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CONFLICT OF LAWS

by

Sharon N. Freytag and Michelle E. McCoy***

PROFESSOR Russell Weintraub describes the subject matter of conflict of laws to include the "study of whether or not and, if so, in what way, the answer to a legal question will be affected because the elements of the problem have contacts with more than one jurisdiction."[1] The subject of conflict of laws presents three general categories of inquiry. What court has jurisiction to adjudicate? Which law should be applied? What effect will a judgment have on suits in other states or countries?[2]

During the survey period, several significant decisions occurred in each of these areas. The United States Supreme Court decided that the due process standard outlined in *International Shoe Co. v. Washington*,[3] which the Court in *Shaffer v. Heitner*[4] stated applied to all assertions of jurisdiction, does not apply to the exercise of jurisdiction over a non-resident defendant served in the forum state.[5] The Court also decided that when a plaintiff initiates a transfer under the federal venue statute, the transferee court must apply the choice of law rules of the transferor court.[6] The fact that a plaintiff selects the federal court because of that forum's favorable statute of limitations and then requests a transfer to his home state where the suit would have been barred does not impact the general rule, which favors convenience and judicial economy.[7] The most significant Texas state court decision during the survey period was the Texas Supreme Court's holding in *Dow Chemical Co. v. Alfaro*.[8] In *Alfaro* the Texas Supreme Court held that the doctrine of *forum non conveniens*, which allows courts with jurisdiction to decline to exercise that jurisdiction, does not apply in Texas to personal injury and wrongful death cases brought under section 71.031 of the Texas Civil Prac-

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1. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 1 (3d. ed. 1986).
2. *Id.* at 1.
3. 326 U.S. 310 (1945).
4. 433 U.S. 186 (1977).
5. Burnham v. Superior Court of California, 110 S. Ct. 2105 (1990).
6. Ferens v. John Deere Co., 110 S. Ct. 1274, 1279 (1990). *See infra* note 246 and accompanying text.
7. 110 S. Ct. at 1279.
8. 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

tice and Remedies Code.[9] Rather, a foreign plaintiff has an absolute right to bring a personal injury or wrongful death suit in Texas. One dissenting judge in *Alfaro* observed that, as a result of that decision, foreign plaintiffs have "hit pay dirt in Texas."[10] The Texas Supreme Court also upheld the constitutionality of the Uniform Foreign Country Money Judgments Recognition Act.[11]

I. WHETHER THE COURT HAS JURISDICTION TO ADJUDICATE

A. Whether Personal Jurisdiction Exists

1. The General Principles that Apply to the Assertion of Personal Jurisdiction

Generally, a court may exercise personal jurisdiction over a non-resident defendant if two conditions are satisfied. First, the applicable long-arm statute must authorize the exercise of jurisdiction.[12] Second, the exercise of jurisdiction must be consistent with constitutional guarantees of due process.[13] Although courts phrase these inquiries differently, the personal jurisdiction analysis involves the same basic questions in state court and in federal court diversity cases.[14]

Texas courts have interpreted the Texas long-arm statute[15] to extend to the limits of due process.[16] Under the due process analysis, the party seek-

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9. *See infra* notes 186-219 and accompanying text.

10. 786 S.W.2d at 697 (Cook, J., dissenting).

11. Don Docksteader Motors, Ltd. v. Patal Enterprises, Ltd., 794 S.W.2d 760, 761 (Tex. 1990). After this Article went to press, the Texas Supreme Court reversed the Corpus Christi court of appeals' decision in Southern Clay Products, Inc. v. Guardian Royal Exchange Assurance, Ltd., 762 S.W.2d 927 (Tex. App.—Corpus Christi 1988), *rev'd sub. nom.*, Guardian Royal Exchange Assurance Ltd. v. English China Clays P.L.C., 34 Tex. Sup. Ct. J. 376 (February 27, 1991). The Texas Supreme Court accepted the foreign insurer's contention that assertion of *in personam* jurisdiction was inconsistent with federal constitutional requirements of due process. *Id.* at 377. Justice Mauzy filed a dissenting opinion. *Id.* at 382-83.

12. Schlobohm v. Schapiro, 784 S.W. 2d 355, 356 (Tex. 1990).

13. *Id.* at 356.

14. In Schlobohm v. Schapiro, 784 S.W.2d 355 (Tex. 1990), the Texas Supreme Court recently modified its statement of the jurisdictional test to include the concept of general jurisdiction so that the Texas formula is "as complete an outline of the [federal] constitutional standard as possible." *Id.* at 358. The Texas formula now reads as follows:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
>
> (2) The cause of action must arise from, or be connected with, such act or transaction. Even if the cause of action does not arise from a specific contact, jurisdiction may be exercised if the defendant's contacts with Texas are continuing and systematic; and
>
> (3) The assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Id.

15. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.069 (Vernon 1986 & Supp. 1991).

16. U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

ing to assert jurisdiction over a non-resident defendant must overcome two hurdles. First, the non-resident must have established minimum contacts with the forum state.[17] Second, maintenance of the suit against the non-resident must not offend traditional notions of fair play and substantial justice.[18]

Under the minimum contacts analysis, the court focuses on the non-resident's purposeful activities in the forum or directed toward the forum. Based on these activities, the court determines whether it can properly require the non-resident to defend suit in Texas.[19] These activities, whether direct acts within the forum or conduct outside the forum, must justify a conclusion that the defendant reasonably expected that he could be sued in Texas.[20]

Minimum contacts may support either specific or general jurisdiction over a non-resident defendant. Specific jurisdiction may be proper if the non-resident defendant's activities are isolated and yet the cause of action arises from or is related to the particular activities.[21] In a specific jurisdiction case, the minimum contacts analysis focuses on the relationship between the defendant, the forum, and the litigation.[22] General jurisdiction is proper if the non-resident defendant maintains continuous and systematic contacts with the forum state notwithstanding the lack of a direct relationship between the defendant's contacts and the cause of action.[23]

The second prong of the due process analysis is separate and distinct from the minimum contacts inquiry and requires that the exercise of personal jurisdiction comport with traditional notions of fair play and substantial justice.[24] Even if the non-resident defendant has the requisite minimum contacts, the court must decline to exercise jurisdiction if the prosecution of the action in Texas would be unreasonable and unfair.[25] The fairness test requires the court to consider the burden upon the non-resident defendant, the interests of the forum state, the plaintiff's interest in securing relief, the interstate judicial system's interest in obtaining the most effective resolution of controversies, and the states' shared interest in furthering fundamental substantive social policies.[26]

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17. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

18. *Id.* As a result of the United States Supreme Court's opinion in Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987), it is clear that this second consideration may defeat jurisdiction even if minimum contacts exist.

19. Hanson v. Denckla, 357 U.S. 235, 253-54 (1958).

20. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

21. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.8 (1984).

22. *Id.* at 414.

23. *Id.* at 414 & n.9.

24. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

25. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105 (1987) (citing *International Shoe*, 326 U.S. at 316).

26. *Asahi*, 480 U.S. at 113 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

2. *The Apparent Deviation from General Principles in the Exercise of Transient Jurisdiction*

This due process analysis may not be necessary or even appropriate when a non-resident defendant is served with process while present in the forum.[27] For thirteen years courts and commentators have disagreed on the meaning of the United States Supreme Court's statement in *Shaffer v. Heitner*[28] that "all assertions of state court jurisdiction must be evaluated according to the [minimum contacts] standards set forth in *International Shoe* and its progeny."[29] The impact of the holding in *Shaffer* on the concept of transient jurisdiction has been uncertain. The Justices of the United States Supreme Court are now also decidedly split on the issue. In *Burnham v. Superior Court of California*[30] four Justices of the Court, Justices Scalia, White, Kennedy, and the Chief Justice relied on tradition and determined that a non-resident's temporary presence in a state is a valid basis for personal jurisdiction in a suit unrelated to the non-resident's activities in that state.[31] These Justices found it unnecessary, however, to engage in the due process analysis dictated by *International Shoe Co. v. Washington*[32] because the due process standard of traditional notions of fair play and substantial justice outlined in *International Shoe* developed "by *analogy* to 'physical presence,' "[33] and, therefore, the constitutionality of physical presence is so firmly established in tradition that the *International Shoe* analysis is unnecessary.[34]

Three Justices, Justices Kennedy, Scalia, and the Chief Justice, acknowledged that this approach to the due process analysis is different from the approach in *Shaffer*, but they refused to acknowledge that the holding contradicted *Shaffer*.[35] They distinguished the problematical language in *Shaffer*, "that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"[36]

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27. Burnham v. Superior Court of California, 110 S. Ct. 2105, 2115 (1990).

28. 433 U.S. 186 (1977).

29. *Id.* at 212; *see Burnham*, 110 S. Ct. at 2121 nn.4 & 5.

30. 110 S. Ct. 2105 (1990). Petitioner Dennis Burnham, a New Jersey resident, was served with a California court summons and a copy of Mrs. Burnham's divorce petition while in California to conduct business and visit his children. Mr. Burnham specially appeared in California court and moved to quash service. Burnham argued that his few visits to the state to conduct business and visit his children were insufficient to establish personal jurisdiction. The trial court denied the motion, and the California appellate court denied mandamus relief. The court of appeals held that personal service on Burnham during his presence in California formed a valid basis for personal jurisdiction. The United States Supreme Court granted *certiorari*. 110 S. Ct. 47 (1989).

31. 110 S. Ct. at 2115.

32. 326 U.S. 310 (1945).

33. 110 S. Ct. at 2115 (emphasis in original).

34. These Justices observed that since *International Shoe*, the Court has considered only those due process challenges to the exercise of jurisdiction in a manner different from the traditions established in the nineteenth century. *Id.* at 2110. The concept of general jurisdiction, established through continuous and systematic contacts thus developed recently. These four Justices noted, however, that the exercise of general jurisdiction over defendants based on contacts unrelated to the cause of action may be proper only as to corporations, not to individuals. *Id.* n.1.

35. 110 S. Ct. at 2115.

36. 110 S. Ct. at 2115-16.

by emphasizing that the facts in *Shaffer* involved *quasi in rem* jurisdiction.[37] Thus, *Shaffer*, grounded on its facts, held only that all assertions of *quasi in rem* jurisdiction must satisfy the *International Shoe* standards.[38] Further, these Justices concluded that the due process analysis is necessary only when courts assess new procedures for asserting personal jurisdiction.[39]

Justice White did not join Justice Scalia, Justice Kennedy, and the Chief Justice in the portion of the opinion distinguishing *Shaffer v. Heitner* and concluding that traditional bases of jurisdiction need not be measured by contemporary due process standards.[40] Rather, Justice White's concurrence observes that the Court has the authority under the fourteenth amendment to reexamine traditionally accepted procedures, but unless a litigant demonstrates that the transient jurisdiction rule is so "arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case," attacks on the rule in individual cases should not be entertained.[41]

Four justices, Justices Brennan, Marshall, Blackmun, and O'Connor, concurred only in the judgment. Justice Brennan, writing the concurrence, observed that *Shaffer* mandated that even traditional rules of jurisdiction must be measured against the standards of *International Shoe*.[42] Therefore, tradition is not decisive on the issue of whether transient jurisdiction satisfies due process. Instead, tradition is only relevant to the question[43] because it puts a defendant present in a forum on notice that he is subject to suit there.[44] The transient jurisdiction rule is thus entitled to a strong presumption that it satisfies due process.[45]

Justice Brennan's concurrence further emphasizes that the transient defendant, by visiting another state, avails himself of significant benefits,[46] including the right to be a plaintiff in the courts of that state.[47] Because a transient plaintiff may obtain the benefits of a forum court, a transient defendant should not be immune from that court's authority.[48] Finally, the

37. 110 S. Ct. at 2116. During the survey period, the Corpus Christi court of appeals applied *Shaffer* to hold that the presence of a bank account in Texas, alone, did not establish *quasi in rem* jurisdiction over a Mexican citizen in a suit requesting a bill of discovery. Ramirez v. Lagunes, 794 S.W.2d 501, 504 (Tex. App.—Corpus Christi 1990, no writ). *Cf.* Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

38. *Burnham*, 110 S. Ct. at 2116.

39. 110 S. Ct. at 2116, 109 L. Ed. 2d at 642. *Cf.* Amusement Equipment, Inc. v. Mordelt, 779 F.2d 264 (5th Cir. 1985), in which the Fifth Circuit applied the due process standard of traditional notions of fair play and substantial justice and found that proper service of process on a nonresident present in the forum gives the defendant notice of the suit and that "is all the process to which he is due." *Id.* at 270.

40. 110 S. Ct. at 2119, 109 L. Ed. 2d at 645.

41. 110 S. Ct. at 2119-20, 109 L. Ed. 2d at 645. This all-or-nothing test seems impossible to meet.

42. *Id.* at 2120.

43. *Id.* at 2122.

44. *Id.* at 2124.

45. *Id.*

46. *Id.* at 2124-25 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

47. 110 S. Ct. at 2124-25 (citing U.S. CONST. art. IV (privileges and immunities clause) and Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 281 n.10 (1985)).

48. 110 S. Ct. at 2125.

burdens on a transient defendant are slight because of modern transportation and communication,[49] and appropriate procedural devices can ameliorate any burden that may arise.[50] As a result of the preceding due process analysis, the concurrence believed that, as a general rule, it is fair to assert jurisdiction over a non-resident defendant based merely on his presence in the forum.[51]

Justice Stevens refused to join the opinion of the Court for the same reason he refused to join the Court's opinion in *Shaffer v. Heitner*;[52] his fear of the broad reach of each opinion. Justice Stevens expressed concern in *Shaffer* that the opinion purported "to decide a great deal more than . . . necessary . . . ."[53] Regardless whether Justice Stevens' related concerns regarding *Burnham* are justified, his position is critical. Given the Court's division, Justice Stevens' opinion could be the decisive one in any future transient jurisdiction decision of the the Court.

3. *Whether the Non-Resident Defendant is Amenable to Jurisdiction*

a. *The Application of the General Principles in Texas Federal Courts.*

In *Gulf Consolidated Services, Inc. v. Corinth Pipeworks, S.A.*[54] the Fifth Circuit applied the stream of commerce doctrine[55] and upheld the district court's exercise of specific jurisdiction over a foreign defendant.[56] Gulf Consolidated Services, Inc. (Gulf), a Texas corporation with its principal office in Houston, imported and sold pipe under the name of International Materials & Services Co. (IMS). In October 1980, IMS purchased 1,260 joints of steel oil field casing from Corinth Pipeworks (Corinth), a Greek corporation with its principal office in Athens, Greece. Corinth warranted to IMS that the casings were manufactured in accordance with API standards.[57]

IMS sold sixty-six joints of the casings to a supply company in Midland, which subsequently sold the casings to Wayman Buchanan. The casings failed in seven separate locations during drilling operations, causing Mr. Buchanan to incur substantial additional drilling expenses. Metallurgical tests indicated that the casings contained defects and thus were not manufactured according to API standards. The Midland supplier reimbursed Mr. Buchanan for the additional drilling expenses, and Gulf's insurer reim-

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49. *Id.*
50. 110 S. Ct. at 2125.
51. *Id.* at 2125.
52. 433 U.S. 186 (1977).
53. *Id.* at 219.
54. 898 F.2d 1071 (5th Cir. 1990).
55. The United States Supreme Court has explained: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." WorldWide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980).
56. 898 F.2d at 1073-75.
57. Corinth had a license agreement with American Petroleum Institute (API), a Dallas, Texas organization, which authorized Corinth to sell API specification pipe.

bursed the supplier. Gulf then sued Corinth.[58] After a bench trial, the district court held that Corinth had breached an express warranty that the casings met API specifications and had breached implied warranties of merchantability and fitness for a particular purpose.[59]

On appeal, Corinth contended that it lacked sufficient contacts with Texas to be subject to personal jurisdiction. Corinth emphasized that it was a Greek corporation with its offices and factory in Greece. In addition, Corinth was not registered to do business in Texas or elsewhere in the United States and maintained no agent, office, or assets in the United States. Corinth also argued that IMS and Corinth negotiated the sale of the casings by telegram and that the actual sale took place in Greece. Under the terms of the sale, performance was complete when Corinth delivered the casings to the ocean carrier in Greece and the risk of loss transferred to Gulf at that time. All of Corinth's pipe sales to U.S. customers were on similar terms. Thus, Corinth argued that it had purposely structured its conduct so as to avoid being haled into a Texas court.

The court rejected Corinth's argument, noting that a sale consummated outside of Texas can form the basis of jurisdiction.[60] Moreover, physical contact with Texas is not essential to the proper exercise of jurisdiction.[61] As Corinth delivered the casings into the stream of commerce with the expectation that only Texas consumers would purchase or use the casings,[62] the minimum contacts requirement was satisfied, and specific jurisdiction was proper.[63]

Considering the reasonableness of asserting jurisdiction, the court observed that Corinth's burden in defending suit in a legal system greatly different from that of Greece should be given significant weight.[64] The court concluded, however, that the burden on Corinth was justified since Texas has a demonstrable interest in providing a Texas resident a forum for litigation arising from injuries caused by a defective product intended for use in Texas, the state where the defect was discovered and where it caused economic injury.[65]

Judge Reavley disagreed with the conclusion of Judges Gee and Garwood

58. Gulf's insurer, American Motorist Insurance Company (AMI), an Illinois corporation with its principal place of business in Illinois, was the real party in interest and prosecuted the action against Corinth.

59. 898 F.2d at 1073.

60. *Id.* (citing Oswalt v. Scripto, Inc., 616 F.2d 191, 197 n.8 (1980)).

