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Conflict of Laws

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CONFLICT OF LAWS

by

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CONFLICTS of law occur when foreign elements appear in a lawsuit. Nonresident plaintiffs or defendants, incidents in other state or countries, and lawsuits outside of Texas are all foreign elements that may create conflicts problems with judicial jurisdiction, choice of law, or the recognition and enforcement of foreign judgments. This Article will review Texas conflicts of law during the Survey period from late 1984 through 1985. The Survey includes cases from Texas state and federal courts, and non-Texas cases affecting Texas practice.

During the Survey period, judicial jurisdiction continued its uncertain theoretical expansion, with Texas courts raising important questions. Foreign judgments law had a more orderly development as the courts applied the uniform foreign judgments acts, now recodified in the new Texas Civil Practice and Remedies Code.[1] Choice of law had no fundamental changes, but some Texas courts groped with the application of the most significant relationship test from the Restatement (Second) of Conflict of Laws.[2]

I. JUDICIAL JURISDICTION

During the Survey period a number of Texas state and federal cases shed light on various areas of judicial jurisdiction, including long-arm jurisdiction (particularly the definition of doing business in Texas), notice, service of process, divorce and child custody jurisdiction, and sovereign immunity. Equally important is the 1985 recodification of Texas long-arm law in the new Civil Practice and Remedies Code, although the expressed legislative intent is to recodify only and not to make substantive changes.[3]

A. Jurisdiction Over Nonresidents

1. Long-Arm Jurisdiction in State Courts. Long-arm jurisdiction, the forum state's authority to compel nonresidents to appear in court, is the foremost component of judicial jurisdiction for conflict of laws purposes. Two

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1. TEX. CIV. PRAC. & REM. CODE ANN. (Vernon Pam 1986).
2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).
3. Act of June 16, 1985, ch. 959, § 10, 1985 Tex. Sess. Law Serv. 7043 (Vernon).

standards govern long-arm jurisdiction: the forum's long-arm statute and the due process clauses of the fifth and fourteenth amendments.[4] The principal Texas long-arm statute is article 2031b, now Chapter 17 of the new Civil Practice and Remedies Code.[5]

Most prominent among this year's long-arm law developments were two state appellate cases. Both dealt with the definition of doing business in Texas for purposes of long-arm jurisdiction.[6] Moreover, both based their analyses on the distinction between general and specific jurisdiction as set forth in the recent and notable *Helicol* decision.[7]

Middleton v. Kawasaki Steel Corporation[8] (*Kawasaki I*) began as a collection action by Oilworld Supply Company against Middleton, a west Texas oil and gas driller, for payment on Middleton's 1979 purchase of pipe casings. Middleton bought the steel pipe casing directly from Oilworld, which had ordered the casing from the Japanese manufacturer, Kawasaki Steel, through the distributor, Japan Cotton Company. Middleton counterclaimed against Oilworld's collection action and added a third-party claim against Japan Cotton and Kawasaki Steel. The counterclaim alleged that the steel casing had separated during insertion in the gas well, requiring the well to be plugged back at the shallower, less productive zone.

The trial court dismissed Middleton's counterclaim against Kawasaki because of lack of personal jurisdiction.[9] The trial court found that Kawasaki Steel, the parent company in Japan, had a Houston office from 1975 to April 1981 for market research and information gathering, and not for soliciting Texas sales. The court further found that at no time had Kawasaki Steel initiated a process from its Houston office by which it sold its products in Texas. Thus the trial court concluded that Kawasaki Steel had done nothing

4. The fifth amendment due process clause imposes limits on the personal jurisdiction of federal district courts in federal question cases with federal service of process. U.S. CONST. amend. V. The fourteenth amendment due process clause applies to state and federal courts in all other cases. U.S. CONST. amend. XIV, § 1.

5. As of September 1, 1985, article 2031b is now in sections 17.042-.045 of the new Texas Civil Practice and Remedies Code. Texas also has specific subject matter long-arm statutes, some of which are affected by the new Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.092 (Vernon Pam. 1986) (former article 2033a) (service on the local representative of nonresident individuals or partnerships supplying public utility services); *id.* § 17.021 (former articles 2033b, 2033c) (service of process on an agent or clerk in county other than the principal's residence, where principal includes individual, partnership, or unincorporated association, and also encompasses nonresidents of Texas; also, detailing the effect of service); TEX. BUS. CORP. ACT. ANN. art. 8.10 (Vernon 1980) (service of process on foreign corporations); TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1986) (acquiring jurisdiction over nonresident respondents in divorce actions); *Id.* § 11.051 (Vernon Pam. Supp. 1986) (acquiring jurisdiction over nonresident respondents in child custody actions). The procedure for serving nonresidents is set out in TEX. R. CIV. P. 108 (nonresidents in the United States) and *id.* 108a (nonresidents in foreign countries).

6. *Cf.* note 29 *infra*, explaining that the real issue in *Beechem v. Pippin*, 686 S.W.2d 356 (Tex. App.—Austin 1985, no writ) was not to further define "doing business in Texas," but to inquire whether the jurisdiction in question satisfies constitutional standards.

7. Helicopteros Nacionales de Colombia, S.A. v. Hall, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

8. 687 S.W.2d 42 (Tex. App.—Houston [14th Dist.]), *writ ref'd n.r.e.*, 699 S.W.2d 199 (Tex. 1985).

9. 687 S.W.2d at 46-47.

purposefully to avail itself of the economic benefits of the Texas market. Based on these factual findings,[10] the trial court concluded that dismissal because of lack of personal jurisdiction was warranted because (1) Kawasaki's few direct contacts with the state of Texas, limited primarily to the operation of the Houston office, did not satisfy the due process standards of judicial jurisdiction, (2) Kawasaki had such minimal contacts with Texas that maintenance of the suit would offend traditional notions of fair play and substantial justice, considering the quality, nature, and extent of Kawasaki's activity in Texas, the relative convenience to the parties, the forum's duty to offer the protection of its law to the parties, as well as the basic equities of the situation, and (3) Kawasaki's activity in Texas did not suggest that it had purposefully availed itself of the benefits of the forum.[11]

Before addressing the merits of the trial court's conclusions, the court of appeals noted that the crucial period for Kawasaki's amenability to Texas service of process was the time when the pipe was sold and failed in 1979. At that time, Kawasaki still had its office in Houston, before its replacement by Kawasaki Steel America, an American subsidiary created in 1981. In making this point the court quoted *Collins v. Mize*:[12] "We see no problem of due process when the forum state is determining a controversy *arising out of a transaction consummated in the forum state* at a time when the defendant himself was a resident of the forum state."[13] The emphasized phrase is noteworthy because it foreshadows the appellate court's conclusion that Middleton's counterclaim arose out of Kawasaki's activities in the Houston office. Although the court did not use the term, this is specific jurisdiction.

Turning to the merits of the lower court's dismissal, the court of appeals first considered the trial court's fact findings regarding Kawasaki's activity in Texas at the crucial time in 1979 when the pipe casings failed in Middleton's west Texas well.[14] The court left intact the finding that Kawasaki's Houston office was used for promotion only and never for sales, but discarded the finding that Kawasaki had not purposefully availed itself of Texas benefits by its Houston promotional activities.[15] The court noted that assertion of jurisdiction depends upon the existence of three elements. First, Kawasaki must have purposefully done some act or consummated some transaction in Texas. Second, Middleton's cause of action must have arisen from, or have been connected with, that transaction. Finally, the forum state's assumption of jurisdiction must not offend traditional notions of fair play and substantial justice.[16] From the trial evidence the court ascertained that Kawasaki had placed its employees in Houston, the oil and gas capital of the nation, to perform market research and to promote sales.[17] As a re-

10. They were labelled as fact findings by the trial court. *Id.* at 45.
11. *Id.* at 46.
12. 447 S.W.2d 674 (Tex. 1969).
13. *Id.* at 675-76 (emphasis added).
14. *See supra* note 10 and accompanying text.
15. 687 S.W.2d at 45.
16. *Id.* at 46.
17. *Id.*

sult, the court found, Kawasaki annually shipped 210 metric tons of steel to Houston.[18] Because Kawasaki manufactured the pipe purchased from Oilworld, the court found that Middleton's cause of action was connected with Kawasaki's purposeful activity in Texas.[19] The court therefore concluded that the assertion of Texas jurisdiction was acceptable under traditional notions of fair play and substantial justice.[20]

One other ground for the trial court's dismissal of Kawasaki from the lawsuit was improper service under the long-arm statute. Middleton served process on Kawasaki's employee, Mr. Toshikazu Tomita, in Kawasaki's Houston office. Middleton alleged that Kawasaki was a New York corporation licensed to do business in Texas with Mr. Tomita as its registered Texas agent. Middleton erred in its allegations about Kawasaki's Texas contacts. Kawasaki Steel was a Japanese corporation not licensed to do business in Texas and had no registered Texas agent. In April 1, 1981 Kawasaki's Houston office became Kawasaki Steel America, wholly-owned subsidiary of the Japanese parent, Kawasaki Steel. Kawasaki Steel America is a New York corporation licensed to do business in Texas, and Mr. Tomita became its general manager and registered Texas agent in April, 1981. Thus Middleton confused the parent Japanese manufacturer, Kawasaki Steel, with an American subsidiary that did not exist at the time Middleton's claim arose in 1979. Kawasaki objected to the manner of service, arguing for jurisdictional dismissal. The appellate court held that Kawasaki's objection to the manner of service was improperly raised in a Rule 120a special appearance to challenge jurisdiction. Instead, the court observed, Kawasaki should have limited its Rule 120a objection to its minimum contacts arguments, and if it lost, immediately filed a motion to quash service. Because Kawasaki raised defective service in a Rule 120a hearing, it waived the objection and thereby thwarted the purpose of the special hearing, that is, it turned a special appearance into a general appearance and thus bound itself to the lawsuit.[21]

One may agree with the court's holding that Kawasaki should be amenable to Texas jurisdiction for Middleton's counterclaim, but reject the court's reasoning behind that conclusion. The court's justification for Texas jurisdiction over Kawasaki was specific jurisdiction—that Middleton's cause of action arose from Kawasaki's Houston activity. Kawasaki limited those activities, however, to market research and information gathering, which, though apparently aimed at increasing Kawasaki's sales in Texas and the United States, had nothing to do with particular sales, including the sale to Middleton. Thus Kawasaki's Houston activity had nothing to do with Middleton's cause of action. The Houston office did nothing to solicit, process, or accept the order from Middleton. Middleton contracted with Oilworld and did not depend on the Houston Kawasaki office in any way during the contract's negotiation, agreement, performance, and breach.

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 46-48. *See infra* notes 140-53 and accompanying text for further discussion.

Arguably Kawasaki ought to be subject to the general jurisdiction of Texas courts in this case, based on its general activity of promoting its products here and the failure of its products in Texas. General jurisdiction requires more strict connections than specific jurisdiction,[22] but Kawasaki probably meets those stricter general jurisdiction standards in this case. The court nonetheless should not have allowed jurisdiction here under the rubric of specific jurisdiction because the connection between Kawasaki's Houston activities and Middleton's contract with Oilworld is dubious.

The Texas Supreme Court issued a *per curiam* opinion (*Kawasaki II*), upholding jurisdiction in *Kawasaki I* on different grounds.[23] The supreme court ignored the court of appeals' analysis of specific jurisdiction, and instead adopted the stream of commerce doctrine from *World-Wide Volkswagen Corporation v. Woodson*.[24] The stream of commerce doctrine states that when a foreign manufacturer places its goods in the interstate or international stream of commerce with a reasonably forseeable chance that some of those goods will enter the forum state, the forum state acquires jurisdiction over disputes based on those goods. The supreme court noted ample facts in the *Kawasaki I* record to support application of the stream of commerce doctrine, particularly as to Kawasaki's knowledge that Texas residents would use its goods. The *Kawasaki II* opinion is superior because it abandons the court of appeals' weak reasoning that based specific jurisdiction primarily on a connection between Middleton's injury and Kawasaki's Houston promotional activity. By abandoning the court of appeals' cause and effect analysis and adopting the stream of commerce doctrine, the supreme court made jurisdiction over Kawasaki more palatable.

Although the Texas Supreme Court did not mention *Helicol* or specific jurisdiction in *Kawasaki II*, the stream of commerce doctrine apparently draws from specific jurisdiction concepts because it ties the forum state's jurisdiction to the defendant's actions that caused injury in the forum state. On the other hand, one could argue that stream of commerce jurisdiction has aspects of both general and specific jurisdiction, and yet is neither. *Kawasaki*'s jurisdictional facts present a good example of this duality in the stream of commerce doctrine. *Kawasaki*'s stream of commerce jurisdiction is unlike specific jurisdiction because it does not depend on Kawasaki's activity in Texas,[25] although the court did consider the Houston promotional

22. The notion that general jurisdiction requires more thorough contacts is not explicit in *Helicol*, but is a compelling inference. *See* 104 S. Ct. at 1872, 1876 n.1, 80 L. Ed. 2d 410-11, 416 n.1 (Brennan, J., dissenting) (discussing Rosenberg Bros. v. Curtis Brown Co., 260 U.S. 516 (1923), and the notion that general jurisdiction requires contacts that amount to the defendant's being "present" in the forum).

