d 331, 342 (5th Cir. 1999)). Texas forum non conveniens law is multi-faceted. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon Supp. 2003) applies to personal injury and wrongful death claims. TEX. CIV. PRAC. & REM. CODE ANN. § 71.052 (Vernon Supp. 2003) applies to asbestosis claims filed by persons not residing in Texas at the time their claims arose. Common law forum non conveniens, in line with *Gulf Oil 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).

Chrysler Corp.,¹⁹⁸ is a wrongful death claim for a three-year-old boy killed when an air bag deployed in a collision in Atizapan de Zaragoza, Mexico. The parents sued in Texas, naming Chrysler and other defendants connected to the air bag's manufacture and the trial court granted defendants' forum non conveniens motion. The appeal focused on plaintiffs' objections to the adequacy of the remedy in Mexico. Apparently because of the remedy-adequacy issue, the court reconfigured the Fifth Circuit's usual two-part forum non conveniens test as a four-part test: First, is an alternative forum *available*? Second, is the alternative forum *adequate*? Third, do the *private interests* favor dismissal? Fourth, do the *public interests* favor dismissal?¹⁹⁹ Plaintiffs' objections to forum adequacy in Mexico are drawn from Justice Marshall's explanation in *Piper Aircraft Co. v. Reyno*, stating that a foreign forum is ordinarily adequate if defendants are amenable to process there, but that in rare circumstances, a clearly unsatisfactory remedy would render a forum inadequate.²⁰⁰ Plaintiffs argued that a Mexican court was unsatisfactory because (1) Mexican tort law has no applicable strict liability remedy, and (2) Mexican law caps damages for a child's wrongful death at approximately \$2,500, based on 730 days of minimum wages.²⁰¹

The Fifth Circuit disposed of plaintiffs' first argument by invoking plaintiffs' cited case, *Piper*. *Piper* held that the unavailability of strict liability in Scotland did not make the forum inadequate.²⁰² Plaintiffs' second objection—the \$2,500 damages cap—was “slightly more problematic.”²⁰³ This objection had two components: first, the recovery would be *de minimis*, and second, because the litigation cost would exceed the potential recovery, the lawsuit would never be brought in Mexico. As to *de minimis* recovery, the court held that however unsatisfactory it might seem, the damages cap was Mexico's policy decision, meant to apply to plaintiffs and not to be second-guessed by an American court.²⁰⁴ The court acknowledged that economic realities govern cases,²⁰⁵ and, pointing to the defendants' concession at oral argument that the case would never be filed in Mexico, recognized that a forum non conveniens dismissal meant judgment for defendants. Nonetheless, the court found that it could not engage in damage-cap line drawing,²⁰⁶ and

198. *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir. 2002).

199. *Id.* at 379-80 (citing various cases). The Fifth Circuit is often cited as having a two part test: the availability of an adequate alternative forum, and the balancing of public and private factors. *See infra* note 196.

200. *Id.* at 380 (quoting *Piper*, 454 U.S. 235, 255 n.22 (1981)).

201. *Id.* at 380-81.

202. *Id.* at 381 (citing *Piper*, 454 U.S. at 255).

203. *Id.*

204. *Id.* at 381-82.

205. The court listed four factors that might affect a party's willingness to sue: (1) whether plaintiff's injuries are compensable in that forum; (2) not whether the forum recognizes some cause of action, but whether it recognizes plaintiff's most provable and compensable claim; (3) whether the forum recognizes defenses that might bar or diminish recovery; and (4) litigation costs. *Id.* at 383.

206. *Id.*

held that not only was Mexico an adequate forum, but that “the adequacy inquiry under *Piper Aircraft* does not include an evaluation of whether it makes economic sense” to file a lawsuit in the alternative forum.²⁰⁷ Once the court resolved the forum adequacy issue, it dispensed with the public-private factor balancing by deferring to the trial court’s decision favoring Mexico.²⁰⁸

Gonzales v. P.T. Pelangi Niagra Mitra International,²⁰⁹ also considered the important issue of forum adequacy. Ecuadoran plaintiff Gonzales was rendered a quadriplegic when working on a barge operated offshore from Indonesia. By the time of the lawsuit, he and his wife lived in Houston where he had moved for therapy.²¹⁰ Gonzales and his wife sued several defendants in federal court in Galveston, who, in turn, moved for a forum non conveniens dismissal in favor of litigation in Indonesia. Plaintiffs’ strongest objection was the alleged corruption of the Indonesian judicial system, substantiated by “voluminous proof . . . including newspaper articles, statements by prominent Indonesian politicians, the results of a survey conducted by the Partnership for Governance Reform in Indonesia, a World Bank report and statements by the United States government.”²¹¹ The court found this argument inadequate for two reasons. First, there was no case law support for concluding that a foreign forum was corrupt.²¹² Second, the court “refuse[d] to sit in judgment upon the integrity of the entire Indonesian judiciary.”²¹³ The court then analyzed the public and private factors, and because they significantly pointed to Indonesia, the court granted defendants’ motion.²¹⁴

207. *Id.*

208. *Id.* at 383-84. The public/private factors conclusion is not controversial considering the case’s significant contacts with Mexico, and the fact that the American contacts (with defendant manufacturers) did not involve Texas. The only Texas contact was that the father had shopped for the car in Houston, although his purchase occurred in Mexico. *Id.* at 379.

209. *Gonzales v. P.T. Pelangi Niagra Mitra Int’l*, 196 F. Supp. 2d 482 (S.D. Tex. 2002).

210. *Id.* at 485.

211. *Id.* at 487.

212. *Id.* at 488. To the contrary, the court found several sources refusing to act on allegations of bias or corruption in foreign courts. *Id.* The court cited six cases rejecting such allegations, but finding one that held that movant “failed to meet its burden of showing that Bolivia was an adequate forum where plaintiff produced strong supporting [evidence] of serious partiality and manipulation there.” *Id.* (citing *Eastman Kodak, Co. v. Kavlin*, 978 F. Supp. 1078, 1087 (S.D. Fla. 1997)).

213. *Gonzales*, 196 F. Supp. 2d at 488 (citing several cases). The court had foreshadowed this conclusion when it commented that “[a]n adequate forum need not be a perfect forum.” *Id.* at 486 (citing *Satz v. McDonnell Douglas Corp.* 244 F.3d 1279, 1283 (11th Cir. 2001)). The court concluded that “a foreign forum qualifies as inadequate only when it amounts to ‘no remedy at all.’” *Id.* (quoting *Piper*, 454 U.S. at 254). Note that it was defendants’ burden to show the Indonesian forum to be adequate. They did so with an affidavit from an Indonesian lawyer stating that Indonesian law provides analogous causes of action and adequate remedies for plaintiffs’ claims, which would not be barred by limitations, and that Indonesian law allows contingency fees. *Id.* at 487.

214. *Id.* at 490-91. The only pertinent American connections were plaintiffs’ post-accident residence in Houston, and the presence of defendant Maxus Energy, a Texas company.

The first of two Firestone cases also raises an important question—how do you protect a forum non conveniens dismissal when plaintiffs can simply file again in another Texas court? *Vasquez v. Bridgestone/Firestone, Inc.*,²¹⁵ was one of four lawsuits arising from a single-car accident in Nuevo Leon, Mexico in 1999. Six passengers died when a tire apparently blew out on a Chevrolet Suburban carrying employees back from a training session. On March 15, 2000, five decedents' spouses filed the first of at least four Texas actions against Bridgestone/Firestone, Inc., and other defendants, but omitted car-manufacturer General Motors Corporation. Soon after the sixth victim's survivor intervened, the court dismissed for lack of jurisdiction.²¹⁶ On January 19, 2001, all six spouses sued in state district court in Orange County, Texas, this time including General Motors. Defendants removed this action to federal district court, which dismissed on forum non conveniens grounds on August 7, 2001,²¹⁷ based on (1) Mexico's relationship to the events and Texas's lack of one,²¹⁸ (2) the applicability of Mexican law,²¹⁹ and (3) the availability of an adequate remedy in Mexico's courts.²²⁰ The court also noted that a plaintiff's choice of forum is entitled to less deference when a foreign plaintiff is trying to avail herself of more-favorable law in the United States.²²¹

Two lawsuits were now resolved, but two remained. Three plaintiffs had sued in state district court in Cameron County on February 21, 2001, and all six had sued in state court in Webb County on August 20, 2001, thirteen days after the second court's conveniens dismissal.²²² To counter these additional suits, defendants returned to the second court (the one granting the forum non conveniens dismissal) and requested an anti-suit injunction to stop plaintiffs from further litigation in Texas courts. In considering the injunction, the federal court had to review the federal Anti-Injunction Act's strong restrictions on federal courts' enjoining state court litigation.²²³ This case, however, neatly fit into one of the Act's three exceptions—injunctions to protect or effectuate federal judgments,

215. *Vasquez v. Bridgestone/Firestone, Inc.*, 192 F. Supp. 2d 730 (E.D. Tex. 2001).

216. *Id.* at 732. *Vasquez* does not state the basis of the other court's jurisdictional dismissal and does not cite the case.

217. *Id.* at 732.

218. *Id.* at 733. The one-car accident occurred in Mexico, in a car manufactured, sold, and maintained in Mexico. The allegedly defective tires were marked "made in Mexico." The driver and seven passengers were Mexican citizens on a local trip in Mexico, while working for a Mexican company. *Id.* at 731.

219. "Both sides exhaustively briefed the choice-of-law issue and the Plaintiffs strenuously argued that the court should apply Texas law, but ultimately the court decided Mexican law applied because Mexico was the forum with the most significant relationship to the accident and the parties." *Id.* at 733.

220. *Id.*

221. *Id.*

222. *Id.* at 732.

223. The Anti-Injunction Act, 28 U.S.C. § 2283 (1994) provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

better known as the relitigation exception.²²⁴

The Fifth Circuit applies a four-part test to determine the applicability of the relitigation exception: First, the parties must be identical or in privity; second, the prior federal judgment must have been rendered by a competent court; third, the prior federal action must have concluded in a final judgment on the merits; and fourth, the suits must involve the same claim or cause of action.²²⁵ These requirements might seem formidable for a case dismissed several months earlier for retrial in Mexico, and for an anti-suit injunction involving three other cases with somewhat different parties. None of these issues were problems. Different lawsuits concerning the same accident qualify for the “same parties” element, and it “is no objection that the former action included parties not joined in the present action, or vice versa, so long as [the test’s other three elements were met].”²²⁶ The competent-court element was satisfied by the court’s diversity jurisdiction,²²⁷ but the court also noted it retained jurisdiction to issue this injunction more than thirty days after dismissal.²²⁸ Of course, no other conclusion is possible because without that ongoing jurisdiction, anti-suit injunctions under the relitigation exception would have little meaning.

The court’s analysis of the third element—a final judgment on the merits—is less convincing. The court found that this element was satisfied by Fifth Circuit precedent that a forum non conveniens dismissal that includes a choice of law determination is final and may be issued with prejudice.²²⁹ That takes care of finality, but fails to address the on-the-merits prong, which would seemingly require a resolution of the plaintiffs’ right to recover, but the court did not discuss it further. The relitigation exception’s fourth element requires the same claim in both suits. In spite of varying claims in the four suits, the court found them sufficiently connected to satisfy the same claim requirement.²³⁰ While it is understandable that a federal court would want to prevent litigious parties from circumventing its forum non conveniens dismissal by filing in nearby courts, the court’s analysis is not convincing on the Fifth Circuit’s requirement of an on-the-merits adjudication of the prior lawsuit. Perhaps the

224. *Vasquez*, 192 F. Supp. 2d at 734 (quoting *Woods Expl. and Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971) “[The Anti-Injunction Act] assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment.” *Woods*, 438 F.2d at 1312).

225. *Vasquez*, 192 F. Supp. 2d at 734 (citing *Regions Bank of Louisiana v. Rivet*, 224 F.3d 483, 488 (5th Cir. 2000) and other cases).

226. *Id.* at 735 (quoting *Dreyfus v. First Nat. Bank*, 424 F.2d 1171, 1175-76 (7th Cir. 1970)).

227. Jurisdiction over the original action was based on 28 U.S.C. § 1332(a)(2), governing actions between citizens of a state and citizens or subjects of a foreign state. *Id.*

228. *Id.* (citing *Southwest Airlines Co. v. Texas Int’l Airlines*, 546 F.2d 84, 90 (5th Cir. 1977); *Carey v. Sub Sea Int’l, Inc.*, 121 F. Supp. 2d 1071, 1073 (E.D. Tex. 2000)).

229. *Id.* (citing *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 719 (5th Cir. 1990)). The court added that plaintiffs acquiesced as to finality by appealing the forum non conveniens dismissal as a final judgment. *Id.*

230. *Id.*

solution is for the Fifth Circuit to reconsider that requirement in forum non conveniens cases, since they will necessarily not be adjudicated on the merits.

The court made two further points that bear mentioning here. First, the Ant-Injunction Act applies only to injunctions against state court litigation, leaving federal courts free to enjoin further litigation in other federal courts.²³¹ Second, the Anti-Injunction Act does not authorize the appropriate injunctions, it merely outlines when they may be issued. Injunctive authority comes from the All Writs Act.²³²

*Urena Taylor v. Daimler Chrysler Corp.*²³³ is the second Firestone case, also involving a single car accident in Nuevo Leon, Mexico. Decedent's 1994 Dodge truck crashed when the tire tread allegedly separated. His survivors sued car maker Daimler Chrysler and tire maker Bridgestone/Firestone in a Texas state court. Defendants removed to federal court and moved for forum non conveniens dismissal, agreeing to submit to jurisdiction in Mexico and pay any resulting damages.²³⁴ The court began by noting that in diversity cases, the Fifth Circuit required the application of federal law rather than state law to forum non conveniens issues.²³⁵ Under the Fifth Circuit test, defendants must first demonstrate the availability of an adequate alternative forum, and then show that the balance of public and private factors favors litigation in the other forum.²³⁶ Given defendants' agreement to submit to Mexico's jurisdiction and Mexico's established record as an adequate forum for wrongful death cases, the court quickly found the adequate-forum requirement satisfied.²³⁷ It had no greater trouble with the private-public interest balancing test. All operative events occurred in Mexico—the decedent was a Mexican citizen, as were all plaintiffs; the accident occurred in Mexico where the car was also maintained; all medical and law enforcement personnel were in Mexico and their availability in Texas would be both expensive and difficult. The Texas court had no compulsory process power over most of the witnesses, all the pertinent reports were in Spanish, and if it were necessary to view the site (admittedly rarely done), it would be far more difficult from Texas.²³⁸ The public factors pointed in the same direction. The

231. *Id.* at 734.

232. 28 U.S.C. § 1651 (1994), noted in *Vasquez*, 192 F. Supp. 2d at 733-34. See also JAMES P. GEORGE, *THE FEDERAL COURTHOUSE DOOR* at 56-60 (2000).

233. *Taylor v. Daimler Chrysler Corp.*, 196 F. Supp. 2d 428 (E.D. Tex. 2001).

234. *Id.* at 430-31.