61. *Id.* (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

62. Corinth clearly expected that the casings would be used in Texas. Corinth marketed API oil field casings only in Houston, where Corinth representatives often met customers. Furthermore, Corinth chartered the ships that transported the casings from Greece to Houston. 898 F.2d at 1073-74.

63. *Id.* at 1073. Corinth argued that the stream of commerce doctrine did not apply because the insurer, the real party in interest, was not affected by the product in the stream of commerce. The court rejected this contention, noting that Corinth's expectation that it would be sued in Texas was not changed simply because the consumer's insurer brought the claim.

64. *Id.* at 1074.

65. *Id.* at 1074-75. Corinth made over $73 million in sales in the Texas market during a seven-year period. The court reasoned that any unfairness to Corinth in having to defend a claim in Texas arising out of one of those sales was minor. *Id.* at 1075.

that the district court's exercise of jurisdiction over Corinth complied with due process[66] because he did not believe that Corinth had established sufficient minimum contacts with Texas under either a specific or general jurisdiction analysis.[67] According to Judge Reavley, the issue was whether, with respect to the sales contract, Corinth purposefully availed itself of the benefit and protection of Texas laws.[68] He noted that merely contracting with a Texas resident was insufficient to subject Corinth to personal jurisdiction in Texas.[69] The court must also evaluate other factors including prior negotiations, contemplated future consequences, terms of the contract, and the parties' actual course of dealing.[70] Judge Reavley viewed the contract as an isolated sale of oil well casing, not a long term relationship with continuing obligations, and concluded that Gulf had not shown that Corinth created sufficient Texas contacts to justify an exercise of specific jurisdiction.[71] Judge Reavley also compared Corinth's contacts with those of Beech Aircraft in *Bearry v. Beech Aircraft Corp.*,[72] found them to be less extensive and decided that general jurisdiction was likewise improper.[73]

Judge Reavley considered the application of the stream of commerce doctrine by the majority in *Gulf* to be inappropriate, pointing out that the doctrine evolved as a means for consumers injured by defective products to acquire jurisdiction over the manufacturers in product liability actions.[74] He emphasized that the dispute between Gulf and Corinth arose out of a sales contract, and courts typically have not applied the stream of commerce rationale in determining jurisdiction in contract disputes.[75]

The breach of express warranty and breach of implied warranty of merchantability and fitness for a particular purpose claims in *Gulf* implicate the law of product liability, however. The focus of each claim was the failure of the product to conform to standards, and the stream of commerce doctrine, contrary to Judge Reavley's conclusion, seems *apropos* when the defective product placed in the stream is the subject of the contract.

Moreover, even applying the purposeful availment test Judge Reavley

66. *Id.* at 1078-83 (Reavley, J., dissenting).
67. *Id.* at 1078-82.
68. *Id.*
69. *Id.* at 1079 (citing *Burger King*, 471 U.S. at 478-79).
70. 898 F.2d at 1079.
71. *Id.* at 1080.
72. 818 F.2d 370, 375 (5th Cir. 1987). In *Beech* the Fifth Circuit held that Texas could not exercise general jurisdiction over Beech Aircraft, a Delaware corporation with its principal place of business in Kansas. *See* Freytag, Bush & George, *Conflict of Laws*, 42 Sw.L.J. 455, 463-66 (1988).
73. 898 F.2d at 1081-82. Concluding that even if Corinth had established minimum contacts, the exercise of jurisdiction under the circumstances was unreasonable. *Id.* at 1082-83. Judge Reavley focused on the heavy burden on Corinth to defend in Texas, Corinth's efforts to structure its relations to avoid the jurisdiction of Texas courts, the minimal interest of Texas in providing an Illinois insurance company a forum for recovery, and the Supreme Court's direction to exercise caution in subjecting alien defendants to the jurisdiction of United States courts. *Id.* at 108283 (citing Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 115 (1987)).
74. 898 F.2d at 1078.
75. *Id.* at 1079.

considered appropriate, the facts of *Gulf* support jurisdiction. In *Vencedor Manufacturing Co. v. Gougler Industries, Inc.*,[76] for example, the First Circuit considered a manufacturer's shipment of goods to Puerto Rican customers, who indisputably knew the destination of the product, sufficient to support jurisdiction in a breach of contract action.[77] The court specifically refused to make a distinction between the jurisdictional principles applicable to contract and those applicable to tort cases. It observed: "To vary the minimum contacts needed for jurisdiction according to the character of the suit would lead plaintiffs into disingenuous manipulation of their pleadings and would plunge the courts into ever more difficult refinements of the categories."[78]

In *Bullion v. Gillespie*[79] the Fifth Circuit reaffirmed the general rule that when the jurisdictional issue is decided on the basis of affidavits, the party seeking to invoke jurisdiction need only present facts sufficient to constitute a *prima facie* case of personal jurisdiction.[80] Moreover, uncontroverted allegations in the complaint must be taken as true, and the court must resolve conflicts between the facts alleged and the parties' affidavits in the plaintiff's favor in determining whether a *prima facie* case for personal jurisdiction exists.[81] The Fifth Circuit determined that the district court erred in *Bullion* when it ignored both of these principles.[82]

The issue in *Bullion* was whether the plaintiff, allegedly injured through participation in an experimental medical program based in California, could require the program's non-resident administrator to defend medical malpractice and deceptive trade practice claims in Texas. Plaintiff Bullion's urologist in Texas advised her to purchase a book written by Dr. Gillespie, a California urologist who was an expert regarding the disease afflicting Bullion. The Texas doctor later contacted Gillespie to review Bullion's problem and eventually referred Bullion to Gillespie for a personal consultation.

Following a visit to California and a determination that Bullion was a suitable candidate for the experimental program, Bullion agreed to participate and returned to Texas. Bullion remained in Texas, and her local doctor supervised Bullion's progress and reported to Gillespie in California. Gillespie sent to Bullion, in Texas, on three separate occasions, the drug angiostat. He also sent other correspondence about treatment. Bullion made direct payments to Gillespie for the angiostat and for medical services.

Bullion sued Gillespie in Texas state court for medical malpractice and violations of the Texas Deceptive Trade Practices Act,[83] alleging that she was injured by a steroid contained in the angiostat. Gillespie removed the

76. 557 F.2d 886 (1st Cir. 1977).
77. *Id.* at 892.
78. *Id.* at 894; *see also* Ben's Marine Sales v. Sleek Craft Boats, 502 A.2d 808, 814-15 (R.I. 1985) (relying on the *Vencedor* decision).
79. 895 F.2d 213 (5th Cir. 1990).
80. *Id.* at 217 (citing WNS, Inc. v. Farrow, 884 F.2d. 200, 203 (5th Cir. 1989)).
81. *Id.* (citing D.J. Investments, Inc. v. Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542, 546 (5th Cir. 1985)).
82. 895 F.2d at 217.
83. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Vernon 1987 & Supp. 1991).

action to federal court, which granted Gillespie's motion to dismiss for lack of personal jurisdiction.[84]

The Fifth Circuit reversed and remanded, holding that the court must resolve disputed factual assertions in favor of Bullion and that she had established a *prima facie* case of personal jurisdiction.[85] Although the facts did not present a basis for the assertion of general jurisdiction over the non-resident doctor, Gillespie's contacts with Texas related to the tort in Texas.[86] Bullion's allegations that Gillespie shipped the drugs that proximately caused her injuries, that Bullion was Gillespie's patient for purposes of the experimental program, that Gillespie received compensation for her services, and that Gillespie maintained regular telephone contact with her local doctor and treated other Texas patients as well provided a *prima facie* case of specific jurisdiction.[87]

Further, the Fifth Circuit held that requiring Gillespie to defend suit in Texas was fair and reasonable[88] because Gillespie shipped the experimental drugs directly to Bullion in Texas and the alleged tort took place in Texas. The court specifically noted, however, that it was not relying on the stream of commerce doctrine as Gillespie did not market drugs in Texas.[89] Rather, he made direct mail shipments of the experimental drug to Bullion for direct consumption.[90]

In two separate actions arising from the sale of alumina ceramic rings by Japanese corporations to a Texas corporation, a Texas federal court denied both Japanese corporations' motions to dismiss for lack of personal jurisdiction. Houston Technical Ceramics, Inc. (HTC) entered into contracts with Iwao Jiki Kogyo Co., Ltd. (IJK) and Shinagawa Refractories (Shinagawa) under which the Japanese corporations agreed to supply HTC with alumina ceramic rings. HTC brought actions against both corporations alleging that the alumina ceramic rings were defective and did not meet specifications.

In *Houston Technical Ceramics, Inc. v. Shinagawa Refractories Co.*[91] the court emphasized that Shinagawa not only entered into a contract with HTC, a Texas corporation,[92] but also sent representatives to Houston to counsel with HTC and to service existing contracts. Furthermore, Shinagawa advertised in Texas, and Shinagawa representatives made numerous business trips to Texas. Thus, the court concluded that these deliberate acts established personal jurisdiction.[93]

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84. 895 F.2d at 215.

85. *Id.* at 217-18.

86. *Id.* at 216. Specific jurisdiction may be proper even if the non-resident defendant has never physically been in Texas. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

87. *Id.* at 217.

88. *Id.*

89. *Id.* at 217 n.8.

90. *Id.*

91. 745 F. Supp. 406 (S.D. Tex. 1990).

92. A contract with a foreign entity is one factor to consider in the jurisdictional analysis, although the contract by itself does not automatically establish sufficient minimum contacts. *Id.* at 408 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-79 (1985)).

93. 745 F. Supp. at 408.

In *Houston Technical Ceramics, Inc. v. Iwao Jiki Kogyo Co.*[94] the uncontroverted allegations and affidavit evidence established contacts by IJK sufficient to support the exercise of specific personal jurisdiction.[95] IJK visited Texas first to solicit HTC's business and later to service its contracts with HTC. Further, IJK knew that Texas companies would buy and use the alumina ceramic rings as component parts.[96] Moreover, IJK solicited additional Texas business and intended to maintain a longterm market in Texas for its products.[97]

The court distinguished *Loumar, Inc. v. Smith*[98] in which the Fifth Circuit held that a Maryland corporation that sold an allegedly defective aircraft part to a Texas corporation by mail order did not have sufficient minimum contacts to support the exercise of specific jurisdiction.[99] The *IJK* court noted that, in contrast to the single transaction at issue in *Loumar*, HTC contracted with IJK for a series of shipments to be made for a period in excess of one year.[100] The transaction between IJK and HTC was more substantial than the single mail order transaction in *Loumar*, and IJK's contacts with Texas were more significant than those of the Maryland corporation in *Loumar*.[101]

Having determined that IJK had minimum contacts to support the exercise of specific jurisdiction, the court examined whether the assertion of jurisdiction was fair and reasonable.[102] The court considered the burden upon IJK, the interest of Texas, and HTC's interest in obtaining relief.[103] The court noted that IJK already conducted extensive business in other states and that it was not unfair to require IJK to defend a suit in Texas.[104] Moreover, Texas had an interest in having the case litigated in Texas because of the potential financial damage to Texas business.[105] Finally, HTC, a small business located only in Houston, was not financially capable of pursuing litigation in Japan.[106] Because IJK had sufficient minimum contacts and the exercise of personal jurisdiction over IJK would not offend traditional notions of fair play and substantial justice, the court denied IJK's motion to dismiss for lack of personal jurisdiction.[107] Neither *Shinagawa* nor *Iwao Jiki*

94. 742 F. Supp. 387 (S.D. Tex. 1990).
95. *Id.* at 391.
96. *Id.*
97. *Id.*
98. 698 F.2d 759 (5th Cir. 1983).
99. 742 F. Supp. at 390.
100. *Id.* at 391.
101. *Id.* at 390-91.
102. *Id.* at 391.
103. *Id.* at 390-91. The court held the other factors generally considered in the fairness analysis were inapplicable to a foreign corporation like IJK. *Id.* at 391.
104. 742 F. Supp. at 391.
105. *Id.* The court pointed out that Texas would have a greater interest in a personal injury case; financial damage alone, however, suffices. *Id.* at n.1 (citing WNS, Inc. v. Farrow, 884 F.2d 200, 202 (5th Cir. 1989) (involving franchise contract dispute)).
106. 742 F. Supp. at 391.
107. *Id.* at 391-92. The court cited the following cases in support of its decision: Bullion v. Gillespie, 895 F.2d 213, 215-16 (5th Cir. 1990) (nonresident doctor who shipped drugs to Texas patient subject to personal jurisdiction); WNS, Inc. v. Farrow, 884 F.2d 200, 202-03

Kogyo specifically mention the stream of commerce doctrine, though each relies in part on a stream of commerce case.[108]

A non-resident whose only relevant contacts are acts performed for the benefit of his employer may successfully assert in an action against him individually that a Texas court lacks personal jurisdiction. In *Saktides v. Cooper*[109] the court applied the fiduciary shield doctrine, which provides that an individual's business transactions within a state solely as a corporate officer do not create personal jurisdiction over the individual.[110] The fiduciary shield doctrine is an equitable, not a constitutional, doctrine.[111] Although some courts have stated that the doctrine does not apply when the state's long-arm statute has been held to extend to the limits of due process, the *Cooper* court considered the fiduciary shield doctrine a necessary subissue of the due process analysis.[112]

Plaintiffs alleged that O'Brien, an account executive at Dean Witter Reynolds, Inc. (Dean Witter) in Reno, Nevada, negligently handled money belonging to Texas National Realty Corporation and made possible the money's fraudulent conversion by other defendants. Plaintiffs argued that O'Brien subjected himself to the jurisdiction of Texas courts by engaging in activities in Nevada that had reasonably foreseeable consequences in Texas. O'Brien filed an affidavit that stated that he had lived in Nevada since 1977 and began his employment with Dean Witter in 1978. O'Brien further alleged that he had very limited contacts with Texas, having been in Texas on military duty for two weeks and no more than four times on personal business unrelated to the litigation. O'Brien denied having any form of continuous and systematic business in Texas and stated that a telephone call to one of the plaintiffs in Thailand was his only contact with the plaintiffs. Most important, O'Brien stated that, at all times, he dealt with the plaintiffs while in the course and scope of his employment with Dean Witter.

The court granted O'Brien's motion to dismiss for lack of personal juris-

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(5th Cir. 1989) (nonresident franchise applicants established sufficient jurisdictional contacts in Texas); Micromedia v. Automated Broadcast Controls, 799 F.2d 230, 233-34 (5th Cir. 1986) (foreign corporation established sufficient minimum contacts in Texas by contracting with Texas buyer); Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081, 1085 (5th Cir. 1984) (Washington manufacturer had sufficient jurisdictional contacts with Louisiana under the stream of commerce doctrine).

108. *See* Shinagawa, 745 F. Supp. at 408 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980)); Iwao Jiki Kogyo, 742 F. Supp. at 391 (citing Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081, 1085 (5th Cir. 1984)).

109. 742 F. Supp. 382 (W.D. Tex. 1990).

110. *Id.* at 385 (citing Stuart v. Spademan, 772 F.2d 1185, 1197 (5th Cir. 1985)). The corporation, however, is subject to personal jurisdiction. *Id.*

111. *Id.* at 385 (citing Marine Midland Bank v. Miller, 664 F.2d 899, 902 (2d Cir. 1981)) ("The fiduciary shield doctrine is not a constitutional principle, but is rather a doctrine based on judicial inference as to the intended scope of the longarm statute."); 742 F. Supp. at 385 n.1 (quoting *Midland Bank*, 664 F.2d at 902).

112. 742 F. Supp. at 385. To avoid the application of the fiduciary shield doctrine, a plaintiff need only allege in good faith that the individual acted to advance his own, rather than his employer's, interests. *Id.* at 386. The fiduciary shield doctrine generally does not apply upon a finding that the individual is merely the alter-ego of the corporation. *Id.* (citing Stuart v. Spademan, 772 F.2d 1185, 1197 (5th Cir. 1985)).

diction.[113] The court applied the fiduciary shield doctrine to both the specific and general jurisdiction analyses and rejected both bases for jurisdiction.[114] The court concluded that requiring employees who do business by telephone or mail with several states to defend lawsuits in their individual capacity in those states based on acts performed for their employer's benefit would offend traditional notions of fair play and substantial justice.[115]

In *Psarianos v. Standard Marine, Ltd.*[116] the federal district court determined that it had both general and specific jurisdiction over a foreign protection and indemnity club.[117] Eagle Transport Ltd., Inc. (Eagle) a closely held Liberian corporation with its principal place of business in New York, was actively engaged in the shipping business until the late 1970s. Due to a decline in the industry, Eagle began to sell its major assets, and by the early 1980s, the Thomas K was the only ship remaining in Eagle's fleet. Eagle later decided to sell the Thomas K as scrap metal to a buyer in Japan. Eagle hired a captain and crew in preparation for the voyage and arranged for the necessary examinations to enable the vessel to sail in compliance with American Bureau of Shipping (ABS) rules.

The Thomas K left Port Arthur, Texas in December 1983 and temporarily docked in Florida to pick up cargo for delivery to a Japanese corporation. The vessel then left for Japan, but in late January the ship encountered heavy seas and bad weather causing its exterior shell to separate. The ship began to take on water, and despite attempted repairs, the Thomas K sank on February 1, 1984. Eight crew members died. Seven crew members survived but sustained various injuries. When the ship sank, Eagle had liability insurance with the United Kingdom Protection & Indemnity Club (the Club), which was organized under the laws of Bermuda.