23. 699 S.W.2d 199 (Tex. 1985). A per curiam "writ ref'd n.r.e." (no reversible error) means that the higher court agreed with the outcome but not with the reasoning.

24. 444 U.S. 286 (1980). The stream of commerce doctrine was developed in federal circuit courts following dicta in *World-Wide Volkswagen*. *See Kawasaki II*, 699 S.W.2d at 201. *Kawasaki II* upheld the court of appeals ruling that a motion to quash service constituted a general appearance, even when raised in a Rule 120a special appearance. This important ruling is discussed in the Notice section, *see infra* notes 140-53 and accompanying text.

25. Even though the court of appeals held that Kawasaki's Houston activities were the basis of jurisdiction, the Texas Supreme Court avoided this analysis and focused instead on

activity as part of the stream of commerce calculus. Instead jurisdiction depends on the fact that Kawasaki placed its products in the stream of commerce by allowing Japan Cotton to distribute them, through Oilworld, into markets that included Texas. Under the stream of commerce doctrine these actions by Kawasaki, which were principally centered in Japan, would presumably produce Texas jurisdiction for any dispute arising in Texas over Kawasaki products. Nonetheless Kawasaki's stream of commerce actions would not produce Texas jurisdiction for disputes arising outside of Texas. In this respect *Kawasaki*'s stream-of-commerce jurisdiction resembles specific jurisdiction more than general. For example, an Oklahoma plaintiff who lost money from a Kawasaki pipe casing failure in an Oklahoma oil field presumably could not sue Kawasaki in Texas.

If *Kawasaki II*'s jurisdictional argument represents a middle ground between general and specific jurisdiction, the resulting confusion may require more detailed guidelines from the United States Supreme Court on the theoretical bases of personal jurisdiction. We may have come to the point of needing statutory guidelines, either in uniform state legislation or federal statutes similar to the federal Parental Kidnaping Prevention Act governing conflicting state dispositions of child custody cases.[26]

The second notable long-arm case of the Survey period is *Beechem v. Pippin*,[27] in which Texas-resident Beechem sued Georgia-resident Pippin for breach of contract. Beechem manufactures, leases, and sells Terragator sludge applicators in Bell County, Texas and advertises them in nationally-circulated trade magazines. Pippin initiated the contract from Georgia by placing two phone calls to Beechem in Texas. A subsequent written contract provided for Beechem to lease the Terragator to Pippin. Pippin made payments by mail to Beechem in Bell County. Pippin also arranged for an independent carrier to haul the Terragator to Georgia, and he insured the move. A dispute arose and Beechem sued Pippin in Bell County for breach of contract. Pippin moved to dismiss the lack of personal jurisdiction. The trial court agreed and dismissed the complaint for lack of specific jurisdiction.[28] Beechem appealed, arguing that Pippin's acts established a basis for jurisdiction.

The court of appeals agreed in a lengthy analysis of every component of the state's power over nonresidents. The court first examined the Texas long-arm statute, considering the definition and scope of "doing business" in Texas as a basis for jurisdiction over non-Texans. The court ruled that the Texas legislature intended for the Texas jurisdiction to extend as far as the federal constitution allows, that is, over foreign defendants doing the consti-

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Kawasaki's activities in Japan that caused their products to be placed in the stream of commerce. 699 S.W.2d at 201.

26. *See* 28 U.S.C. § 1738A (1982), discussed *infra* at notes 109-34 and accompanying text. The Parental Kidnaping Prevention Act governs state subject matter jurisdiction of child custody cases, but is based on residency and contacts similar to personal jurisdiction.

27. 686 S.W.2d 356 (Tex. App.—Austin 1985, no writ).

28. *Id.* at 358.

tutional minimum of business in Texas.[29] The court was guided in its analysis of long-arm reach by the recent Texas *Helicol* decision.[30] In *Helicol* the Texas Supreme Court noted the difference between specific and general jurisdiction. General jurisdiction, the court observed, requires a greater quality and/or quantity of contracts between the lawsuit and the forum than specific jurisdiction. Once those greater contracts are shown, however, the defendant may be sued in Texas for causes of action unrelated to the defendant's activity in Texas.[31]

Having posed the general/specific jurisdiction possibilities, the court of appeals stated that *Beechem* was a case of specific jurisdiction.[32] In other words, Pippin's acts in Texas directly related to the lawsuit. Thus the contacts between Pippin and the forum need not have been of the same high quality and/or quantity as for general jurisdiction, but only enough to establish that the Texas contacts existed, and that they related to Beechem's lawsuit. The court of appeals therefore declined application of *Helicol*'s formulas for general jurisdiction, lawsuit unrelated to defendant's forum contracts, to the facts in *Beechem*. *Helicol* directed *Beechem*'s analysis to specific jurisdiction, but had no further impact.

The court then turned to the other component of state jurisdiction—federal due process. The court listed several standards that bore on whether the exercise of personal jurisdiction comports with due process: minimum contacts,[33] the quality and quantity of contacts,[34] the degree to which the defendant has availed himself of the benefits and protections of the forum,[35] and the likelihood that the defendant could foresee the possibility of personal jurisdiction in the forum state.[36] To this list the court added Professor Brilmayer's theorem that the quality and quantity of contacts reveal the extent to which the defendant's activity in the forum puts the forum's residents at risk, thus creating a point at which the state acquires a regulatory interest over the defendant.[37] Reiterating the general/specific jurisdiction distinction, the court noted that some contacts are so great that the cause of action

29. Texas courts have often observed that the Texas long-arm statute is intended to have the maximum constitutional reach. Reiteration seemed appropriate here, as the court of appeals noted that fourteenth amendment due process was the real jurisdictional issue. The court concluded that in *Beechem* and future cases involving nonresident defendants with business connections to Texas, the jurisdictional issue would not be to define "doing business," but to examine the pertinent judicial interpretations of due process. 686 S.W.2d at 359.

30. Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870 (Tex. 1982), *rev'd on other grounds*, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

31. *Id.* at 872.

32. 686 S.W.2d at 359.

33. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Milliken v. Meyer, 311 U.S. 457, 462-64 (1940).

34. *See* Calder v. Jones, 104 S. Ct. 1482, 1486, 79 L. Ed. 2d 804, 811 (1984).

35. *See* Hansen v. Denckla, 357 U.S. 235, 253 (1958).

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

37. Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. CT. REV. 77, 87 (hereinafter cited as Brilmayer). Note that this notion of state interest (the degree of risk to local citizens) is a valid jurisdictional issue according to both Brilmayer and the *Beechem* court, while the state interest expressed in legislation is not. *See infra* note 40.

does not have to be related, such as when a defendant corporation has a branch office in the forum. A more compelling case for jurisdiction exists, however, when the defendant's contacts with the forum relate to the cause of action. Even in specific jurisdiction cases, however, more than a mere relation must exist between the defendant's actions in the forum and the lawsuit.[38]

The court next addressed and discarded two other arguable components of personal jurisdiction: the burden on the defendant, and the forum state's interest in the litigation. The court suggested that once minimum contacts were found, the inquiry should turn to the fairness of requiring a nonresident to defend in Texas. The court disregarded this inquiry, however, concluding that fairness is an issue of venue and inconvenient forum and not of jurisdiction.[39] Similarly, the court dismissed state interest as a valid component of personal jurisdiction, reasoning that consideration of the forum's interest in the litigation confuses a legislative wish to assert jurisdiction with the constitutional right to do so.[40]

Having stated the pertinent standards under Texas long-arm law and federal due process, and having discarded state interest and fairness to the defendant, the court of appeals restated the applicable jurisdictional equation: Personal jurisdiction over non-Texans requires an examination of the nature and number of the defendant's contacts with the forum. Particular consideration should be given to (1) the degree to which defendant availed himself of the forum's benefits and protections, (2) the foreseeability of in-state effects traceable to defendants acts in or out of the forum, and (3) the degree to which Texas citizens[41] are put at risk by the defendant's acts.[42] The court re-emphasized that a stronger relationship between plaintiff's cause of action and the above contracts increases the likelihood of finding personal jurisdiction.[43]

With the jurisdictional rule stated, the court reviewed the facts, prefacing the factual recitations with its conclusion that Beechem's cause of action arose out of Pippin's contacts with Texas. The court noted that Pippin initiated the negotiations by calling Beechem in Texas,[44] that Beechem signed

38. 686 S.W.2d at 360 (citing U-Anchor Advertising, Inc. v. Burt, 533 S.W.2d 760 (Tex. 1977)).

39. *Id.* Those precedents favoring a weighing of defendant's litigation burden include *World-Wide Volkswagen*, 444 U.S. at 292-94 and D.J. Investments v. Metzler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542, 545 (5th Cir. 1985) (defendant's inconvenience represents one facet of personal jurisdiction issue); *see also* G.R.M. v. Equine Inv. & Management Group, 596 F. Supp. 307, 315 (S.D. Tex. 1984) (to satisfy due process requirements defendant's burden must be equitable).

40. 686 S.W.2d at 360-61 (citing Brilmayer, *supra* note 33, at 107). State interest in the litigation and the burden on the nonresident defendant are unique to each case and hard to measure (too hard in the *Beechem* case). By limiting the jurisdictional analysis to contacts, the equation is simpler and more objective, though perhaps less fair to nonresidents.

41. "Citizens" should perhaps be "residents."

42. 686 S.W.2d at 361.

43. *Id.*

44. Beechem's national advertising could be construed as a general solicitation for business that led to Pippin's call, meaning that Pippin did not initiate the contract, but merely acted on Beechem's solicitation. In fact, the court noted this ambiguity as to the offeror's

the contract in Texas, and that Pippin made payments by mail to Beechem in Texas. Pippin thus fell within the *Hansen v. Denckla* standard of personal jurisdiction, having "purposely [availed themselves] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[45] The court added that a lawsuit was foreseeable in this instance, and that Pippin's actions placed Texas citizens at risk.[46]

Pippin argued that the facts at issue were similar to those in *U-Anchor Advertising, Inc. v. Burt*,[47] a much-cited Texas long-arm case that denied jurisdiction over an Oklahoma buyer of a Texas product. The court saw some similarity in *U-Anchor* but distinguished it on the ground that U-Anchor's Texas seller went to the Oklahoma buyer to solicit, negotiate, and sign the contract.[48] The only Texas contact was the Oklahoma buyer's mailing his payments to Amarillo. The court also invoked *McGee v. International Life Insurance Co.*[49] to justify jurisdiction over Beechem. *McGee* was a California lawsuit arising from the renegotiation of an insurance contract. A Californian purchased an insurance policy that was later reassigned to a Texas insurance company, International Life. When renewal time came, the insured renewed with International Life, who mailed the new policy to California. Upon the insured's death, the California beneficiary sued to collect, and then filed the California judgment in a Texas court. The Texas court denied enforcement based on a lack of California jurisdiction over the Texas insurance company. The United States Supreme Court reversed, holding that it was sufficient that the suit was based on a contract that had a substantial connection to California. Thus the Texas insurer was subject to California jurisdiction even though the insurer had never directly solicited business in California, having merely renewed the policy. The *Beechem* court noted that the *McGee*-type contacts were perhaps the least permissible for asserting jurisdiction, but that *Beechem* contained *McGee's* important feature, the solicitation of the contract, which for Beechem and Pippin occurred in Texas.[50]

The court made two final points. First, it clarified that *Beechem* does not hold that merely contracting with a Texas resident will always result in Texas jurisdiction.[51] Then the court underscored its assurance that it had not assumed extraordinary jurisdiction by noting that Pippin owned real and personal property in Texas, and had conducted sales there. While property ownership does not in and of itself establish personal jurisdiction for an un-

identity, 686 S.W.2d at 362 n.2. This ambiguity, however, does not affect jurisdiction. Beechem's national advertising might subject him to Georgia jurisdiction, but that does not diminish Pippin's contacts with Texas. Both Georgia and Texas are seemingly proper forums.

45. *Id.* at 361.

46. The court does not describe the risk other than stating that it lay in Pippin's performing or not performing the contract. *Id.*

47. 553 S.W.2d 760 (Tex. 1977).

48. 686 S.W.2d at 361-62.

49. 355 U.S. 220 (1957).

50. 686 S.W.2d at 362.

51. *Id.* at 363.

related lawsuit,[52] it is a consideration in determining whether Pippin has so enjoyed the benefits and protection of the Texas forum that he should be compelled to defend in Texas courts, even in matters unrelated to his property. Thus the court established general jurisdiction over Pippin as an afterthought to specific jurisdiction.