235. *Id.* at 431 (citing *In re Air Crash Disaster Near New Orleans, La.*, on July 9, 1982, 821 F.2d 1147, 1159 (5th Cir. 1987), vacated on other grounds and remanded, *Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), reinstated in relevant part, *In re Air Crash Disaster Near New Orleans, La.*, 883 F.2d 17 (5th Cir. 1989)).

236. *Id.* at 431-32 (citing *McLennan v. American Eurocopter Corp., Inc.*, 245 F.3d 403, 423 (5th Cir. 2001)); see *supra* note 197 for the list of private and public interest factors.

237. *Id.* at 432 (citing *Aguilar v. Boeing Co.*, 806 F. Supp. 139, 143 (E.D. Tex. 1992)); *David Rodriguez Diaz v. Mexicana de Avion, S.A.*, No. SA-86-CA-1065, 1987 U.S. Dist. LEXIS 13399, at *4-9 (W.D. Tex. Jan. 23, 1987), *aff'd mem.* 843 F.2d 498 (5th Cir. 1988). Mexico recognizes wrongful death actions but not strict liability; neither that nor the prospect of lesser damages renders a forum inadequate. *Id.* (citing *Rodriguez Diaz*, at *8).

238. *Id.* at 433.

court noted its large docket and Texas's lack of interest in the controversy. If the case were litigated here, the Texas choice of law rules would almost certainly indicate the application of Mexico's law, which this court would be less skilled in applying.²³⁹ The court accordingly granted defendants' motion and ordered dismissal, conditioned on (1) a court in Nuevo Leon, Mexico, asserting jurisdiction; (2) with the defendants appearing generally and waiving any jurisdictional defenses and any limitations defenses that did not exist at the time the Texas complaint was filed; and (3) with defendants producing in Nuevo Leon all of plaintiffs' reasonable discovery requests.²⁴⁰ Implicit in these conditions is the court's power to reinstate for non-complying defendants.

In *Psarros v. Avior Shipping, Inc.*,²⁴¹ a federal court denied a forum non conveniens motion filed in a Greek seaman's injury claim arising in the Port of Houston. Greek resident Nikolas Psarros was a third mate aboard the M/V Eirini, a Panamanian-registered ship owned by defendants Makri Shipping Company and operated by Overseas Shipping Company, Ltd., both Panamanian corporations. While the Eirini was docking in the Port of Houston on May 8, 2000, a securing rope snapped and struck Psarros's leg, partially amputating it. The snapped line was sold either by Defendant International Marine Supplies, Inc., (a Texas corporation) or by Universal Maritime Service Corporation (a New York corporation).²⁴²

Psarros sued his employers and the rope's sellers in federal district court in Galveston, alleging claims under the Jones Act and state law.²⁴³ Defendants opposed plaintiff's choice of forum on two grounds: a forum selection clause designating Greece as the exclusive forum,²⁴⁴ and a forum non conveniens objection. Because Psarros's response to the motion conceded that Greek courts were both available and adequate for his claims,²⁴⁵ the court went straight to the balancing of public and private factors. Both favored retention of the case. Private interests pointed to the Texas forum because proof was more available in Texas, the site of the injury, of plaintiff's initial treatment and the accident reports.²⁴⁶

239. *Id.* at 434 (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984)).

240. *Id.* at 434-35.

241. *Psarros v. Avior Shipping, Inc.*, 192 F. Supp. 2d 751 (S.D. Tex. 2002).

242. *Id.* at 752.

243. *Id.* The court expressed doubt regarding Psarros's allegations that Makri and Avior were his employers, with defendants' allegations of his employment status with Overseas appearing more plausible. But because this was defendants' motion to dismiss, all disputed allegations were construed in plaintiff's favor. *Id.* at 752, n.1.

244. See *supra* notes 186-89 and accompanying text.

245. The court recited the requirements of federal forum non conveniens as a two-part test: (1) available and adequate forum, and (2) the balancing of public and private interests. *Psarros*, 192 F. Supp. 2d at 755 (citing *Piper*, 454 U.S. at 254-56); see *supra* note 197. Some courts have referred to this as a four part requirement. See *supra* note 198. Both are correct, although the two-part test conveniently distinguishes the alternative forum and balancing factors. In this case, Plaintiff expressly stated that he "does not contest that Greece is [an] adequate and available [forum] as to the Defendants." *Psarros*, 192 F. Supp. 2d at 755.

246. *Id.* at 755-56.

Moreover, the relevant information concerning the failed rope was also located in the United States, though not necessarily in Texas.²⁴⁷ Witnesses would be more available locally and, more importantly, defendants had not shown that the various Texas witnesses would be subject to a Greek court's subpoena or willing to testify there.²⁴⁸ None of the defendants had assets in Greece, and the court expressed concern about the resulting viability of plaintiff's remedy.²⁴⁹ The court also observed that although the defendants argue the inconvenience of the Texas forum, they waited one year to file the motion, just six weeks before trial. Apart from the inconvenience a forum non conveniens dismissal would work at this point, the delay undermined defendants' inconvenience argument.²⁵⁰ Public interest factors also pointed to retaining the case. The foreign defendants had all availed themselves of the United States market and in doing so, had allegedly engaged in unsafe procedures. The court conceded that the case would be complicated by some degree of far-flung evidence and parties, but that there had been no showing that trying the case in Greece would ease this burden.²⁵¹ The court thus denied the motion and retained the case, carefully noting that in doing so, it was not deciding whether Greek or United States law governed.²⁵²

3. *Parallel Litigation*

Parallel litigation is difficult to define. Sometimes it means identical lawsuits with exactly the same parties bringing the same claims, and sometimes it means two or more lawsuits that may result in claim preclusion for some or all parties. Parallel litigation occurs both intra- and inter-jurisdictionally, and involves remedies of transfer and consolidation (intra-jurisdictional only), stay, dismissal, and anti-suit injunction, or in many cases, allowing both cases to proceed and using the first-to-judgment to preclude the other.²⁵³ This article only discusses parallel litigation involving at least one case outside of Texas, that is, it will not consider multiple related actions involving courts all located in Texas.²⁵⁴

247. *Id.* at 756.

248. *Id.*

249. *Id.*

250. *Id.* at 756, n.10.

251. *Id.* at 756-57.

252. *Id.* at 757, n.11.

253. See generally, *Parallel Litigation*, *supra* note 20; James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 TEX. INT'L L.J. 499 (2001).

254. The Survey period produced five in-state instances of parallel litigation, all involving conflicts between state and federal courts. See *DVI Bus. Credit Corp. v. Crowder*, 193 F. Supp. 2d 1002 (S.D. Tex. 2002) (federal court denied motion to stay federal case in favor of four Texas state court cases, which themselves had been stayed by federal bankruptcy filing); *Lemery v. Ford Motor Co.*, 205 F. Supp. 2d 710 (S.D. Tex. 2002) (federal court declines to remand personal injury action removed from probate court, finding an exception to the probate prohibition in federal courts); *Jones v. Hoel*, 211 F. Supp. 2d 823 (E.D. Tex. 2002) (federal court rejected defendants' notice of stay, which they filed after the Texas insurance commissioner declared that defendant physician's insurer was impaired); *Am. Nat'l Gen. Ins. Co. v. Ryan*, 274 F.3d 319 (5th Cir. 2001) (notes in passing the removal

The Fifth Circuit affirmed an unauthorized anti-suit injunction in the Survey period's only reported instance of parallel litigation. *Fleetwood Enterprises, Inc. v. Gaskamp*²⁵⁵ was a family's claim for personal injury from formaldehyde exposure from a mobile home manufactured in Mississippi. The mobile home's financing agreement had an arbitration clause designating Harris County, Texas, as the forum.²⁵⁶ After becoming ill, the Gaskamp parents ignored the clause and sued in a Mississippi state court.²⁵⁷ Defendants filed this action in federal court in Texas to compel arbitration and stay (or enjoin) the Mississippi action. The federal district court ordered the Gaskamps to arbitrate and halted the Mississippi litigation.²⁵⁸ On appeal, the Fifth Circuit upheld the arbitration clause, but ruled that it applied only to the parents since the Gaskamp children were not parties to the financing agreement containing the clause.²⁵⁹ Thus, the Mississippi action was "stayed" as to the parents but allowed to continue on the children's claims. The case is fully discussed in the choice of law section,²⁶⁰ focusing on the choice of law considerations in an action to compel arbitration under the Federal Arbitration Act.

Although *Fleetwood's* outcome is reasonable, its misapplication of the stay provision of the Federal Arbitration Act is a concern. The Act provides that when a court is satisfied that an action is subject to a written arbitration agreement, it shall, under any party's application, stay the action.²⁶¹ In spite of the statute's language—"any of the courts of the United States"—it applies to state as well as federal courts.²⁶² But, and this is important, the statute's language expressly limits the staying power to the court in which the action is pending.²⁶³ This limitation is consistent with the meaning of stay—best used to describe a court's decision to stop a case on its own docket temporarily (stopping permanently is called a dismissal). Apart from the Bankruptcy Act's misuse of *stay*,²⁶⁴ a court does not stay litigation in another court; rather, it enjoins a party under

of a state court action for consolidation with parallel federal action) (note that this is not really a declining of jurisdiction, but a manipulation of parallel cases); and *Diamond Off-shore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 540 (5th Cir. 2002) (reversing a federal district court's dismissal, finding the federal and state cases were not sufficiently parallel).

255. *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002).

256. *Id.* at 1073, n.4.

257. *Id.* at 1072.

258. *Id.*

259. *Id.* at 1077-78.

260. See *infra* notes 333-44 and accompanying text.

261. The Act states: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, *the court in which such suit is pending*, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3 (1999) (emphasis added).

262. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 27 n.34 (1983).

263. See emphasized language, *supra* note 261.

264. 11 U.S.C. § 362 (1993).

its jurisdiction from pursuing the other litigation. For the federal district court's act of stopping the Mississippi lawsuit, the proper term is *anti-suit injunction*, which is not only difficult to obtain in any case, but is subject to special limits where federal courts are acting against state litigation. Specifically, the Anti-Injunction Act bars federal courts from enjoining state court litigation except in three instances: where the injunction is authorized by act of Congress (this one is not); where the injunction is necessary in aid of in rem jurisdiction (not the case here); and where the injunction is necessary to protect or effectuate a final federal judgment (no final judgment here).²⁶⁵ Clearly Fleetwood or a co-defendant needed to ask the Mississippi court to stay its own action, which it was required to do after the federal court ordered arbitration.

II. 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 basic principles. First, choice of law is a question of *state* law, both in state and federal courts.²⁶⁶ 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.²⁶⁷ Third, the forum state has broad power to make choice of law decisions, either legislatively or judicially, subject only to limited constitutional requirements.²⁶⁸

Within the forum state's control of choice of law is a hierarchy of choice of law rules. At the top are legislative choice of law rules, that is, statutes directing the application of certain state's laws, based on events or people important to the operation of that specific law.²⁶⁹ Second, in the choice of law hierarchy is party-controlled choice of law, that is, choice of law clauses in contracts that apply unless public policy dictates

265. The Anti-Injunction Act, 28 U.S.C. § 2283 (1994) provides that “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

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

267. The Restatement (Second) creates a presumption against *renvoi* except for limited circumstances. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971). Although commentators defend *renvoi*'s limited use, 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 SCOLES & HAY, *supra* note 20, at 67-72 (especially 68 n.4); WEINTRAUB, *supra* note 1 at 88-94. Texas law provides for *renvoi* in TEX. BUS. & COM. CODE ANN. §§ 1.105(b), 2.402(b), 4.102(b), 8.106, 9.103 (Vernon 1994 & 2002). For federal courts, *Klaxon* reiterates the forum state's control of choice of law. 313 U.S. at 497.

268. See *infra* notes 381-82 and accompanying text for a brief description of these constitutional requirements.

269. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) and cmt. a (1971). See e.g., *Owens Corning v. Carter*, 997 S.W.2d 560 (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 to the case.); TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1997 & Supp. 2003).

otherwise.²⁷⁰ 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.²⁷¹ This Survey article is organized according to this hierarchy, that is, 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 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 of course note that, because choice of law is a state law issue, the only binding opinions are those of the Texas Supreme Court.²⁷²

A. STATUTORY CHOICE OF LAW RULES

The Survey period offered only one short discussion involving Texas choice of law statutes. *Mayo v. Hartford Life Insurance Co.*,²⁷³ deals with the validity in Texas of corporations buying life insurance policies on employees in the absence of an insurable interest—a practice illegal in Texas but allowed in some states.²⁷⁴ *Mayo*'s statutory issue was article 21.42 of the Texas Insurance Code, stating that insurance contracts payable to Texas citizens or inhabitants by any entity doing business in Texas is a Texas contract, governed by Texas law.²⁷⁵ Because the beneficiaries were employers outside of Texas, they did not fall within the statute's express language, thus leaving the choice of law analysis to the most significant relationship test.²⁷⁶ But, the defendant corporations also argued that article 21.42 defined the outer reaches of Texas insurance law—that is, Texas insurance law governs everything within 21.42 and nothing outside of it. The court rejected this argument, finding nothing within the statute

270. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187. Law Of The State Chosen By The Parties § 187 (1971) allows contracting parties to choose a governing law, within defined limits as explained *infra* note 285. Texas has adopted § 187. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-78 (Tex. 1990).

271. See *infra* note 307 for the factors in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

272. The exception would be where a federal court rules on a constitutional issue such as that discussed in *Nat'l W. Life Ins. Co. v. Rowe*, 86 S.W.3d 285 (Tex. App.—Austin 2002, pet. filed), discussed *infra* at notes 345-55.

273. *Mayo v. Hartford Life Ins. Co.*, 220 F. Supp. 2d 714 (S.D. Tex. 2002).

274. See *id.* The Texas insurable interest doctrine restricts ownership of life insurance policies on Texas residents to "putative beneficiaries," defined as someone (1) "so closely related by blood or affinity that he wants the other to continue to live, irrespective of the monetary considerations; (2) a creditor; [or] (3) one possessing a reasonable expectation of pecuniary benefit or advantage from the [insured's continued life]." *Id.* at 727 (citing various cases) (first alteration in original). Texas law also permits a person to designate his or her beneficiary, even absent an insurable interest (citing TEX. INS. CODE ANN. art. 3.49-1, §§ 1, 2, 3, & 5 (Vernon 1981)), and allows employers to insure key employees. *Id.*

275. The statute reads: "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." TEX. INS. CODE ANN. art. 21.42 (Vernon 1981).