The surviving crew members and the survivors of the deceased crew members filed personal injury and wrongful death actions against Eagle and others. The defendants filed third party claims against the Club, alleging that the Club breached its insurance contract. The Club moved to dismiss the third party complaint for lack of personal jurisdiction.[118]

Addressing the issue of whether the Club had sufficient minimum contacts with Texas such that it could reasonably anticipate being sued in Texas, the court first engaged in a general jurisdiction analysis, considering all of the

113. 742 F. Supp. at 387.

114. *Id.*

115. *Id.* at 387 (citing Bowers v. NETI Technologies, Inc., 690 F. Supp. 349, 358 (E.D. Pa. 1988)).

116. 728 F. Supp. 438 (E.D. Tex. 1989).

117. *Id.* at 448.

118. Initially, the trial court severed the third party complaint from the main action. After the trial of the main action to a jury, the court reconsolidated the third party action with the main suit. 728 F. Supp. at 443. Also, the court consolidated a companion case brought by the Japanese corporation to recover for the loss of cargo aboard the Thomas K with the main suit, and the Club asserted lack of personal jurisdiction as to both the third party claims and those of the foreign corporation.

Club's activities in Texas.[119] From 1980 until 1989, other vessels insured by the Club regularly called at various Texas ports. From 1979 through 1985, the Club issued payments to Texas claimants on seventy-seven separate occasions for matters including cargo loss or damage, collisions, and personal injuries. From 1980 through 1986, partners and employees of the Club were present in Texas for fifty days for business purposes, including marketing and solicitation. The court also noted that the Club insured Texas companies, and the Club paid its correspondent attorneys directly in Texas.[120] These attorneys performed various services in Texas on behalf of the Club and its insureds.

The Club argued that neither the Club nor any of its employees were licensed to do business in Texas, nor did they maintain offices, bank accounts, or property in Texas, or advertise in any Texas publications. The Club also argued that its contacts were not those of the Club itself but those of its members or correspondent agents and therefore of no consequence in a due process analysis.[121] The court rejected these arguments, concluding ample evidence existed to establish general jurisdiction in Texas over the Club.[122]

The Club also argued that since Texas has no statute providing for a direct suit by a plaintiff against an insurance company, it had no reason to anticipate being haled into a Texas court. The court rejected this argument also, holding that the quantity and quality of contacts, not the existence or absence of a direct action statute, determined whether the Club could reasonably anticipate being sued in Texas.[123] According to the court, the Club should have foreseen being involved if an indemnity dispute arose in Texas because the Club knew that its insured vessels routinely frequented Texas ports, and the Club insured Texas risks. Therefore, the court confirmed that general jurisdiction existed over the Club.[124]

In a somewhat labored analysis, the court also found that specific jurisdiction existed.[125] Yet, the court did not fully explain how the cause of action arose from or was related to the Club's Texas activities. The court noted that the Club knew of the Thomas K's status at the Port Arthur berth and that changes in the insurance contract occurred while the ship was in

119. 728 F. Supp. at 444-46.

120. *Id.* at 445.

121. The Club relied upon Hanson v. Denckla, 357 U.S. 235, 253 (1958): "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." 728 F. Supp. at 446.

122. *Id.* at 447. The court discussed three cases upholding personal jurisdiction over foreign protection and indemnity clubs in reaching its result. 728 F. Supp. at 446-47; *see* Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652, 668-69 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); McKeithen v. M/T Frosta, 435 F. Supp. 572, 574-75 (E.D. La. 1977); Travelers Indemnity Co. v. Calvert Fire Ins. Co., 798 F.2d 826 (5th Cir. 1987), *modified on rehearing on other grounds*, 836 F.2d 850 (5th Cir. 1988).

123. 728 F. Supp. at 447. The Club also relied upon stream of commerce cases to bolster its contention that it could not reasonably anticipate being sued in Texas. The court distinguished the case before it from product liability cases because P&I insurers can contract to exclude liability. When they do not, they should foresee being sued. *Id.*

124. *Id.*

125. *Id.* at 447-48.

Texas.[126] It observed that the Club's reasons for denying coverage related directly to Eagle's and ABS' alleged acts and omissions while the Thomas K was in Port Arthur.[127] None of these factors demonstrate convincingly, however, a connection between the cause of action and the activities. Moreover, the court seemed to lapse again into general jurisdiction analysis when it considered, as relevant to its specific jurisdiction holding, the number and frequency of visits by Club insured vessels to Texas, the extensive work of correspondent law firms, the presence of Club policyholders in Texas who pay premiums from Texas, and the Club's insurance of Texas related risks, including the Thomas K.[128] The court's specific jurisdiction analysis thus seems questionable.

A Texas federal court examined a fact pattern remarkably similar to the facts of *Burger King Corp. v. Rudzewicz*[129] in *Igloo Products Corp. v. The Mounties, Inc.*[130] Igloo Products Corp. (Igloo), a Texas corporation, filed an action against The Mounties, Inc. (The Mounties) based upon a contract under which The Mounties, in 1987, became Igloo's sales representative in Oregon and Washington. The Mounties filed a motion to dismiss for lack of personal jurisdiction.

The court noted that, like the parties in *Burger King*, who contracted for a long-term relationship, Igloo and The Mounties had entered into successive contracts for a period of at least thirteen years.[131] The contracts provided that Texas law would apply.[132] The court also emphasized that Texas was Igloo's principal place of business, and The Mounties and Igloo conducted business in Texas by mail and by telephone.[133] The Mounties regularly sent checks directly to Igloo's Texas office and participated in several meetings in Texas directly related to the contract in question. The *Burger King* court considered all such factors relevant to a proper assertion of jurisdiction, and the Texas court found that *Burger King* controlled the personal jurisdiction issue in *Igloo*.[134]

b. The Application of the General Principles in Texas State Courts.

In *Matthews v. Proler*[135] the court of appeals held that a Texas attorney

126. *Id.* at 448.

127. *Id.*

128. *Id.* The court also noted that the plaintiff was a Texas resident and that Texas' interest in protecting its own residents is relevant to jurisdiction. *Id.* (citing De Melo v. Toche Marine, Inc., 711 F.2d 1260, 1272 (5th Cir. 1983)). The court further observed that the Club had taken certain steps to protect its interest in the litigation between the plaintiffs and Eagle. In fact, the Club's counsel had attended the entire trial to ensure that Eagle presented a bona fide defense. *Id.* at 448-49.

129. 471 U.S. 462 (1985).

130. 735 F. Supp. 214 (S.D. Tex. 1990).

131. *Id.*

132. In *Burger King* the contract provided that the law of Florida, the jurisdictionally challenged state, would apply.

133. 735 F. Supp. at 216.

134. *Id.* The court abstained from hearing the case and transferred the action to Oregon, however, based on the pendency of a related action filed by The Mounties against Igloo. *Id.* at 218.

135. 788 S.W.2d 172 (Tex. App.—Houston [14th Dist.] 1990, no writ).

could not recover legal fees from a non-resident client because the attorney did not meet his burden of showing that the contract was to be performed in Texas.[136] Following the client's failure to pay fees, the attorney brought an action against the client for breach of contract and recovery in quantum meruit. The client specially appeared,[137] and the trial court dismissed the case for lack of jurisdiction.[138]

The court found that the client was not a Texas resident, was not required to designate or maintain a registered agent for service in Texas, and did not maintain a place of business in Texas.[139] As the client met his burden to negate the attorney's allegations of jurisdiction in Texas, the burden shifted to the attorney to demonstrate that the client purposely availed himself of the benefits and protections of Texas laws.[140]

Although the parties indisputably entered into the contract in Texas, the trial court concluded that the agreement was to be performed in Wisconsin.[141] Upholding the trial court's dismissal for lack of jurisdiction, the court of appeals distinguished the tort and contract provisions of the Texas long-arm statute.[142] The court noted that while proof that a non-resident committed a purposeful act in Texas is sufficient to establish jurisdiction in a tort action, the proof that a non-resident enters into a contract in Texas, standing alone, is insufficient.[143]

The Dallas court of appeals, in *Electronic Data Systems Corp. v. Hanson*,[144] reversed the trial court's dismissal for lack of personal jurisdiction because the pleadings and affidavits of the non-resident defendant were not sufficient to negate jurisdiction.[145] Electronic Data Systems Corp. (EDS) alleged that Hanson, a North Carolina resident, promised to pay EDS $9,000 at its offices in Dallas, Texas. As EDS met its burden of pleading sufficient allegations to bring Hanson within the provisions of the long-arm statute,[146] the burden shifted to Hanson to present evidence to negate all

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136. *Id.* at 174.

137. *See* TEX. R. CIV. P. 120(a).

138. 788 S.W.2d at 173.

139. *Id.*

140. *Id.* at 174.

141. *Id.* at 173-74. The attorney argued that the contract for legal services was performed in part in Texas. The court acknowledged that it was doubtful that a Texas attorney handling a case in Wisconsin would not do at least a portion of the work at his Texas office. *Id.* at 174. No statement of facts was recorded at the special appearance hearing, however. Therefore, the court presumed that the evidence presented at trial was sufficient to support all findings of fact necessary to support the judgment and refused to substitute its own subjective determination for that of the trial judge. *Id.*

142. *Id.* at 174-75. In addition to other acts that may constitute doing business, a non-resident does business in this state if the non-resident:

> (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;
>
> (2) commits a tort in whole or in part in this state.

TEX. CIV. PRAC. & REM. CODE ANN. § 17.042(1), (2) (Vernon 1986 & Supp. 1991).

143. 788 S.W.2d at 175.

144. 792 S.W.2d. 506 (Tex. App.—Dallas 1990, no writ).

145. *Id.* at 508.

146. EDS alleged that Hanson purposefully engaged in business in Texas by entering into a

bases of personal jurisdiction.[147] Hanson did not appear and testify, nor did she produce any witnesses in support of her claim of lack of jurisdiction. The court rejected Hanson's argument that her pleadings and *ex parte* affidavit were sufficient to establish lack of jurisdiction, noting that neither was competent evidence to support a special appearance.[148] The court, therefore, held that Hanson failed to meet her burden of showing lack of amenability to long-arm process, and the trial court erred in sustaining Hanson's special appearance.[149]

4. *Whether Service of Process is Proper*

In *Wilson v. Dunn*[150] the Texas Supreme Court held that a plaintiff must strictly comply with Texas Rule of Civil Procedure 106(b) service requirements to obtain a default judgment based on substituted service.[151] This rule applies even if the defendant has actual knowledge of the lawsuit.[152] Wilson brought a personal injury action against Dunn, and after several months of unsuccessfully attempting to serve Dunn at his apartment, Wilson's attorney filed a motion for substituted service under rule 106(b). Wilson's motion was not verified or supported by affidavit as rule 106(b) expressly requires.[153] The trial court, however, granted the motion and ordered that the citation be served upon Dunn either by attaching it to his apartment door or by delivering it to his apartment manager.[154] The trial court specifically instructed the clerk to attach a note to the docket sheet stating that no default judgment was to be taken.[155] The return of citation stated that it had been delivered to the defendant's agent for service, Dunn's apartment manager. Dunn actually received the papers and hand-delivered them to his insurance agent.

The insurance adjuster and Wilson's attorney agreed that, pending efforts to settle Wilson's claim, Wilson would not require Dunn to file an answer in

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contract with a Texas resident which was to be performed in whole or in part in Texas. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986 & Supp. 1991).

147. *Id.* at 507 (citing Read v. Cary, 615 S.W.2d. 296, 298 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.)); Roquemore v. Roquemore, 431 S.W.2d. 595, 600 (Tex. Civ. App.—Corpus Christi 1968, no writ).

148. *Id.* at 508.

149. *Id.*

150. 800 S.W.2d 833 (Tex. 1990).

151. *Id.* at 836.

152. *Id.*

153. Rule 106(b) states:

> Upon motion *supported by affidavit* stating the location of the defendants' usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named *in such affidavit* but has not been successful, the court may authorize service
>
> (1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or
>
> (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

TEX. R. CIV. P. 106(b) (emphasis added).

154. 800 S.W. 2d at 834.

155. *Id.*

the case. They also agreed that no default judgment would be taken without ten days notice. Nearly two years after the accident, the parties had yet to reach a settlement. Following a conversation with Dunn, Wilson's attorney, distrustful of the insurance adjuster, went to the trial court to obtain a default judgment. The attorney requested the file from the clerk to take it to another judge for hearing on his request for a default judgment. Although the clerk hesitated because of the attached note prohibiting a default judgment, she eventually gave the file to Wilson's attorney. Prior to the hearing before another judge, Wilson's attorney removed the note from the file and threw it away. After the hearing, the judge rendered a default judgment for Wilson in the amount of $475,000.00.[156]

After Dunn learned of the default judgment, he filed a motion for new trial. The trial court denied the motion, concluding that Dunn had received actual notice of the suit and that his failure to file an appearance was his insurer's fault.[157] The court of appeals reversed, holding that service was defective and could not support the default judgment.[158]

The Texas Supreme Court affirmed the court of appeals' decision. The court noted that, regardless whether a defendant has notice, Texas law proscribes talking a default judgment absent strict compliance with the rules of civil procedure service requirement.[159] The court held that service on Dunn was defective because it was not properly authorized without the requisite affidavit.[160]

In contrast to the rigid application of rule 106 in *Wilson*, the Texas Supreme Court, in *Higginbotham v. General Life & Accident Insurance Co.*,[161] held that, when an officer's return of service of process does not recite the proper method of service but the record affirmatively demonstrates a proper form of service and contains an order tantamount to formal amendment of the return of citation, service is sufficient.[162] In *Higginbotham* the court rendered a default judgment against two insurance companies that actually received citation but did not file an answer because the citations were erroneously placed in the wrong file rather than forwarded to the corporate attorney.[163] The return on the citations reflected that they were served at 12:01 p.m. on Tuesday, March 18, 1986. The insurance companies filed motions for new trial, asking the court to set aside the default judgments be-

156. *Id.* at 835. After the default judgment was awarded, Wilson's attorney told the judge that he had removed the note from the file because Dunn had actual knowledge of the suit and default was therefore appropriate. The judge chastised Wilson's attorney for his tactics but did not set aside the default judgment. The Supreme Court did not comment on the attorney's behavior.

157. *Id.* at 835.

158. *Id.* at 836-37.

159. *Id.*

160. *Id.* at 836. The court noted that the express requirement of an affidavit in support of a motion for substitute service was added in 1981. Since that time the courts have consistently held that substitute service may not properly issue on a motion supported by an affidavit that is conclusory or otherwise insufficient. *Id.*

161. 796 S.W.2d 695 (Tex. 1990).

162. *Id.* at 697. TEX. R. CIV. P. 118 provides for amendment of citations.

163. 796 S.W.2d at 696.

cause of improper service. The trial court overruled the motions, finding service proper under article 3.64 of the Insurance Code, the relevant statutory provision in 1986.[164]

The court of appeals reversed and remanded the cause for trial, holding that, although the record reflected the time and date of service, it did not affirmatively show service at either company's home office during business hours.[165] The Texas Supreme Court reversed the court of appeals on the grounds that the trial court's finding that service was proper under article 3.64 necessarily also found that service was made during business hours.[166]

The court emphasized that it had not retreated from its rule that failure to strictly comply with the rules of civil procedure governing service of process renders the attempted service invalid and a default judgment improper.[167] The court observed that the citation return alone in *Higginbotham* would have been insufficient to show valid service.[168] The court limited its holding to situations involving a record that showed strict compliance with a valid method of service and an order expressly or implicitly amending the return of citation.[169]

Four justices dissented from the majority holding.[170] Writing the dissenting opinion, Chief Justice Phillips stated that the defendants were amenable to service under two statutes, but plaintiffs complied with neither.[171] Article 2.11 of the Texas Business Corporations Act provides that a domestic corporation may be served by delivering process to its president, any vicepresident, or its registered agent,[172] and the return of service on General Life and Accident Insurance Company stated that Joyce Brown was the defendant's registered agent. The record, however, established that Ms. Brown was not the company's registered agent. Moreover, the return of service on National Benefit Life Insurance Company did not even state Joyce Brown's capacity.

Plaintiffs did not comply with article 3.64[173] because nothing in the returns indicated that "3900 S. FWY" was either company's home office.[174]

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164. *Id.* Article 3.64 provides:

> Process in any civil suit against any "domestic" company, may be served only on the president, or any active vice president, or secretary, or general counsel residing at the city of the home office of the company, or by leaving a copy of same at the home office of such company during business hours.

TEX. INS. CODE ANN. art. 3.64 (repealed 1987) (currently TEX. INS. CODE ANN. art. 1.36) (Vernon Supp. 1991) [hereinafter art. 3.64].

165. 750 S.W.2d 19, 20 (Tex. Civ. App.—Fort Worth 1989), *rev'd*, 796 S.W.2d 695 (Tex. 1990).

166. 796 S.W.2d at 696. The Court also noted that the trial court could properly take judicial notice that 12:01 p.m. on March 18, 1986, was early on Tuesday afternoon and not a statutory holiday. TEX. R. EVID. 201(b), (c).

167. 796 S.W.2d at 697 (citing Uvalde Country Club v. Martin Linnen Supply Co., 690 S.W.2d 884, 885 (Tex. 1985)).

168. *Id.*

169. *Id.*

170. *Id.* at 697-700.

171. *Id.* at 698-99.

172. *See* TEX. BUS. CORP. ACT ANN. art. 2.11 (Vernon 1980).

173. *See* art. 3.64, *supra* note 164.