Unlike *Kawasaki I*, *Beechem* offers a solid basis for specific jurisdiction. Pippin sought out a Texas product, negotiated and finalized the agreement in Texas, and sent payments to Beechem in Texas. Out of these Texas contacts a dispute arose, and Texas courts provide a viable forum for that dispute, though not necessarily the exclusive forum. Although Beechem's national advertising and interstate sales may have made him equally amenable to suit in the Georgia courts, it seems just as proper to have brought Pippin before a Texas court.

Beechem and *Kawasaki* are important because they further define "doing business" in Texas under federal constitutional standards. *Kawasaki I* held that a Houston-based promotional office for a Japanese manufacturer is sufficient business in Texas to require the manufacturer to defend a breach of contract lawsuit by a west Texas customer, even when the lawsuit and its underlying contract at best indirectly relate to the Houston promotional activities. In *Kawasaki II*, however, the Texas Supreme Court under cut *Kawasaki I*'s "doing business" equation by applying the stream of commerce doctrine as a sounder basis for jurisdiction. *Beechem* held that a Texas product ordered by telephone from Georgia with the Texas-to-Georgia shipment arranged by the Georgia purchaser provides sufficient Texas business activity for exercise of personal jurisdiction over the Georgia purchaser. *Beechem* and *Kawasaki* are also significant because they employ the specific/general jurisdictional concept from *Helicol*,[53] the Texas case in which the United States Supreme Court promulgated yet another paradigm for state judicial jurisdiction.[54] *Beechem* expressly invoked *Helicol*, while in *Kawa-*

52. *See id.* (citing Shaffer v. Heitner, 433 U.S. 186 (1977)).

53. 104 S. Ct. 1868, 1872, 80 L. Ed. 2d 404, 410-11 (1984).

54. There was a time when major changes in the constitutional standards for state judicial jurisdiction occurred several years apart, giving lawyers time to learn the new standards. The first clear standard came from Pennoyer v. Neff, 95 U.S. 714 (1878), and its holding that physical presence within the forum state was the basis of personal jurisdiction. Harris v. Balk, 198 U.S. 215 (1905), clarified the in rem and quasi in rem bases of jurisdiction. Hess v. Pawloski, 274 U.S. 352 (1927), marked the first small move away from *Pennoyer* and the physical presence test in its creation of the legal fiction that nonresidents motorists "appointed" a state official as agent for service of process, and thus were deemed to consent to jurisdiction for litigation based on their accidents in the forum state. In 1930 Learned Hand developed the minimum contacts analysis in Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930), but left *Pennoyer* intact. Fifteen years passed before the minimum contacts notion became effective in International Shoe Co. v. Washington, 326 U.S. 310 (1945), with its adoption of a fairness test of jurisdiction, and the displacing of the *Pennoyer* model for personal jurisdiction. Seven years later, Perkins v. Benguet Consolidated Mining, 342 U.S. 437 (1952) expanded *International Shoe* by allowing state jurisdiction over a foreign corporation for a cause of action arising outside the forum because the defendant corporation's contacts with the forum were very substantial. *Id.* at 447-48. Five years later, McGee v. International Life Ins. Co., 355 U.S. 220 (1957) again expanded minimum contacts, holding that a single transaction, contract or tort, might be sufficient for personal jurisdiction if it amounts to a "substantial

saki I the court of appeals used the same specific jurisdiction model without mentioning *Helicol*.

A 1985 United States Supreme Court decision offers yet newer developments in the personal jurisdiction equation. *Burger King Corp. v. Rudzewicz*[55] involved a breach of contract action by the parent franchisor in Florida against Michigan franchisees. The Michigan defendant had a

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connection" with the forum state. *Id.* at 223. *McGee*'s facts and holding resemble 1985's *Burger King* decision.

The first restriction on minimum contacts occurred the following year with Hanson v. Denckla, 357 U.S. 235 (1958) which held that personal jurisdiction does not exist unless the defendant commits "some act by which he purposely avails himself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws." *Id.* at 253.

The expansion of minimum contacts resumed in 1966 with Seider v. Roth, 216 N.E.2d 312 (N.Y. 1966), a seminal state court opinion offering the most extreme of the quasi in rem theories. *Seider* allowed the attachment of an automobile insurer's obligation to defend and indemnify the driver as a basis for jurisdiction in any state where the insurer did business, even though the obligation to defend and indemnify did not arise under the insurance contract until a court had validly assumed jurisdiction over the policy holder. In other words, *Seider* authorized bootstrap jurisdiction. *Seider* was adopted by several states, including California and Minnesota, and led to the watershed opinion eleven years later in Shaffer v. Heitner, 433 U.S. 186 (1977). *Shaffer* overruled *Pennoyer* and *Harris v. Balk* and held that the *International Shoe* minimum contacts test applied not only to jurisdiction over persons, but also to jurisdiction over property in the belief that all adjudication concerned the rights of people, not the rights of property. *Id.* at 207. Follow-up decisions were needed to clarify the *Shaffer* standard (lawyers and judges were reluctant to give up the in rem and quasi in rem bases of jurisdiction), and those necessary clarifying decisions began to come more quickly. One year after *Shaffer*, Kulko v. Superior Court, 436 U.S. 84 (1978) held that a nonresident father was not subject to California jurisdiction to modify child support merely for having sent his daughter to live with her mother in California. *Id.* at 94. Two years after *Kulko*, World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) further restricted state court jurisdiction by denying Oklahoma jurisdiction over a New York-based car dealer and distributor for an Oklahoma accident that injured New York plaintiffs en route to California, thereby affirming the need for some contacts between the forum state and foreign defendants. *Id.* at 298. Rush v. Savchuk, 444 U.S. 320 (1980), issued with *World-Wide Volkswagen*, also restricted state court jurisdiction by disallowing *Seider* actions, and making clear that such actions must satisfy *Shaffer* minimum contacts standards. *Id.* at 332.

In 1982, Insurance Corp. v. Compagnie Des Bauxites de Guinea, 456 U.S. 694 (1982), held that state sovereignty was no longer the underlying justification for state judicial jurisdiction, and that sovereignty was replaced with the 14th amendment's guidelines on individual liberty and the permissible restrictions on that liberty. *Id.* at 702 n.10.

The Supreme Court had a bumper crop in 1984, with three significant jurisdictional developments for state courts. Helicopteros Nacionales de Colombia, S.A. v. Hall, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984) offered the general/specific jurisdiction models, in spite of the decision's denial of Texas jurisdiction in that case. *Id.* at 1874, 80 L. Ed. 2d at 414. The dissent, however, believed that Texas had specific jurisdiction, which the majority failed to address fully. *Id.* at 1879, 80 L. Ed. 2d at 419-20 (Brennan, J., dissenting). Keeton v. Hustler Magazine, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), held that New Hampshire jurisdiction could be based on the defendant magazine's sales there. The fact that the plaintiff had no New Hampshire contacts, other than a liking for its longer statute of limitations for libel claims, was irrelevant to jurisdiction over Hustler Magazine since there is no minimum contacts requirement for plaintiffs. *Id.* at 1481, 79 L. Ed. 2d at 801-02. Calder v. Jones, 104 S. Ct. 1482, 1486-87, 79 L. Ed. 2d 804, 812 (1984), produced the "effects test" with its holding that California jurisdiction could be based on the effects plaintiff Shirley Jones felt in California as a result of statements in the defendant's newspaper, The National Enquirer. In 1985 the Supreme Court offered yet another significant state jurisdiction case, Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

55. 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

twenty-year contract with Miami-based Burger King to operate a Burger King franchise in Michigan. The contract stipulated that its formation and execution was in Miami, that Florida law governed the agreement, that all monthly franchise payments and other fees would be sent to Miami, that the Miami office would receive all contractual notices, and that the Miami office would set all policies and resolve all disputes. Day-to-day operations, however, were managed by district offices that reported to the Miami office.

In executing and performing this contract defendant Rudzewicz never set foot in Miami, although his partner MacShara attended a brief training course in Miami to prepare him for managing the restaurant. The Eleventh Circuit held that MacShara's Miami presence was irrelevant to the jurisdictional issue because MacShara and Rudzewicz were not partners.[56] The Supreme Court observed that even if MacShara and Rudzewicz were not partners, the corporate decision by Rudzewicz and MacShara to send MacShara to Miami could subject Rudzewicz to Florida jurisdiction.[57] MacShara's Miami training, however, was not pivotal to the disposition of this case because jurisdiction over Rudzewicz was established on other grounds.[58]

The Court held that a forum-based contract alone is not determinative of jurisdiction over nonresident contracting parties.[59] In certain circumstances, however, including Rudzewicz's, "[A] forum may assert specific jurisdiction over a nonresident defendant where an alleged injury arises out of or relates to actions by the defendant *himself* that are purposefully directed toward forum residents, and where jurisdiction would not otherwise offend 'fair play and substantial justice.' "[60] The Court found that Rudzewicz's out-of-state contacts with Miami by mail, telephone, and wire communications were sufficient to compel him to defend in Florida. The Court further found that the contracts' choice of Florida law was relevant to the personal jurisdiction equation, although not dispositive.[61] Moreover, the court found ample evidence in Rudzewicz's actions to support their conclusion that Rudzewicz had purposefully availed himself of Florida benefits and protections in his Burger King contract, and that as an accountant and investor, Rudzewicz had sufficient cognizance of the contract's implications for Florida jurisdiction.[62]

Burger King did not establish a distinctly new jurisdictional paradigm. It did, however, clarify state judicial power over nonresidents by spelling out the test for judicial jurisdiction based only on the contract.[63] Finally, *Burger*

56. 724 F.2d 1505, 1513 n.4 (11th Cir. 1984).

57. 105 S. Ct. at 2186 n.22, 85 L. Ed. 2d at 545 n.22.

58. *Id.*

59. *See id.* at 2176, 85 L. Ed. 2d at 534 (Court Syllabus); *id.* at 2185, 2189, 85 L. Ed. 2d at 545, 549-50.

60. *Id.* at 2176, 85 L. Ed. 2d at 534 (Court Syllabus) (emphasis original). Even though the Supreme Court syllabus is not a part of the opinion for precedent purposes, this quote provides a good synopsis for this brief review of *Burger King*.

61. *Id.* at 2187, 85 L. Ed. 2d at 547.

62. *Id.* at 2186-89, 85 L. Ed. 2d at 545-49.

63. Factors that determine jurisdiction based on contractual dealings within the forum

King affirmed that a contractual choice of law clause is relevant to determination of judicial jurisdiction.

2. State Long-Arm Jurisdiction in Federal Courts. Several noteworthy federal court applications of Texas long-arm jurisdiction under 2031b occurred during the survey period. *D.J. Inv. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*[64] involved a diversity action for breach of oral contract and fraud. Plaintiff D.J. Investments, a Texas corporation, attempted through its agent Hovers to purchase Van Sickler's Race Ready, the exclusive Texas distributor for Metzeler motorcycle tires, which were manufactured in Washington state. Hovers contacted Metzeler owner, Robert Gregg, and told Gregg that D.J. Investments was interested in buying Race Ready if it could continue to be the exclusive Metzeler distributor in Texas. According to Hovers, Gregg agreed that D.J. Investments could have the exclusive distributorship if it submitted an irrevocable letter of credit for $30,600.28 to cover Race Ready's current Metzeler stock, and if D.J. Investments acquired Race Ready. Hovers and Gregg held their discussions by telephone between Texas and Washington, except for one when Gregg flew to Texas, met with Hovers, and agreed to the distributorship. During these negotiations, Hovers alleged, Gregg told him that he was making no other deals with anyone for a Texas Metzeler distributorship.

D.J. Investments sent the irrevocable letter of credit to Metzeler and bought Van Sickler's Race Ready for $400,000. Hovers called Gregg to tell him the letter of credit had been mailed, and Gregg allegedly assured him of their agreement. Six days later, however, Metzeler Company cancelled the agreement. D.J. Investments requested return of its letter of credit but was refused. D.J. Investments brought suit in federal district court alleging a breach of their oral agreement and fraud in that Gregg had already made a deal with someone else for an exclusive Metzeler distributionship in Texas.

The district court found that Gregg and his company had no place of business in Texas, no employees in Texas, no agent for service of process in Texas, and no permit to do business in Texas. Gregg's only contacts with Texas were calls to Hovers and one visit to the Dallas/Fort Worth airport. The court further found that although Gregg had been selling his Metzeler tires in Texas through Race Ready, the instant contract was solicited by Hovers. Based on this, the court dismissed the case for insufficient contacts with Texas.[65]

D.J. Investments appealed and the Fifth Circuit reversed, holding that sufficient Texas contacts existed.[66] The court held that the small number of Texas contacts were not determinative in this case. Rather, the court declared that "[t]he more important issue is whether the defendants engaged in activity, including activity 'outside the state that has reasonably foreseeable

included (1) prior negotiations, (2) contemplated future consequences, (3) the contract's terms, and (4) the parties' actual course of dealing. *Id.* at 2186, 85 L. Ed. 2d at 528.