276. *Mayo*, 220 F. Supp. 2d at 738-39.

or its purpose to support it. Instead, the court found that 21.42 was intended to impose Texas law on insurance policies naming Texans as beneficiaries, but without repealing "the longstanding, prophylactic common law insurable interest doctrine."²⁷⁷ This left the analysis to the most significant relationship test, as discussed below.²⁷⁸

In *Gilcrease v. Tesoro Petroleum Corp.*,²⁷⁹ the San Antonio Court of Appeals addressed a question of first impression regarding Texas's new wrongful-death borrowing statute. Specifically, the court considered whether Alaska's statute of repose applied in a Texas action for an asbestos-related death. This case is fully discussed in the Limitations section.²⁸⁰

B. CHOICE OF LAW CLAUSES IN CONTRACTS

Texas law permits contracting parties to choose a governing law, subject to the exceptions discussed in *Monsanto Co. v. Boustany*,²⁸¹ an action by 110 former Monsanto employees suing for the right to exercise stock options. Plaintiffs had worked for Monsanto-sub subsidiary Fisher Controls International, Inc., and wished to act on earlier incentive plans that had been granted each year from 1989 through 1992. All options included Fisher employees, and expressly expired three years from the date of creation or upon termination of employment, whichever occurred first. Monsanto sold Fisher in 1992, deeming the sale a termination of employment, triggering a clause in the options that required exercise, if at all, within three months of termination. At that time, Monsanto's stock was lower than the price at which the 1990 and 1991 options could be exercised, which meant that the plaintiffs could not profitably exercise those options within the three month window. Monsanto then decided to extend the options for nine months. None of the plaintiffs protested this decision and some exercised the option when Monsanto's stock price rose.²⁸²

By 1996, Monsanto's stock price had risen considerably and a number of Fisher employees then attempted to exercise their earlier options. Monsanto refused, and when the Fisher employees sued in a Texas state court, Monsanto moved for summary judgment on the grounds that the Fisher sale was a termination of employment under Delaware law and that the action was barred by Delaware's three year limitation period.²⁸³ The trial court granted summary judgment without stating its grounds; the court of appeals reversed, finding that no termination had occurred

277. *Id.* at 738.

278. *See infra* notes 384-90 and accompanying text.

279. *Gilcrease v. Tesoro Petroleum Corp.*, 70 S.W.3d 265 (Tex. App.—San Antonio 2001, pet. denied) (discussing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon Supp. 2003)).

280. *See infra* notes 416-24 and accompany text.

281. *Monsanto Co. v. Boustany*, 73 S.W.3d 225 (Tex. 2002).

282. *Id.* at 228.

283. *Id.*

and that Texas's four year limitation period applied.²⁸⁴

The Texas Supreme Court reversed again. For governing law, the supreme court honored the option clause's designation of Delaware law, noting that Texas law approves of choice of law clauses "if the particular issue is one that they could have resolved by explicit agreement."²⁸⁵ The supreme court further noted that the chosen law must have a reasonable relationship to the contract and must not "thwart or offend the public policy of the state the law of which ought otherwise to apply."²⁸⁶ The court then observed that it knew of no public policy in Texas that would be thwarted by allowing parties to agree to these terms and specifically noted that Delaware law should govern a stock option from a Delaware corporation.²⁸⁷

Plaintiffs lost their breach of contract claims, but Monsanto failed on the second choice of law issue—that Delaware's three year limitation period would bar plaintiffs' remaining claims for fraud and conversion. Monsanto urged the supreme court to adopt Restatement (Second) of Conflict of Laws section 142 governing the application of foreign limitations periods.²⁸⁸ But Monsanto's appellate brief failed to argue the substance or effect of Delaware limitation period, and accordingly the supreme court declined to consider it and remanded the fraud and conversion claims.²⁸⁹

The Texas Supreme Court also held, in 2002, that a contract's choice of Colorado law would not be upset by the contract's reference to a uniform act adopted in similar form in Texas. *In re J.D. Edwards World Solutions Co.*²⁹⁰ was an action for various contract and commercial tort claims, opposed by a motion to compel arbitration as provided in the parties' contract. In 1997, Arlington-based Dorskocil Manufacturing Company licensed software from J.D. Edwards World Solutions from Colorado. The software failed, and in 1998 Dorskocil requested arbitration pursuant

284. *Id.*

285. *Id.* at 229 (citing *DeSantis*, 793 S.W.2d at 677-78, in turn citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971)). The Texas Supreme Court has adopted RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187's provision that (1) parties may choose any state's law to govern any issue which the parties could have explicitly agreed to in the contract, and (2) for issues not capable of explicit agreement, the parties may choose any law bearing a substantial relationship to the parties or the transaction, unless it would violate a fundamental policy of a state having a materially greater interest than the chosen state, and which would be the state selected under the contract choice of law principles in § 188; *id.* see *infra* note 316 for § 188's factors; see also *DeSantis*, 793 S.W.2d at 677-81.

286. *Id.* at 229 (citing *DeSantis*, 793 S.W.2d at 677).

287. *Id.* at 229.

288. *Id.* Readers should note that the ALI has amended § 142 twice since the Restatement's original publication. The most recent version appears in the 1988 supplement to the 1986 Revisions, and provides that § 6 governs limitations issues, and that in general: (1) a forum limitation period *barring* the claim will be applied unless exceptional circumstances make such a result unreasonable; and (2) a forum limitation *permitting* a claim will be applied unless the forum has no significant interest *and* the claim would be barred under the limitation period of a state with a more significant relationship to the parties and the occurrence.

289. *Monsanto Co.*, 73 S.W.3d at 229, 233.

290. *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546 (Tex. 2002).

to a clause in the licensing agreement designating Colorado law for the dispute and the Uniform Arbitration Act for the arbitration procedure.²⁹¹ The arbitration request listed claims for fraud, fraudulent inducement, misrepresentation, breach of contract, breach of warranty, and negligence.²⁹² Dorskocil then asserted the same claims in a Texas state district court. J.D. Edwards moved to compel arbitration of all claims, and the trial court granted the motion except for the fraudulent inducement claim.²⁹³ The court of appeals denied J.D. Edwards's mandamus request on the remaining fraudulent inducement claim, leading to the same request in the Texas Supreme Court.²⁹⁴ The essential issue—whether the arbitration clause covered the fraudulent inducement claim—rested on what law governed, according to Dorskocil. Its argument was that the alleged fraud occurred prior to the agreement and therefore could not be a dispute “involving this Agreement” as the clause provided. Colorado law would nonetheless include pre-agreement conduct,²⁹⁵ but Texas law apparently did not address this, at least under the language of this arbitration clause.²⁹⁶ Dorskocil thus hoped to avoid the Colorado precedent and create an opposite result for Texas law.

The Texas Supreme Court quickly found that there was no basis for the application of Texas law to this case. The court noted the power of contracting parties under the Restatement (Second) of Conflict of Laws to choose a governing law for issues capable of resolution by an explicit provision in the contract,²⁹⁷ and even for issues incapable of express agreement so long as the chosen state has a substantial relationship to the parties or the underlying transaction.²⁹⁸ The court found that Colorado indeed had a substantial relationship to the parties and the transaction, so that under either section 187(1) or 187(2), the parties' choice of Colorado law controlled.²⁹⁹

Dorskocil argued that in spite of the Colorado choice of law, Texas law governed because the arbitration clause referred to the Uniform Arbitra-

291. The clause read: “All disputes involving this Agreement, except actions arising under the copyright provision of Title 17 of the U.S. Code, shall be determined under the law of the State of Colorado and shall be submitted to an arbitrator appointed and operating under the Uniform Arbitration Act and the procedural rules of the American Arbitration Association. The location of the arbitration hearing will be chosen by the party not initiating the arbitration or action. The written decision of the arbitrator shall be final, binding and convertible to a court judgment in any appropriate jurisdiction.” *Id.* at 548.

292. *Id.*

293. *Id.*

294. *Id.* at 548-49.

295. *Id.* at 550-51 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (interpreting the Federal Arbitration Act, 9 U.S.C. § 4); *National Camera, Inc. v. Love*, 644 P.2d 94 (Colo. Ct. App. 1982) (adopting *Prima* for Colorado's Arbitration Act); *Austin v. U.S. West, Inc.*, 926 P.2d 181 (Colo. Ct. App. 1996) (applying this rule to an even more narrowly-worded arbitration clause)).

296. The opinion does not refer to contrary Texas law.

297. *Id.* at 549 (citing *DeSantis*, 793 S.W.2d at 677-78, in turn quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187(1) (1971)).

298. *Id.* (citing *DeSantis*, 793 S.W.2d at 678, in turn quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187(2)).

299. *Id.*

tion Act, on which the Texas Arbitration Act was based, and that Texas law was necessarily implicated when Dorskocil filed its lawsuit in Texas. That is, because the parties' arbitration clause referred to the Uniform Arbitration Act, and because the Texas Arbitration Act was drawn from the Uniform Act, Texas law necessarily applied when a resulting lawsuit was brought in a Texas court. The supreme court rejected this, finding instead that an arbitration clause's designation of Colorado law would not be disturbed merely because a party filed suit in Texas.³⁰⁰ But, a question remained about which law did apply—Colorado's law, federal law, or the Uniform Arbitration Act—even though the result was the same under all three.³⁰¹ As noted above, both the United States Supreme Court and Colorado appellate courts had held that parties could not avoid arbitration clauses with the claim that the underlying contract was fraudulently induced.³⁰² Dorskocil did not argue contrary Texas precedent, but apparently hoped to avoid the Colorado precedent and set a different one in Texas.

Dorskocil's next argument entered rare territory for conflict of laws: non-forum law as affecting the forum's appellate remedies. The issue was whether the extraordinary remedy of mandamus was available to J.D. Edwards; it would not be available if interlocutory appeal was possible. Under the Texas Arbitration Act, interlocutory appeals are available for denials of motions to compel arbitrations generally,³⁰³ but are not available for denials relating to arbitrations under the Federal Arbitration Act.³⁰⁴ Dorskocil argued that this was simply a TAA appeal (contrary to J.D. Edwards's express reliance on the Federal Arbitration Act in its original motion to compel),³⁰⁵ and thus entitled to interlocutory appeal but not mandamus. This argument was based on Dorskocil's earlier point that the arbitration clause's reliance on the Uniform Arbitration Act necessarily invoked the Texas Arbitration Act. The court again rejected this, resulting in the interesting feature of the application of non-Texas law as affecting the Texas remedy.

Another important issue is noted briefly in *Holley v. Grigg*, discussed below,³⁰⁶ where the court of appeals found a false conflict between Texas and Missouri law in a dispute over the inheritance of an Edward Jones investment account. The account had a choice of law clause designating Missouri law. In finding the clause enforceable (though irrelevant because of its lack of conflict with Texas law), the court cited section 1.105(a) of the Texas Business and Commerce Code governing contracts made under the Uniform Commercial Code, as this one was. The point

300. *Id.* at 549-50.

301. *Id.* at 550.

302. *See supra* note 294.

303. *Id.* at 551 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (Vernon 1997)).

304. 9 U.S.C. § 16 (1999).

305. *In re* J.D. Edwards, 87 S.W.3d at 548 (referring to J.D. Edwards's motion to compel under article nine of the United States Code).

306. 65 S.W.3d 289 (Tex. App.—Eastland 2001, no pet.); *see infra* 401-04.

for attorneys facing the enforcement of choice of law clauses is to determine which of several Texas statutes governs their validity and enforcement.³⁰⁷ Invoking the wrong statute can mean a more difficult standard, or worse, an inadequate foundation to sustain that choice on appeal.

C. THE MOST SIGNIFICANT RELATIONSHIP TEST

If there is no statutory choice of law rule, and if contracting parties have not made an effective choice of law, then Texas courts apply the most significant relationship test from the Restatement (Second) of Conflict of Laws.³⁰⁸ The Survey period produced six noteworthy cases applying the test.

*Mayo v. Hartford Life Insurance Co.*³⁰⁹—an uncertified plaintiff and defendant class action—concerns the validity in Texas of corporate-owned life insurance policies (“COLI”) on employees. Plaintiffs were a group of Texas-based employees who sued various defendants seeking a declaratory judgment that corporate-owned life insurance policies on employees were invalid. Plaintiffs named three employer defendants, two

307. TEX. BUS. & COM. CODE ANN. § 1.105 (Vernon Supp. 2003) applies to contracts governed by the Texas version of the Uniform Commercial Code, and provides that parties to UCC-based contracts bearing a reasonable relation to Texas and another state or nation may agree to be governed by Texas or the other state’s or nation’s law, except for the specific limits stated in § 1.105(b). Section 1.105(c) further imposes the requirements of TEX. BUS. & COM. CODE ANN. § 35.51 (Vernon 2002) to appropriate UCC-based contracts. Section 35.51 governs contracts involving at least \$1 million in consideration or loan value, and sets forth detailed rules regarding contracting parties choice of governing law, such as (1) the requirement of the chosen law’s having a reasonable relation to a party, the subject matter, negotiations, or performance; (2) default provisions when the contract violates the chosen state’s public policy; and (3) issues ineligible for party choice. TEX. BUS. & COM. CODE ANN. § 35.52 (Vernon 2002) makes voidable the choice of law clauses in certain contracts for real property construction in Texas. TEX. BUS. & COM. CODE ANN. § 35.53 (Vernon 2002) applies to contracts for the sale, lease, or other disposition of goods for consideration of \$50,000 or less, that are not governed by § 1.105, and for which execution occurred at least partly in Texas and involved either a Texas resident or a corporation or association created under Texas law; it requires that choice of law or choice of forum clauses in such contracts designating another state “be set out conspicuously in print, type, or other forum of writing that is bold-faced, capitalized, underlined, or otherwise set out in such a matter that a reasonable person against whom the provision may operate would notice.” *Id.* § 35.53(b). Failure to comply makes the clause voidable. *Id.*; TEX. BUS. & COM. CODE ANN. § 35.531 (Vernon 2002) applies to internet contracts and imposes Texas law unless a party proves that the other party had notice of a choice of law clause and agreed to it. TEX. INS. CODE ANN. § 21.42 (Vernon 1981) imposes Texas law on insurance contracts made payable to a Texas citizen or inhabitant.; for a case involving § 21.42, see *infra* notes 309-24.

308. The embodiment of the most significant relationship test are 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. *Id.*

309. *Mayo v. Hartford Life Ins. Co.*, 220 F. Supp. 2d 714 (S.D. Tex. 2002).

insurers, and others, seeking certification of a class of employers and insurers who engage in the practice of selling insurance policies to corporations to insure the lives of their employees. The employers would pay the insurance premiums by borrowing money from the insurers, and would claim the interest paid on these loans as tax deductions. The employers also earned non-taxable interest through the COLI policies. When the employee died, the employer would use the death benefit to repay the premium loans and cover other expenses.³¹⁰

Texas law clearly forbids COLI policies.³¹¹ Defendants argued that Georgia law governed and would allow the policies, and that alternatively, the laws of Arkansas, North Carolina, or Delaware would apply, presumably reaching the same result as Georgia law.³¹² This was a federal diversity case and the federal court accordingly applied Texas conflict of laws principles.³¹³ Starting with the Restatement (Second) of Conflict of Laws section 6, the court immediately noted its predicate requirement that the court follow any statutory directives of the forum state—that is, choice of law statutes preempt the most significant relationship test.³¹⁴ As discussed above, the only possibly pertinent statute is article 21.42 of the Texas Insurance Code, which mandates Texas law for policies payable in Texas, but not to out-of-state beneficiaries as in this case.³¹⁵

Absent a controlling choice of law statute, the insurance contracts at issue were analyzed under the Restatement (Second)'s general choice of law test and its contract principles.³¹⁶ In undertaking this analysis, the court noted the lack of precedents for applying contract choice of law issues to claims limited to the insurable interest doctrine.³¹⁷ The resulting

310. *Id.* at 722 and nn.14, 15. The Internal Revenue Service disputed some of these deductions and other tax issues, although the opinion does not report the resolution of those disputes. *Id.* at n.15.