174. 796 S.W.2d at 699. In Mahon v. Caldwell, Haddad, Skaggs, Inc., 783 S.W.2d 769, 771 (Tex. App.—Fort Worth 1990, no writ), the court of appeals held that provision of the

Moreover, the recitals in the petition failed to prove that service was effected on the defendants at their home office as required by article 3.64.[175] The dissent also emphasized that, contrary to the majority holding, a return of citation cannot be amended by implication.[176]

Despite the disclaimer by the majority in *Higginbotham*, the court did indeed change the rules.[177] The requirement of strict compliance with the rules of service of process is now modified, and the amendment by implication holding invites courts to deviate from over a century of established law.

The date of service of process relates back to the date of filing *only if* the plaintiff exercises diligence in effecting service.[178] In *Gant v. DeLeon*,[179] the Texas Supreme Court held that the unexplained failure to serve process on a defendant for periods totalling more than three years established lack of diligence as a matter of law.[180] Plaintiffs filed suit on April 8, 1981, but did not serve the defendant until July 7, 1987, more than six years after plaintiffs had filed suit.[181]

The trial court granted Gant's motion for summary judgment on the grounds that the plaintiff failed to exercise diligence and thus the applicable two-year statute of limitations barred his claims.[182] The court of appeals reversed and remanded, holding that the summary judgment proof raised a fact issue concerning the plaintiff's diligence in effecting service.[183] The Texas Supreme Court reversed, observing that the uncontroverted summary judgment proof established that the plaintiffs failed to obtain service on the defendants during three extended periods in the six years it took the plaintiffs to accomplish service.[184] Thus, the record established failure to use diligence as a matter of law.[185]

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non-resident's sole recorded place of business satisfies the requirement that the Secretary of State receive the name and address of the non resident's home office. The court based its holding on the fact that the contract between the parties that was admitted into evidence contained only one business address. *Id.* at 771.

175. 769 S.W.2d at 699. The trial court made a finding of fact that this address was the home office based on evidence presented at the motion for new trial hearing. The dissent emphasized, though, that such postjudgment evidence could not supply the necessary information lacking in the record when the judgment was signed. *Id.* (citing Cox Marketing, Inc. v. Adams, 688 S.W.2d 215, 217-18 (Tex. App.—El Paso 1985, no writ)).

176. 769 S.W.2d at 699-700.

177. *Id.* at 699.

178. Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam) (citing Zale Corp. v. Rosenbaum, 520 S.W.2d 889, 890 (Tex. 1975) (per curiam)).

179. 786 S.W.2d 259 (Tex. 1990).

180. *Id.* at 259.

181. July 7, 1987 was also almost eight years after the automobile accident, the subject of the suit, occurred.

182. 786 S.W.2d at 259. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986). To bring suit within the two-year limitations period prescribed by § 16.003, a plaintiff must not only file suit within the applicable limitations period but must also use diligence to have the defendant served with the process. Rigo Mfg. Co. v. Thomas, 458 S.W.2d 180, 182 (Tex. 1970).

183. DeLeon v. Gant, 773 S.W.2d 396, 398 (Tex. App.—San Antonio 1989), *rev'd*, 786 S.W.2d 259 (Tex. 1990).

184. 786 S.W.2d at 260. Specifically, plaintiffs did nothing from June 12 to December 31, 1981, from March 16, 1983, to November 9, 1984, and from May 28, 1986, to June 3, 1987.

185. *Id.*

B. *Whether to Exercise the Personal Jurisdiction that Exists*

According to the doctrine of *forum non conveniens*, a court has the discretion to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.[186] In a major decision, *Dow Chemical Co. v. Alfaro*,[187] a majority of the Texas Supreme Court determined that the doctrine of *forum non conveniens* does not apply in statutory personal injury and death cases.[188] Rather, a foreign plaintiff has an absolute right to bring suit in Texas under section 71.031 of the Texas Civil Practice and Remedies Code.[189] The court based its decision on its interpretation of section 71.031 as containing a statutory abolition of the doctrine of *forum non conveniens*. The court found support for this interpretation in its previous refusal of writ in a 1932 case, *Allen v. Bass*,[190] which had interpreted the predecessor of section 71.031 to grant a foreign plaintiff an absolute right to bring a proper suit in Texas.[191] The *Alfaro* case spawned two concurrences and four dissents, each with a written opinion.[192]

The dispute in *Alfaro* arose between Costa Rican employees of the Standard Fruit Company and Dow Chemical Company (Dow) and Shell Oil Company (Shell), both of which are incorporated in Delaware but authorized to do business in Texas. The employees claimed that they suffered severe medical problems, including sterility, as a result of exposure to a pesticide manufactured by Dow and Shell. The employees filed a petition in Texas state court, alleging that the court had jurisdiction under the predecessor to section 71.031. Both section 71.031 and its predecessor provide that a foreign citizen may enforce a personal injury or wrongful death action

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186. BLACK'S LAW DICTIONARY (5th ed. 1979); *see* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

187. 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

188. *Id.* at 679.

189. Section 71.031 of the Texas Civil Practice and Remedies Code provides:

> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death of injury takes place in a foreign state or country, if:
>
> (1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
>
> (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
>
> (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.
>
> (b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.
>
> (c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986) [hereinafter § 71.031].

190. 47 S.W.2d 426, 427 (Tex. Civ. App.—El Paso 1932, writ ref'd).

191. 786 S.W.2d at 678. The predecessor to § 71.031, *supra* note 189, was Revised Statutes, § 1, art. 4678, 1925 TEX. REV. CIV. STAT. 2, 1283, *amended by* Act of May 29, 1975, ch. 530, § 2, 1975 Tex. Gen Laws 1381, 1382, *repealed by* Civil Practice and Remedies Code, ch. 959, § 9, 1985 Tex. Gen. Laws 3242, 3322 [hereinafter article 4678].

192. Justices Hightower and Doggett issued concurring opinions. Justices Phillips, Gonzalez, Cook and Hecht issued dissenting opinions. 786 S.W.2d at 679-708.

in Texas under certain conditions.[193] After trying unsuccessfully to remove the suit to federal court, Dow and Shell attacked the trial court's jurisdiction and also contended that the court should dismiss the case under the doctrine of *forum non conveniens.*

The trial court, although finding jurisdiction, dismissed the case on *forum non conveniens* grounds.[194] The Houston court of appeals reversed, holding that Texas courts have no authority to dismiss a personal injury or wrongful death claim under section 71.031 on that basis.[195]

The supreme court affirmed, concluding that the Texas legislature statutorily abolished the doctrine of *forum non conveniens* when it enacted the predecessor to section 71.031.[196] The court thus was compelled to establish that the doctrine of *forum non conveniens* existed in Texas before enactment of that predecessor statute in 1913. To attempt to do so, the court cited four early cases in which the courts refused to exercise jurisdiction.[197] None of these cases, however, used the term *forum non conveniens.*[198] Nonetheless, the court determined that the doctrine existed prior to 1913.[199] The court further determined that the language in section 71.031 and its predecessor, providing that a personal injury action "may be enforced in the courts of this state," is mandatory, and does not allow a trial court to dismiss an action under section 71.031 based on *forum non conveniens,* thus abolishing the doctrine by statute.[200]

The court relied upon its refusal of writ of error in *Allen v. Bass*[201] to bolster its interpretation of section 71.031. In *Allen* the court held that the predecessor statute gave citizens of a neighboring state the absolute right to maintain a suit under that statute in a Texas court.[202] According to the *Alfaro* court, the *Allen* court clearly addressed and rejected the doctrine of *forum non conveniens* in the context of the predecessor statute.[203] As the Texas Supreme Court refused the application for writ of error in *Allen,* the

193. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986). Section 71.031, *supra* note 189, contained no substantive change from its predecessor, article 4678, *supra* note 191. The Supreme Court thus determined that § 71.031 governed the instant case. 786 S.W.2d at 675 n.1.

194. 786 S.W.2d at 674.

195. Alfaro v. Dow Chemical Co., 751 S.W.2d 208 (Tex. App.—Houston [1st Dist.] 1988), *aff'd.*, 786 S.W.2d 674 (Tex. 1990), *cert. denied,* 111 S. Ct. 671 (1991).

196. 786 S.W.2d at 678-79.

197. *See* Missouri, Kansas & Texas Ry. v. Godair Comm'n Co., 87 S.W. 871 (1905, writ ref'd); Southern Pacific Co. v. Graham, 34 S.W. 135 (1896, no writ); Mexican Nat'l R.R. v. Jackson 33 S.W. 857 (1896, no writ); Morris v. Missouri Pac. Ry., 14 S.W. 228 (1890).

198. Two commentators have observed that the doctrine of *forum non conveniens* originated in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 512 (1947). *See* Robertson & Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions,* 68 TEX. L. REV. 937, 948-49 (1990).

199. 786 S.W.2d at 677.

200. *Id.* at 678-79. Justice Hightower, in concurrence, encouraged the legislature to amend § 71.031, *supra* note 189, if it did not intend the statute and its predecessor to abolish the doctrine of *forum non conveniens.* 786 S.W.2d at 680.

201. 47 S.W.2d 426 (Tex. Civ. App.—El Paso 1932, writ ref'd).

202. 786 S.W.2d at 678. *Allen* involved a dispute between a New Mexico plaintiff and a New Mexico defendant arising out of an accident occurring in New Mexico.

203. 786 S.W.2d at 678.

Alfaro court decided that its interpretation of section 71.031 was controlled by that refusal.[204] A close reading of *Allen* puts immediately at issue, however, the court's conclusion that *Allen* clearly addressed and squarely rejected the *forum non conveniens* doctrine.

Justices Gonzalez and Hecht wrote the most extensive dissenting opinions.[205] Both attacked the majority's view that the legislature had abolished *forum non conveniens* in 1913 by pointing out that the court itself recently observed that the applicability of *forum non conveniens* to an article 4678 (predecessor to section 71.031) suit was an open question.[206] Both Justices emphasized that section 71.031 does not confer upon foreign litigants an *absolute* right to bring suit in Texas; rather, courts should construe the statute as permissive.[207] The authors agree.[208] Justices Gonzalez and Hecht predicted, respectively, that, if the legislature fails to reinstate the doctrine of *forum non conveniens*, Texas will become "an irresistible forum for all mass disaster lawsuits"[209] and "the courthouse for the world."[210]

Justice Gonzalez noted that the legislature provided no indication that it sought to abolish *forum non conveniens* when it enacted the predecessor statute to section 71.031 in 1913 because the doctrine itself did not exist in the state until after the United States Supreme Court's decision in *Gulf Oil v. Gilbert*.[211] The predecessor statute merely gave *Texas citizens* the right to maintain an action without threat of dismissal under the dissimilarity doctrine.[212]

Furthermore, Justice Gonzalez observed that *Allen* is not conclusive on

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204. *Id.* The Texas Supreme Court's refusal of writ of error indicates that the judgment of the court of appeals was correct and the principles of law declared in the opinion were correctly determined. Texas Rules of Form app. A at 48 (7th ed.).

205. Justice Doggett wrote a separate concurrence specifically to attack the dissenters, who, in his opinion, advocated a doctrine that would immunize "multinational corporations from accountability for their alleged torts causing injury abroad . . . ." 786 S.W.2d at 681. Justice Doggett's concurrence indicates, however, that he actually believes less that the doctrine has been abolished than that it should be, *id.* at 689, and in effect, supports accomplishing by judicial fiat what the legislature permitted but did not mandate.

206. 786 S.W.2d at 691 n.3, 706 (citing Couch v. Chevron Int'l Co., 682 S.W.2d 534, 535 (Tex. 1984) (per curiam)); Flaiz v. Moore, 359 S.W.2d 872, 876 (Tex. 1962).

207. 786 S.W.2d at 690 (Gonzalez, J., dissenting) (trial courts have inherent authority to apply *forum non conveniens* in appropriate cases); *id.* at 707 (Hecht, J., dissenting) (*forum non conveniens*, appropriately exercised, does not preclude courts from receiving cases they ought to hear. Rather, it enables courts to avoid cases under circumstances basically unfair to the defendants, the public, or both.)

208. Chief Justice Phillips pointed out in his dissent to the opinion of the court overruling the Motion for Rehearing that the amendment to the Texas Rules of Appellate Procedure, providing that the court's exercise of jurisdiction over direct appeals is discretionary, directly conflicts with its opinion in *Alfaro*. Both § 71.031 and the statute authorizing direct appeals use the term "may." Chief Justice Phillips properly observed that "may" cannot be mandatory in one instance and not in the other. 786 S.W.2d at 709.

209. *Id.* at 690 (Gonzalez, J., dissenting).

210. *Id.* at 707 (Hecht, J., dissenting). Justice Phillips stated in his dissent that he "lack[ed] the prescience to foretell whether dire consequences [would] follow." 786 S.W.2d at 689-90. Justice Cook's dissent observed that the plaintiffs in *Alfaro* "hit pay dirt in Texas." *Id.* at 697.

211. *Id.* at 694 (citing Gulf Oil v. Gilbert, 330 U.S. 501 (1947)). *See supra* note 198.

212. Some courts refuse to enforce actions for personal injury or wrongful death when the applicable law is too dissimilar from the law of the forum. RUSSELL J. WEINTRAUB, COM-

the issue of the application of *forum non conveniens* to section 71.031 because the *Allen* court did not address the doctrine of *forum non conveniens* (or engage in the balancing of the public or private interests it demands) but rather applied the doctrine of comity.[213] After proposing guidelines for a *forum non conveniens* analysis,[214] Justice Gonzalez concluded that only the legislature may abolish the doctrine of *forum non conveniens*, an act which it absolutely has not yet performed.[215]

Justice Hecht observed that Texas is the first state to reject absolutely the doctrine of *forum non conveniens*.[216] Moreover, supreme courts in states with statutes similar to section 71.031 have interpreted the term "may" as permissive.[217] In Justice Hecht's opinion, *Allen* is feeble precedent and should be overruled.[218] Justice Hecht observed that the majority gave neither authority nor policy reasons for abolishing the doctrine of *forum non conveniens*.[219] His rhetorical questions deserve answers. Among those questions are these: 1) "Why . . . should Texas be the only state in the country, perhaps the only jurisdiction on earth, possibly the only one in history, to offer to try personal injury cases from around the world?"[220] and 2) "What advantage for Texas does the Court see, or what advantage does it think the legislature envisioned, that no other jurisdiction has ever seen, in abolishing the rule of *forum non conveniens* for personal injury and death cases?"[221]

The supreme court's action in *Alfaro*, combined with the Fifth Circuit's decision in *In re Air Crash Disaster*[222] that the federal law of *forum non conveniens* applies in diversity cases, will undoubtedly increase the number of attempted removals from state to federal court so that defendants can rely upon the federal law of *forum non conveniens*. This procedure is perhaps unnecessary in state court maritime cases, but some uncertainty exists. Judge Gee's recent opinion in *Exxon Corp. v. Chick Kam Choo*[223] stated that the reverse *Erie* doctrine requires state courts to apply federal *forum non conveniens* law in maritime cases.[224] The United States Supreme Court reversed the decision on other grounds, observing that, while "[i]t may be

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MENTARY ON THE CONFLICT OF LAWS 49 n.5 (2d ed. 1980). Texas law has abandoned the dissimilarity doctrine. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984).

213. 786 S.W.2d at 694 (citing McNutt v. Teledyne Indus., Inc., 693 S.W.2d 666, 668 (Tex. App.—Dallas 1985, writ dism'd)).

214. 786 S.W.2d at 695-96.

215. *Id.* at 697.

216. *Id.* at 703 n.6. Nine states, while not adopting the doctrine, have not rejected it outright.

217. *Id.* at 705, discussing statutes in Kansas, Iowa and Alabama.

218. *Id.* at 706. Justice Hecht emphasized that no other court has followed *Allen*, and two courts have expressly rejected it. *Id.*; *see* McNutt v. Teledyne Indus. Inc., 693 S.W.2d 666, 668 (Tex. App.—Dallas 1985, writ dism'd); ForcumDean Co. v. Missouri Pac. R.R., 341 S.W.2d 464, 465-66 (Tex. Civ. App.—San Antonio 1960, writ dism'd). Chief Justice Phillips agrees that *Allen* should be overruled. 786 S.W.2d at 689.

219. 786 S.W.2d at 706.

220. *Id.* at 707.

221. *Id.*

222. 821 F.2d 1147, 1159 (5th Cir. 1987).

223. 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988), *vacated and remanded*, 849 F.2d 910 (5th Cir. 1988).

224. *Id.* at 309.

that the respondents' reading of the preemptive force of federal maritime *forum non conveniens* determinations is correct . . . ." they need not reach the issue.[225] Maritime cases may thus be an exception to the *Alfaro* holding.

In addition, the Fifth Circuit, in *Ikospentakis v. Thalassic Steamship Agency*,[226] recently refused to approve a plaintiff's voluntary dismissal of a maritime suit in federal court and subsequent refiling in a state court in Louisiana, which does not recognize the *forum non conveniens* doctrine in maritime cases, because despite the statement in *Choo* that state courts *must* apply federal law in maritime cases, Louisiana courts have refused to accept Judge Gee's pronouncement.[227] The panel in *Ikospentakis* thus noted that the defendants in *Ikospentakis* would be guinea pigs in the state court.[228] Whether Texas state courts will adopt Judge Gee's analysis in *Choo* and apply the federal law of *forum non conveniens* in maritime cases in state court in the face of the *Alfaro* decision remains an open question.