64. 754 F.2d 542 (5th Cir. 1985).

65. *Id.* at 543-44.

66. *Id.* at 547-49.

consequences in the state,' by which they purposely availed themselves of the benefits and protections of the forum state's law."[67] In deciding this issue the court noted that the injurious effect of Gregg's acts was felt in Texas, that Gregg purposefully directed his activity at Texas, and that Gregg's contacts with Texas were intentional and not fortuitous.[68]

The Fifth Circuit applied a distinctive two-part test in deciding the jurisdictional question. First, the nonresident must have some minimum contacts with the forum resulting from an affirmative act or acts on their part. Second it must not be unfair or unreasonable to require the nonresident to defend the suit in the forum state.[69] This differs from *Helicol* and other United States Supreme Court opinions because it makes fairness to the defendant a distinct second test, after minimum contacts have been found.[70] A Texas court of appeals rejected this fairness consideration in *Beechem v. Pippin*.[71]

Another interesting point in *Metzeler* relates to the choice of law clause as a factor for judicial jurisdiction. The *Metzeler* district court based its dismissal in part on an earlier Fifth Circuit decision, *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*,[72] in which the Fifth Circuit considered the parties' choice of law agreement, choosing Alaska rather than Texas law, as a basis for denying Texas jurisdiction over the defendant. In *Metzeler* the Fifth Circuit found *Hydrokinetics* inapposite to *Metzeler* because the contract in *Metzeler* contained no choice of law clause.[73]

Donovan v. Grim Hotel Co. illustrates a second instance of a Texas federal court's using 2031b.[74] Grim Hotels consist of five hotel corporations, each corporation representing one hotel, and each owned by Charles Alberding. The United States Department of Labor and 177 hotel workers sued Alberding and his five hotel corporations for violations of the Fair Labor Standards Act, particularly as to minimum wage and overtime pay. In addition to jurisdiction over the Texas hotels, the plaintiffs sought personal jurisdiction against Alberding for his personal liability under federal labor law. Alberding, an Illinois resident, performed much of his hotel management work in Illinois. When he did travel to Texas, he did so as president of the hotel corporations.

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67. *Id.* at 547 (quoting Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1268 (5th Cir. 1981)).
68. *Id.* at 547-49.
69. *Id.* at 545.
70. The United States Supreme Court has incorporated a fairness doctrine, *see e.g.*, *World-Wide Volkswagen*, 444 U.S. at 292-94 (due process clauses guarantee fairness); *Hanson*, 357 U.S. at 259 (Black, J., dissenting) (jurisdiction held not unfair); *id.* at 263 (Douglas, J., dissenting) (jurisdiction held not unfair); *International Shoe*, 326 U.S. at 319 (due process concerns include fairness of administration of laws); *id.* at 324-26 (Black, J.) (use of term "fairness" incorrectly limits powers constitutionally granted to states), but in doing so simply used fairness as a justifying argument for minimum contacts. In fact, in *World-Wide Volkswagen* the Supreme Court stated that fairness is expressed as minimum contacts. 444 U.S. at 291-92; *id.* at 300-01 (Brennan, J., dissenting).
71. 686 S.W.2d at 360.
72. 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2180, 80 L. Ed. 2d 561 (1984).
73. 700 F.2d at 548.
74. 747 F.2d 966 (5th Cir. 1984).

Alberding argued that the Texas federal court lacked personal jurisdiction over him because his only contacts with Texas were in his role as corporate president, thus giving him a fiduciary shield to personal liability. The trial court overruled Alberding's objections to personal jurisdiction, entered partial summary judgment as to liability, and enjoined the hotels from continuing this practice.[75] On appeal the Fifth Circuit upheld the trial court's assertion of personal jurisdiction over Alberding on the grounds that Alberding had sufficient contacts with Texas in his management of the five hotels, and that he had no fiduciary shield because his liability did not derive from his status as corporate president.[76] Rather, the court concluded that his liability resulted from violations of federal law for which he was personally accountable. Moreover, the court found that his out-of-state activities squarely fit within the long-arm statute's definition of doing business in Texas.[77]

In *Maurice Pierce and Associates v. Computerage*[78] the defendant successfully challenged 2031b service of process in a federal diversity action for breach of contract. The court's reasoning, however, had nothing to do with a minimum contacts analysis. The court based the dismissal on plaintiff's failure to allege a contractual relationship with the out-of-state defendant, and a failure to demonstrate sufficient agency or alter ego ties between the out-of-state defendant and the in-state defendants who were validly in the lawsuit. The case illustrates the importance of pleading all essentials, even in the era of notice pleading.

Finally, one non-Texas case is of interest to Texans. In *Pedelahore v. Astropark, Inc.*[79] a Houston amusement park was subjected to personal jurisdiction in an eastern Louisiana federal court for a personal injury action by local Louisiana residents injured in a Texas amusement park. In upholding the trial court's finding of jurisdiction, the Fifth Circuit relied on the extensiveness of the Louisiana long-arm statute, and the amusement park's extensive solicitation of business from Louisiana.[80]

3. Personal Jurisdiction for Federal Claims. Texas federal courts produced two noteworthy cases in 1985 regarding personal jurisdiction for federal question claims. *GRM v. Equine Investment Group*[81] involved a securities fraud action under the federal securities acts[82] with a pendent claim under Texas law. The plaintiffs were Texas residents who had invested in a Florida limited partnership known as The Arabian Breeding Program I. Defendants included Andover Funding Limited, a South Dakota general partnership with a Delaware corporation as its corporate general partner, and Andover

75. *Id.* at 968.
76. *Id.* at 973.
77. *Id.*
78. 608 F. Supp. 173 (N.D. Tex. 1985).
79. 745 F.2d 346 (5th Cir. 1984).
80. *Id.* at 350.
81. 596 F. Supp. 307 (S.D. Tex. 1984).
82. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa 1982; Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982).

Financial Corporation, a Maine corporation with its principal place of business in Connecticut. In moving for dismissal the defendants argued that the Texas long-arm statute did not provide the Houston federal court with jurisdiction,[83] that federal securities law did not provide personal jurisdiction, that the court lacked personal jurisdiction over the defendants because they had no contacts with Texas, and that applying the statute to the defendants violated the fifth amendment.[84] Plaintiffs alleged a common securities fraud scheme perpetrated by all of the defendants against the plaintiffs, all of whom resided in Houston. The plaintiffs further alleged that all of the violations occurred in Texas, and that the negotiations were conducted by a private placement memorandum and numerous interstate telephone calls to Texas.[85]

The court held that it had personal jurisdiction over the defendants for two reasons. First, the court held that Texas long-arm jurisdiction was irrelevant to this case because Congress had preempted state long-arm jurisdiction for federal securities claims when it enacted section 78aa of the Securities Exchange Act.[86] Section 78aa governs all claims under the 1933 and 1934 Securities acts as well as all pendent state securities claims. Thus the court held that 2031b had no applicability to this case, either for the state securities violations, or as an alternative service method for the federal claims under the Federal Rules of Civil Procedure.[87]

The court then turned to a lengthy analysis of section 78aa. The court began by noting that section 78aa authorizes personal jurisdiction in any district where a defendant transacts business, inhabits, or can be found, or any district where any act or transaction constituting the violation occurred.[88] The defendants argued that section 78aa did not apply because all of their alleged violations occurred outside of Texas, and the defendants neither inhabited, transacted business, nor could be found in Texas. Because the plaintiffs did not allege that the defendants transacted business, inhabited, or could be found in Texas, personal jurisdiction would have to rest on a violation having occurred in the Southern District of Texas. The defendants argued that there were no such allegations in the plaintiff's complaint. The court nonetheless held that the defendants were subject to jurisdiction

83. 599 F. Supp. at 311. FED. R. CIV. P. 4(e) invokes state long-arm rules in connection with federal service of process in some federal question cases.

84. 96 F. Supp. at 310-11. In federally-based claims the minimum contacts standard is imposed by the due process clause of the fifth amendment rather than the fourteenth amendment.

85. *Id.* at 312.

86. *Id.* at 311.

87. FED. R. CIV. P. 4 under certain circumstances allows for federal service of process under the state law of (1) the state in which the federal district court sits, *see id.* at 4(b) (notice of service made pursuant to state statute must correspond to that state's law); *id.* at 4(c) (complaint may be served in accordance with the law of the state where the district court sits); *id.* at 4(e) (service on party not found in district court's state may be made pursuant to state law), or (2) the state in which service is made, *see id.* at 4(d)(2) (service upon infant or incompetent must follow law of state in which service is made upon such defendants); *id.* at 4(d)(6) (service upon state or municipal corporation may follow law of state in which service is made upon such defendants). *Id.* at 4(i) has similar provisions for service in foreign countries.

88. 596 F. Supp. at 311.

since the acts of their co-defendants, who did not challenge jurisdiction, occurred in the Southern District of Texas, which is sufficient in an action based on a common securities fraud scheme. Moreover, the court stated that the act that ties the defendants to the district need not be crucial to the fraud, but merely of material importance to the consummation of the scheme. It is enough for one act by one co-defendant to "reach into" the forum district to obtain investors. In this case the sufficient act was the telephone calls to Houston by the co-defendants.[89]

The court then turned to the defendants' second argument, that even if section 78aa bound them to this lawsuit based on their co-defendants' acts, such jurisdictional assertions violated the minimum contacts test of fifth amendment due process. The court disagreed. First, the court explained that section 78aa allows for nationwide service of process if the defendant has minimum contacts with the United States as a whole.[90] The court added that most federal courts have held section 78aa's nationwide service constitutional under the notion that jurisdiction is based on sovereignty; federal jurisdictional statutes are thus geared to United States sovereignty, and therefore extend to all United States boundaries.[91] The court continued, however, to point out that the Supreme Court has recently rejected sovereignty as the basis of jurisdiction, replacing sovereignty with the due process test that "maintenance of the suit not offend traditional notions of fair play and substantial justice."[92] The court observed that it could not equate the "fair play and substantial justice" standard to nationwide boundaries, or for that matter, to Texas boundaries.[93] Thus the court concluded that minimum contacts with the forum, Texas or the United States, was not a proper measure of fair play and substantial justice. Rather, the court considered the following factors in examining personal jurisdiction:

> (1) the defendants' burden in presenting a defense in the forum, (2) the defendants' reasonable expectations and the foreseeability of litigation in the forum, (3) the plaintiffs' interest in obtaining a convenient and effective remedy, (4) the federal judiciary's interest in efficient resolution of disputes, and (5) the forum's interest in adjudicating the dispute in a local court.[94]

The court found that the defendants' burden in Texas litigation was not too great, given modern travel and communication.[95] The court further found that defendants' reasonable expectations and the foreseeability of Texas litigation favored jurisdiction over the defendants because of the nature of defendants' multi-state business and their knowledge of their

89. *Id.* at 312.
90. *Id.* at 312-15.
91. *Id.* at 313.
92. *Id.* at 313-14 (discussing Insurance Corp. v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982)).
93. 596 F. Supp. at 314 (citing Bamford v. Hobbs, 569 F. Supp. 160, 166 (S.D. Tex. 1983)).
94. 596 F. Supp. at 315.
95. *Id.* at 315-16.

scheme's impact in Texas.[96] Moreover, the court determined that plaintiffs' interest in joining all defendants in one action is great, and that it would unduly burden the plaintiffs to have to sue the Andover defendants separately in Connecticut.[97] In addition, the court noted that the federal judicial system had a similar interest in resolving this dispute in one court to conserve judicial resources.[98] Finally, the court found that Texas had an interest in providing its residents a forum, and in protecting its residents from fraud.[99] With all factors pointing toward jurisdiction over the defendants, the court held that due process was satisfied.[100]

GRM does not blaze any legal trails, but is significant in its reinforcement of the holding in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*[101] that individual liberty, not state sovereignty, provides the foundation of personal jurisdiction. Although the five-factor due process analysis appears sound in *GRM*, the court seems to use the test as boilerplate for due process standards. For example, the court resolves all five factors with such pro-jurisdiction language that it seems that the defendants would have lost under anyone of the factors standing alone. Multi-factor tests for judicial jurisdiction and choice of law are meant to balance *competing* interests. An objective application of these tests should in most cases produce some factors favoring the nonresident defendant. It is burdensome for the Andover defendants to litigate in Texas, and the foreseeability of Texas litigation by the Andovers is questionable given their total lack of contact with Texas. This is not to say the defendants' jurisdictional contacts did not establish jurisdiction. But even if the defendants had planned their co-conspirators' Texas activities, that does not make Texas litigation convenient for the Andovers. Moreover, if the Andovers had no knowledge of their co-conspirators' Texas contacts, and the facts do not indicate that they did, then Texas litigation was not very foreseeable. The court need not stack the deck against nonresidents when using the five-factor balancing tests. In *GRM* sufficient basis existed for exercising Texas jurisdiction over the defendants since the plaintiffs' interest, the federal judiciary's interest, and Texas' interest in providing a forum outweighed the burden on the defendants. Courts should nonetheless properly assess the defendant's burden for the balancing test to work.[102]

The second noteworthy federal jurisdiction case is *Thomas v. Kadish*,[103] a civil rights lawsuit against the State Bar of Texas and California law school officials. Plaintiff, a University of California at Berkeley graduate, was denied admission to the Texas Bar for his alleged mental and emotional unfitness. As required by the Texas Bar application, plaintiff asked the law

96. *Id.* at 316-17.
97. *Id.* at 317-18.
98. *Id.* at 318.
99. *Id.* at 318-19.
100. *Id.* at 319.
101. 456 U.S. 694 (1982).
102. This possibly one-sided application of balancing tests may not be limited to judicial jurisdiction. *See infra* notes 208-310 and accompanying text for a discussion of similar singularity in choice of law analyses.
103. 748 F.2d 276 (5th Cir. 1984).

school officials to verify his law degree and to comment on his good moral character and emotional fitness. The officials confirmed plaintiff's law degree but declined to comment on his moral character and emotional fitness. Instead they furnished a copy of plaintiff's record, which revealed a series of plaintiff's conflicts with other students and professors. Based on this, the Texas Bar officials asked plaintiff to have a psychological examination, and plaintiff agreed. The psychologists reported that plaintiff had serious emotional problems, including a paranoid psychotic condition. The Texas Bar denied plaintiff admission relying on these results.