311. *Id.* at 727. A putative insurance beneficiary only has an insurable interest in the life of another where the beneficiary is “(1) so closely related by blood or affinity that he wants the other to continue to live, irrespective of the monetary considerations; (2) a creditor; [or] (3) one possessing a reasonable expectation of pecuniary benefit or advantage from the continued life of another.” *Id.* (citing various cases) (alteration in original).

312. *Id.* at 728.

313. *Id.* (citing *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941); *Denman by Denman v. Snapper Div.*, 131 F.3d 546, 548 (5th Cir. 1998)).

314. *Mayo*, 220 F. Supp. 2d at 728 (citing the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971) and various cases).

315. *Id.* at 728, discussed *supra* at note 275 and accompanying text.

316. The general choice of law test is the seven-factor balancing test commonly known as the most significant relationship test, *see supra* note 308, although that name may also be used for the Restatement's collection of choice of law principles. The contract choice of law principles are found at RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186-221 (1971). In particular, section 188 states the primary test for contract cases (in the absence of an effective choice of law clause), starting with the factors in section 6, followed by special attention to five additional factors: “(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties.” RESTATEMENT (SECOND) OF CONFLICTS OF LAWS at § 188(2) (1971).

317. *Mayo*, 220 F. Supp. 2d at 730 n.36 (referring to RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 (1971), which applies to contracts for the rendition of services, and

analysis in this first-impression case is as thorough as any this Survey's authors have seen, and is somewhat too long to report here. The difficult issues included (1) contacts with eight states,³¹⁸ (2) the various states' policies regarding insurable interests,³¹⁹ (3) the constitutional limits on the extraterritorial application of Texas or Georgia law,³²⁰ (4) the parties' justified expectations in making multi-state contracts,³²¹ (5) the different defendant-insurers which triggered different applications of section 188, and (6) the result of no one state clearly having the most significant relationship to this case.³²² The court concluded that although no one state emerged as dominant, the Texas forum's substantial interest and contacts dictated the application of its law.³²³

If Judge Atlas provided a model choice of law analysis in *Mayo*, the Fifth Circuit did less in two abbreviated opinions, one possibly setting bad precedent.³²⁴ *Schneider National Transport v. Ford Motor Co.*,³²⁵ was a claim against insurers to recover costs in defending actions arising from a multi-vehicle collision. Schneider is the successor entity to Builders Transport, Inc., a national freight company based in South Carolina (its state of incorporation is not given). In 1993, one of Builders's trucks was involved in an accident in Texas which led to two deaths and several catastrophic injuries. The resulting lawsuit in Jefferson County, Texas, was settled before trial. The insurers paid portions of the settlement, but Builders/Schneider claimed reimbursement for defense costs, leading to this lawsuit. The dispute concerned the pro-rata expense reimbursement between primary insurer, Planet Insurance Company, and the excess-coverage insurer, Alexander and Alexander of New York, Inc. The trial court found that Pennsylvania law governed based on Alexander's incorporation there, and that under Pennsylvania law, plaintiff Schneider was entitled to summary judgment against both insurers.

gives priority to the state where the services are to be performed, unless the parties have made an effective choice of law, or unless some other state has a more significant relationship to the dispute, under the factors listed in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971), *see supra* note 308).

318. Arkansas, Connecticut, Delaware, Georgia, New York, North Carolina, Pennsylvania and Texas all had some connection to the case, although the Texas and Georgia connections were strongest. *See id.* at 722, 739-41.

319. Insurable interest doctrine is explained *supra* note 274. In discussing Texas policy regarding insurable interest, the court noted another Survey-period case, then valid but now withdrawn. *See Certain Underwriters at Lloyd's London v. Smith*, 77 S.W.3d 859 (Tex. App.—Houston [14th Dist.] 2002), *vacated*, 2002 WL 31235437 (Tex. App.—Houston [14th Dist.] Oct. 3, 2002), *withdrawn*, 93 S.W.3d 657 (Tex. App.—Houston [14th Dist.] Dec. 5, 2002). In a prescient aside, the *Mayo* court found *Smith* unpersuasive as signaling a change in Texas law on insurable interest. *Mayo*, 220 F. Supp. at 734.

320. *Id.* at 739-41.

321. *Id.* at 742-43.

322. *Id.* at 758.

323. *Id.* at 763.

324. Federal opinions on state choice of law rules are, of course, no more precedential than any other federal ruling on state law. Nonetheless, these decisions are often applied with the same force and should be carefully decided.

325. *Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532 (5th Cir. 2002).

The Fifth Circuit reversed on both choice of law and the merits. After first noting a false conflict between Texas and Pennsylvania law (both endorsed the plain meaning rule applied in the summary judgment),³²⁶ the court went on to find that if there was a conflict, Texas law controlled. In particular, the court found that the only relation that Pennsylvania had to this case was the excess coverage insurer's incorporation there, even though that insurer did its business from New York. On the other hand, all litigation leading to this dispute occurred in Texas and involved Texas attorneys.³²⁷ In reaching this conclusion, the court noted the applicability of the most significant relationship test but failed to cite its substance.³²⁸ If it had, included would be not only the most significant relationship test in section 6 of the Restatement (Second) of Conflict of Laws, but also section 188 (the general test for contracts) and possibly section 193 (governing casualty insurance policies).³²⁹ The conclusion that Pennsylvania law does not apply is almost certainly correct. If sections 188 and 193 were applied, their reference to the situs of negotiation and the "principal location of the insured risk"³³⁰ would have led to South Carolina or New York, and not Pennsylvania.³³¹ Neither would it have led to Texas, a fortuitous accident site. Given the nationwide coverage of this policy, the notion of adjudicating the contact's meaning under the law of any state where an accident occurred does not lead to the certainty, uniformity, and predictability of result called for in section 6.³³² On the other hand, if plaintiff's only choice of law request was for Pennsylvania law, the court's application of Texas law is correct by default.³³³ But, courts have a sua

326. *Id.* at 536.

327. *Id.*

328. *Id.*

329. *See supra* notes 308 (§ 6's factors) & 315 (§ 188's factors). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 governs "Contracts of Fire, Surety or Casualty Insurance" and calls for the application of the state "which the parties understood was to be the principle location of the insured risk during the term of the policy," unless some other state has a more significant relationship. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1971).

330. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193, quoted *supra* note 329.

331. *See supra* note 316 for RESTATEMENT (SECOND) § 188's factors.

332. "[C]ertainty, predictability and uniformity of result" make up the sixth factor of the seven-factor most significant relationship test. *See supra* note 308; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. i.

333. There is no federal precedent for this proposition because codified federal law does not address the pleading and proof of state law. *See infra* note 434. In federal courts, proof of state law is controlled by federal common law, simply requiring federal courts to take judicial notice of states laws. *Lamar v. Micou*, 114 U.S. 218, 223 (1885); *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir. 1987). There is no clear allocation of a burden or description of the necessary proof. Nonetheless, the point is almost certainly valid either by analogy, or because state law controls in the absence of federal law. Texas courts impose a burden on parties seeking the application of sister state or foreign law, *see* TEX. R. EVID. 202, 203; *see also* *Gevison v. Manhattan Const. Co. of Okla.*, 449 S.W.2d 458, 465 n.2 (Tex. 1969) (absent adequate proof of New York law, it is presumed that Texas law is identical); *accord*, *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759 (Tex. App.—Corpus Christi 1999, pet. denied). Similarly, parties in federal court seeking the application of a *foreign country* law must plead and prove its contents. FED. R. CIV. P. 44.1; *see also* *DP Aviation v. Smiths Indus. Aerospace & Defense Sys. Ltd.*, 268 F.3d 829 (9th Cir. 2001) (Washington state law applied in the absence of adequate proof of English law).

sponte power to raise important issues, and this case warranted it. Although the finding of a false conflict between Pennsylvania and Texas law reduces the choice of Texas law to dictum, to the extent *Schneider* stands as a choice of law analysis for nationwide insurance coverage, it is poorly reasoned.

The Fifth Circuit repeated its *Schneider*-like non-analysis in a choice of law footnote in *Fleetwood Enterprises, Inc., v. Gaskamp*,³³⁴ a case nonetheless valuable for its discussion of the state choice of law function in arbitrations compelled under the Federal Arbitration Act.³³⁵ The case involved a Texas family's claims for personal injury from formaldehyde exposure. In 1997, the Gaskamps bought a mobile home manufactured by Fleetwood Enterprises, and in doing so, signed a financing agreement containing an arbitration clause applying to:

any and all controversies or claims arising out of, or in any way relating to, the Retail Installment Contract or Cash Sale Contract or the negotiation, purchase, financing, installation, ownership, occupancy, habitation, manufacture, warranties (express or implied), repair or sale/disposition of the home which is the subject of the Retail Installment Contract or Cash Sale Contract, whether those claims arise from or concern contract, warranty, statutory, property or common law.³³⁶

After moving in, the Gaskamp family members began suffering from throat and eye irritation and respiratory problems. In 1999, their daughter Brooke was hospitalized with breathing difficulties which were diagnosed as formaldehyde related. The Texas Department of Health tested the home and found elevated levels of formaldehyde, and the Gaskamps moved out.³³⁷

In June, 2000, the Gaskamp parents brought tort-related claims for themselves and their three children against the seller, the financing institution, Fleetwood, and Georgia-Pacific Corporation (the particle board manufacturer).³³⁸ They chose a Mississippi state court as the forum, apparently based on Fleetwood's location, and perhaps hoping to avoid the arbitration clause which identified Harris County, Texas, as the forum.³³⁹ Six months later, Fleetwood and Georgia-Pacific brought this action in federal court in Houston to compel enforcement of the financing agreement's arbitration clause. The federal district court ordered all the Mississippi claims arbitrated,³⁴⁰ and the Gaskamps appealed two points: that the arbitration clause (1) could not apply to the Gaskamp's children's claims, and (2) was unconscionable as to the Gaskamp parents' claims.³⁴¹

334. *Fleetwood Enter. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002).

335. Article 9 of the United States Code.

336. *Fleetwood*, 280 F.3d at 1071 n.2.

337. *Id.* at 1071-72.

338. *Id.* at 1072, n.3.

339. *Id.* at 1073 n.4.

340. *Id.* at 1072-73.

341. *Id.* at 1073.

The Fifth Circuit reversed the arbitration order for the children's claims but upheld it as to the parents.³⁴² In finding the arbitration clause acceptable for the parents' claims, the court noted that Texas law governed the issues not addressed by the Federal Arbitration Act (under which this claim was brought), and that Texas choice of law rules pointed to Texas law.³⁴³ As with its decision in *Schneider*,³⁴⁴ the Fifth Circuit again conducted a Texas choice of law analysis without resort to the elements listed in section 6's most significant relationship test. Unlike *Schneider*, the result is not questionable. The Gaskamps purchased the mobile home in Texas, signed the agreements in Texas, and the arbitration clause identified Harris County, Texas, as the proper forum.³⁴⁵ Moreover, the parties had not disputed the applicability of Texas law. Readers should note that the *Fleetwood* analysis is one of contract only, since the federal action in Texas concerned only the parties' agreement to arbitrate, and not the underlying claims for personal injury.

National Western Life Insurance Co. v. Rowe,³⁴⁶ is an interlocutory appeal of a class action certification. The underlying lawsuits for breach of contract and fraud concerned National's alleged failure to refund premiums for its child-rider coverage, applicable to premiums mistakenly paid after the coverage had ceased at the child's twenty-fifth birthday. National argued that the controlling law was that of the state of each class member, both under the Restatement rules and the United States Supreme Court's opinion in *Phillips Petroleum Co. v. Shutts*.³⁴⁷ The court of appeals rejected this, finding that (1) Texas law applied under the Restatement's principles, and (2) that the parties had misread the facts in *Shutts*. In its analysis, the court pointed out the distinction between the forum state's choice of law rules and the constitutional limits on those rules.

The court first decided that Texas law applied under sections 6,³⁴⁸ 145 (the general tort principle)³⁴⁹ and 188 (the general contract principle) of

342. *Id.* at 1078.

343. *Id.* at 1073, n.4. Implicit in the court's conclusion on this point is that the Erie doctrine requires (1) that federal courts apply state law where federal law is silent, (2) that the state law in question is that of the state in which the federal court sits, and (3) that the starting point with the forum state's law is its choice of law rule. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Denman v. Snapper Div.*, 131 F.3d 546, 548-49 (5th Cir. 1998); see also CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 387-392 (6th ed. 2002).

344. See *supra* notes 325-28 and accompanying text for a discussion of *Schneider*.

345. *Schneider*, 280 F.3d at 1073, n.4.

346. *Nat'l W. Life Ins. Co. v. Rowe*, 86 S.W.3d 285 (Tex. App.—Austin 2002, no pet.)

347. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

348. See *supra* note 308 for the factors in the most significant relationship test.

349. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971) is the General Tort Principle, listing four contacts to be considered along with the factors in section 6. They include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.

the Restatement (Second) of Conflict of Law.³⁵⁰ National was domiciled in Colorado but had no offices or employees there, and instead had its principal place of business in Austin, Texas, where it maintains all contact with policyholders, transmits correspondence containing the billing notices, and receives premiums.³⁵¹ All child riders at issue were designed in Texas, and all conduct allegedly causing injury occurred as a result of National's activities in Texas. While only twenty-seven percent of the riders were sold in Texas, all class members maintained contact with Texas. The court of appeals thus affirmed the trial court's application of Texas law.³⁵²

Defendant National argued that section 192 of the Restatement (Second) compelled application of the law of the residence of each class member.³⁵³ Section 192 relates to insurance contracts, and provides that in the absence of a valid choice of law agreement, the validity of life insurance contracts is governed by the law of the state of the insured's domicile, unless some other state has a more significant relationship to the transaction and the parties. The court noted that National had apparently read only the first clause of section 192 and failed to read the second, which gave priority to the state with the more significant relationship, which the court had already determined was Texas.³⁵⁴ The court then reiterated its conclusion that Texas had the most significant relationship, noting the additional factor in section 6 calling for choices of law promoting certainty, predictability, and uniformity. That encouraged the application of one law over many in class actions involving one defendant and a class covering forty-one states.³⁵⁵

National's third challenge to the choice of Texas law was constitutional. Specifically, National argued that the United States Supreme Court's opinion in *Phillips Petroleum Co. v. Shutts*³⁵⁶ required the respective laws of the states of each class member be applied unless Texas has sufficient contacts with each class member. The court rejected this as well, finding that *Shutts* rejected Kansas law because it had no connection to most of the plaintiff class's claims, while Texas had some connection to each plaintiff class member.³⁵⁷

*Vega v. State*³⁵⁸ is an example of criminal law—ordinarily strictly forum law—encountering a conflict with another state's evidentiary privilege rule. In *Vega*, the Texas Court of Criminal Appeals invoked the Restatement (Second) of Conflict of Laws in its analysis of the admissibil-

350. See *supra* note 316 (quoting factors from RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971)).

351. *Nat'l W. Life Ins. Co.*, 86 S.W.3d at 301.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

357. *Id.* at 301-02. For a further discussion of the constitutional limits on choice of law, see *infra* notes 382-95 and accompanying text.