In *Hotvedt v. Schlumberger, Ltd.*[229] the Fifth Circuit reversed the trial court's dismissal of a diversity action by a Canadian citizen and a California resident against Schlumberger Technology Corporation (STC), a Texas corporation and Schlumberger, Ltd. (SL), its parent corporation, on *forum non conveniens* grounds. Hotvedt, a Canadian citizen and California resident, was exposed to radioactive isotopes during his employment with SL in Brazil. Hotvedt originally filed suit in California state court, which dismissed the action against SL for lack of personal jurisdiction and stayed the action against STC on the grounds of *forum non conveniens*.[230] Instead of pursuing STC in Venezuela or Brazil, as the California court directed, Hotvedt filed suit in Texas state court. The defendants removed the action to federal court, and the Texas federal court dismissed the action against STC on statute of limitations grounds and against SL on *forum non conveniens* grounds.[231]

With regard to the *forum non conveniens* dismissal, the Fifth Circuit observed that because STC, allegedly the most culpable defendant, was a wholly owned subsidiary of SL, it would be fair to make SL defend the action in Texas.[232] In fact, requiring the plaintiffs to file suit against SL in Brazil or Venezuela would be an abuse of discretion.[233] The Fifth Circuit did not mention the *Alfaro* decision, even though it would apparently be applicable to Hotvedt's personal injury claims.

The most interesting part of the *Hotvedt* decision, however, concerns its

225. 486 U.S. at 147. The *Chick Kam Choo* holding was reaffirmed in Ikospentakis v. Thalassic S.S. Agency, 915 F.2d 176, 178 (5th Cir. 1990).

226. 915 F.2d 176 (5th Cir. 1990).

227. *Id.* at 178. The other two panel members did not join in Judge Gee's opinion that federal *forum non conveniens* law applies in state court.

228. *Id.* at 180; *cf.* Quintero v. Klaveness Ship Lines, 914 F.2d 717, 721 (5th Cir. 1990) (case dismissed with prejudice on *forum non conveniens* grounds).

229. 914 F.2d 79 (5th Cir. 1990).

230. *Id.* at 80.

231. *Id.*

232. *Id.* at 82.

233. *Id.*

holding related to the Texas savings clause, which provides a period of time for tolling the applicable statute of limitations until the refiling of a lawsuit when the suit was dismissed for *lack of jurisdiction*.[234] The Fifth Circuit stretched the savings clause to apply to the situation in *Hotvedt*, although the California court originally stayed the action against STC on the basis of *forum non conveniens*.[235] Even though the California court had jurisdiction and a literal reading of the savings statute would preclude its applicability to these facts, the Fifth Circuit determined that the court "effectively did not have jurisdiction because it used the doctrine of *forum non conveniens* to avoid the imposition of its jurisdiction."[236] The Fifth Circuit's conclusion is questionable because the California court actually had jurisdiction but declined to exercise it. This distinction is an important one. No adequate rationale appears for the court's application of the savings statute on these facts, and the court's opinion adds confusion to the doctrine of *forum non conveniens*.

II. WHICH LAW APPLIES

A. Choice of Law in Transfers under 28 U.S.C. § 1404(a).

The United States Supreme Court, in *Ferens v. John Deere Co.*,[237] held that the rule established in *Van Dusen v. Barrack*[238] applies both to plaintiffs and defendants. The Court focused primarily on convenience and the interest of justice and minimized the impact of manipulative forum shopping. A transferee court must therefore apply the transferor court's choice of law rules after a section 1404(a) transfer initiated by either a defendant or a plaintiff.[239]

Ferens was injured on his farm in Pennsylvania while working with a combine manufactured by John Deere.[240] Ferens did not file a tort suit during Pennsylvania's two year limitations period. During the third year following the accident, Ferens instituted a diversity action against John Deere

234. TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 (Vernon 1986) states the following:

> (a) The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
>
> (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.
>
> (b) This section does not apply if the adverse party has shown in abatement that the first filing was made with intentional disregard of proper jurisdiction.

235. 914 F.2d at 82-83.

236. *Id.* at 82.

237. 110 S. Ct. 1274 (1990). Justice Kennedy wrote the opinion of the Court, joined by Chief Justice Rehnquist and Justices White, Stevens, and O'Connor.

238. 376 U.S. 612 (1964). Under *Van Dusen*, a transferee court must apply the transferor court's choice of law rules to a defendant-initiated § 1404(a) transfer.

239. 110 S. Ct. at 1280.

240. John Deere Co. was a Delaware Corporation with its principal place of business in Illinois.

in Pennsylvania federal court, raising contract and warranty claims for which the Pennsylvania limitations period had not run. Ferens also filed a second diversity suit against John Deere in federal court in Mississippi, alleging negligence and product liability claims, to take advantage of Mississippi's six year statute of limitations applicable to tort claims.[241]

Ferens then filed an unopposed motion to transfer the Mississippi action to Pennsylvania federal court under 28 U.S.C. § 1404(a) on the ground that Pennsylvania was a more convenient forum. The Mississippi court transferred the action to the federal court in Pennsylvania,[242] and the Pennsylvania district court consolidated the transferred tort action with the pending contract and warranty action.[243] The Pennsylvania court ruled, however, that because Ferens moved for transfer as a plaintiff, the *Van Dusen* rule requiring application of the transferor court's choice of law rules to a defendant-initiated section 1404(a) transfer did not apply.[244] Thus, the district court refused to apply the Mississippi statute of limitations and dismissed Ferens' tort action on the grounds that the Pennsylvania two-year limitations period barred it.[245] The Third Circuit upheld the district court's dismissal of the tort action, ruling that a transferor court's choice of law rules do not apply following a transfer under section 1404(a) on a motion by a plaintiff.[246]

The United States Supreme Court quoted extensively from *Van Dusen*[247] and applied the three policies asserted there to determine that *Van Dusen*'s rationale applies whether the movant is plaintiff or defendant.[248] First, section 1404(a) should not deprive parties of state law advantages that exist absent diversity jurisdiction. That is, a party should have the same advantages in a section 1404(a) diversity suit in the forum as in a state court suit in the forum.[249] The *Van Dusen* Court recognized the danger of subjecting a plaintiff's venue privilege and resulting state law advantages to the defend-

241. Under Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941), the Mississippi court exercising diversity jurisdiction in *Ferens* was required to apply Mississippi's choice of law rules. Under those rules, Pennsylvania substantive law would control the personal injury claim, but Mississippi law would govern the limitation period. 110 S. Ct. at 1278. *See* MISS. CODE ANN. § 15149 (1972).

242. 110 S. Ct. at 1278.

243. *Id.*

244. *Id.*

245. *Id.* (citing Ferens v. Deere & Co., 639 F. Supp. 1484 (W.D. Pa. 1986)).

246. 110 S. Ct. at 1279 (citing 862 F.2d 31 (3d Cir. 1988)). Initially, the Third Circuit affirmed on a different theory that applying Mississippi's statute of limitations would violate due process because Mississippi had no legitimate interest in the case. 110 S. Ct. at 1278 (citing Ferens v. John Deere & Co., 819 F.2d 423 (3d Cir. 1987)). The United States Supreme Court vacated the decision after its ruling in Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), which held that a state may apply its own statute of limitations to claims governed by the substantive laws of another state without violating either the full faith and credit clause or the due process clause. 110 S. Ct. at 1279. On remand, the Third Circuit ruled that the *Van Dusen* rule did not apply to a § 1404(a) transfer by a plaintiff. *Id.* (citing 862 F.2d 31 (3d Cir. 1988)).

247. 110 S. Ct. at 1279.

248. *Id.* at 1280.

249. *Id*; *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

ant's control through successful transfer.[250] Weighing the relative considerations, the *Ferens* Court decided that application of the law of the transferee state would deprive the plaintiff of his state law advantages but would only deprive the defendant of the advantage of forcing the plaintiff to litigate in Missippii.[251] The Court held that application of the transferee court's law would thus undermine *Erie* by changing the state law applicable to a diversity case.[252]

Second, the Court in *Ferens* held that applying the transferor state's law to plaintiff-initiated 1404(a) transfers did not contravene *Van Dusen's* policy against forum shopping because applying the transferor court's law would not give a plaintiff an opportunity to obtain a choice of law that he could not already obtain through his initial forum selection.[253] Moreover, the plaintiff could have also shopped for Mississippi law in Mississippi state courts.[254]

Finally, the *Van Dusen* policy that a decision to transfer under section 1404(a) should turn on considerations of convenience rather than on the possibility of prejudice resulting from a change in the applicable law requires application of the law of the transferor state in plaintiff-initiated transfers.[255] One reason behind *Van Dusen*'s ruling that a transfer of venue by the defendant does not result in a change of law was to eliminate the necessity for the court to expend extensive judicial time and resources in determining the prejudice to the plaintiff.[256] The *Ferens* Court held that the same policy requires application of the transferor law when a plaintiff initiates a transfer.[257] Moreover, section 1404(a) exists for the benefit of the witnesses and interest of justice, and the entire judicial system should not suffer for the benefit of punishing an arguably manipulative plaintiff.[258]

The Court observed that although applying the transferee law under the facts of *Ferens* might be simple, such a rule would leave uncertain which law should apply when both parties move for a transfer of venue or when the court transfers venue on its own motion.[259] The Court thus held that foresight and judicial economy favor application of the transferor law regardless whether the plaintiff or the defendant makes the 1404(a) motion.[260] The Court so ruled even though the rule applied here allowed Ferens to have

250. Van Dusen v. Barrack, 376 U.S. 612, 638 (1964).

251. 110 S. Ct. at 1280-81, 108 L. Ed. 2d at 449-50.

252. 110 S. Ct. at 1281, 108 L. Ed. 2d at 450. Furthermore, the Court noted that *Ferens* would not have moved to transfer had he known that the Pennsylvania court would dismiss the action. *Id.* The authors believe that the plaintiff's tactical maneuver does not require such deference. Moreover, the court's comment that if John Deere had moved to transfer, Mississippi law would apply, is at best tangential.

253. 110 S. Ct. at 1282.

254. *Id.*

255. *Id.* at 1282-83.

256. *Id.* (citing Van Dusen v. Barrack, 376 U.S. 612, 636 (1964)).

257. 110 S. Ct. at 1283, 108 L. Ed. 2d at 452. If the law were to change following a plaintiff-initiated transfer, a trial court would similarly be reluctant to grant a transfer prejudicial to the defendant. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 1283-84.

both his choice of law and choice of forum and even seemed to reward him for his arguably manipulative conduct.[261] The Court specifically declined to develop sophisticated federal choice of law rules for diversity cases because state conflict of law rules are sufficient to ensure that appropriate laws apply to diversity cases.[262]

Justice Scalia wrote a dissenting opinion in which Justices Brennan, Marshall, and Blackmun joined.[263] Justice Scalia focused on the Rules of Decision Act,[264] which, as interpreted in *Erie*, requires a federal court to apply the law of the state in which it sits.[265] Justice Scalia viewed the issue before the Court as whether section 1404(a) alters the "principle of uniformity within a state" established by *Erie* and *Klaxon*.[266] He emphasized that by bringing suit in the Mississippi federal court en route to suit in the Pennsylvania federal court, Ferens sought to obtain application of a different substantive law in federal than in state court by use of a Pennsylvania federal court, where the transferor law of Mississippi would apply, instead of a Pennsylvania state court, where Pennsylvania law would apply. This result is the one *Klaxon* was designed to prevent.[267]

B. Choice of Law in Contract Actions

1. Choice of Law and Forum Selection Clauses

In *DeSantis v. Wackenhut Corp.*[268] the Texas Supreme Court withdrew its opinion and judgment entered nearly two years earlier[269] but reached the same result on the choice of law issue: Texas law governed a noncompetition clause in a contract for the performance of services in Texas, notwithstanding that the contract provided for the application of Florida law.[270] The court did, however, engage in a much more extensive and therefore more accurate choice of law analysis than in the earlier decision.

In August 1981 DeSantis, who had a career in the field of international and corporate security services, accepted a position as the Houston area manager of Wackenhut Corporation (Wackenhut), a Florida company that

261. 110 S. Ct. at 1284. The court focused on the result, rather than the means of obtaining the result, and noted that permitting the Pennsylvania and Mississippi actions involving the same issues to be simultaneously pending in different district courts would lead to the waste of time, energy, and money that § 1404(a) was designed to prevent. *Id.*

262. *Id.*

263. *Id.* at 1284-88.

264. 28 U.S.C. § 1652 (1988).

265. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

266. 110 S. Ct. at 1288. In Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941), the Supreme Court held that in diversity cases, a federal court must follow the conflict of laws rules prevailing in the state in which it sits. The Court reasoned that bringing suit in a federal court should not allow a plaintiff to achieve a result different than would be achieved by filing in state court.

267. 110 S. Ct. at 1286. A Pennsylvania state court would not apply the Mississippi six-year statute of limitations. The dissent also observed that the file-and-transfer ploy would cost the federal courts more time than it would save. 110 S. Ct. at 1287-88.

268. 793 S.W.2d 670 (Tex. 1990).

269. *See* DeSantis v. Wackenhut, 31 Tex. S. Ct. J. 616 (July 13, 1988).

270. 793 S.W.2d at 681.

specializes in providing security guards for businesses. At Wackenhut's request, DeSantis signed an agreement that, for the duration of his employment with Wackenhut and for two years thereafter, he would not compete in any way with Wackenhut in a forty county area in south Texas. DeSantis also agreed not to divulge any confidential or proprietary information acquired through his employment with Wackenhut. Finally, the parties agreed "that any questions concerning interpretation or enforcement of [the] contract shall be governed by Florida law."[271]

In March 1984 DeSantis resigned from Wackenhut under threat of termination. Thereafter, DeSantis formed Risk Deterrence, Inc. (RDI) to provide security consulting services and security guards to a small number of clients. One month following his resignation, DeSantis sent letters to twenty or thirty businesses, some of which were Wackenhut clients, announcing his new company. Although DeSantis expressly disclaimed in these letters any intent to interfere with existing contracts with Wackenhut, one of Wackenhut's clients terminated its contract with Wackenhut and signed a five-year contract with RDI.

In October 1984 Wackenhut sought to enjoin DeSantis and RDI from violating the noncompetition agreement. Wackenhut also sought damages for breach of the agreement.[272] At trial, the jury found that DeSantis breached the covenant not to compete.[273] The trial court applied Florida law, the law chosen by the parties, and held the noncompetition clause valid but overly broad.[274] Thus, the court permanently enjoined DeSantis from competing with Wackenhut in a limited area and from divulging Wackenhut's client list or proprietary information.[275] The court of appeals affirmed.[276]

The Texas Supreme Court first considered whether to apply Texas law or the Florida law selected by the parties to determine the enforceability of the noncompetition agreement.[277] This issue was one of first impression.[278] The court recognized that contracting parties may agree that the law of a particular state will apply to the contract,[279] but the chosen law must bear a rela-

271. *Id.* at 675.

272. Wackenhut alleged that DeSantis and RDI used confidential client and pricing information obtained through DeSantis' employment with Wackenhut. DeSantis and RDI counterclaimed. DeSantis alleged that Wackenhut fraudulently induced him to sign the noncompetition agreement, that the agreement violated state antitrust laws, and that enforcement of the agreement by temporary injunction was wrongful and tortiously interfered with DeSantis and RDI's contractual and business relationship.

273. 793 S.W.2d at 676.

274. *Id.* at 674-75. The trial court concluded that irreparable harm to Wackenhut was either presumed from DeSantis' breach of the agreement under Florida law or established as a matter of law because of the absence of an adequate legal remedy for breach of the agreement under Texas law. *Id.* at 676.

275. The trial court denied all relief DeSantis and RDI requested based upon the jury's finding that DeSantis had breached his agreement. 793 S.W.2d at 676.

276. *Id.* at 675.

277. *Id.* at 677.

278. *Id.*

279. *Id.* This conflict of laws concept is referred to as "party autonomy." *Id.* (citing RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 26971 (1971)). Texas has

tionship to the agreement or the parties and not contravene the public policy of the forum.[280]

The court based its analysis on section 187 of the *Restatement*, which describes the circumstances under which the court may apply the parties' choice of law.[281] Section 187(2)(b) required the court to determine 1) whether Texas had a more significant relationship than Florida to the parties and their transaction; 2) whether Texas had a materially greater interest than Florida in determining the enforceability of the noncompetition agreement; and 3) whether application of Florida law would conflict with Texas public policy.[282] In its earlier opinion, the court leaped to the third factor without analyzing the first two.[283] In the opinion after rehearing, it analyzed all three factors. The court noted that the parties executed the contract in Texas and concluded that the focus of the agreement was the performance of personal services in Texas.[284] Under section 196 of the *Restatement*, the latter factor alone is normally conclusive.[285] Thus, the court found that Texas had the most significant relationship to the parties and the transaction.[286]

The court also concluded that Texas had a materially greater interest than Florida in deciding whether the noncompetition agreement should be enforced. The court noted that Florida's interest was in protecting a national business headquartered in Florida. On the other hand, Texas was directly interested in DeSantis as a Texas employee, Wackenhut as a national employer doing business in Texas, RDI as a new Texas business, and Texas consumers of the services provided by the parties.[287]

Finally, the court determined that applying Florida law would contravene a fundamental policy of Texas. The court noted that enforcement of noncompetition agreements is a fundamental policy of Texas and concluded that to apply Florida law to determine the enforceability of such an agreement under the circumstances presented in *DeSantis* would contravene this policy.[288] In the withdrawn opinion, the court had painstakingly compared Texas and Florida law. The court had concluded that because Florida law "differed so significantly," its application would contravene public policy.[289] In this opinion, the court arguably mandated that, regardless the law of the

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recognized the party autonomy rule. *See* TEX. BUS. & COM. CODE ANN. § 1.105(a)(Vernon Supp. 1991); *see also* First Commerce Realty Investors v. KF Land Co., 617 S.W.2d. 806, 808-09 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd. n.r.e.) (express agreement of parties regarding choice of law enforceable if contract bears reasonable relation to chosen state and no countervailing public policy of the form demands otherwise).