Plaintiff ignored his appellate remedies in state district court,[104] and instead filed a federal civil rights action alleging state action by the Texas Bar and a conspiracy by the law school officials.[105] The only pertinent issue for this Survey article is the personal jurisdiction over the nonresident California defendants.[106] The trial court found no basis for personal jurisdiction, and the Fifth Circuit confirmed, stating that neither plaintiff's allegations of a conspiracy in California, nor the alleged effect of this conspiracy in Texas established sufficient minimum contacts with Texas.[107]

Divorce and Custody

Nine family law cases addressed jurisdictional points of Texas law during the Survey period.[108] *Heartfield v. Heartfield*[109] involved a Texas/Louisiana conflict over the enforcement of contrary child support and visitation decrees. The Texas divorce awarded the mother custody of the three children, setting child support at $2025 per month. The mother moved to Louisiana and filed a new Texas action to relitigate child support and visitation. The father counterclaimed for lower child support and increased visitation, and he eventually won on both issues. Before the father's Texas court victory, however, the mother petitioned a Louisiana court to enforce the original Texas order. The father filed suit in Texas federal court to enjoin the Louisiana court, which thereafter abstained voluntarily pending the federal decision. The federal district court accepted jurisdiction and issued the injunction, from which the mother appealed.[110] On appeal the Fifth Circuit held that the district court had jurisdiction to enforce the child custody juris-

104. The state remedy is provided under State Bar Admission Rule XI(k), *cited in Thomas*, 748 F.2d at 280 n.5.

105. The alleged conspiracy was based entirely in California. There were no allegations of the conspiracy reaching into Texas, other than by the law school's response to Thomas's request for degree confirmation and fitness comments. 748 F.2d at 282.

106. The trial court dismissed the action against the Texas defendants for lack of subject matter jurisdiction, the the Fifth Circuit affirmed. *Id.* at 279-82.

107. *Id.* at 282-83.

108. Primary family law jurisdictional statutes are 10 U.S.C. § 1408 (1982) (providing state jurisdiction over military retirement benefits in the Uniformed Services Former Spouses' Protection Act, hereinafter "FSPA"); 28 U.S.C. § 1738A (1982) (Federal Parental Kidnaping Prevention Act, hereinafter "PKPA"); TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1986) (long-arm divorce jurisdiction); *id.* §§ 11.51-.75 (Vernon Pam. Supp. 1986) (Uniform Child Custody Jurisdiction Act, hereinafter "UCCJA").

109. 749 F.2d 1138 (5th Cir. 1985).

110. *Id.* at 1139-40.

diction standards of the federal parental Kidnapping Prevention Act,[111] and that the Act gave Texas exclusive jurisdiction over child support and visitation as long as the father remained in Texas.[112] The district court lacked jurisdiction, however, to enjoin the Louisiana court because the Louisiana court had not yet acted.[113]

Although federal law has been available to protect parents from constant relitigation in other states since the Act's implementation in 1981, many federal courts have been unwilling to enforce the Act because of the traditional federal abstention from family law. The Fifth Circuit's holding in *Heartfield* signals a change in federal court involvement in interstate child custody cases.

In *Soto-Ruphuy v. Yates*[114] the San Antonio Court of Appeals enjoined the trial judge from assuming modification jurisdiction where the child and mother have a new home state, even though that same Texas court had granted the divorce. This holding rests on section 11.53(a)(2) of the Texas Family Code, which also provided the basis of a Colorado decision that Texas lacked child custody jurisdiction under Texas law, and that Colorado therefore had an unchallenged claim of jurisdiction.[115]

Lundell v. Clawson[116] is a Minnesota father's mandamus action against a Texas trial judge for the immediate habeas corpus enforcement of a Minnesota custody order. The Texas-residing mother had originally been awarded custody in a Minnesota divorce. She thereafter decided to move to Texas, and petitioned the Minnesota court for permission to take the child to Texas, which the court granted on May 26, 1983. In June, 1983, the mother moved to Texas and left the two children with the father in Minnesota for the father's two week summer vacation. The father kept the children beyond the two week period, and on July 1, 1983, filed a Minnesota action to modify custody. Upon the Minnesota court's interim order the father delivered the children to the mother in Texas. Upon final hearing in Minnesota the father won custody of the older child, and the mother was awarded custody of the younger child. Both appealed, and the Minnesota appellate court awarded both children to the father. The mother did not appeal to the Minnesota Supreme Court, but instead immediately filed a new action in Minnesota for custody, which she lost. The father then filed a Texas habeas corpus action for custody of the younger child. In that Texas habeas action the mother cross-petitioned for custody of the younger child. The Texas trial court denied habeas to the father, granted the mother temporary custody, and assumed jurisdiction over the child on the emergency ground that the child wanted to remain with the mother in Texas. The father then filed a mandamus action against the trial judge regarding the habeas relief, which he won in regard to his right to immediate custody based on the Minnesota custody

111. 28 U.S.C. § 1738A (1982).
112. 749 F.2d at 1141-42.
113. *Id.* at 1143.
114. 687 S.W.2d 19 (Tex. App.—San Antonio 1984, no writ).
115. Dunn v. Franklin, 701 P.2d 158 (Colo. Ct. App. 1985).
116. 697 S.W.2d 836 (Tex. App.—Austin 1985, no writ).

award enforceable in Texas under the Parental Kidnaping Prevention Act[117] and the Texas Family Code.[118]

The habeas award to the father was merely temporary relief, however. The court of appeals noted that the mother was entitled to litigate the matter of Texas child custody jurisdiction if she could show that Minnesota had lost or declined jurisdiction since the 1983 Minnesota custody orders. In so holding the court of appeals rejected the mother's two jurisdictional arguments. The mother first argued that by permitting her to take the children to Texas, Minnesota declined jurisdiction. The court observed that this is not necessarily true since Minnesota could keep jurisdiction as long as the father remained in Minnesota, and as long as the Minnesota court elected to exercise jurisdiction.[119] The mother then argued that the facts compelled Texas to assume emergency jurisdiction. The court, however, held that allegations that the child wanted to remain in Texas did not establish emergency jurisdiction, even though the child's wishes might ultimately be heeded by the state with continuing jurisdiction, which, if not Minnesota, was Texas.[120]

In *Bolger v. Bolger*[121] a Texas court of appeals denied Texas child custody jurisdiction in a divorce because a New York court had assumed jurisdiction. The Texas court held that because Texas was not the children's home state (the father had them temporarily in Texas for a visit when he filed the divorce and custody action), Texas could not assume jurisdiction if the home state, New York, elected to do so.[122] This was true even though the father filed the Texas action first. The father also objected to the enforcement of the New York custody order because it was not final. The court of appeals held that under the Parental Kidnapping Prevention Act all custody determinations, including temporary ones, are equally enforceable.[123]

Williams v. Knott[124] considered jurisdiction for termination of nonresident parental rights. The father and mother were divorced in Oklahoma in 1979 and the mother moved to Texas and remarried. The mother's new husband sought to adopt the mother's child, which required the termination of the father's parental rights. The mother sued the father in Texas to terminate his parental rights based on the father's not having paid child support for one year. The father argued that Texas could not assume jurisdiction over this issue because of Oklahoma's continuing child custody jurisdiction under the PKPA.

The Austin Court of Appeals held that the PKPA did not apply to this parental termination action because it was not a child custody determination.[125] The father also challenged the Texas court's personal jurisdiction

117. 28 U.S.C. § 1738A (1982).
118. TEX. FAM. CODE ANN. §§ 11.63, 11.64(a) (Vernon Pam. Supp. 1986).
119. 697 S.W.2d at 839-40.
120. *Id.* at 840-41.
121. 678 S.W.2d 194, 196 (Tex. App.—Corpus Christi 1984, no writ).
122. *Id.*
123. *Id.* at 197.
124. 690 S.W.2d 605 (Tex. App.—Austin 1985, no writ).
125. *Id.* at 608-09.

over him, citing *Shaffer v. Heitner*[126] and *Kulko v. Superior Court.*[127] The Texas court acknowledged that the father might not have minimum contacts with Texas, but pointed out that not all assertions of jurisdiction require minimum contacts.[128] The court noted that status adjudications like custody are governed by special jurisdiction principles.[129] The court cited *Perry v. Ponder*[130] as authority that Texas did not need personal jurisdiction over the nonresident parent in a child custody case. Analogizing *Perry*'s child custody jurisdiction holding to the instant parental termination case, the court noted that little authority existed as to whether parental terminations required personal jurisdiction over the nonresident parent. The court noted, however, that the Restatement (Second) of Conflict of Laws provides that parental termination is a status proceeding that does not require personal jurisdiction.[131] Thus the father was compelled to defend his parental rights in Texas, but his litigation on the merits fared better. The court of appeals denied the mother's request, holding that she failed to show that the termination was in the best interest of the child or that the father had willfully evaded his support payments.

Three other cases addressed miscellaneous jurisdictional issues. *Irving v. Irving*[132] involved a three-year divorce action with conflicting Illinois and Texas custody awards. The final contest occurred in Texas where the Illinois resident mother sought enforcement of her Illinois custody order and the return of her two children who were brought to Texas by the father four days before his Texas filing.[133] The mother and the Illinois decree eventually won because Illinois was the children's home state at the time of the father's Texas filing,[134] thus denying Texas jurisdiction under section 11.53 of the

126. 433 U.S. 186 (1977).
127. 436 U.S. 84 (1978).
128. 690 S.W.2d at 606.
129. *Id.*
130. 604 S.W.2d 306 (Tex. Civ. App.—Dallas 1980, no writ).
131. 690 S.W.2d at 607. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 69-79 (1971).
132. 682 S.W.2d 718 (Tex. App.—Fort Worth 1985, writ dism'd).
133. At the time of Texas filing, the father had lived in Texas only four months and twenty-seven days. The six-month residency requirement of TEX. FAM. CODE ANN. § 3.21 (Vernon 1975) is not jurisdictional, however, and such cases are litigable unless timely challenged.
134. *Irving*'s home state jurisdictional standard is from the UCCJA, which was adopted in Texas after *Irving*'s filing but before trial. Most courts faced with this retroactivity question have applied the UCCJA to already-filed case. *See, e.g., In re* Potts, 83 Ill. App. 3d 518, 404 N.E.2d 446, 450 (1980) (lower court ruling vacated in light of enactment of Act); Johnson v. Melback, 5 Kan. App. 2d 69, 612 P.2d 188, 194-95 (1980) (jurisdiction denied on the basis of Act); Elliott v. Elliott, 612 S.W.2d 889, 892-93 (Mo. Ct. App. 1981) (procedural nature of statute permits retroactive application); Wenz v. Schwartze, 598 S.W.2d 1086, 1093 (Mont. 1979) (to uphold judgment rendered prior to Act the facts must meet the jurisdictional standards of Act), *cert. denied*, 444 U.S. 1071 (1980); *In re* William L., 99 Misc. 2d 346, 416 N.Y.S.2d 477, 484-85 (N.Y. Fam. Ct. 1979) (retroactivity permitted because statute is procedural or, alternatively, reflects law prior to enactment); Tuttle v. Henderson, 628 P.2d 1275, 1276 n.7 (Utah 1981) (Act is persuasive authority as to state of law prior to enactment). Other courts have declined rectroactive application, *see* Wilke v. Wilke, 73 A.D.2d 915, 423 N.Y.S.2d 249, 252 (1980); Pitrowski v. Pitrowski, 97 Misc. 2d 755, 412 N.Y.S.2d 316, 320-21 (N.Y. Sup. Ct. 1979). *See generally* O'Daniel, *Retroactivity and Judicial Adoption*, in INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND

Family Code.[135] *Seeley v. Seeley*[136] held that FSPA jurisdiction was satisfied when the military husband made a special appearance to challenge jurisdiction, then allowed the court to proceed without ruling on his jurisdictional challenge. In so doing, he entered a general appearance and satisfied the jurisdiction by consent section of the FSPA.[137]

Deanne v. Deanne[138] involved a Texas default judgment against a military husband stationed in Germany. The husband appealed based on lack of notice. The trial court had proceeded on the wife's assurance that the husband had actual notice of the action, even though the court record did not show that notice was legally made. The court of appeals upheld the husband's challenge, ruling that notice must comply with Texas law and remanding for trial.[139]

B. Notice

Service of process, the constitutional notice requirement, is an essential element of judicial jurisdiction apart from the forum's territorial contacts with the defendant. Service of process must satisfy both forum law and federal constitutional standards to establish jurisdiction. Described another way, the exercise of judicial jurisdiction requires (1) the defendant's amenability to service based on minimum contacts with the forum, and (2) the valid execution of service. Failure of the first element results in a dismissal, but, contrary to a line of appellate holdings, failure of the second does not. In its per curiam ruling in *Kawasaki II*[140] the Texas Supreme Court clarified the ramifications of defective service. The court held in *Kawasaki II* that (1) Texas had constitutionally-sufficient contacts with the Japan-based defendant under the stream of commerce doctrine, and (2) Kawasaki had submitted to Texas jurisdiction in its special appearance by contesting the manner of service.[141] This second ruling does not represent new law in Texas, but will seem so to many courts and advocates who have subscribed to a long line of Texas cases holding that a defendant may argue defective service of process in a special appearance.[142]

LAW 12-1 (1982). Even if the *Irving* court had not applied the UCCJA retroactively, Texas would have lacked jurisdiction because the UCCJA's Texas predecessor gave jurisdictional priority to the child's principle residence, which for *Irving* was Illinois. *See* 682 S.W.2d at 721.

135. TEX. FAM. CODE ANN. § 11.53 (Vernon Pam. Supp. 1986).

136. 690 S.W.2d 626 (Tex. App.—Austin 1985, no writ).

137. *See* 10 U.S.C.A. § 1408(c)(4)(C) (West 1983). The FSPA has three bases of jurisdiction over military retirement benefits for divorce property settlements, all based on the forum state's relationship to the military spouse. They are: (a) jurisdiction by residence, other than by military assignment, in the territorial jurisdiction of the court, (b) jurisdiction by domicile in the territorial jurisdiction of the court, and (c) jurisdiction by consent. *See id.* at § 1408(c)(4)(A)-(C).

138. 689 S.W.2d 262 (Tex. App.—Waco 1985, no writ).

139. *Id.* at 263.

140. 699 S.W.2d 199 (Tex. 1985).

141. *See Kawasaki II* discussion, *supra* notes 8-26 and accompanying text.

142. *See* TM Prods. v. Blue Mountain Broadcasting, 623 S.W.2d 427, 431-32 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); *In re* D.N.S., 592 S.W.2d 35, 37 (Tex. Civ. App.—Beaumont 1979, no wirt).

A special appearance is a procedural device for contesting judicial jurisdiction and is governed in Texas by Rule 120a of the Rules of Civil Procedure.[143] Defendant Kawasaki entered a Rule 120a special appearance and argued that it lacked sufficient contacts with Texas. Furthermore, the defendant argued, even if those contacts existed, jurisdiction was defective because Middleton had incorrectly alleged that Mr. Tomita was Kawasaki's registered Texas agent in 1979, and thus service on Tomita was insufficient under Texas law.[144]

The Texas Supreme Court noted that the sole purpose of a Rule 120a hearing is for the defendant to argue that he is not amenable to service of process,[145] that is, that the contacts are insufficient for jurisdiction. When Kawasaki also challenged the manner of service, the court stated, it exceeded the scope of a Rule 120a hearing and thereby entered a general appearance. Manner of service of process is a curable defect and must be challenged in a motion to quash service, which is done in a general appearance.[146] If a defendant succeeds in quashing service, the court noted, the only advantage gained is additional time to answer.[147]

In thus clarifying the law, the supreme court noted contrary rulings by numerous Texas courts of appeals, all holding that a defendant may raise curable defects in a Rule 120a special appearance, and if successful, have the case dismissed.[148] According to *Kawasaki II* those decisions are wrong. The court's clarification of curable defects in jurisdictional pleading and service brings Texas state courts into line with federal practice in this area. The court applied *Kawasaki II*'s ruling on defective service in a per curiam opinion in *Wheat v. Toone*,[149] holding that plaintiff's defective jurisdictional allegations were curable defects that required additional time to amend and not a dismissal.[150]

In addition to *Kawasaki II*'s clarification of Rule 120a practice, several 1985 cases reaffirmed basic rules for service of process on nonresidents. These rules are sufficiently evasive without periodic review. Such rules include the need for a properly worded citation showing manner of service,[151] strict pleading compliance for substituted service,[152] and diligence in attempting to serve the registered agent before qualifying for substituted

143. TEX. R. CIV. P. 120a.

144. 699 S.W.2d at 200, 201-03. Middleton did not attempt 2031b long-arm service on Kawasaki apparently because he believed that Kawasaki was amenable to local service through Mr. Tomita in Houston. *Id.*

145. *Id.* at 201-02.

146. *Id.* at 202.

147. *Id.* This occurs because once the defendant has moved to quash service, he has entered a general appearance and answer time begins to run.

148. *Id.*

149. 29 Tex. Sup. Ct. J. 101 (Dec. 11, 1985).

150. *Id.* at 101.

151. Cox Mktg., Inc. v. Adams, 688 S.W.2d 215, 217 (Tex. App.—El Paso 1985, no writ).

152. *See* McGuffy Co. v. Perfected Indus. Prods., 683 S.W.2d 781, 782 (Tex. App.—Houston [14th Dist.] 1984, no writ); Public Storage Properties, VII v. Rankin, 678 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1984, no writ).

service.[153]

C. *Inconvenient Forum*

Forum non conveniens is a conflict of laws doctrine stating that otherwise valid jurisdiction should not be exercised if the forum is seriously inconvenient for litigation, provided that a more appropriate forum is available to the plaintiff.[154]

In *Gannon v. Payne*[155] the Dallas Court of Appeals initially affirmed the defendant's forum non conveniens argument, then reversed on rehearing. Gannon and Payne were partners in an oil and gas lease in Canada which began in 1965. Sometime after 1971 Gannon unilaterally reduced Payne's share of the mineral proceeds with the explanation that Payne had a "free ride" while Gannon did all the work. Payne disagreed with the reduction and sued Gannon in Canada. Payne prevailed on most of his claims against Gannon but lost on others. Gannon appealed the Canadian results and lost. Payne, a Texan, did not appeal in Canada.

In 1982 Payne sued Gannon in Texas, seeking recovery of the damages denied in Canada, as well as other relief.[156] Gannon responded by filing his answer and counterclaim to the Texas action, and by filing a declaratory judgment action in Canada seeking to interfere with the Texas court's jurisdiction. Payne moved to have the Texas court enjoin Gannon, who had submitted himself to Texas jurisdiction, from pursuing the Canadian declaratory judgment action. Gannon objected to Payne's motion on the grounds that the Texas litigation was burdensome on Gannon (forum non conveniens), that comity required the Texas court's deference to the Canadian action, and that res judicata from the earlier Canadian action barred Payne's Texas claims. The trial court overruled Gannon's objections and enjoined him from pursuing the Canadian declaratory judgment action.[157] Gannon appealed and the court of appeals ruled that the trial court abused its discretion in issuing the injunction against Gannon. Upon rehearing, however, the court of appeals reversed itself, holding that the trial court had not abused its discretion because (1) the burden on Gannon of litigation in Texas was not disproportionately greater than the burden on Payne of litigation in Canada,[158] (2) comity was a matter of judicial discretion not a matter of right,[159]

153. Bilek & Purcell Indus. v. Paderwerk Gebr. Benteler GmbH & Co., 694 S.W.2d 225, 226 (Tex. App.—Houston [1st Dist.] 1985, no writ). *See also* Delta S.S. Lines v. Albano, 768 F.2d 728, 730 (5th Cir. 1985) (service rules in federal diversity cases).

154. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971) [hereinafter cited as RESTATEMENT]. In general, forum non conveniens is unavailable in purely Texas actions in which all parties are Texas residents and Texas law controls. *See* Couch v. Chevron Int'l Oil Co., 672 S.W.2d 16, 18 (Tex. App.—Houston [14th Dist.] 1984, no writ); Cherokee Village v. Henderson, 538 S.W.2d 169, 174-75 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dism'd).

155. No. 05-84-00826-CV (Tex. App.—Dallas, April 26, 1985), *withdrawn on rehearing*, 695 S.W.2d 741 (Tex. App.—Dallas 1985, writ granted).

156. 695 S.W.2d at 743.

157. *Id.* at 743. The text of the trial court's injunction against Gannon is set out in an appendix to the appellate opinion, *id.* at 745-47.

158. *Id.* at 744-45.

and (3) the court could not consider res judicata in this interlocutory order because it went to the merits of the claim.[160]

Justice Akin dissented, arguing that Gannon should not be enjoined because Payne had failed to establish a probability of victory on the merits due to the res judicata effect of the Canadian judgment.[161] Justice Akin further contended that forum non conveniens principles required deference to the more convenient Canadian court where the better evidence existed.[162] Finally, Justice Akin argued, comity called for deference to the Canadian courts judgment.[163]

Any in-depth analysis of *Gannon* is beyond the scope of this Survey. Further analysis would require familiarity with the voluminous facts and issues from the initial Canadian litigation.[164] Litigators, however, should review the *Gannon* opinions for the Dallas court of appeals' analysis of forum non conveniens and simultaneous foreign litigation.

D. Sovereign Immunity

Sovereign immunity is frequently ignored as a component of conflict of laws. The Restatement (Second) of Conflict of Laws provides that "[a] state will not exercise judicial jurisdiction when inaction on its part is required by international law or by the needs of judicial administration."[165] Sovereign immunity is a customary[166] rule of international law requiring inaction by courts in protection of diplomatic personnel and foreign governmental agencies engaged in noncommercial activities. The United States has codified this international rule in the Foreign Sovereign Immunities Act.[167] The earlier customary rules were binding as federal common law.[168]

Texas courts produced two cases during the Survey period turning on sovereign immunity. In *Brazosport Towing Company v. 3838 Tons of Sorghum*[169] a Mexican government agency, Conasupo,[170] contracted with Flumgo, S.A., a private Mexican corporation, for the shipment of sorghum from Texas to Mexico. Although the Conasupo/Flumgo contract was not assignable, Flumgo assigned its duties to Brazosport who shipped the sor-

159. *Id.* at 744. *See infra* notes 194-207 and accompanying text for further discussion of comity in *Gannon*.

160. *Id.* at 744.

161. *Id.* at 749 (Akin, J., dissenting).

162. *Id.* at 750-51.

163. *Id.* at 751.

164. *Id.* at 742 n.1.

165. RESTATEMENT, *supra* note 154, at § 83. *See* comments following section 83 for examples of sovereign immunity, as well as the needs of judicial administration.

166. Custom, defined as general practice accepted as law, is a principle source of international law. *See* The Paquete Habana, 175 U.S. 677, 700 (1900); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102(1)(a), (2) (Tent. Draft 1985).

167. 28 U.S.C. §§ 1602-1611 (1982).

168. *See* The Paquete Habana, 175 U.S. 677, 700 (1900); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 131 (Tent. Draft 1985), and reporters' notes following.

169. 607 F. Supp. 11 (S.D. Tex. 1984).

170. Compania Nacional de Subsistencias Populares.

ghum to Mexico. Conasupo refused to accept or pay for the shipment and returned the sorghum to the United States. Brazosport then sought payment of freight charges from Conasupo by suing in federal district court in Galveston. Conasupo failed to answer or notify the court that it was a foreign government agency, and the court issued a default judgment.