358. *Vega v. State*, 84 S.W.3d 613 (Tex. Crim. App. 2002).

ity in a Texas murder trial of defendant's confession obtained by Chicago police while in custody there. In December 1994, Marie Garcia Vega and her boyfriend fled to Chicago after their implication in a capital murder committed in Starr County, Texas. Upon their apprehension, Chicago police obtained a statement from Vega later used in her Texas murder trial. In appealing her conviction, Vega challenged the Chicago confession's admissibility.³⁵⁹

The Corpus Christi Court of Appeals affirmed,³⁶⁰ leaving the Court of Criminal Appeals to ponder the admissibility of a juvenile confession legally obtained in Illinois law, but privileged and inadmissible under Texas law, where the offense and the trial occurred. A specious precedent existed in the Court of Criminal Appeals's recent decision in *Davidson v. State*.³⁶¹ There, the Court of Criminal Appeals held that admissibility of out-of-state confessions is a procedural question and thus governed by forum law; this resulted in the non-admissibility of a Montana confession for which no recording was made, as required by Texas law.³⁶² But *Davidson* involved an adult defendant's confession, governed by Texas Code of Criminal Procedure article 38.22 section 3(a). Texas law governing juveniles' confessions is not only a different statute, it is codified at Texas Family Code section 51.01.³⁶³ Unlike article 38.22, the Family Code requires a magistrate's presence at the confession. Thus, *Davidson's* holding, that article 38.22 governed out-of-state confessions, had no direct application to Vega's confession in Chicago.

To resolve this, the court's majority applied Texas conflict of laws principles under Restatement (Second) of Conflict of Laws sections 6 and 145, with references to sections 138 and 139. But this led only to a partial conclusion that Texas law probably applied. Vega was a Texas resident charged with an offense in Texas, and her contact with Illinois was limited to the one session of questioning in which this highly material statement resulted.³⁶⁴ Although her statement was made in Illinois, that state had no interest in the prosecution.³⁶⁵ But while these factors point to Texas law, the question of fairness remained. One such issue was the lack of deterrent effect that would result from excluding this evidence. Because the Illinois interrogation had complied with Illinois law, excluding Vega's confession here would have no effect either on Texas police or Illinois police.³⁶⁶ As a result, the court remanded the case to the court of

359. *Id.* at 615.

360. *Vega v. State*, 32 S.W.3d 897 (Tex. App.—Corpus Christi 2000), *rev'd and remanded*, 84 S.W.3d 613 (Tex. Crim. App. 2002).

361. *Davidson v. State*, 25 S.W.3d 183 (Tex. Crim. App. 2000).

362. *Id.* at 185-86 (citing TEX. CODE OF CRIM. PROC. art. 38.22 § 3(a)); *see Vega*, 84 S.W.3d at 615.

363. TEX. FAM. CODE ANN. § 51.01 (Vernon 2002).

364. *Vega*, 84 S.W.3d at 617.

365. *Id.* The majority also engaged in *renvoi* by pointing out that the Illinois choice of law rule would also apply Texas law to this question. *Id.* (citing *People v. Saiken*, 275 N.E.2d 381, 385 (Ind. Ct. App. 1971)).

366. *Id.* at 619.

appeals for an analysis of these issues in light of Texas law.³⁶⁷

Judge Keller's strenuous dissent (joined by Judges Keasler and Hervey) argued that the majority erred in creating a confusing double standard for admissibility of out-of-state confessions. Specifically, the dissent argued that this would result in adult defendant's confessions being routinely subjected to Texas law while juveniles' confessions would require a complicated choice of law analysis in each case. Judge Keller pointed out that *Davidson* incorrectly reached its conclusion—that the issue of evidentiary privilege is simply a procedural issue—by applying Restatement (Second) section 138 (governing evidence).³⁶⁸ Keller proposed that *Davidson* be overruled and that the court of appeals reconsider out-of-state evidentiary privilege under Restatement (Second) section 139, governing privilege.³⁶⁹ This would produce a single choice of law analysis for the issue of admissibility of foreign-obtained confessions in *Miranda* settings.³⁷⁰

*Chickasha Cotton Oil Co. v. Houston General Insurance Co.*³⁷¹ is an unpublished decision involving choice of law for an insurance claim arising from related lawsuits for air, ground and water pollution. Chickasha is an Arizona-based company that operated The Electric Gin in Commerce, Texas. Chickasha allegedly used arsenic as a cotton defoliant prior to harvesting, with the cotton burr being burned and allegedly releasing arsenic into the atmosphere. Chickasha's neighbor was the Hi-Yield Chemical Company, a manufacturer and distributor of pesticides and other products containing arsenic. When hundreds of local residents sued Chickasha and Hi-Yield in 1995 for release of arsenic into the air, ground and water, Chickasha sought defense and indemnity from its insurance carriers, Houston General, GEICO, and others. The underlying lawsuits were brought in state district courts in five Texas counties.³⁷²

367. *Id.*

368. *Id.* at 625-26.

369. *Id.* at 625-32. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 is entitled Privileged Communication and provides that (1) evidence not privileged under the local law of the state with the most significant relationship with the communication will be admitted, even though it would be privileged under forum law, unless the admission of such evidence would be contrary to the forum's strong public policy; and (2) evidence privileged under the local law of the state with the most significant relationship with the communication but which is not privileged under forum law will be admitted unless there is some special reason why forum law should not be followed. Under section 139, the court would have reached the same result—admitting the evidence—but under a somewhat different and more appropriate analysis.

370. Texas had already recognized this in *Gonzalez v. State*, 45 S.W.3d 101, 104 (Tex. Crim. App. 2001) (applicable to confessions from children ages ten to sixteen (and seventeen if found in need of supervision)), under TEX. FAM. CODE ANN. §§ 51.01, 51.095 (Vernon 2002). Referring to this, Judge Keller wrote that, "Unlike other rules of evidence, privileges are not designed primarily to exclude unreliable evidence. In fact, privileges expressly subordinate the goal of truth-seeking to other societal interests." *Vega*, 84 S.W.3d at 626 (Keller, J., dissenting), (quoting *Gonzalez*, 45 S.W.3d at 106).

371. *Chickasha Cotton Oil Co. v. Houston Gen. Ins. Co.*, No. 05-00-01789-CV (Tex. App.—Dallas 2002, no pet.) (not designated for publication), 2002 WL 1792467.

372. The pollution actions against Chickasha were brought in Dallas, Harris, Jefferson, Fannin and Hunt counties. *Id.* at *1.

The insurers denied coverage, apparently because of disputed policy dates for the alleged pollution, which had occurred over a period dating from 1952.³⁷³

Chickasha then sued the insurers for a declaratory judgment that the insurance policies covered the claims in the related lawsuits. Its claims included some under Arizona law for bad faith, breach of the implied covenant of good faith and fair dealing, and a violation of the Arizona Consumer Fraud Act.³⁷⁴ The opinion does not indicate the difference between Texas and Arizona law on these claims. Instead, the court noted the insurers' objection to the application of Arizona law, then proceeded directly to a choice of law analysis under the Restatement (Second)'s most significant relationship test.

The Arizona claims were tort-based and therefore governed by the principles described in section 6 (the seven-factor balancing test for most significant relationship) and section 145 (general tort principles).³⁷⁵ Specifically, the contacts under section 145 include (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered.³⁷⁶

Applying these factors, the court found that any injury to Chickasha occurred in Arizona and the insurers' alleged wrongful conduct occurred in Texas. Chickasha is a Delaware corporation located in Arizona, while Houston General and the related Houston General Lloyds are both incorporated and located in Texas. GEICO is an Iowa corporation with its principal place of business in the District of Columbia, and Liberty Mutual is incorporated and located in Massachusetts. The relationship was centered, the court found, in Texas. Based on this analysis, the Dallas Court of Appeals upheld the trial court's application of Texas law and rejection of the Arizona claims.³⁷⁷

Chickasha argued that a federal decision compelled the application of Arizona law. That case—*SnyderGeneral*³⁷⁸—involved a similar action to compel the application of insurance policies to defend and indemnify the insured. The insurer and the original insured were based in Minnesota, where the underlying incidents occurred. But a Texas company, SnyderGeneral, had purchased the Minnesota insured, resulting in a finding that "Texas has a significant interest in matters related to violations of its insurance laws."³⁷⁹ Chickasha argued that *SnyderGeneral's* holding was essentially that "Texas choice-of-law rules apply 'the laws of the state

373. *Id.*

374. The opinion does not cite which Arizona statute was pleaded.

375. *Id.* at *9-10.

376. *Id.* (quoting the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 135(2) (1971)).

377. *Id.* at *11.

378. *SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674 (N.D. Tex. 1996), *aff'd* 133 F.3d 373 (5th Cir. 1998).

379. *SnyderGeneral*, 928 F. Supp. at 678.

where the policyholder was affected by the alleged bad-faith acts.’”³⁸⁰ The *Chickasha* court appropriately rejected this argument, noting that in *SnyderGeneral* the policyholder’s location was not per se determinative and that Texas choice of law rules (under the Restatement) clearly apply a multi-factor test.³⁸¹ The court of appeals did not point out that *SnyderGeneral*—a federal decision—would not be declarative of Texas law in any event.

D. OTHER CHOICE OF LAW ISSUES

1. Constitutional Limits on State Choice of Law Rules

Like the due process limitation on state long-arm statutes,³⁸² the United States 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), the 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.³⁸³ Constitutional problems most often occur when a state court chooses its own law in questionable circumstances. But the inappropriate choice of forum law is not the only conceivable constitutional issue, and even when choosing foreign law, courts must apply choice of law rules with an eye toward constitutional limitations.

In *National Western Life Insurance Co. v. Rowe*, defendant National argued that the Texas forum could not apply its law to a class action covering plaintiffs in forty-one states regarding the reimbursement of child-rider premiums for adult children having passed the age limit.³⁸⁴ As discussed above, the Austin Court of Appeals found that Texas law did apply under the most significant relationship test, and that Texas had a sufficient connection to the class members and their claims in order to have its law apply to the entire class.³⁸⁵ National argued that the United States Supreme Court’s opinion in *Phillips Petroleum Co. v. Shutts*³⁸⁶ required the respective laws of the states of each class member be applied

380. *Chickasha*, 2002 WL 1792467, at *10.

381. *Id.*

382. *See supra* notes 31-37.

383. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 and comments (1971). *See also* SCOLES & HAY, *supra* note 20, at 78-109; 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).

384. *Nat’l W. Life Ins.*, 86 S.W.3d at 300-02.

385. *Id.*

386. *Shutts*, 472 U.S. at 797. National also argued the “significant aggregation of contacts” requirement from *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981). The court disposed of this argument with a simple reference to National’s Texas contacts already mentioned in the opinion. 86 S.W.3d at 301-02.

unless Texas has sufficient contacts with each class member.³⁸⁷ In finding *Shutts* inapposite, the court compared the respective contacts. Shutts involved claims by gas-lease royalty owners for interest Phillips had not paid them while money was escrowed pending federal approval of interstate rate increases. Three plaintiffs sued Phillips in a Kansas state court, purporting to represent class members from all fifty states and several foreign countries. One named plaintiff was from Kansas, and the other two were from Oklahoma. More than ninety-nine percent of the leases were outside of Kansas, with eleven percent being in Texas and Oklahoma. Defendant Phillips Petroleum was also from Oklahoma. Only 1,000 of the 28,000 plaintiff class members were from Kansas.³⁸⁸ On these facts, and the plaintiffs' choice of a Kansas forum, the Kansas supreme court applied a favorable Kansas law to all claims. The United States Supreme Court reversed, establishing guidelines for the application of one state's law to nationwide and international class actions.³⁸⁹ In *National Western*, on the other hand, all plaintiff class members had a connection through defendant's Austin office.³⁹⁰

A second Survey case considered two related constitutional cases, and again the issue was extraterritorial application of Texas law to insurance contracts. In *Mayo v. Hartford Life Insurance Co.*,³⁹¹ the Supreme Court first applied *Griffin v. McCoach* for the point that "Texas courts have the constitutional authority to 'refuse enforcement of an insurance contract where the beneficiaries have no insurable interest on the ground of its interference with local [Texas] law.'"³⁹² *Mayo* then rejected defendants' argument that *Home Insurance Co. v. Dick*³⁹³ barred the application of Texas law to this multi-state class action.³⁹⁴ The court found to the contrary, that comparing Home Insurance's lack of Texas contacts with the significant Texas contacts in *Mayo* compelled a conclusion favoring plaintiffs, not defendants.³⁹⁵

2. False Conflicts

A false conflict exists when other potentially applicable laws are the same as the forum's, or at least reach the same result.³⁹⁶ Defining a clear,

387. *Nat'l W. Life Ins.*, 86 S.W.3d at 301-02.

388. *Id.* at 302. See *Phillips*, 472 U.S. at 799-800.

389. *Nat'l W. Life Ins.*, 86 S.W.3d at 302; see *Phillips*, 472 U.S. at 823.

390. *Nat'l W. Life Ins.*, 86 S.W.3d at 302.

391. *Mayo v. Hartford Life Ins. Co.*, 220 F. Supp. 2d 714, 731, 739-40.

392. *Id.* at 731 (quoting *Griffin v. McCoach*, 313 U.S. 498, 506 (1941)).

393. *Home Ins. v. Dick*, 281 U.S. 397 (1930).

394. *Id.* at 739-40.

395. *Id.* at 740 & n.65.

396. This is the Restatement's definition of false conflict. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, cmt. i; *id.* at § 186, cmt. c. A very different concept of false conflicts came from Professor Brainerd Currie's government interest analysis, which defines a false conflict as one in which only one state has a real interest. See SCOLES & HAY, *supra* note 20 at 16-19. Unfortunately, Texas courts have used both definitions. Cases applying the Restatement definition (no difference in outcome) include: *Texas Employers Ins. Ass'n v. Borum*, 834 S.W.2d 395 (Tex. App.—San Antonio 1992, no writ); *Smith v.*

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.³⁹⁷ The Survey period produced four noteworthy false conflict cases, the most significant (in terms of litigation) being *Compaq Computer Corp. v. LaPray*.³⁹⁸ This was a consumer class action regarding computer software, raising claims of breach of contract and express warranty. Defendant Compaq appealed the trial court's class certification, arguing that the plaintiff class's spanning members in several states would require the application of several states' laws, thus rendering jury instructions in a single trial unmanageable. But Compaq failed to demonstrate any conflict between Texas law and that of the other states,³⁹⁹ and the Beaumont Court of Appeals upheld class certification.⁴⁰⁰

*Holley v. Grigg*⁴⁰¹ involved a conflict between Texas and Missouri law in a contest over the nontestamentary transfer of a decedent's investment account. Decedent C.C. Grigg's heirs included four surviving sons, as well as a granddaughter who was the only child of Grigg's predeceased fifth son. Grigg's will left his residuary property to his four surviving sons and his granddaughter. But one of his investments, an Edward Jones account, appeared to exclude the granddaughter because of Grigg's failure to elect an option allowing a predeceased beneficiary's share to pass to

Foodmaker, Inc., 928 S.W.2d 683 (Tex. App.—Fort Worth 1996, no writ); BDO Seidman v. Miller, 949 S.W.2d 858 (Tex. App.—Austin 1997, writ dism'd); Turford v. Underwood, 952 S.W.2d 641 (Tex. App.—Beaumont 1997, no pet.). Cases using Currie's definition include: the Texas Supreme Court's *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 422 (Tex. 1984) (not a precedent-setting use); *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 260-61 (Tex. App.—San Antonio 1999, pet. denied); and *DeAguilar v. Boeing Co.*, 47 F.3d 1404, 1414 (5th Cir. 1995, cert. denied). The United States Supreme Court's only application employed the Restatement usage; see *Phillips Petroleum*, 472 U.S. at 823-45 (Stevens, J., concurring in part and dissenting in part). Currie's definition does not fit well with states like Texas that also use the Restatement (Second)'s most significant relationship test. Currie's false conflict analysis is conclusive—if one of two states is found to lack any interest in the dispute, the court should apply the law of the only state having an interest. On the other hand, under the most significant relationship test, the relative degree of states' interests is merely one of seven factors to be balanced in the choice of law analysis. See *supra* note 308 for the seven factors. Currie's use of the term "false conflict" may have been nothing more than the label he applied after the interest balancing was completed, often reaching the same result as the Restatement would (that is, Currie and the Restatement are themselves a false conflict, but only under the Restatement's definition). Nonetheless, Currie's approach is confusing, over-emphasizes state interest, and even if it works in California and New Jersey, should not be used with the most significant relationship test.