280. 793 S.W.2d at 677.
281. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).
282. 793 S.W.2d. at 678.
283. *See* Freytag, George & McCoy, *Conflict of Laws*, 44 SW.L.J. 489, 509 (1990).
284. 795 S.W.2d at 679.
285. *Id.* at 678-79 n.4.
286. *Id.* at 679.
287. *Id.*
288. *Id.* at 680-81.
289. 31 Tex. S. Ct. J. at 620.

other state, Texas law applies.[290]

The Dallas court of appeals, in *Resource Savings Association v. Neary*,[291] rejected an argument that the federal full faith and credit clause requires Texas courts to give effect to foreign statutes that conflict with Texas law and upheld the parties' contractual choice of Texas law.[292] A Texas general partnership, Dimension-Lang Georgia Partners, obtained a loan from Resource Savings Association (Resource) in 1985. The partnership delivered a promissory note in the amount of $11 million, secured by a deed to secure debt on real property in Georgia. Two of the partners, Neary and Lang, executed an unconditional guaranty securing repayment of the note.

Both the guaranty and the promissory note contained choice of law provisions. The guaranty stated unambiguously that all rights, obligations, and liabilities arising under the guaranty would be construed according to Texas law. The note stated that any questioned or challenged provision of the note or of any document securing the indebtedness would be construed in accordance with whichever applicable federal or Texas law would uphold or enforce the challenged or questioned provision. The note also contained an exception that Georgia law would govern procedural and substantive matters relating only to creation, perfection, and enforcement by the holder of its rights and remedies against the Georgia property securing the debt.

The partnership defaulted, and Resource filed suit in Texas against Neary and Lang based on the guaranty. Neary and Lang filed a general denial, and Resource subsequently moved for summary judgment. Before the hearing on the motion for summary judgment, Resource foreclosed on the Georgia property securing the partnership debt and purchased the property at a nonjudicial foreclosure sale, applying the proceeds as a credit against the debt.[293] Neary and Lang then filed a motion for summary judgment, asserting that Resource failed to comply with a Georgia statute requiring a judicial order confirming the sale before a party can sue for a deficiency.[294] The trial court granted Neary and Lang's motion for summary judgment and denied Resource's motion for summary judgment.[295]

On appeal, Resource argued that the Texas lawsuit sought to enforce remedies against the guarantors, Neary and Lang, and therefore, the trial court erred in granting Neary and Lang's motion for summary judgment based on the application of Georgia law. The appellate court agreed.[296] The court rejected Neary and Lang's argument that even if Texas law applied, Resource's failure to obtain confirmation of the sale extinguished the debt and

290. 793 S.W.2d at 681.
291. 782 S.W.2d 897 (Tex. App.—Dallas 1989, writ denied).
292. *Id.* at 903.
293. The partnership went into bankruptcy following the default. Resource obtained relief from the automatic stay in the partnership's bankruptcy case to foreclose on the property. *Id.* at 898.
294. *See* GA. CODE ANN. § 44-14-161 (Michie 1990). The statute provides that a party must seek a judicial order confirming a foreclosure sale within 30 days after the sale before suing for a deficiency judgment.
295. 782 S.W.2d at 899.
296. *Id.* at 899, 902.

therefore the guarantors were not liable on the debt.[297] According to the court, that argument failed because it presumed, incorrectly, that Georgia law would apply in the first instance and that Georgia law would extinguish the remaining debt.[298]

The court also rejected Neary and Lang's argument that the full faith and credit clause of the federal Constitution required the application of Georgia law.[299] The court of appeals noted that although the full faith and credit clause preserves rights acquired under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the full faith and credit clause does not require one state to substitute another state's conflicting law for its own.[300] The court pointed out that literal enforcement of the full faith and credit clause would lead to the irrational result that a court could not enforce any laws of the forum state that conflicted with those of another state, while courts of the other state would be mandated to enforce the conflicting laws of the forum state.[301]

The court thus focused on the parties' contractual choice of Texas law except in actions involving the real property in Georgia. The court determined that no public policy precluded application of Texas law because Texas law could not possibly be in conflict with any policy of the forum, Texas.[302] The court then turned to a determination of the law chosen by the parties to govern the particular dispute and whether the contract bore a reasonable relationship to the chosen law.[303] The court concluded that the particular dispute was an action to enforce Resource's legal remedies against the guarantors, not an action seeking enforcement of Resources' remedies against the Georgia property.[304] Therefore, pursuant to the note and guaranty, the court applied Texas law.[305]

The court also concluded that the contracts bore a reasonable relationship to Texas because the partnership that executed and delivered the note was a Texas partnership, Resource was a Texas savings and loan association located in Dallas, Texas, the indebtedness was payable at a Resource office in Dallas, the guarantors were Texas residents, and the guarantors agreed that their obligations under the guaranty were performable in Dallas County and waived the right to be sued anywhere but Dallas County. Accordingly, the

297. *Id.* at 899-900.

298. *Id.* The court interpreted the Georgia statute to preclude a suit for deficiency not to extinguish the debt. *Id.* at 899.

299. *Id.* at 900-01. Neary and Lang relied upon Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932), but the court concluded that this case actually supported Resource's position that Texas law applied.

300. *Id.* at 901.

301. *Id.* at 901 (citing Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939)).

302. 782 S.W.2d at 902.

303. *Id.*

304. *Id.* at 902-03.

305. *Id.* The construction of the guaranty and note were questions of law for the court, and the court concluded that the parties clearly intended that Texas law would govern except in actions seeking enforcement of Resource's right and remedies against the real property in Georgia.

court of appeals reversed the trial court's grant of summary judgment in favor of Neary and Lang and remanded the case.[306]

Caton v. Leach Corp.[307] illustrates the principle of depacage, that different states' laws may apply to separate issues in lawsuits involving multiple claims. Caton, a Texas resident, worked for twenty-two years as an employee and sales representative for Leach Corporation (Leach), a manufacturer of electronic and mechanical products for use in the aerospace industry. Leach is a Delaware corporation with its principal place of business in California.

In 1983, Caton, who had been working as an independent representative for Leach since 1973, entered into a sales representative agreement with Leach.[308] The agreement provided that the contract "shall be construed under the laws of the State of California" and further provided that Leach would pay Caton on a commission basis. At the time of the agreement, Caton was Leach's exclusive representative for the sale of relay switches in Texas.

During 1984, Caton notified Leach that General Dynamics, a purchaser of relay switches for the F16 aircraft, expected a large order from the government. Through Caton's efforts, Leach received quotation requests from General Dynamics for relay switches for the government project and bid to supply over $12,000,000.00 of relay equipment by June 15, 1985.

In a May 14, 1985, letter Leach notified Caton that it would terminate the sales representative agreement in thirty days, two days before the switches were to be supplied. Caton brought an action against Leach to recover damages in contract and tort as well as restitution. Caton maintained that he had solidified Leach's position as a General Dynamics supplier and that his efforts in fulfilling his sales representative responsibilities contributed significantly to Leach's obtaining the General Dynamics contract.

Leach moved for summary judgment based on a provision of the agreement giving either party the express right to terminate the agreement upon thirty days notice, and the trial court granted Leach's motion.[309] On appeal, the Fifth Circuit first addressed whether California or Texas law applied to each of Caton's claims. Regarding the contract claims, the court applied the Texas rule enforcing contractual choice of law clauses if the chosen law bears a reasonable relationship to the parties and the contract and does not contravene Texas policy.[310] As the choice of law clause provided that the agreement would be construed under California law and Texas has adopted the rule that parties may contract with regard to the law applying to con-

306. 782 S.W.2d at 903-04. Although Resource prayed for rendition on appeal, the court could not render judgment for Resource because Resource did not appeal from the denial of its motion for summary judgment; rather, it appealed only from the granting of Neary and Lang's motion for summary judgment. *See* TEX. R. APP. P. 74(d), (f). Thus, the proper disposition was reversal of the judgment below and remand for further proceedings. 782 S.W.2d at 904.

307. 896 F.2d 939 (5th Cir. 1990).

308. Caton served as a company employee for approximately ten years and became an independent sales representative for Leach in 1973.

309. 896 F.2d at 942.

310. *Id.*

struction of an agreement,[311] the Fifth Circuit held that California law governed both Caton's breach of contract and breach of implied contract claims.[312]

The choice of law clause provided, however, for the application of California law only to construe the contract. The clause did not provide for a particular state's law to govern the rights and liabilities of the parties with respect to noncontractual claims. Therefore, the Fifth Circuit applied the most significant relationship test to determine the law applicable to the tort and restitution claims.[313]

Although Caton and Leach agreed that Texas law should be applied to the noncontractual claims, the court engaged in a limited analysis of the facts to demonstrate that Texas had the most significant relationship.[314] The court then concluded that Texas law applied to Caton's claims for breach of good faith and fair dealing[315] and restitution.[316]

The Fifth Circuit approved the trial court's issuance of an injunction to uphold a forum selection provision in an agreed judgment[317] in *Seattle-First National Bank v. Manges*.[318] In the agreed judgment, the defendants promised to pay the bank $30,000,000.00 and further agreed that any suit that could potentially impair the enforcement of the judgment must be brought in the United States District Court for the Western District of Texas, San Antonio Division. The defendants defaulted, and the bank obtained an order from the district court directing the seizure and sale of the property securing the debt.

Subsequently, several of the defendant entities filed bankruptcy in the Southern District of Texas, Corpus Christi Division. The bank sought a temporary restraining order and preliminary injunction to restrain the defendants from initiating proceedings that would impair enforcement of the agreed judgment in any forum other than the Western District. The district court granted the preliminary injunction.[319] The defendants appealed, con-

311. *Id.* at 943.

312. *Id.*

313. *Id.* (citing Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971) (providing for application of most significant relationship test in tort cases)).

314. 896 F.2d at 943. Although Leach was a foreign corporation, Caton, a Texas resident, worked for Leach in Texas and solicited sales from Texas companies. The court also emphasized that Texas has a significant interest in providing a tort remedy to a Texas citizen. *Id.*

315. As Texas does not recognize a tort duty of good faith in the employer/employee context, Caton could not recover on this claim. *Id.* at 948-49.

316. *Id.* Section 221 of the Second Restatement applies the most significant relationship test to determine the applicable law for restitution claims. The factors considered in the analysis regarding the tort claims also led the court to apply Texas law to the restitution claim. The fact that Leach received the benefit of Caton's efforts in Texas as well as Texas' interest in applying its restitution policy to a transaction that enriched a foreign corporation at the expense of a Texas citizen were important considerations. *Id.* at 943.

317. Seattle-First Nat'l Bank v. Manges, 900 F.2d 795, 800 (5th Cir. 1990).

318. 900 F.2d 795 (5th Cir. 1990).

319. *Id.* at 798. The district court entered three orders. The first granted a preliminary injunction continuing in effect the TRO. The second ordered defendants to seek transfer of the bankruptcy proceedings to the Western District. The third denied motions to clarify or amend the previous orders.

tending that the district court abused its discretion in granting the preliminary injunction to enforce the negotiated choice of venue provision contained in the agreed judgment. The defendants also contended that the district court's order violated the automatic stay provision of the Bankruptcy Code.[320] They argued further that the bankruptcy court in the Southern District, not the district court in the Western District, should decide the effect of the venue selection clause.

The Fifth Circuit rejected these arguments.[321] The court determined that the defendants did not demonstrate that the clause was invalid as a product of fraud or overreaching or that enforcement of the clause would deprive defendants of a forum for their bankruptcy proceedings.[322] Furthermore, the court held that the defendants waived venue in the Southern District by agreeing to the venue selection clause.[323] Thus, the district court properly issued the injunction enforcing the forum selection provision and properly ordered the defendants to transfer their bankruptcy proceedings to the Western District of Texas.[324]

A contractual forum selection clause was also the decisive factor in favor of a transfer under the federal venue statute to the jurisdiction contractually selected by the parties in *Brock v. Entre Computer Centers, Inc.*[325] The plaintiff in *Brock* entered into a franchise agreement with defendant Entre Computer Center (Entre) for the operation of computer stores in Texas and Louisiana. A clause in the franchise agreement provided that any action brought by either party in either federal or state court would be brought in Virginia.

The plaintiff franchisees, as other Entre franchisees across the country, received numerous complaints from the buying public and failed in their endeavor.[326] The plaintiffs filed a diversity action in Texas federal district court, claiming fraud, fraudulent inducement, breach of contract, breach of fiduciary duty, and violations of the Texas Deceptive Trade Practices Act. The defendants moved to transfer the action to the Eastern District of Virginia on the basis of the forum selection clause.

The court rejected the plaintiffs' arguments that the forum selection clause

320. 11 U.S.C. § 362 (West 1979 & Supp. 1990).

321. 900 F.2d at 798-99.

322. *Id.* at 799. Such circumstances would overcome the *prima facie* validity of a forum selection clause. *See* M/S Bremen v. Zapata OffShore Co., 407 U.S. 1, 10 (1972).

323. 900 F.2d at 799 (citing Hunt v. Bankers Trust Co., 799 F.2d 1060, 1068 (5th Cir. 1986) (parties may waive bankruptcy venue provisions)). The court further noted that venue was proper in the Western District of Texas because an affiliate of the defendants was involved in bankruptcy proceedings in the Western District. 900 F.2d at 799. *See* 28 U.S.C. § 1408(2) (West Supp. 1990) (venue proper in any district where affiliate of debtor involved in bankruptcy proceedings).

324. 900 F.2d at 799-800. The district court's first order, however, did not state the reasons for its issuance and was not sufficiently specific. Thus, the court remanded the case to the district court to conform the injunction to the requirements of FED. R. CIV. P. 65(d).

325. 740 F. Supp. 428 (E.D. Tex. 1990).

326. Other franchisees brought similar claims against Entre in various federal courts. In each of the cases, the defendants filed motions to transfer based on the contractual forum selection clause, and in each instance, the district courts enforced the clause contained in the contract and transferred the cases to the Eastern District of Virginia. *Id.* at 430, 432.

was unenforceable and that venue was proper in Texas. First, the court noted that two courts had rejected the argument that forum selection clauses do not cover tort claims, including one court construing the same clause contained in the Entre contract.[327] Second, the court held that the forum selection clause applied to all parties to the contract, whether signatories or not.[328] Third, the court determined that the forum selection clause was enforceable because the franchise agreement, not the clause, was fraudulently induced.[329] The fraud exception applies to a venue selection clause only when its inclusion is itself the product of fraud or coercion.[330]

Having determined the validity of the forum selection clause, the court addressed the motion to transfer. Although a strong presumption ordinarily exists in favor of the plaintiff's choice of forum, the fact that the parties contractually stipulated that any suit must be brought in Virginia effectively neutralized this presumption.[331] The convenience factors considered in the venue analysis proved inconclusive, as the location of the witnesses and evidence did not significantly favor either Texas or Virginia as a forum. The fact that the plaintiffs retained Kansas attorneys who had litigated several of the other pending suits against Entre in the Eastern District of Virginia, and therefore already had certain documents in their possession, mitigated against the plaintiffs.[332] Finally, the court pointed out that a transfer served the interests of justice because the Eastern District of Virginia had received transfers of several cases against Entre presenting similar issues, and the amount of litigation in the Eastern District of Virginia was substantially less than in the Eastern District of Texas.[333] Thus, the court ordered the case transferred to the Eastern District of Virginia.[334]

Had the franchise agreement not contained the forum selection clause, the plaintiffs could have maintained their suit in Texas. *Brock*'s lesson is that in a case in which the convenience factors do not clearly favor either party, a valid forum selection clause will eradicate any presumption in favor of the plaintiff's choice of forum.

2. *Choice of Law in Actions Involving Insurance Contracts*

In *W.R. Grace & Co. v. Continental Casualty Co.*[335] the trial court ruled that it was not required to make a choice of law decision because "the basic principles of policy construction in each jurisdiction [Texas and New York]

327. *Id.* at 430 (citing Stewart Organization, Inc. v. Ricoh Corp., 810 F.2d 1066, 1071 (11th Cir. 1987) (en banc), *aff'd and remanded on other grounds*, 487 U.S. 22 (1988)); Stephens v. Entre Computer Centers, Inc., 696 F. Supp. 636, 638 (N.D. Ga. 1988)).

328. *Id.* at 430-31.

329. *Id.* at 431. Plaintiffs relied on M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

330. 740 F. Supp. at 431; *see* Seherk v. Alberto-Culver Co. 417 U.S. 506, 519 n.14 (1974).

331. 740 F. Supp. at 432; *see* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981).

332. *Id.* at 432.

333. *Id.*

334. *Id.* at 433. The court, therefore, did not address Entre's argument that it did not have the requisite minimum contacts with Texas for the Texas court to exercise personal jurisdiction over the individual defendants.