Upon Conasupo's application for relief from the default judgment, the court granted it sovereign immunity because Conasupo had no contact with the United States other than having its sorghum returned here.[171] The court noted that the underlying contract for shipment was between Conasupo and Flumgo, both Mexican entities. Moreover, the parties negotiated and signed the shipment contract in Mexico with a Mexican choice of law clause.[172] The court therefore held that this did not constitute commercial activity by the Mexican government[173] and thus the Foreign Sovereign Immunities Act protected Conasupo.[174]

Callejo v. Bancomer, S.A.[175] involved a breach of contract and securities action against a Mexican bank for paying off certificates of deposit in devalued pesos instead of the contracted-for United States dollars. Bancomer did so in compliance with a Mexican law that mandated all deposits in Mexican banks be paid out in pesos, no matter what the designation of the currency. The plaintiffs were Dallas residents who purchased four Bancomer certificates of deposit worth a total of $300,000. The certificates were denominated and payable in United States dollars upon three months' maturity. One month after the purchase Mexico nationalized its banks and decreed that obligations formerly payable in United States dollars would now be paid in the plunging pesos.[176] The Callejos sued for breach of contract in state district court in Dallas. Bancomer removed the action to federal district court[177] and the Callejos amended their claim to allege state and federal securities violations.[178]

Bancomer, now part of the Mexican government, moved to dismiss under the Foreign Sovereign Immunities Act and the district court complied.[179] The Fifth Circuit disagreed that sovereign immunity applied but upheld the dismissal on different grounds.[180] The court held that the bank was not immune because its actions constituted commercial activities not covered by the Foreign Sovereign Immunities Act.[181] The Callejos' lawsuit was nonetheless barred by the act of state doctrine, which in effect is a choice of law

171. 607 F. Supp. at 15.
172. *Id.* at 13.
173. *Id.* at 15.
174. *Id.*
175. 764 F.2d 1101 (5th Cir. 1985).
176. The Mexican laws and regulations were issued in August and September, 1982. *Id.* at 1106.
177. Removal authority was 28 U.S.C. § 1441(d) (1982), relating to suits against an "agency or instrumentality of a foreign state" as defined by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b) (1982). *See* 764 F.2d at 1106 n.3.
178. See 764 F.2d at 1106 n.4 for cites to the alleged securities violations.
179. *Id.*
180. *Id.* at 1125-26.
181. *Id.* at 1106-12.

rule requiring that courts apply foreign law to appropriate issues in the case.[182] The application of Mexican law resulted in the payment-in-pesos law superseding the Callejos' contracts with Bancomer, thus absolving Bancomer for breach of contract liability.[183]

Callejo contains excellent discussions of the Foreign Sovereign Immunities Act and the act of state doctrine.[184] In particular, *Callejo* explores the act of state doctrine's exceptions. These exceptions include commercial activities,[185] contrary treaty obligations,[186] and the situs of the deposit as compelling the application of foreign rather than Texas law.[187]

Finally, *Zernicek v. Petroleos Mexicanos (Pemex)*[188] was a personal injury action in Texas state court against Pemex, a Mexican government agency, for radiation sickness suffered by a United States citizen working in Mexico. Pemex removed to federal district court and asked for dismissal on sovereign immunity grounds. Zernicek argued that Pemex had waived sovereign immunity when it allowed prime contractor Corporacion de Construciones de Campeche (CCC) to make a subcontract with Brown and Root that included a Texas choice of law clause for any claims based on the parties' acts or omissions. The court held that waivers of sovereign immunity are narrowly construed and must be based on strong evidence of the foreign government's intent to waive immunity.[189] The court found the CCC contract with Brown and Root insufficient to waive Pemex's immunity for a personal injury lawsuit by an alleged third party beneficiary to that contract.[190] The court also rejected Zernicek's argument that the United States had jurisdiction under the effects test of the FSIA,[191] because of the ongoing effects Zernicek would experience in the United States from the radiation sickness.[192] The court held that even though radiation sickness may be an ongoing injury, the original injury was sufficiently localized in Mexico to invalidate the jurisdiction-by-effects argument.[193]

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182. *Id.* at 1112-25. Although the Act of State doctrine is said to operate as a choice of law rule, *see* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 469, Reporters' Note 1 (Tent. Draft 1985); L. HENKIN, R. PUGH, O. SCHACHTER, H. SMIT, INTERNATIONAL LAW 133-34 (1980), its purpose is to deny courts the judicial jurisdiction to review the sovereign acts of a foreign government within its own territory, even if those acts had transnational effects.

183. That is, if the court applied Texas law to the Callejos' claims as they requested, Bancomer might be held liable. If the court applied Mexican contract law to the breach, but did not apply the bank nationalization decree, again Bancomer might be found liable. By requiring the application of all pertinent Mexican law, Bancomer is given the benefit of the Mexican nationalization decree it was forced to obey.

184. 764 F.2d at 1106-25.

185. *Id.* at 1114-16.

186. *Id.* at 1116-21.

187. *Id.* at 1121-25.

188. 614 F. Supp. 407 (S.D. Tex. 1985).

189. *Id.* at 411.

190. *Id.* at 411-12.

191. *See* 28 U.S.C. § 1605(a)(2) (1982), discussed in 614 F. Supp. at 412-13.

192. 614 F. Supp. at 412-13.

193. *Id.* at 413.

E. Comity

A nonbinding custom of international law suggesting restraint in judicial jurisdiction is comity, the international attempt at full faith and credit.[194] Comity applies to foreign acts, both legislative and judicial; in this sense, "foreign" means sister states as well as other nations. The instant discussion relates only to comity's role in encouraging Texas courts to refrain from exercising judicial jurisdiction in deference to non-Texas courts. The "Foreign Judgments" section below will briefly mention comity as it applies to the recognition of foreign judgments.[195]

Comity is a weak legal doctrine and has never been reliable as an advocate's tool, although it has given many judges a nail on which to hang their decisions. Two reasons for comity's weakness exist. First, it is non-binding,[196] designed merely to promote friendly relations between sovereigns and not to protect litigants' rights. Second, a barrage of criticism has been aimed at comity for many years, both on theoretical[197] and practical grounds.[198] The omission from the Restatement (Second) of Conflict of Laws,[199] and a brief reference in the drafts of the Revised Restatement of the Foreign Relations Law of the United States reflect comity's legal weakness and disfavor.[200]

In spite of its bad reputation, comity manages a few mentions each year in Texas cases. In 1985 a Houston appellate court held in *InterFirst Bank-Houston v. Quintana Petroleum*[201] that the trial court did not abuse its discretion in dismissing counterclaims against the trustees of a Louisiana-based trust. The court based the dismissal on comity to a Louisiana court that was

194. Some will disagree with the equating of comity with full faith and credit. The latter is a binding rule, the former is not. The two are similar, however, in that (1) both seek the forum's recognition of foreign law and judgments, and (2) both have underlying theories of political good will and respect for the judicial acts of other governments. But as explained in notes 197-98 *infra*, comity's judicial validity is questionable.

195. *See infra* text accompanying notes 311-402.

196. *But see* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31 (3d ed. 1979) (stating that certain aspects of comity may ripen into binding law).

197. Critics argue that comity's underlying theory is political, designed to promote cooperation between sovereigns. Thus, comity is an executive doctrine and not a judicial one. *See* G. CHESHIRE and P. NORTH, PRIVATE INTERNATIONAL LAW 4 (10th ed. 1979) (hereinafter cited as CHESHIRE).

198. Comity is entirely discretionary, leading to arbitrary judicial applications and erratic precedents. The early American conflicts scholar, Samuel Livermore, described comity as "a phrase which is grating to the ear, when it proceeds from a court of justice." De Nova, *The First American Book on Conflict of Laws*, 8 AM. J. LEGAL HIST. 136, 141 (1964). Cheshire says of comity, "The term is, indeed, frequently found in English writing and judgments, but on analysis it will be found to be either meaningless or misleading." CHESHIRE, *supra* note 197, at 4. *See also* E. SCOLES & P. HAY, CONFLICT OF LAWS 12-16 (1982) (tracing development and criticism of comity in America); R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 1-8 (3d ed. 1981) (brief history of choice of law).

199. RESTATEMENT, *supra* note 154, fails to mention comity in section 83 (concerning limits on judicial jurisdiction imposed by international law), section 86 (pendency of foreign actions), or section 98 (recognition of foreign judgments).

200. *See* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 491, reporters' note 1 (Tent. Draft 1985).

201. 699 S.W.2d 864 (Tex. App.—Houston [1st Dist.] 1985, no writ).

litigating the same matter, and on the Louisiana court's more effective remedy in its exclusive power to dismiss the trustee.

Another Texas comity case, *Gannon v. Payne*,[202] was discussed in the Inconvenient Forum section above.[203] *Gannon* held that comity was not a matter of right, but of deference and courtesy within the trial court's discretion—a standard invocation when courts consider comity. The trial court rejected the comity argument.[204] The court of appeals reversed, relying partly on comity in agreeing with the defendant that he should not be enjoined from pursuing simultaneous litigation in Canada.[205] Upon rehearing, however,the court reversed itself and deferred to the trial court's discretion in rejecting comity. The court upheld the trial court's injunction against the defendant pursuing the Canadian litigation,[206] with Justice Akin's dissent that comity to Canada was appropriate.[207] *Gannon*'s discussion of comity does not warrant further comment here, but its analysis of a Texas court's obligation in the face of simultaneous foreign litigation is noteworthy.

II. CHOICE OF LAW

In *Duncan v. Cessna Aircraft Co.*[208] the Texas Supreme Court rejected the choice of law analysis traditionally applied by Texas courts in contracts cases[209] and held that the so-called "most significant relationship" test[210] would thereafter be applicable to all choice of law cases unless the parties have agreed to a valid choice of law clause.[211] Decisions rendered by Texas courts and by federal courts applying Texas law reported in late 1984 and in 1985 involving choice of law in the contractual context have applied the *Duncan* rule several times. Unfortunately, the courts have not carefully applied the most significant relationship analysis. Under the Texas Supreme Court's earlier decision in *Gutierrez v. Collins*, choice of law analysis in torts cases[212] also applies the most significant relationship test. This analysis has

202. No. 05-84-00826-CV (Tex. App.—Dallas, April 26, 1985), *withdrawn on rehearing*, 695 S.W.2d 741 (Tex. App.—Dallas 1985, writ granted).

203. *See supra* notes 155-64 and accompanying text.

204. 695 S.W.2d at 743, 745-47.

205. *Id.* at 742.

206. *Id.* at 744.

207. *Id.* at 747, 751.

208. 665 S.W.2d 414 (Tex. 1984).

209. With respect to traditional Texas choice of law analysis, see Pedersen & Cox, *Choice of Law and Usury Limits Under Texas Law and the National Bank Act*, 34 SW. L.J. 755, 755-87 (1980) [hereinafter cited as Pedersen and Cox].

210. RESTATEMENT, *supra* note 154, at § 6.

211. 665 S.W.2d at 421.

212. 583 S.W.2d 312 (Tex. 1979). *Gutierrez* involved a suit by a Texas plaintiff, Ms. Gutierrez, against a Texas defendant, Mr. Collins, seeking damages for personal injuries suffered in an automobile accident that occurred in Mexico. Under traditional Texas choice of law principles, the law of the place where the wrong occurred, the *lex loci delicti*, would have been applied to determine the rights of the parties. Accordingly, Mexican law would have applied. The plaintiff prayed in the alternative for damages to be measured in accordance with one of two sets of rules, ordinary Texas rules and rules of Mexican law. The defendant argued that the case should be dismissed in accordance with the so-called dissimilarity doctrine, under

not developed significantly in the 1984-1985 Survey period although a few reported decisions have considered the choice of law issue in that context.

Duncan is the starting point for any analysis of Texas developments in choice of law in the contractual context. In that case a Texas resident was killed in an airplane crash that occurred in New Mexico. The family of the decedent filed a wrongful death action against the owner of the airplane, Air Plains West, Inc., and against the estate of the airplane's pilot, Benjamin Smithson, who was also killed in the crash. The plaintiffs settled with Air Plains West. In connection with the settlement the plaintiffs executed a release of the defendants and also "any other corporations or persons whomsoever responsible therefor, whether named herein or not,"[213] from any and all claims on account of the injuries to and death of the plaintiffs' decedent. The widows of the decedents thereafter brought wrongful death actions against Cessna Aircraft Company alleging that certain purported design and manufacturing defects caused their husbands' deaths. Cessna argued that the Duncan family's release terminating the litigation against Air Plains West and the estate of the pilot discharged Cessna from any liability. Cessna based its argument upon New Mexico law, under which Cessna claimed the release would have been so construed. Mrs. Duncan argued that the case presented no true conflict of laws problem, because whichever law was applicable, Cessna's argument should be rejected.

The trial court ruled New Mexico law applied.[214] The court of appeals,

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which a Texas court will dismiss a case for lack of jurisdiction if the applicable foreign law is "so different from . . . [the laws] . . . of Texas as to make it impossible for a Texas court to apply and enforce" it. *Id.* at 313. The trial court sustained the defendant's contention and dismissed the case. The court of appeals affirmed. In analyzing which jurisdiction's law should be applicable, the supreme court first rejected the defendant's argument that under former article 4678, Act of June 19, 1975, ch. 530, § 2, 1975 Tex. Gen. Laws 1381, 1382, *repealed by* Act of June 16, 1985, ch. 959, § 9, 1985 Tex. Sess. Law Serv. 7043, 7218 (Vernon), a portion of the Texas Wrongful Death Statute, the law of Mexico must be applied even in cases involving a common law cause of action. The court then analyzed the modern trend in many states away from the *lex loci delicti* rule and quoted approvingly from Professor Robert Leflar's treatise to the effect that the Restatement, in section 6 and elsewhere throughout the Restatement, "includes most of the substance of all the modern thinking on choice of law." 583 S.W.2d at 318 (quoting R. LEFLAR, AMERICAN CONFLICTS LAW § 139 (3d ed. 1977)). The court held:

> Having considered all of the theories, it is the holding of this court that in the future all conflicts cases sounding in tort will be governed by the "most significant relationship" test as enunciated in Sections 6 and 145 of the Restatement (Second) of Conflicts. This methodology offers a rational yet flexible approach to conflicts problems. It offers the courts some guidelines without being too vague or too restrictive. It represents a collection of the best thinking on this subject and does indeed include "most of the substance" of all the modern theories.