397. *Phillips Petroleum*, 472 U.S. at 823-45 (Stevens, J., concurring in part and dissenting in part).

398. *Compaq Computer Corp., v. LaPray*, 79 S.W.3d 779 (Tex. App.—Beaumont 2002, pet. filed).

399. *Id.* at 791-92. Compaq's only reference to conflicting laws was a citation to several federal cases applying federal law. The court rejected this, stating that "Compaq fails to explain how a conflict, if any, between Texas law and federal law necessitates this court finding a conflict between Texas law and the laws of other states." *Id.* at 792.

400. *Id.* at 794.

401. *Holley v. Grigg*, 65 S.W.3d 289 (Tex. App.—Eastland 2001, no pet.). This case is also discussed in the Contractual Choice of Law section, *supra* notes 307-08 and accompanying text.

that beneficiary's children. The four sons sued, seeking a declaratory judgment that the Jones account did not pass to Grigg's granddaughter. The trial court granted summary judgment for the sons, and the granddaughter appealed.

The Edward Jones contract designated Missouri law, both for validity and effect. Pertinent were the laws governing nontestamentary transfers, and the Eastland Court of Appeals finding that Texas law was "essentially the same" as Missouri law.⁴⁰² The court thereafter applied Texas statutes and cases to affirm the trial court's summary judgment. In reaching that decision, however, the court noted a second false conflict between Missouri and Texas laws. The granddaughter argued that the Jones agreement violated the Texas nontestamentary transfer statute by transferring the property to the four sons, contrary to the Texas statute's reference to payment after death "to a *person* designated by the decedent . . ."⁴⁰³ The court of appeals noted that both Texas and Missouri law provide that statutory references to the singular include the plural and the plural includes the singular unless expressly provided otherwise.⁴⁰⁴

In *Schneider National Transport v. Ford Motor Company*,⁴⁰⁵ the Fifth Circuit reversed a federal district court's finding that Pennsylvania law governed the interpretation of insurance contracts at issue. The circuit court found instead that Pennsylvania and Texas law were the same, both endorsing the plain meaning rule that produced the trial court's opinion.⁴⁰⁶

*United States ex rel. Wilkins v. North American Construction Corp.*⁴⁰⁷ briefly discussed a false conflict in a federal qui tam action relating to the construction of a groundwater treatment facility at Tinker Air Force Base in Oklahoma City. The lawsuit was brought under the False Claims Act⁴⁰⁸ and included a separate common law fraud claim. One defendant raised, but did not argue, a question of which law governed the non-federal fraud claim—Texas (both as the forum and a state with party contacts), Oklahoma (as the performance site), or federal common law (based on the primary federal claim). The court first dispensed with federal common law, noting that no party had established the threshold necessary to compel its application.⁴⁰⁹ The court ended the discussion with a

402. *Id.* at 294-95.

403. *Id.* at 292, 294 (discussing TEX. PROB. CODE ANN. § 450 (Vernon 2003) (emphasis added)).

404. *Id.* at 294 (citing TEX. GOV'T CODE ANN. § 312.003(b) (Vernon 1998) and MO. REV. STAT. § 1.030 (2000)).

405. *Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532 (5th Cir. 2002); see *supra* notes 325-33 for additional discussion of this case.

406. *Id.* at 536.

407. *United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601 (S.D. Tex. 2001).

408. 31 U.S.C. §§ 3729-3730 (2002).

409. The court noted that "[a] federal court may fashion federal common-law rules only upon a specific showing that the use of state law will create a significant conflict with, or threat to, some federal policy or interest." *Id.* at 630-31, (citing *Atherton v. FDIC*, 519 U.S. 213, 214 (1997), in turn citing *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994)).

showing that Texas and Oklahoma law did not materially differ as to the elements of fraud.⁴¹⁰ The court thereafter applied Texas law to the common law fraud issues.⁴¹¹

In re J.D. Edwards World Solutions Co. also uses a false conflicts analysis after finding that Texas law did not govern, and that the remaining possibilities of Colorado, the Federal Arbitration Act, and the Uniform Arbitration Act produced the same result.⁴¹²

3. *Limitations*

When should the forum apply its limitations and repose periods to claims arising under foreign law? Courts, legislatures, and scholars have wrestled with this in the past few years, producing the Uniform Conflict of Laws—Limitations Act⁴¹³ and a 1986 revision to the Restatement (Second) of Conflict of Laws section 142.⁴¹⁴ The Texas legislature amended its wrongful death statute in 1997 to add a *borrowing statute* calling for the application of the situs state's and the Texas limitations period.⁴¹⁵

In Gilcrease v. Tesoro Petroleum Corp.,⁴¹⁶ the San Antonio Court of Appeals faced a question of first impression regarding Texas's new borrowing statute—whether it applies to foreign statutes of repose. When Fred Gilcrease discovered he had mesothelioma in 1999, he and his wife sued thirty-six oil refineries where he had worked over the years. Defendant Tesoro Petroleum Corporation owned a refinery in Kenai, Alaska, where Fred had worked in 1974 and 1980. The Gilcreases filed the action in Texas even though Fred had never worked at a Texas refinery and the Gilcreases lived in Oregon at the time of filing. Texas law permits non-resident plaintiffs to sue in Texas for wrongs occurring outside of Texas if suit is filed within the time allowed by Texas and by the laws of the state or country where the act occurred.⁴¹⁷ Tesoro pleaded Alaska's ten year

410. *Id.* at 631.

411. *Id.* at 645-48.

412. *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 550 (Tex. 2002).

413. The Uniform Act provides that (1) a claim substantively based on the law of one state is governed by that state's limitations period, (2) a claim substantively based on the law of more than one state is governed by the limitations period of the state designated by the forum state's choice of law rule, and (3) all other claims are subject to the forum state's choice of law rule. See UNIF. CONFLICT OF LAWS—LIMITATIONS ACT § 2, 12 U.L.A. 158 (1996). The Act also has an unfairness clause that allows the forum state to ignore the governing limitations period of another state if a party had no fair opportunity to sue on the claim. *Id.* at § 4.

414. The 1986 revision provides that "[a]n action will be maintained if it is not barred by the statute of limitations of the forum unless the action would be barred in some other state, which, with respect to the issue of limitations, has a more significant relationship to the parties and the occurrence." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1986 Revision).

415. See Acts 1997, 75th Leg., ch. 424, § 3, eff. May 29, 1997. For a discussion of borrowing statutes, see WEINTRAUB, *supra* note 1 at 65-66, 70-77.

416. *Gilcrease v. Tesoro Petroleum Corp.*, 70 S.W.3d 265 (Tex. App.—San Antonio 2001, pet. denied).

417. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon Supp. 2002).

statute of repose and was awarded summary judgment. Plaintiffs appealed.

The court of appeals first examined Texas law regarding foreign personal injury and wrongful death claims. Drawing from the Texas Supreme Court's 2000 analysis, the court recited that the original statute in 1913 merely permitted Texas citizens the remedy of suing in Texas for wrongful conduct occurring elsewhere.⁴¹⁸ In 1985, the Texas legislature consolidated the 1913 statute with related remedies and codified it as section 71.031 of the Texas Civil Practice and Remedies Code, without imposing foreign time limits.⁴¹⁹ The result was a perceived abuse of Texas courts by foreign plaintiffs bringing actions with no connection to Texas other than defendant's amenability to Texas jurisdiction. As the *Gilcrease* opinion explains, a California resident could sue in Texas based on wrongful conduct in California as long as the Texas limitation period had not run.⁴²⁰ This led to a 1997 amendment that added the borrowing language currently found in section 71.031, which now requires foreign personal injury and wrongful death plaintiffs to satisfy the time limits of both Texas and the situs of the wrong.⁴²¹

The court of appeals then turned to section 71.031's legislative history, concluding that the 1997 amendment's purpose was to prevent forum shopping, and that this intent necessarily included the application of foreign statutes of repose.⁴²² Having ventured into new territory, the court had yet further to go, now with Alaska law—if the Alaska statute of repose applied, did it bar plaintiffs' claims dating from 1974 and 1980? The court examined several aspects of Alaska's statute and its exceptions and found that it barred plaintiffs' claim.⁴²³ Readers should note that the San Antonio Court of Appeals was in no position to apply Restatement (Second) of Conflict of Laws section 142 (applying to statutes of limitation, and not yet adopted by the Texas Supreme Court) because of a more specific borrowing statute that applied here, that is, section 71.031. In another Survey period case, the Texas Supreme Court refused to consider adopting section 142 because the requesting party had failed to brief it.⁴²⁴

4. Choice of Law in Complex Cases

*In re Norplant Contraceptive Products Liability Litigation*⁴²⁵ is a multi-

418. See Act of April 8, 1913, ch. 161, § 1, 1913 Tex. Gen. Laws 338, 338; Act of March 30, 1917, ch. 156, § 1, 1917 Tex. Gen. Laws 365, 365, discussed at *Gilcrease*, 70 S.W.3d at 268-69 (citing *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76-78 (Tex. 2000)).

419. Act 1985, ch. 959, § 1 eff. Sept. 1, 1985 Tex. Gen. Laws 3242, 3297.

420. *Gilcrease*, 20 S.W.3d at 268.

421. *Id.* at 269.

422. *Id.*

423. *Id.* at 269-72. The court considered the claim's accrual date, the Alaska statute's hazardous waste exception, and a foreign bodies tolling provision, and found that none applied.

424. *Monsanto Co. v. Boustany*, 73 S.W.3d 225, 229 (Tex. 2002), discussed *supra* notes 281-89 and accompanying text.

425. *In re Norplant Contraceptive Prod. Liab. Litig.*, 215 F. Supp. 2d 795 (E.D. Tex. 2002).

district litigation (MDL) case in which the court decided to apply the choice of law rules of the various state from which the cases were transferred. MDL cases are created under 28 U.S.C. § 1407, which authorizes the transfer and consolidation of related cases for the limited purpose of resolving pretrial matters.⁴²⁶ This MDL case began in 1994 when thousands of lawsuits were filed against various manufacturers of Norplant, an implanted prescription contraceptive. In December, 1994, the Judicial Panel on Multidistrict Litigation ordered the transfer of all federal Norplant cases to the Eastern District of Texas for pretrial matters.⁴²⁷ The Wyeth defendants⁴²⁸ filed a motion for partial summary judgment regarding causation and the duty to warn. Specifically, defendants raised the learned intermediary doctrine—an exception to the manufacturers' duty to warn—as an affirmative defense.⁴²⁹ The doctrine, of course, varies from state to state, and the summary judgment's resolution depended on which states' laws governed.

Choice of law is an issue in any case touching more than one state, but special problems arise in MDL cases. First, the transferee court must apply the transferor court's respective laws. In federal question cases this means applying the law from each federal circuit, but in a diversity case, it means applying some state's law. This raises the second problem: a federal court applying state law must use the choice of law rule of the state in which that federal court sits. This is true for all diversity cases, but in transfers under 28 U.S.C. § 1404 as well as MDL cases, the transferee federal court must apply the choice of law rule of the state from which the case was transferred. This was in turn complicated by the learned intermediary doctrine's piecemeal application—both the duty to warn and its exceptions varied with different side effects suffered by the victims, and then varied again according to which state's law governed.

Fortunately, the cases involving the Wyeth defendants implicated only the states of New York, New Jersey, and Illinois. Even that analysis is too lengthy to review, but briefly, the court ruled that (1) the New Jersey choice of law rule dictated the application of New Jersey law to claims filed in New Jersey by plaintiffs receiving the implants elsewhere;⁴³⁰ and (2) under New York and Illinois choice of law rules, New Jersey law governed the failure-to-warn issue for claims filed in New York or Illinois by plaintiffs receiving the implants in New Jersey.⁴³¹ The court then applied

426. 28 U.S.C. § 1407 (1993).

427. *Norplant*, 215 F. Supp. 2d at 800.

428. *Id.* at 795. The Wyeth defendants included American Home Products Corporation, Wyeth-Ayerst Laboratories, Inc., and Wyeth Laboratories, Inc.

429. *Id.* at 803 (citing *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1276 (5th Cir. 1974); *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966)). "Under the doctrine, a drug manufacturer is excused from warning each patient who receives the product when the manufacturer properly warns the prescribing physician of the product's dangers." *Norplant*, 215 F. Supp. 2d at 803 (quoting *Porterfield v. Ethicon, Inc.*, 183 F.3d 464, 467-68 (5th Cir. 1999), in turn citing *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 591-92 (Tex. 1986)).

430. *Norplant*, 215 F. Supp. 2d at 812-18.

431. *Id.* at 818-21.

these conclusions to reach a partial summary judgment that is also too complex for this brief summary. The opinion appears well reasoned, especially in light of the difficulty of applying New York's government interest analysis and New Jersey's bifurcated rules including both the Restatement (Second) of Conflict of Laws and a government interest analysis. The court simplified this by characterizing the government interest approach as focused on contacts that implicate the state's laws, which leads back to a Restatement-like analysis.⁴³²

National Western Life Insurance Co. v. Rowe, discussed in two sections above, also illustrates choice of law in complex cases.⁴³³ Unlike the multi-state choice of law analysis in *Norplant*, the Austin Court of Appeals held in *National Western* that the law of one state, Texas, governed a class action involving plaintiffs in forty-one states claiming insurance reimbursement for child-rider premiums.

5. Proof of Foreign Law

Litigants seeking the application of another state's or nation's law must comply with the forum's rules for pleading and proving foreign law. In both Texas and federal courts, judicial notice is sufficient for the application of sister-states' laws.⁴³⁴ Foreign country law, on the other hand, must be adequately pleaded and proven.⁴³⁵

*Long Distance International, Inc. v. Telefonos de Mexico, S.A. de C.V.*⁴³⁶ was a business dispute regarding 1-800 service between Mexico and the United States. In 1976, the Mexican government gave a thirty-year exclusive concession to Telefonos de Mexico ("Telmex") to provide telephone service in Mexico, but in 1990 amended the concession to allow

432. *Id.* at 813 (New Jersey) & 818-19 (New York).