335. 896 F.2d 865 (5th Cir. 1990).

are the same."[336] The Fifth Circuit disagreed.[337] In *Grace* several independent Texas school districts brought a strict liability and negligence action against asbestos manufacturers seeking recovery for the cost of replacing asbestos-containing materials installed in several school buildings throughout Texas. The manufacturers, including W.R. Grace (Grace), filed third party complaints against their primary and excess insurers. Grace and the school districts settled, and the district court granted Grace's motion for summary judgment against the insurers.[338]

The Fifth Circuit held that the district court erred in several respects, including its choice of law analysis.[339] The insurers asked the district court to apply New York law, and the district court refused, reasoning that it was not required to make a choice of law because of the similarity of law in both jurisdictions.[340] The Fifth Circuit observed, however, that New York and Texas law differ on many issues, and in other areas the law of New York is unclear and could arguably be resolved differently than under Texas law.[341] First, the Fifth Circuit held that a conflict existed between New York law and the law applied by the trial court as to whether allegations of an underlying claim determine a duty to indemnify.[342] Second, as New York courts have not determined how the term "property damage" should be applied for the purpose of imposing insurance coverage, it was error for the district court to decide this issue.[343] Third, New York law on the trigger of coverage issue either conflicted with the law the district court applied or was at least unsettled in that area.[344] Finally, New York law on the insurers' nondisclosure defense either conflicted with the law the district court applied or was unclear.[345] Thus, the district court abused its discretion in retaining ancillary jurisdiction over these issues.[346]

Erie[347] requires that a federal district court apply state law when the law of different jurisdictions directly conflicts or when the law is unclear. Thus, the Fifth Circuit held that the district court erred in its failure to apply the Texas choice of law rule[348] to determine which state had the most significant

336. Dayton Indep. School Dist. v. National Gypsum Co., 682 F. Supp. 1403, 1406. (E.D. Tex. 1988).
337. 896 F.2d at 873.
338. *Id.* at 867-68.
339. *Id.* at 872-73.
340. *Id.*
341. *Id.* at 873.
342. *Id.* at 874-75. The law applied by the federal district court is not the law of Texas, which measures a duty to indemnify by the acts of the insured not the allegations against him. The latter measures a duty to defend. *See* Green v. Aetna Ins. Co., 349 F.2d 919, 923 (5th Cir. 1965) (under Texas law, an "insurer does not pay because [the insured] is alleged to be legally responsible but because [the insured] has been adjudicated to be legally responsible."); American Alliance Ins. Co. v. FritoLay, Inc., 788 S.W.2d 152, 153 (Tex. App.—Dallas 1990, error dismissed) (under Texas law, duty to defend distinct from duty to indemnify; duty to indemnify based on actual facts, not on pleadings).
343. 896 F.2d at 875.
344. *Id.* at 875-76.
345. *Id.* at 876-77.
346. *Id.* at 877.
347. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
348. *Id.* at 873. Texas applies the most significant relationship test.

relationship to the issues involving the construction and application of the insurance policies.[349]

The Fifth Circuit noted that once the parties settled the main action, Texas had no further interest in whether Grace or its insurers paid the amount of the settlement.[350] The remaining dispute was between Grace, a New York corporation, and its insurers, primarily New York residents. Further, Grace's insurance broker was based in New York, and the policies were solicited, negotiated, and delivered in New York. Grace also paid the insurance premiums in New York and gave notice of the school districts' claims in New York. New York was the center of the relationship between Grace and the insurers, and New York has a strong interest in the outcome of insurance coverage disputes between a New York insured and its contractual relationships with insurers doing business in New York.[351] Thus, the Fifth Circuit concluded that New York, not Texas, had the most significant relationship to the questions of insurance law at issue in the third party action.[352]

Grace petitioned for rehearing, contending that article 21.42 of the Texas Insurance Code required application of Texas law.[353] Article 21.42 provides that an insurance contract "payable to any citizen or inhabitant of [Texas] by any insurance company or corporation doing business [in Texas]" will be governed by Texas law, notwithstanding certain recitations in the policy.[354] The Fifth Circuit denied the petition for panel rehearing because the policy at issue was not payable to a Texas citizen or inhabitant, but to Grace, a New York corporation. The court concluded that applying article 21.42 to a case in which there has been no payment by the insurer to a Texas resident would impermissibly give the statute extraterritorial effect to regulate business outside Texas.[355]

3. *The Juxtaposition of Personal Jurisdiction and Choice of Law Analysis*

Gulf Consolidated Services, Inc. v. Corinth Pipe Works, S.A.[356] evidences the sometimes overlapping considerations in personal jurisdiction and choice

349. 896 F.2d at 873.

350. *Id.* at 874.

351. *Id.* at 873. The court rejected Grace's argument that Texas law should control because the third party action would determine the source of funds for payment of Grace's settlement with the school district. *Id.* at 873 (citing Atlantic Mutual Ins. Co. v. Truck Ins. Exchange, 797 F.2d 1288 (5th Cir. 1986) (rejecting similar argument)).

352. 896 F.2d at 874. The Fifth Circuit also held that the district court erred in applying general rules of construction favoring the insured without first applying the substantive law of either New York or any specific jurisdiction. General rules of construction are relied upon only as a last resort. 896 F.2d at 874. New York law either differed from the general rules the district court applied or was unclear on several important issues of insurance law presented. The district court therefore erred in determining these issues under general rules of construction in lieu of submitting them to be decided in a state court. *Id.*

353. *See* TEX. INS. CODE ANN. art. 21.42 (Vernon 1981).

354. *Id.*

355. 896 F.2d at 883. The court reasoned that such an application would raise serious questions of constitutionality under the commerce and due process clauses of the Fourteenth Amendment (citing Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924)).

356. 898 F.2d 1071 (5th Cir. 1990), discussed *supra* at notes 54-78 and accompanying text.

of law analyses. Corinth, a Greek corporation, argued for the application of Greek law, according to which Gulf's claims would be barred by a six month statute of limitations expressly disallowing a prediscovery tolling period.[357] The *Gulf* court relied primarily on the stream of commerce doctrine in its personal jurisdiction analysis;[358] the court used the most significant relationship analysis to assess the choice of law applicable to the licensing agreement between Corinth and API (a Dallas based organization),[359] but the factors considered are similar. For example, in the personal jurisdiction analysis, the court focused on the licensing agreement between Corinth and API.[360] This agreement allowed Corinth the opportunity to sell casings to Texas customers and contained the warranty forming the basis of the dispute in *Gulf*. The court also considered Corinth's $73,000,000.00 in sales of API standard tubular goods to Texas customers.[361] After considering these same factors in the choice of law analysis, the court emphasized that Texas has a substantial interest in providing a remedy for a Texas citizen who has purchased products from a foreign corporation in reliance upon a warranty that the product conformed to the standards of a Texas organization.[362] While the personal jurisdiction and choice of law determinations in *Gulf* each focused on the same factors and favored Texas, each analysis is a distinct one and can often yield different results.

C. *Choice of Law in Tort Actions*

In *Trailways, Inc. v. Clark*[363] the court of appeals held that Texas law applied in an action against an American bus company and a Mexican bus company for damages resulting from an accident that occurred in Mexico.[364] Trailways, Inc. (Trailways), a busline operated in Texas, does not provide bus service in Mexico but has an interlining agreement with Transportes Del Norte (TDN), a Mexican bus line, whereby TDN honors Trailways tickets from the border to destinations in Mexico.[365] TDN also has rights to sell tickets to destinations in the United States, and Trailways honors the TDN tickets.

The plaintiffs in *Clark* were the survivors of two victims of a TDN bus accident in Mexico. The decedents, American citizens and Texas residents, purchased round trip tickets from Corpus Christi to Mexico City through a Trailways Subsidiary. The decedents boarded a Trailways bus in Corpus

357. Corinth cited Greek Civil Code 554, 555.
358. 898 F.2d at 1073.
359. *Id.* at 1075-76.
360. *Id.* at 1074.
361. *Id.* at 1075.
362. *Id.* at 1075-76. The court rejected Corinth's argument that Texas did not have any interest in the lawsuit as the ultimate economic loss would fall upon an Illinois insurance corporation, just as it rejected this argument in the personal jurisdiction analysis. *Id.* at 1074, 1076.
363. 794 S.W.2d 479 (Tex. App.—Corpus Christi 1990, writ denied).
364. *Id.* at 485.
365. *Id.* TDN then reclaimed from Trailways the price of the ticket for the Mexican portion of the journey, less a 12% Trailways commission.

Christi and traveled to Brownsville, Texas, where they transferred to a TDN bus to continue their journey into Mexico. The TDN driver lost control of the bus, and the bus left the highway and overturned. The survivors of the Texas passengers brought an action to recover wrongful death and survival damages from TDN and Trailways.

The court of appeals considered whether the trial court had properly applied Texas law to the calculation of wrongful death damages.[366] In tort actions, as in contract actions, Texas has adopted the most significant relationship test as set forth in sections 6 and 145 of the Second Restatement.[367] Section 6 provides broad general guidelines for conflicts analysis, and section 145 applies these guidelines specifically to tort actions.[368] If no other factor besides diversity of citizenship makes the interests of one state any more significant than those of the other, the law of the place of injury generally determines wrongful death damages.[369]

In *Clark*, however, the court concluded that other factors controlled. The relationship between the decedents and TDN centered in Texas because initial negotiations and ticket purchases occurred in Texas.[370] Through TDN's solicitation of business in Texas by virtue of the interlining agreement, Texas acquired an interest in compelling TDN, a foreign corporation, to pay adequate compensation for injuries to Texas residents, even if those injuries occurred in Mexico.[371] Accordingly, the court held that the trial court

366. 794 S.W.2d at 484. The court noted that TDN waived its right to rely on Mexican indemnity law against Trailways. *Id.* Although TDN put the court and the parties on notice of Mexican law by filing a letter from a Mexican attorney explaining the provisions of Mexican law relating to wrongful death damages and including copies of the Mexican law and certified translations, TDN did not inform the court of Mexico's indemnity law in any way. Thus, the court of appeals concluded that the trial court properly assumed that Mexico's law, even if applicable, was the same as Texas law. Consequently, the only choice of law issue on appeal was whether the trial court properly applied Texas law to the calculation of wrongful death damages. *Cf.* Daugherty v. Southern Pacific Transp. Co., 772 S.W.2d 81, 83 (Tex. 1989) (trial court may take notice of another jurisdiction's law even if not pled).

367. *See* Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979) (adopting §§ 6 and 145 of RESTATEMENT (SECOND) OF CONFLICT OF LAWS).

368. 794 S.W.2d at 484. Furthermore, § 175 of the Restatement provides that the law of the state where the injury occurred governs unless some other state has a more significant relationship to the occurrence and the parties under the principles stated in § 6.

369. 794 S.W.2d at 485 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 (1971); Butler v. United States, 726 F.2d 1057, 1066 (5th Cir. 1984)).

370. *Id.*; *see also* Wall v. Noble, 705 S.W.2d 727, 733 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.) (injury occurred in Louisiana, but Texas had more significant interest based in part on the fact that relationship began and ended in Texas). The court, emphasizing the widespread adoption of the Restatement test, also relied on a Colorado case. 794 S.W.2d at 486 (citing Kinnett v. Sky's West Parachute Center, Inc., 596 F. Supp. 1039 (D. Colo. 1984)). It erroneously referred to the test as the "most significant contacts" test, however. 794 S.W.2d at 480. In *Kinnett* a Wyoming resident purchased in Wyoming a round trip airline ticket to Dallas, Texas. The airplane crashed in Colorado, and the decedents' relatives brought a wrongful death action in Colorado, asking the court to apply Wyoming's wrongful death statute. The court determined that Wyoming had a more significant relationship than Colorado and emphasized that the decedent purchased his ticket in Wyoming from a corporation doing business in Wyoming for a trip that would begin and end in Wyoming. The court further noted that there is no injustice in requiring out-of-state corporations conducting business in Wyoming to be responsible according to Wyoming's laws for the deaths of Wyoming residents while they are being transported on round trips beginning and ending in Wyoming. *Id.* at 486.

371. *Id.*

properly determined that Texas had the most significant relationship to the parties and issues involved.[372] The court saw no injustice in requiring TDN to be responsible under Texas law for the death of passengers who purchased tickets in Texas to travel to Mexico City and return to Texas.[373]

In *Perry v. Aggregate Plant Products Co.*[374] the court held the summary judgment proof insufficient to support the trial court's application of Indiana substantive law on the statute of limitations issue.[375] In *Perry* an Indiana resident, who was injured at work in Indiana when a silo collapsed, brought a product liability action against Aggregate Plant Products, a Texas company that designed and manufactured the silo in Texas. The trial court applied Indiana law and Indiana's ten-year statute of repose, which barred plaintiff's action, and granted summary judgment for the manufacturer.[376]

On appeal, the court's analysis involved application of the general principles of section 6 and the specific guidelines of section 145 of the Restatement (Second) of Conflicts of Laws.[377] Section 145 focuses on these considerations: "the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered."[378]

Although the Indiana residents were injured in Indiana, the place of the conduct causing the injury was disputed. Perry alleged that the conduct causing the injury was the design, manufacture, and sale of the silo and that the silo was placed into the stream of commerce in Texas. The manufacturer argued that the silo entered the stream of commerce in Indiana because it was substantially changed during assembly in Indiana.[379] The court found insufficient summary judgment evidence to demonstrate that the installation

372. *Id.* at 486-87.
373. *Id.* at 486.
374. 786 S.W.2d 21 (Tex. App.—San Antonio 1990, writ denied).
375. *Id.* at 23.
376. *Id.* at 22.
377. *Id.* at 23-25 (citing Gutierrez v. Collins 583 S.W.2d 312, 318 (Tex. 1979)). Section 6 sets out the most significant relationship analysis. It provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include,
> (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 unifromity of result, and
> (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).
378. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971).
379. The manufacturer relied upon Houston Lighting & Power Co. v. Reynolds, 765 S.W.2d 784, 785 (Tex. 1988), in which the court held that electricity does not enter the stream of commerce when introduced in the transmission lines because it is substantially changed by the transformers; therefore, it does not reach the consumer in the same condition as it was sold.

substantially changed the silo.[380] Furthermore, the court observed that Perry complained of the design and manufacture of the silo at the time of the sale, not of subsequent changes. As the silo was designed and manufactured in Texas and the cause of action was directed at the design and manufacture of the silo, the court concluded that the conduct causing the injury occurred in Texas.[381]

The parties' residence, the third factor in the section 145 analysis, was undisputed. The plaintiffs were Indiana residents, and the manufacturer was located and registered to do business in Texas. The court's analysis of the final factor, the center of the parties' relationship, focused once again on the design and manufacture of the silo in Texas.[382] As the summary judgment evidence viewed most favorably to the nonmovant showed that the silo was manufactured and designed in Texas, that the manufacturer was located and registered to do business in Texas, and that the conduct causing the injury occurred in Texas, the manufacturer failed to show that Indiana substantive law applied as a matter of law.[383] Thus, the court of appeals reversed the summary judgment and remanded the action to the trial court.[384]

Although a choice of law issue is appropriate for summary judgment, *Perry* demonstrates a movant's difficulty in achieving a favorable ruling absent clear supporting summary judgment evidence. Consequently, during discovery, counsel should focus as specifically on choice of law facts as on facts going to the merits of the dispute.

In *Osborn v. Kinnington*[385] the court held that an Alabama resident could maintain his action against another Alabama resident in a Texas court even though such an action could not be maintained in an Alabama court.[386] Osborn and Kennington were Alabama residents employed as truck drivers. When the two returned together to Alabama from California, the vehicle Kinnington drove overturned in Texas injuring Osborn. Osborn received workers compensation benefits from his employer and also filed suit in Texas to recover for his injuries.

In Texas an employee has no right of action against his employer or other employees for damages for personal injuries.[387] If Osborn had filed the suit

380. 786 S.W.2d at 24.

381. *Id.* at 24-25. Although it was unclear where the contract was actually made, the court resolved any doubts in favor of appellant and found that the sale took place in Texas based upon the fact that the manufacturer's address was at the top of the invoice.

382. *Id.* at 25. Although the points of sale and entry into the stream of commerce were unclear from the summary judgment evidence, the court again resolved any doubts in Perry's favor.

383. *Id.* (citing Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex. 1985)).

384. 786 S.W.2d at 26.

385. 787 S.W.2d 417 (Tex. App.—El Paso 1990, writ denied).

386. *Id.* at 420.

387. *See* TEX. WORKERS' COMP. ACT art. 8306, § 3; Act of March 28, 1917, 35th Leg., R.S., ch. 103, 1917 Tex. Gen. Laws 269, *amended by* Act of April 3, 1923. 38th Leg., R.S., ch. 177, 1923 Tex. Gen. Laws 384, *amended by* Act of June 10, 1963, 58th Leg., R.S., ch. 437, § 1, 1963 Tex. Gen. Laws 1132, *repealed by* Act of December 12, 1989, 71st LEg., 2d C.S., ch. 1, § 16.01(7) to (9), Jan. 1990 VERNON'S TEX. SESSION LAW SERV. 114; *see also* Mobley v. Moulas, 468 S.W.2d 116, 116 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.) (injured employee's sole relief under Workers' Compensation Act).

in Alabama, the Alabama court would have apparently applied Texas law based on the rule of *lex loci delecti*.[388] In Alabama, however, an employee may maintain a personal injury action against a co-employee.[389] Thus, the court was faced with a choice between the law of the forum, which would preclude the suit, and the law of a foreign state,[390] which would not preclude the suit. The trial court applied Texas law and dismissed the action.

The court of appeals reversed, holding that Alabama law applied and that Osborn could maintain his suit in Texas.[391] In the choice of law analysis, the court noted that the section 145 considerations in a tort case were equal, as the injury and the conduct causing the injury both occurred in Texas, while the residence and business of the parties and center of the relationship were in Alabama.[392] Restatement (Second) section 184,[393] however, specifically addresses immunity from tort claims arising out of workers' compensation. Section 184 provides that the statute under which the employer is required to provide insurance and under which the plaintiff has obtained an award for the injury controls in a conflict of laws situation.[394] Thus, since Alabama's statute controlled, Osborn could maintain his suit against the co-employee in Texas, although an Alabama court applying Texas law would have dismissed it.

III. WHAT IS THE EFFECT OF FOREIGN JUDGMENTS?

The Fifth Circuit upheld the district court's refusal to recognize an Abu Dhabi money judgment in *Banque Libanaise Pour Le Commerce v. Khreich*.[395] In its decision the Fifth Circuit relied on one of the grounds for nonrecognition listed in the Texas Uniform Foreign Country Money Judgment Recognition Act (Recognition Act).[396] Banque Libanaise Pour Le Commerce (Bank), which has a branch office in Abu Dhabi, brought an ac-

388. 787 S.W.2d at 419.
389. *Id.* at 418.
390. Osborn's employer had its principal place of business in Alabama.
391. 787 S.W.2d at 419.
392. *Id.* at 419-20. The Court noted that the comment to § 145(2) provides that when the injury and the conduct causing the injury occur in a clearly ascertainable state, "that state will usually be the state of the applicable law with respect to most issues involving the tort." *Id.* at 419.
393. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 184 (1971).
394. 787 S.W.2d at 419; *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 184 (1971).
395. 915 F.2d 1000 (5th Cir. 1990).
396. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-36.008 (Vernon 1986 & Supp. 1990) [hereinafter The Recognition Act]. Section 36.005(b) provides:

> A foreign country judgment need not be recognized if:
> (1) the defendant in the proceedings in the foreign country did not receive notice of the proceedings in sufficient time to defend;
> (2) the judgment was obtained by fraud;
> (3) the cause of action on which the judgment is based is repugnant to the public policy of this state;
> (4) the judgment conflicts with another final and conclusive judgment;
> (5) the proceeding in the foreign country court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court;

tion in Texas against Khreich, a Texas resident and former Abu Dhabi resident, to recover 200,000 dirhams the Bank advanced to Kheich based on an overdraft agreement. Khreich also brought suit against the Bank in Abu Dhabi, alleging that the Bank breached an agreement with Khreich.

The Abu Dhabi court entered judgment in favor of the Bank before the Texas action went to trial. The Bank then filed a motion for summary judgment in the Texas case, claiming that the Abu Dhabi judgment was dispositive. The district court refused to recognize the Abu Dhabi judgment because of lack of reciprocity and because Abu Dhabi does not provide procedures compatible with due process of law.[397] After trial to a jury, Khreich prevailed.[398] The Bank appealed, asserting that the district court erred in refusing to recognize the Abu Dhabi judgment and in applying Texas law.

Applying state rather than federal law,[399] the Fifth Circuit looked to the Recognition Act.[400] The Recognition Act recognizes the enforceability of a foreign country money judgment which is final, conclusive and enforceable where rendered.[401] Section 5 of the Recognition Act provides, however, for nonrecognition of a foreign country money judgment in some instances.[402] The Recognition Act specifically provides that a court has the discretion to refuse to recognize a foreign country money judgment if "it is established that the foreign country in which the judgment was rendered does not recognize" Texas judgments.[403]

The Fifth Circuit found that Khreich met his burden of proving nonreciprocity by introducing an affidavit of an American attorney practicing in Abu Dhabi.[404] The affidavit stated that the attorney, as well as other members of his firm who had practiced in Abu Dhabi since 1974, was unaware of any Abu Dhabi courts enforcing United States judgments. Although the Bank attempted to refute the affidavit by providing the court with a translation of Abu Dhabi law providing for the recognition of foreign judgments at the Abu Dhabi's court's discretion, the court concluded that the affidavit expressed valid concerns as to whether Abu Dhabi courts would

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(6) in the case of jurisdiction based only on personal service, the foreign country court was a seriously inconvenient forum for the trial of the action; or

(7) it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of "foreign country judgment."

397. 915 F.2d at 1003.

398. *Id.*

399. As jurisdiction was based on diversity of citizenship, the federal court applied state rather than federal law on the recognition of foreign country money judgments. *Id.* at 1003; *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

400. 915 F.2d at 1004. *See* TEX. CIV. PRAC. & REM. CODE §§ 36.001-36.008 (Vernon 1986 & Supp. 1990).

401. The Recognition Act, *supra* note 396, § 36.004.

402. The Recognition Act, *supra* note 396, § 36.005(a) (mandatory provisions) and § 36.005(b) (discretionary provisions).

403. The Recognition Act, *supra* note 396, § 36.005(b)(7). A district court's decision is reviewed on an abuse of discretion standard. 915 F.2d at 1004.

404. 915 F.2d at 1005-06.

actually recognize an American judgment.[405] Thus, the Fifth Circuit held that the district court did not abuse its discretion in refusing to recognize the Abu Dhabi judgment.[406]

Before 1990, the Recognition Act did not expressly contain a procedure for a judgment debtor to assert grounds for non-recognition.[407] The Texas Supreme Court upheld the constitutionality of the pre-1990 version of the Recognition Act in *Don Docksteader Motors, Ltd. v. Patal Enterprises, Ltd.*[408] Docksteader obtained a judgment against Patal in the Supreme Court of British Columbia and subsequently filed a suit in Texas state court to recognize and enforce the judgment. The trial court refused to recognize the judgment and granted summary judgment in favor of Patal.[409] The court of appeals affirmed on the basis that the Recognition Act was unconstitutional[410] because it failed to provide due process as it did not expressly set forth a procedure by which a judgment debtor could assert grounds for non-recognition.[411]

The Texas Supreme Court reversed.[412] The court noted that, although the Recognition Act did not expressly provide a procedure for a judgment debtor to assert grounds for nonrecognition, section 36.004 of the Recognition Act expressly provides that a foreign country money judgment "is enforceable in the same manner as a judgment of a sister state."[413] One means of enforcing a foreign judgment under the Texas Uniform Enforcement of Foreign Judgments Act (the Enforcement Act)[414] is a common law action.[415] A common law suit provides a judgment debtor notice and a preliminary hearing at which he can assert all defenses, including grounds for nonrecognition, and thus due process is afforded.[416]

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405. *Id.* at 1006.

406. *Id.* The Fifth Circuit did not reach Khreich's argument that the district court should not recognize the Abu Dhabi judgment because Abu Dhabi procedures did not comport with due process. *Id.* at 1005 n.4. In addition, the Fifth Circuit affirmed the application of Texas law rather than Abu Dhabi law on the grounds that the bank failed to meet its burden to present clear proof of the relevant Abu Dhabi legal principles to the district court. *Id.* at 1006 (citing Symonette Shipyards, Ltd. v. Clark, 365 F.2d. 464, 468 n.5 (5th Cir. 1966), *cert. denied*, 387 U.S. 908 (1967); Liechti v. Roche, 198 F.2d 174, 176 (5th Cir. 1952)). The bank did not produce translations of the relevant Abu Dhabi law or testimony from Abu Dhabi lawyers explaining the applicable law until the bank appealed the district court's decision. 915 F.2d. at 1006.

407. The Recognition Act has since been amended and expressly includes procedural steps for asserting grounds for nonrecognition. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.0041-.0044 (Vernon Supp. 1991).

408. 794 S.W.2d 760 (Tex. 1990).

409. *Id.* at 760.

410. Don Docksteader Motors, Ltd. v. Patal Enterprises, Ltd., 776 S.W.2d 726 (Tex. App.—Corpus Christi 1986), *rev'd*, 794 S.W.2d 760 (Tex. 1990).

411. 794 S.W.2d at 760-61.

412. *Id.* at 761.

413. TEX. CIV. PRAC. & REM. CODE ANN. § 36.004 (Vernon 1986 & Supp. 1991).

414. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-.008 (Vernon 1986 & Supp. 1991) [hereinafter The Enforcement Act].

415. *See* The Enforcement Act, *supra* note 414, § 35.008. The Enforcement Act also provides for enforcement of foreign judgments at §§ 35.003-.005.

416. 794 S.W.2d at 761. The court expressly disapproved of Plastics Eng'g, Inc. v. Diamond Plastics Corp., 764 S.W.2d 924 (Tex. App.—Amarillo 1989, no writ), and Detamore v.

In *Minuteman Press International, Inc. v. Sparks*[417] the Fort Worth court of appeals adopted the rule that the introduction of a properly authenticated copy of a foreign default judgment, even if signed by a clerk rather than a judge, shifts the burden to the opposing party to establish why the judgment should not receive full faith and credit.[418] In so doing, the court specifically disapproved the holding in *Interamerican Lambs Wood Products, Ltd. v. Doxsee Food Corp.*[419] The *Minuteman* court rejected an argument that the presumption in favor of a foreign judgment is inapplicable when the foreign judgment is taken by default.[420] The court pointed out that while the court does not presume the validity of a default judgment directly attacked on appeal, courts apply the presumption of validity when the judgment is collaterally attacked.[421]

The Sparkses entered into a franchise agreement with Minuteman Press International, Inc. (Minuteman), to operate a printing business in Texas. The franchise agreement contained choice of law and choice of forum provisions in favor of New York law and New York courts.[422] Eventually, the Sparkses became dissatisfied with their benefits under the franchise agreement and ceased paying the franchise fee to Minuteman. Minuteman filed suit in New York seeking damages for breach of contract. Although the Sparkses received service of process, they did not appear in New York to contest the suit, and the New York court entered judgment against them.[423]

Sullivan, 731 S.W.2d 122 (Tex. App.—Houston [14th Dist.] 1987, no writ), insofar as they conflicted with the decision in *Docksteader*. In *Detamore* the court held that the Recognition Act's failure to expressly provide for notice and an opportunity for hearing to challenge the recognition of the foreign judgment rendered the Recognition Act unconstitutional. 731 S.W.2d at 124. The court in *Plastics Engineering* agreed with *Detamore* that the act violated due process. 764 S.W.2d at 927. Both courts disagreed with the conclusion of the court in Hennessy v. Marshall, 682 S.W.2d 340 (Tex. App.—Dallas 1984, no writ) in which the court concluded the right to a hearing can be inferred from the language of the statute outlining the criteria for nonrecognition. 682 S.W.2d at 345; *see also* Freytag, George & McCoy, *Conflict of Laws Survey of Texas Law*, 44 Sw.L.J. 489, 513-14 (1990). Although *Hennessey* did not actually decide the constitutionality issue, it relied upon § 4 to find the inferrence of a right to a plenary hearing just as the court in *Docksteader* relied upon § 4 to determine the constitutionality of the Act.

417. 782 S.W.2d 339 (Tex. App.—Fort Worth 1989, no writ).

418. *Id.* at 340-42.

419. 642 S.W.2d 823 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). In *Interamerican Lambs Wool* the court relied upon Mathis v. Wachovia Bank & Trust Co., 583 S.W.2d 800 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.), to conclude that a New York judgment was not entitled to full faith and credit in Texas. 642 S.W.2d at 826. In both *Interamerican Lambs Wool* and *Mathis*, the courts held that a foreign judgment unsigned by the judge is not enforceable in Texas because of the lack of indication that the judgment was actually rendered, adopted, or signed. *Interamerican Lambs Wool*, 642 S.W.2d at 826; *Mathis*, 583 S.W.2d at 804.

420. 782 S.W.2d at 342.

421. *Id.* at 342-43; *see* Mitchim v. Mitchim, 518 S.W.2d 362, 364 (Tex. 1975) (presumption of validity applied in collateral attack of judgment). Moreover, at least three courts have expressly rejected the proposition that the presumption in favor of a foreign judgment does not apply if the foreign judgment was taken by default. *See* First Nat'l Bank v. Rector, 710 S.W. 2d 100, 103 (Tex. App.—Austin 1986, writ ref'd n.r.e.); Hart v. Calkins Mfg. Co., 623 S.W.2d 451, 453 (Tex. App.—Texarkana 1981, no writ); A & S Distrib. Co. v. Providence Pile Fabric Corp., 563 S.W.2d 281, 283 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

422. 782 S.W.2d at 341.

423. *Id.*

Minuteman then brought an action in Texas to enforce the New York judgment. The trial judge ruled that the Sparkses lacked sufficient New York contacts, and, therefore, the New York judgment was invalid.[424]

The court of appeals relied upon *Burger King Corp. v. Rudzewicz*,[425] a "remarkably similar" case,[426] and found that the Sparkses had sufficient minimum contacts with New York to support the New York court's exercise of jurisdiction.[427] The franchisees in *Sparks* freely entered into the agreement and obligated themselves to pay franchise fees in New York. Furthermore, the franchisees agreed that New York law would govern all rights and agreements of the parties and that any disputes regarding the franchise agreement would be decided by New York courts. In addition, the franchisees attended a mandatory two week business seminar in New York. Thus, given the franchise agreement and the other contacts with New York, the court held that the Sparkses could expect to come under the jurisdiction of New York courts.[428] Therefore, because the Sparkses faced the presumption of the judgment's validity and failed to meet their burden to establish otherwise, the Court reversed and rendered judgment that the New York judgment be enforced.[429]

Only *final* judgments from other jurisdictions are entitled to the same force and effect as Texas judgments.[430] During the survey period, two appellate courts reversed trial courts' enforcement of nonfinal foreign judgments. In *Myers v. Ribble*[431] Ribble filed an action in Texas seeking to enforce a 1987 Florida divorce decree, and the trial court granted summary judgment in her favor.[432] Myers, Ribble's ex-husband, appealed on the grounds that the Florida decree was not a final judgment because the court specifically reserved jurisdiction to determine attorneys' fees and court costs.[433]

The court of appeals sustained Myers' position that the Florida decree was not final and therefore was not enforceable in Texas.[434] The court distinguished *Medical Administrators, Inc. v. Koger Properties, Inc.*[435] in which the court considered a Florida judgment final although the Florida trial court reserved jurisdiction to consider additional attorneys' fees incurred in

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424. *Id.*

425. 471 U.S. 462 (1985). In *Burger King* the United States Supreme Court concluded that a Florida court had jurisdiction over a Michigan franchisee based upon the franchise agreement, coupled with negotiations contemplating future consequences in Florida, as well as the actual course of dealing between the parties. *Id.* at 471-72, 476.

426. 782 S.W.2d at 341.

427. *Id.* at 342.

428. *Id.*

429. *Id.* at 343.

430. *See* Medical Administrators, Inc. v. Koger Properties, Inc., 668 S.W.2d 719, 721 (Tex. App.—Houston [1st Dist.] 1984, no writ); Simonsen v. Simonsen, 414 S.W.2d 54, 56 (Tex. Civ. App.—Amarillo 1967, no writ).

431. 796 S.W.2d 222 (Tex. App.—Dallas 1990, no writ).

432. *Id.* at 223.

433. *Id.*

434. *Id.* at 224.

435. 668 S.W.2d 719, 721 (Tex. App.—Houston [1st Dist.] 1984, no writ.) ("[A] judgment otherwise disposing of all issues between the parties is not rendered interlocutory if further proceedings may be required to carry the judgment into effect . . . .").

supplemental proceedings because in *Koger* the court retained jurisdiction only over future proceedings.[436] In *Myers* the face of the decree indicated the court's retention of jurisdiction in the same proceeding and thus the nonfinality of the judgment.[437]

Failure to dispose of a counterclaim in an order granting summary judgment renders the order nonfinal and precludes enforceability of the judgment in a foreign forum. In *Stine v. Koga*[438] Koga brought an action against the Stines in Hawaii, alleging default under a condominium sales agreement. The Stines counterclaimed, asserting a deceptive trade practices cause of action against Koga. Koga moved for summary judgment "for the relief demanded in the Complaint."[439] The Hawaiian trial court granted the motion for summary judgment and entered an interlocutory decree of foreclosure.[440] After the property was sold, Koga obtained a deficiency judgment against the Stines in Hawaii and sought to enforce it in Texas.[441] The Stines moved to stay enforcement, contending that the judgment did not dispose of the counterclaim and therefore was not final. The trial court denied the motion.[442]

The court of appeals reversed and rendered, holding that, as the summary judgment did not mention or refer to all of the issues in the counterclaim, these issues remained unadjudicated, and therefore the judgment was not final.[443] Accordingly, the Hawaiian judgment was not entitled to full faith and credit and was unenforceable.[444]

In *Mayhew v. Caprito*[445] the Texas Supreme Court considered whether the court of appeals correctly refused to recognize the Louisiana Supreme Court's judgment that Caprito was a Louisiana domiciliary when he died.[446] The court of appeals' decision that the judgment need not be recognized directly conflicted with the United States Supreme Court's holding in *Durfee v. Duke*.[447] *Duke* held that once questions have been fully and fairly litigated and judgment is rendered, absent fraud, the judgment is entitled to full faith and credit, even as to questions of jurisdiction.[448] Thus, the Texas Supreme Court, without hearing oral argument, reversed the appellate court's ruling as contrary to the United States Supreme Court's decision in *Duke*.[449]

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436. 796 S.W.2d at 224.
437. *Id.* at 225.
438. 790 S.W.2d 414 (Tex. App.—Beaumont 1990, no writ).
439. *Id.* at 413.
440. *Id.*
441. *Id.* Koga sought to enforce the deficiency judgment in Texas pursuant to the Enforcement Act. *See supra* note 414 and accompanying text.
442. 790 S.W.2d at 413.
443. *Id.* at 414-15 (citing Chase Manhattan Bank v. Lindsay, 787 S.W.2d 51, 52-53 (Tex. 1990)).
444. *Id.* at 415.
445. 794 S.W.2d 1 (Tex. 1990).
446. *Id.* at 2.
447. 375 U.S. 106 (1963).
448. *Id.* at 111.
449. 794 S.W.2d at 2 (citing Eichelberger v. Eichelberger, 582 S.W.2d 395, 400 (Tex.

1979)); *see also* TEX. R. APP. P. 133(b) (when appellate court's decision conflicts directly with supreme court ruling, supreme court may grant writ of error and, without hearing oral argument, reverse lower court's judgment).