433. *Nat'l W. Life Ins. Co. v. Rowe*, 86 S.W.3d 285 (Tex. App.—Austin 2002, no pet.). See *supra* notes 346, 351-55 and accompanying text, and *supra* notes 384-90 and accompanying text.

434. Texas Rule of Evidence 202 allows a Texas court to take judicial notice of sister states' laws on its own motion and requires it to do so upon a party's motion. Parties must supply "sufficient information" for the court to comply. *Id.* Federal practice is the same under federal common law; neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure address judicial notice of American states' laws. See *Lamar v. Micou*, 114 U.S. 218, 223 (1885); *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir. 1987). Even though Federal Rule of Evidence 201 (the sole federal evidence rule dealing with judicial notice) does not apply to states' laws, we should assume that *Lamar's* judicial notice mandate for American states' laws is subject to Rule 201(b)'s provision for proof of matters "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." That is, federal courts may take judicial notice of American states' laws from (1) official statutory and case reports, (2) widely-used unofficial versions, or (3) copies—all subject to evidentiary rules on authentication and best evidence.

435. TEX. R. EVID. 203 requires written notice of foreign law by pleading or other reasonable notice at least thirty days before trial, including all written materials or sources offered as proof. For non-English originals, parties must provide copies of both the original and the English translation. Sources include affidavits, testimony, briefs, treatises, and any other material source, whether or not submitted by a party, and whether or not otherwise admissible under the Texas Rules of Evidence. Federal practice is similar. See FED. R. CIV. P. 44.1.

436. *Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A. de C.V.*, 49 S.W.3d 347 (Tex. 2001).

for eventual transition to a competitive telecommunications market, as reflected in this case. Southwestern Bell Corporation owns ten percent of Telmex, and its subsidiary SBC International ("SBI") assists Telmex's operations.

In 1992, Telmex entered agreements with several United States carriers, including MCI, to provide international 1-800 service. Although 1-800 calls are ordinarily free to the caller and billed to the receiver, international calls necessarily involve more than one carrier and split billing. The various telephone service providers reached fee-splitting agreements for three categories of 1-800 service. The first category was "end users," that is, United States customers (usually businesses) who give their 1-800 numbers to Mexican callers who can then call the end user to purchase goods or services. For these calls, MCI billed the end user for the entire call, then reimbursed Telmex for the Mexican portion.

The second category involved other United States telephone companies, including plaintiff Long Distance International ("LDI"), who had contracted through larger providers such as MCI to sell 1-800 access directly to Mexican customers. The Mexican customers would call the LDI-provided number, then be switched by MCI to another number in order to reach the end use in the United States. For these calls, LDI would bill the Mexican caller directly and pay a portion to MCI, which would in turn reimburse Telmex for the Mexican portion of the call. In this second category, Telmex could only set the rate for the portion in Mexico, and not for the entire call as it could in the first category.

The third category involved "call-back" services, where the Mexican customer would call an end user in the United States, which would record the caller's number without answering the call, and then implement a call back that gave the Mexican caller a dial tone to call anywhere in the United States. As with the second category, the United States provider would bill the Mexican customer directly, but because the original call from Mexico went unanswered, Telmex received nothing for the original call, and only a portion for the call back.

In 1993, a Mexican regulatory agency notified MCI that the call back scheme was illegal under Mexican law, and requested that MCI suspend that third category of service. In 1994, Telmex also notified MCI of the third category's illegality and asked for a list of MCI's customers so that Telmex could disconnect them. MCI refused to furnish the list, claiming illegality under United States law, and requesting copies of the pertinent Mexican laws. In July, 1994, Telmex began disconnecting certain Mexican residents' telephone numbers that it determined were being used in this third category, including some numbers linked to plaintiff LDI.

LDI sued Telmex and SBI in 1996, alleging breach of contract and related commercial torts. Telmex and SBI raised the affirmative defense of category three's illegality under Mexican law, and on that basis won a

summary judgment.⁴³⁷ The San Antonio Court of Appeals affirmed,⁴³⁸ but the Texas supreme court reversed, finding that LDI's contracts did not violate Mexican law. The case was remanded to determine if defendants should have summary judgment on any other asserted ground.

In spite of the reversal, the Texas Supreme Court endorsed several important points about the application of foreign country law. First, the proof of foreign law is akin to a hybrid rule resembling the presentation of evidence but decided as a question of law.⁴³⁹ Second, summary judgment is available, if there is no dispute that all pertinent foreign law was properly submitted, even where the parties or experts disagree on the foreign law's application to the facts.⁴⁴⁰ Third, the trial court's determination of foreign law is reviewed de novo.⁴⁴¹ On remand, the court of appeals issued an opinion on March 13, 2002, that was later withdrawn when the parties settled and requested dismissal.⁴⁴²

*Exxon Corp. v. Breezevale Ltd.*⁴⁴³ illustrates a more fundamental aspect of Rule 203—failure to comply bars the application of foreign law. This was a contract action regarding Exxon's hiring of London-based Breezevale to assist Exxon in obtaining oil exploration rights off the Nigerian coast. Breezevale provided a range of services—arranging appointments, conducting briefings, obtaining information and technical data on available deepwater blocks, and speaking with Nigerian government officials—for several months with no formal agreement, hoping to share in the profits rather than receive fixed compensation. Based on a series of negotiations, Breezevale later claimed an agreement giving it a two-and-a-half percent working interest in the Nigerian operation. Exxon disagreed and argued that no essential agreement was ever reached. In any event, there was no writing.⁴⁴⁴

Among other things, Exxon argued that the Texas statute of frauds precluded enforcement of this oral agreement involving an interest in land.⁴⁴⁵ Breezevale responded that the Texas statute of frauds could not be applied to an agreement involving real property in another country, and that the issue was instead governed by the law of the property's situs.⁴⁴⁶ Fatal to Breezevale's argument was its failure to give notice or

437. *Id.* at 350.

438. 18 S.W.3d 706 (Tex. App.—San Antonio 2000, pet. granted), *rev'd* 49 S.W.3d 347.

439. *Long Distance Int'l*, 49 S.W.3d at 351 (citing *Ahumada v. Dow Chem. Co.*, 992 S.W.2d 555, 558 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *Lawrenson v. Global Marine, Inc.*, 869 S.W.2d 519, 525 (Tex. App.—Texarkana 1993, writ denied)).

440. *Id.* (citing *Bridas Corp. v. Unocal Corp.* 16 S.W.3d 893, 896 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)).

441. *Id.* (citing TEX. R. EVID. 203); *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 312 (Tex. 1999)).

442. *Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A.*, No. 04-98-00873-CV, 2002 WL 1999754 (Tex. App.—San Antonio 2002, no pet.) (not designated for publication).

443. *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429 (Tex. App.—Dallas 2002, pet. filed)

444. *Id.* at 434-35.

445. *Id.* at 435-36.

446. *Id.* at 437.

proof of Nigerian law under Texas Rule 203, thus invoking the presumption that foreign law is the same as the forum's.⁴⁴⁷ The Dallas Court of Appeals accordingly applied the Texas statute of frauds.

III. 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. Foreign judgments include those from sister states and foreign country judgments, but do not include federal court judgments from districts outside Texas because those judgments are enforced as local federal court judgments.⁴⁴⁸

A. ENFORCEMENT

Texas recognizes two methods of enforcing foreign judgments: the common law method using the foreign judgment as the basis for a local lawsuit,⁴⁴⁹ and, since 1981, the more direct procedure under the two uniform judgments Acts. There were no instances of common law enforcement during the Survey period.⁴⁵⁰ The Uniform Enforcement of Foreign Judgments Act ("UEFJA") provide for summary enforcement of non-Texas judgments that are entitled to full faith and credit.⁴⁵¹ This includes sister-state judgments as well as foreign country money judgments that Texas recognizes under the Uniform Foreign Country Money-Judgment Recognition Act (UFCMJRA).⁴⁵²

447. *Id.* (citing *Telmex*, 49 S.W.3d 347, 350, discussed *supra* immediately prior to this case, and also citing *Pellow v. Cade*, 990 S.W.2d 307, 313 (Tex. App.—Texarkana 1999, no pet.) for the proposition that unproven foreign law is the same as Texas law); see also *Humphrey v. Bullock*, 666 S.W.2d 586, 589 (Tex. App.—Austin 1984, writ ref'd n.r.e.); *Creavin v. Moloney*, 773 S.W.2d 698, 702 (Tex. App.—Corpus Christi 1989, writ denied); *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1005-06 (5th Cir. 1990).

448. See 28 U.S.C. § 1963 (Supp. 2002).

449. The underlying mandate for the 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 (1994). 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 (Vernon 1997).

450. Examples of common law enforcement after the UEFJA's enactment include *McFadden v. Farmers & Merchants Bank*, 689 S.W.2d 330 (Tex. App.—Fort Worth 1985, no writ); *Cal Growers, Inc. v. Palmer Warehouse & Transfer Co.*, 687 S.W.2d 384 (Tex. App.—Houston [14th Dist.] 1985, no writ); *First Nat'l Bank v. Rector*, 710 S.W.2d 100 (Tex. App.—Austin 1986, writ ref'd n.r.e.); *Escalona v. Combs*, 712 S.W.2d 822 (Tex. App.—Houston [1st Dist.] 1986, no writ); *Keller v. Nevel*, 699 S.W.2d 211 (Tex. 1985).

451. TEX. CIV. PRAC. & REM. CODE ANN. § 35.001-.007 (Vernon 1997). Section 35.003 requires the judgment creditor to file a copy of the judgment authenticated under federal or Texas law. Sections 35.004 and 35.003 require notice to the judgment debtor from the clerk, or the judgment creditor. Section 35.006 provides that the judgment debtor may move to stay enforcement if grounds exist under the law of Texas or the rendering state. Section 35.003 provides that the debtor may challenge enforcement along traditional full faith and credit grounds such as the rendering state's lack of personal or subject matter jurisdiction.

452. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-.008 (Vernon 1997). Like the UEFJA, the UFCMJRA requires the judgment creditor to file a copy of the foreign country judgment that has been authenticated under federal or Texas law (§ 36.0041), with no-

1. *The Uniform Enforcement of Foreign Judgments Act*

The Survey period's one reported case provided a good review of UEFJA procedures and an interesting question concerning the gray area between jurisdiction and judgments on the merits. *Cash Register Sales and Services of Houston, Inc. v. Copelco Capital, Inc.*⁴⁵³ arose from a New Jersey default judgment against Cash Register Sales and Services of Houston, Inc. ("CRS"). The New Jersey dispute concerned CRS's lease of equipment from Minolta, which had then assigned the lease to Copelco Capital, Inc. Copelco sued CRS in a New Jersey state court for failure to make lease payments, obtaining a default judgment for \$3,557.28 and costs of \$131.15. Copelco then domesticated the New Jersey judgment in Texas by filing a notice of domestication of foreign judgment in state court in Harris County.⁴⁵⁴ CRS responded with a motion to vacate for lack of jurisdiction,⁴⁵⁵ supported by affidavits from CRS's president, Brian Smith, and its bookkeeper, Sue Domicolo. The trial court denied CRS's motion and CRS appealed.⁴⁵⁶

The Houston Court of Appeals began by explaining the full faith and credit basis for simplified enforcement of foreign judgments. The federal constitution requires that a state give the same force and effect to a judgment of a sister state as it would its own.⁴⁵⁷ The resulting procedure is that a judgment creditor files an authenticated copy of the foreign judgment, which is prima facie evidence of a valid, enforceable judgment. The burden then shifts to the judgment debtor to show the judgment is unenforceable, that is, not entitled to full faith and credit, along one of four grounds: (1) the foreign court lacked jurisdiction over the judgment debtor or, for in rem actions, the property; (2) the foreign court lacked subject matter jurisdiction (under its own law); (3) no jurisdiction to enter the particular judgment that was entered; and (4) no capacity to act as a

tice to the debtor provided either by the clerk, (§ 36.0042), or the creditor, (§ 36.0043). The judgment debtor has thirty days to challenge enforcement, or sixty if domiciled in a foreign country, with a twenty-day extension available for good cause. *Id.* § 36.0044. Unlike the UEFJA, the UFCMJRA explicitly states ten grounds for non-recognition—three mandatory and seven discretionary. 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). The discretionary grounds for non-recognition are that 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 (e.g., 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, (§ 36.007), and expressly reserves the right of enforcement of non-money judgments under traditional, non-statutory standards, (§ 36.008). See *Hilton v. Guyot*, 159 U.S. 113 (1895) (comity as discretionary grounds for recognizing and enforcing foreign country judgments).

453. *Cash Register Sales & Serv. of Houston, Inc. v. Copelco Capital, Inc.*, 62 S.W.3d 278 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

454. TEX. CIV. PRAC. & REM. CODE ANN. § 35.003(a) & (b) (Vernon 1997).

455. *Id.* § 35.003(c).

456. *Cash Register Sales*, 62 S.W.3d at 280.

457. U.S. CONST., art. IV, § 1.

court.⁴⁵⁸ The enforcement proceeding on a sister-state judgment may not be used to relitigate the merits of the original action,⁴⁵⁹ and the burden of proof for factual issues establishing these legal defenses is clear and convincing evidence.⁴⁶⁰

Judgment debtor CRS attempted to object to New Jersey's personal jurisdiction but nonetheless confronted the merits. CRS argued that it had never done anything in New Jersey that would subject it to the personal jurisdiction of New Jersey's courts, and in particular, that within the past five years it had never purchased any goods or services from New Jersey, transacted any business with anyone in New Jersey, agreed to be sued in New Jersey or appeared in a court there, and never entered into a contract with anyone there (including Plaintiff Copelco).⁴⁶¹ CRS conceded that bookkeeper Domicolo signed several documents upon receiving the equipment at issue, including a rental agreement, and that the rental agreement contained both choice of forum and choice of law clauses designating New Jersey. But CRS argued that Domicolo's signing of the agreement was invalid because she lacked authority to bind CRS, and that even if she had authority, her signing was fraudulently induced.⁴⁶²

The First District Court of Appeals found this to be an attack on fact issues that went to the merits of the case rather than merely to personal jurisdiction. It therefore declined to adjudicate whether Domicolo had authority to bind CRS, and affirmed the trial court's enforcement of the New Jersey judgment against CRS.⁴⁶³ Justice Nuchia dissented on the grounds that the only basis for finding CRS amenable to New Jersey jurisdiction was the choice of forum clause in the rental agreement, and that CRS's denial of Domicolo's authority to sign the agreement created a litigable objection.⁴⁶⁴ Both the Nuchia dissent and the majority opinion briefly refer to the lease agreement's original signing by CRS's Domicolo and agents for Minolta, which then assigned the lease to Copelco.⁴⁶⁵ These facts are not further explained, but CRS apparently contended that Minolta misrepresented certain features of the lease agreement, and that Domicolo relied on this when she signed the agreement and accepted the goods. Justice Nuchia's dissent notes that Copelco never controverted CRS's affidavit denying contacts with New Jersey, and concludes as a result that the only basis was the New Jersey choice of forum clause alleg-

458. *Cash Register Sales*, at 283 (citing *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 167 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.)). Note that foreign judgment enforcement under the common law was the same prior to Texas's adoption of the UEFJA, and here, the court mingles common law and UEFJA cases.

459. *Id.* (citing *Strick Lease, Inc. v. Cutler*, 759 S.W.2d 776, 777 (Tex. App.—El Paso 1988, no writ) and other cases).

460. *Id.* at 281 (citing *Escalona v. Combs*, 712 S.W.2d 822, 824 (Tex. App.—Houston [1st Dist.] 1986, no writ)).

461. *Id.*

462. *Id.* at 282.

463. *Id.* at 283.

464. *Id.* at 283-84.

465. *Id.* at 282-83 (majority), and 284 (Nuchia, J., dissenting).

edly fraudulently-induced agreement. This, according to Justice Nuchia, deserves adjudication.⁴⁶⁶

On the other hand, as the majority pointed out, it is undisputed that Domicolo signed the Minolta agreement, and that the agreement contained a New Jersey choice of forum clause.⁴⁶⁷ That leaves an interesting question of whether the resulting objections to (1) Domicolo's agency status for CRS, and (2) the allegations of fraudulent inducement, are objections to jurisdiction or to the merits of the case. To the extent that personal jurisdiction was based on nothing more than the contract's choice of forum clause, both arguments seem plausible, or better, have merit.

2. *The Uniform Foreign Country Money Judgment Recognition Act*

*Society of Lloyd's v. Turner*⁴⁶⁸ is the enforcement of several English judgments to collect reinsurance premiums from Lloyd's underwriters, known as Names.⁴⁶⁹ The dispute began when the Lloyd's insurance syndicate lost billions of dollars as a result of toxic tort cases. To offset these losses, Lloyd's engaged in a Reconstruction and Renewal plan that involved, among other things, the obtaining of reinsurance from an independent company, Equitas Reinsurance, Ltd., to be funded from reinsurance premiums paid by the Names.⁴⁷⁰ The plan had a "pay now, sue later" provision that ensured the quick funding of the R & R plan that would allow the Lloyd's market to continue. Most of the Names—95 percent—accepted the R & R reinsurance plan; five percent did not, including Duncan Webb and Percy Turner, both Texas residents. For the noncompliant Names, Lloyd's appointed a substitute agent who accepted on their behalf, and Lloyd's paid the premiums. In 1996, Lloyd's brought collection actions in England against the non-paying Names, including Webb and Turner. Turner defended and Webb defaulted.⁴⁷¹

After a lengthy series of cases in English courts, the Lloyd's R & R plan was upheld and final judgments were entered against Webb, Turner, and other noncompliant Names. Lloyd's then brought enforcement actions against Webb and Turner in separate divisions of the Northern District of Texas, under the UFCMJRA. Webb and Turner challenged the filing, asking for summary judgment against enforcement. Lloyd's filed its cross motion for summary judgment and won in both courts. The cases were consolidated on appeal.⁴⁷²

Webb and Turner challenged both the due process of the English litiga-

466. *Id.* at 284.

467. *Id.* at 282-83.

468. *Society of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002).

469. *See id.* at 326-27 (quoting *Haynsworth v. Corp.*, 121 F.3d 956, 958-59 (5th Cir. 1997)).

470. *Society of Lloyd's*, 303 F.3d at 326-28.

471. *Id.* at 328.

472. *Id.* at 329.

tion⁴⁷³ and its repugnancy to Texas public policy.⁴⁷⁴ The due process challenge failed to specify any deficiencies with the English courts and instead attacked the Lloyd's self-regulatory system.⁴⁷⁵ The Fifth Circuit court nonetheless analyzed this objection in regard to the English courts, and found that the UFCMJRA requires only a system of impartial tribunals and procedures compatible with due process of law. This is "interpreted . . . to mean that the foreign procedures [must only be] 'fundamentally fair' and . . . not offend against 'basic unfairness.'"⁴⁷⁶ The circuit court further pointed out that the origins of our concept of due process are English, and concluded that this was no basis for objection.⁴⁷⁷

Defendants' public policy argument was that English law required proof of only two elements to establish a contract breach, while Texas law requires four.⁴⁷⁸ Observing that the standard for public policy contravention must be high, the court explained that contrary to defendants' argument the public policy violation must go to the repugnancy of the foreign cause of action itself, not just on its distinction from a similar Texas claim.⁴⁷⁹ The court cited *Southwest Livestock & Trucking Co. v. Ramon*,⁴⁸⁰ where a Mexican judgment on a promissory note with a forty-eight percent interest rate was upheld because the cause of action to collect on a promissory note did not offend Texas public policy. In this case, the action against Webb and Turner was for breach of contract, a claim recognized under Texas law.⁴⁸¹ Accordingly, the trial courts' summary judgments favoring enforcement were affirmed.⁴⁸²

In *Brousseau v. Ranzau*,⁴⁸³ the Beaumont court of appeals applied the UFCMJRA as persuasive authority on the issue of the collateral estoppel effect to be given a Mexican judgment. This is more fully discussed immediately below and is not directly applicable to this Uniform Act discussion because the plaintiff was not seeking the enforcement of a money judgment.

473. *Id.* at 329-30 (invoking TEX. CIV. PRAC. & REM. CODE § 36.005(a)(1)). *See supra* note 451.

474. *Id.* at 331-32 (invoking TEX. CIV. PRAC. & REM. CODE § 36.005(b)(3)). *See supra* note 451.

475. *Id.* at 331 n.22.

476. *Id.* at 330 (alterations in original).

477. *Id.* at 331.

478. English law requires a showing that a contract exists and the amount owed, but Texas law requires proof of (1) the contract, (2) plaintiff's performance, (3) defendant's breach, and (4) damages. *Id.* at 332.

479. *Id.* at 331-32.

480. *S.W. Livestock & Trucking Co. v. Ramon*, 169 F.3d 317, 321 (5th Cir. 1999).

481. *Society of Lloyd's*, 303 F.3d at 332-33 (citing *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no writ) for the elements of contract breach under Texas law, and *Hunt v. BP Exploration Co.*, 492 F. Supp. 885, 901 (N.D. Tex. 1980), for the point that Texas public policy does not reject foreign causes of action merely because they differ in elements or proof).

482. *Id.* at 333.

483. *Brousseau v. Ranzau*, 81 S.W.3d 381 (Tex. App.—Beaumont 2002, pet. denied).

B. PRECLUSION

Both sister-state and foreign country judgments are entitled to preclusive effect in Texas courts. The full faith and credit clause compels full faith and credit for valid and final sister-state judgments involving the same parties and claims, as well as collateral estoppel if the required elements are satisfied.⁴⁸⁴ Under the doctrine of comity, foreign country judgments may also be given *res judicata* and preclusive effect, subject to discretion based on the nature of the foreign proceeding and satisfaction of traditional preclusion requirements.⁴⁸⁵

1. Interstate Preclusion

There were no reported interstate preclusion cases during the Survey period.

2. International Preclusion

The only noteworthy case regarding international preclusion reported in the Survey period—*Brosseau v. Ranzau*⁴⁸⁶—considers the collateral estoppel effect to be given a Mexican judgment, which itself was based on prior Texas state court judgments. This complicated, decade-long dispute humbles the intricacies of the other cases reported in this Survey. Ranzau and Brosseau formed a partnership in the 1980s when they decided to pool their money to buy a house in Acapulco, known as Casa T, that rented for \$1,500 a day. Each paid the owner \$60,000 down and co-signed a note for \$800,000. Brosseau claimed he did not have the time to draw up partnership papers, and with Ranzau's permission the financing went through one of Brosseau's companies, Argos Properties, Inc. This resulted in Argos being Casa T's sole listed owner, and Ranzau having later to prove an oral partnership with Brosseau.⁴⁸⁷ A further complication was the nature of the property. Although the parties' interest was directed to real property in Acapulco, the ownership was defined by a single share of stock representing the seller's Canadian corporation, known as 80451 Holdings, Ltd. This single share was sold to Argos and financed by a promissory note pledged to First State Bank of Liberty, in Liberty, Texas.⁴⁸⁸

Ranzau became concerned that Brosseau was not properly accounting for Casa T's expenses and income. After several requests and Brosseau's resulting nondisclosures, Ranzau sued in state district court in Liberty County, Texas, for breach of their partnership agreement, breach of fiduciary duty, fraud, and the appointment of a receiver.⁴⁸⁹ In April, 1989,

484. U.S. CONST. art. IV, § 1; see WEINTRAUB, *supra* note 1, at 701-02; see also 28 U.S.C. § 1738.

485. SCOLLES & HAY, *supra* note 20 at 999-1001.

486. *Brosseau v. Ranzau*, 81 S.W.3d 381 (Tex. App.—Beaumont 2002, pet. filed).

487. *Id.* at 385.

488. *Id.*

489. *Id.*

the trial court appointed a receiver to take charge of property, but the note-holder Liberty Bank soon failed and the FDIC (as bank receiver) removed Ranzau's claim to federal court. As part of a settlement, Brosseau and his company Argos conveyed Casa T—or more properly, the 80451 stock—to the FDIC, which in turn conveyed title to the Liberty court receiver when Ranzau's action was remanded there.⁴⁹⁰

Other lawsuits emerged. Brosseau's wife Teresa began a divorce action in Dallas County and to perfect her claim to the Casa T property, intervened in Ranzau's Liberty County action in April, 1991.⁴⁹¹ In the divorce action, Teresa and one of the Brosseau's children's trusts agreed to sell the any interest they had in Casa T to Ranzau, although the divorce court eventually declared that Casa T was the property of the Brosseau's children.⁴⁹² This ruling had no effect on Ranzau because he was not a party to that action, and Teresa's intervention in the Liberty case did not produce that result.⁴⁹³ Additionally, Brosseau filed for bankruptcy in October, 1991, but Ranzau bought any interest Brosseau might have from the trustee.⁴⁹⁴

Back in Liberty, in November, 1991, the trial court entered an interlocutory judgment for Ranzau, finding that a partnership existed, and that the partners owned the property as tenants in common. The trial court awarded Ranzau \$307,196.76 in actual and exemplary damages; at a later hearing in August, 1992, the Liberty court found that Brosseau had diverted rental income and violated court orders, and ordered the receiver to sell the property.⁴⁹⁵ On September 9, 1992, Brosseau filed his second recusal motion⁴⁹⁶ and then appealed the trial judge's failure to address it (presumably along with his appeal of the August ruling). In 1995, the Beaumont Court of Appeals held that the trial judge had erred in not addressing the recusal motion, but on remand the trial court denied the motion.⁴⁹⁷ Brosseau then appealed his lack of notice of the recusal hearing. Finding in Brosseau's favor, the court of appeals voided the trial judge's actions taken after the recusal hearing and ordered another hearing, held in February, 2001, that resulted in another denial.⁴⁹⁸ Eventually the court of appeals found that Brosseau's recusal arguments had no merit and had produced nothing but years of delay.⁴⁹⁹

This leads to the case in Mexico, which in 1996 had held that the 80451 stock was owned by Brosseau children's trust and a Mexican company,

490. *Id.*

491. *Id.*

492. *Id.* at 386.

493. *Id.* at 391 (citing *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 329 (1971)).

494. *Id.* at 385-86.

495. *Id.*

496. In September, 1991, Brosseau filed a motion to recuse the trial judge, but because it was not verified, the trial judge refused to refer it to the presiding judge. *Id.* at 386.

497. *Id.*

498. *Id.*

499. *Id.* at 386.

Desarrollo Turistico Alexa, S.A. de C.V. (DTA was not a party here), and that Ranzau was not and never had been the owner.⁵⁰⁰ This decision rested on two points—that Texas courts have no power to adjudicate title to real property in Mexico, and that the Liberty County finding in Ranzau's favor had been voided by the Beaumont Court of Appeals. On this holding, Brosseau had moved for summary judgment in the Liberty County trial court, and now appealed its denial.⁵⁰¹

Before reaching the Mexican judgment's preclusive effect, the court had to consider that judgment's contention that Texas courts lacked jurisdiction to adjudicate claims to real property in Mexico. The court of appeals rejected the in rem characterization and found instead that this was a claim to personal property—the one share of stock in 80451 Holdings, Ltd., whose sole asset was Casa T. Texas law deems corporate ownership litigable as personal property even where the corporation owns real property.⁵⁰² Thus, the Texas court's jurisdiction was over personal property, not real estate in Acapulco.

The question remained of the Mexican judgment's effect in the still-unresolved Liberty case. In opposing preclusion, Ranzau cited the grounds for nonrecognition under the Uniform Foreign Country Money Judgment Recognition Act.⁵⁰³ Although, the Act did not apply here because there was no foreign country money judgment at issue, the Beaumont Court of Appeals found that under its obligation to apply comity to foreign judgments, the UFCMJRA was instructive on the preclusive effect to be given foreign country judgments.⁵⁰⁴ Ranzau had raised three of the Act's discretionary grounds for refusing recognition.⁵⁰⁵ First, the Mexican judgment conflicted with a 1994 bankruptcy judgment authorizing the bankruptcy trustee to convey the Casa T stock to Ranzau.⁵⁰⁶ Second, the foreign country proceeding was contrary to several agreements between the parties.⁵⁰⁷ The court did not reach the third ground—lack of reciprocity⁵⁰⁸—but found sufficient grounds under the first two for denying preclusive effect to the Mexican judgment. . The court found an addi-

500. *Id.* at 387.

501. *Id.* at 387.

502. *Id.* (citing *Evans v. Prufrock Rests., Inc.*, 757 S.W.2d 804, 805-06 (Tex. App.—Dallas 1988, writ denied)).

503. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.005-.008, *discussed supra* at note 452.

504. *Brosseau*, 81 S.W.3d at 388-89.

505. The court noted the UFCMJRA three mandatory and seven discretionary grounds for refusing recognition for a foreign country judgment. *Id.* at 388 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 36.005 (Vernon 1997), and *Dart v. Balaam*, 953 S.W.2d 478, 489 (Tex. App.—Fort Worth 1997, no pet.)). The ten grounds are briefly stated, *supra* note 452.

506. *Id.* at 388-89 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(4) (Vernon 1997)).

507. *Id.* at 389-90 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(5) (Vernon 1997)). In settling other aspects of Brosseau's various lawsuits involving the Casa T property, Brosseau had conveyed or agreed to convey the property to Ranzau.

508. *Id.* at 389 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(6) (Vernon 1997)).

tional reason for denying preclusive effect in that the Mexican judgment was based in part on the Beaumont court of appeals earlier voiding of the judgment favoring Ranzau, which was later overturned.⁵⁰⁹

509. In a prior trial, the Beaumont court of appeals had voided orders entered by a trial judge that Brosseau sought to recuse. The Mexican court based its conclusion at least in part on the voiding of those orders. The Beaumont court of appeals later found that the trial judge had not erred in refusing to recuse himself, resulting in the reinstatement of the earlier rulings contrary to Brosseau. *Id.* at 391.