Id.

Having so held, the court reversed the judgments of the lower courts and remanded the case to the trial court for reconsideration of the choice of law issue. *Id.* at 319. In so doing the court noted that Mexico's only contact with the case was the fact that the accident occurred there and that it made "little sense to apply Mexico's measure of damages, which indexes the amount of recovery to the prevailing wages set by the labor law of that nation, when both Gutierrez and Collins are residents of Texas." *Id.* at 319.

213. 665 S.W.2d at 418.

214. *Id.* at 420.

however, held that Texas law governed the construction of the release because the release was a contract executed in Texas and, in accordance with established Texas law, the law of the place of making of a contract, the *lex loci contractus*, applied to its construction.[215] On appeal to the supreme court, both Cessna and Duncan argued that the rule of *lex loci contractus* should not apply. They argued that the proper approach to this issue was the most significant relationship methodology of the Restatement which the Texas Supreme Court had adopted in *Gutierrez* for resolving choice of law issues in tort cases.[216]

In analyzing this issue the Texas Supreme Court found that most of the inadequacies of the *lex loci delicti* rule were also present in the *lex loci contractus* rule. According to the court, each of those rules promotes mechanistic decision making at the expense of just and reasoned results.[217] Thus the supreme court held that in choice of law cases, except contract cases in which the parties have agreed to a valid choice of law clause,[218] the law of the state with the most significant relationship[219] to the particular substan-

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215. Numerous Texas decisions have applied the lex loci contractus rule that the law of the place of contracting is applicable in construing a contract. Among those decisions are Austin Bldg. Co. v. National Union Fire Ins. Co., 432 S.W.2d 697, 701 (Tex. 1968); Dugan v. Lewis, 79 Tex. 246, 253, 14 S.W. 1024, 1026 (1891); Andrews v. Hoxie, 5 Tex. 171, 187-88 (1849); Crosby v. Huston, 1 Tex. 203, 231-32 (1847); Hill v. McDermot, Dallam 419 (Tex. 1841); Taylor v. Leonard, 275 S.W. 134, 135 (Tex. Civ. App.—Texarkana 1925, no writ). Several decisions have also held that if the place of formation of the contract is other than the place of performance, then the law of the latter jurisdiction will control on the theory that such is the intent of the parties. *See, e.g.*, Seiders v. Merchants' Life Ass'n, 93 Tex. 194, 199, 54 S.W. 753, 754 (1900) (circumstances must show that parties intended for the law of the state of formation to apply); Conner & Walker v. Donnell, Lawson & Co., 55 Tex. 167, 173 (1881) (promissory note that is usurious in New York but not in Texas is enforceable if the parties appear to have intended to make it payable in Texas); Shreck v. Shreck, 32 Tex. 579, 587 (1870) (Mexican law applied to a marriage entered into in Texas because the parties looked to performance in Mexico).

216. 655 S.W.2d at 420.

217. *Id.* at 421.

218. *Id.* By its reference to a "valid choice of law clause," the supreme court affirmed the efficacy of such clause but did not indicate what factors might render such a clause invalid. The supreme court did not indicate whether other sections of the Restatement, *e.g.*, RESTATEMENT, *supra* note 154, at § 187, entitled "Law of the State Chosen by the Parties," should be considered in analyzing whether a particular choice of law would be enforced. In *Gutierrez* the supreme court made specific reference not only to section 6 but also to *id.* § 145, which sets forth contacts to be taken into account in applying section 6 in the torts context. In *Duncan* the court made no reference to *id.* § 188, which lists the contacts to be taken into account in applying section 6 in the context of a contracts matter. Whether this omission was deliberate is not clear. Note, however, that the comments to section 6 refer to numerous other sections of the Restatement and make it clear that the drafters of the Restatement did not intend for section 6 to be read in a vacuum.

219. The Texas Supreme Court applied the most significant relationship test of the RESTATEMENT, *supra* note 154, at § 6, which provides:

> CHOICE-OF-LAW PRINCIPLES
>
> (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,

tive issue will apply to resolve that issue.[220]

In applying the most significant relationship test to the facts of *Duncan* the court noted that the number of contacts with the particular state would not be determinative, but rather that the qualitative nature of the particular contacts would determine the applicable law.[221] The court reviewed the contacts of the various parties with Texas, New Mexico, and Kansas, the domicile of the defendant Cessna, and stated that identification of the policies or governmental interest of each state in the application of its rules is the starting point for evaluating these contacts.[222] According to the court, New Mexico simply had no interest in applying its policies to cut off a Texas resident's claim against a Kansas corporation. On the other hand, Texas had an important interest in allowing Mrs. Duncan's action to proceed.[223] In addition the supreme court noted that the plaintiff could reasonably have expected that Texas law would govern the effect on third parties of a settlement agreement executed and negotiated in Texas.[224] Thus, a false conflict existed since only one state, not two or more, had an interest in applying its law, and the law of Texas, the only state with a true interest in the application of its law, applied.[225]

A. Texas Cases

Recent decisions in Texas have continued to apply the most significant relationship rule, although unfortunately the courts' analyses of the rule have been scanty at best. In *Cessna Finance Corp. v. Morrison*[226] a court of appeals in Houston held, in a suit on a promissory note, that since the note expressly provided for payment in Kansas, the laws of Kansas governed the parties' substantive rights and liabilities.[227] In support of this conclusion the

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(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

According to the Restatement, the list of factors is not exclusive. RESTATEMENT, *supra* note 133, at § 6 comment c.

220. 665 S.W.2d at 421.

221. *Id.* Thus, the court noted that: "[s]ome contacts are more important than others because they implicate state policies underlying the particular substantive issue." *Id.*

222. *Id.*

223. Although under New Mexico law the release in question would have been effective to discharge Cessna, the court concluded that the New Mexico law "reflects policies of effectuating the intent of the parties to the release and of protecting New Mexico defendants". *Id.* Since Cessna was a Kansas corporation, there was no "New Mexico defendant". *Id.* The court apparently did not consider whether Cessna did business in New Mexico or, indeed, whether Cessna had its principal operations there.

224. *Id.* at 422.

225. The supreme court's failure to analyze the interest of Kansas, the domicile of Cessna, is interesting since Cessna "had not asserted any error in the trial court's application of New Mexico law." 665 S..W.2d at 421 n.6.

226. 667 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1984, no writ).

227. 667 S.W.2d at 585.

court cited *Andrews v. Hoxie*,[228] an 1849 supreme court decision, and *Wade v. Darring*,[229] a court of appeals decision rendered ten years earlier. The court simply held *Duncan* inapplicable. The court recognized that *Duncan* set forth the controlling law for resolving the conflict issue in contract cases.[230] The court refused, however, to believe the Texas Supreme Court intended to extend this principle to negotiable instruments.[231] The reported decision contains no analysis to support this conclusion. The court cited Restatement section 214, comment (b), entitled "Obligations of Makers and Acceptors."[232] That section states that the local law of the state designated in the instrument as the place of payment determines the obligations of the maker of a note with certain exceptions.[233] Comment (b) analyzes the values of certainty and predictability in the area of negotiable instruments and states that only the stated place of payment is considered in selecting the state whose local law governs the obligations of the maker or acceptor of a negotiable instrument. In the case of other contracts a number of factors and contacts are taken into account.[234] According to the Restatement, therefore, the state of payment, if set forth in the instrument, will always furnish the applicable law.[235]

On its face the *Morrison* decision indicates that *Duncan* and the most significant relationship analysis are irrelevant when a negotiable instrument constitutes the subject of the lawsuit. On the other hand, if the court of appeals relied upon Restatement section 214, it confirmed that all of the Restatement's choice of law rules, not just section 6,[236] apply in analyzing choice of law issues in contracts matters. This analysis is not free from difficulty; however, if the court actually applied the Restatement rules, it should have analyzed Restatement section 203 in the context of the usury challenge made by the plaintiff.[237] All in all, *Morrison* provides uncertain authority for any choice of law proposition but it has interesting possibilities.

Despite the lack of clarity in the choice of law analysis in *Morrison*, a court of appeals in Houston recently followed that decision without additional analysis in *Velde v. Swanson*.[238] In *Velde* the court had to determine what law should govern in a lawsuit brought by a payee of five promissory notes against the estate of the notes' maker. Execution of the notes occurred

228. 5 Tex. 171 (1849).
229. 511 S.W.2d 320 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).
230. 667 S.W.2d at 585.
231. *Id.*
232. *Id.*
233. RESTATEMENT, *supra* note 154, at § 214(1).
234. *See id.* §§ 187, 188.
235. *Id.* § 214 comment b.
236. *See supra* note 219.
237. RESTATEMENT, *supra* note 154, at § 203 states:
> The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.

238. 679 S.W.2d 627 (Tex. App.—Houston [1st Dist.] 1984, no writ).

in Nebraska where the maker resided. The notes were payable on demand to the payee in Nebraska. The critical issue in the case was whether the four year statute of limitations under Texas law had been extended by certain partial payments by the maker after the payee's claim would have otherwise been barred by the statute of limitations. The plaintiff argued that under *Duncan* Nebraska law should apply, while the defendant contended that *Duncan* provided authority for application of Texas law. Relying upon the decision in *Morrison*,[239] the court held that since the notes in question were executed in Nebraska and made payable to the plaintiff at her residence in Nebraska, the laws of Nebraska should apply to govern the substantive rights and liabilities of the parties. Notably absent from the decision was any analysis of the competing policies listed in section 6 of the Restatement, although in quoting *Morrison* the court also cited Restatement section 214, comment (b).[240] On its merits the *Velde* decision is probably correct if one follows the rather tortuous route through Restatement sections 214, 188 and 6, but the lack of analysis is remarkable.

In *Seth v. Seth*[241] the choice of law issue involved the validity of a marriage. In 1957 Mohan Seth, an alien, married Saroj Seth (Saroj), also an alien. In 1967 Mr. Seth was granted permanent resident alien status in the United States. The decision does not indicate whether Saroj lived with him in the United States. In 1975 Mr. Seth and Anuradha Mohan Seth (Anuradha) converted to Islam and were married in Bombay, India in an Islamic ceremony. Approximately a year and half later Mr. Seth divorced Saroj in Kuwait according to Islamic law. The next day Mr. Seth and Anuradha were married again in another Moslem ceremony. Approximately one year later Anuradha was granted permanent resident alien status in the United States as the wife of Mr. Seth. In 1982 Anuradha filed a petition for divorce in Dallas County and named Mr. Seth as respondent. Saroj then filed plea in intervention, alleging that she was the lawful wife of Mr. Seth and that Anuradha was never lawfully married to him. Mr. Seth and Saroj basically denied all factual assertions made by Anuradha including the assertion that the divorce and marriage ceremonies occurred in India and Kuwait. The trial court applied Texas law to resolve the several issues raised by the marriage and divorce ceremonies which the court held had occurred in Kuwait and India.

On appeal, the court of appeals held that while traditionally courts have utilized the law of the place of a divorce or marriage to determine validity, *Duncan* required that choice of law decisions, even in divorce cases, should be made on the basis of the most significant relationship approach using the factors set forth in the section 6 of the Restatement.[242] Without explaining its analysis, the court of appeals held that on the basis of *Duncan* and *Guiterrez* the criteria of section 6 and not the place of celebration test traditionally

239. *See supra* note 226.
240. 679 S.W.2d at 629.
241. 694 S.W.2d 459 (Tex. App.—Fort Worth 1985, no writ).
242. *Id.* at 462.

applied by Texas courts[243] should apply to determine the applicable law in a marriage or a divorce context.[244] Also, according to the court the most critical consideration in analyzing section 6 of the Restatement in the divorce and marriage context is the policy of the forum.

The court appeared most concerned that although Islamic law apparently allowed a non-Moslem man to convert to Islam by pronouncing a short phrase and then to divorce his wife through an ex parte procedure, "[t]he harshness of such a result to the non-Muslim divorced wife runs so counter to our notions of good morals and natural justice that . . . Islamic law in this situation need not be applied."[245] The court held that the other factors listed in section 6 of the Restatement, including (1) the needs of the interstate and international systems, (2) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (3) the protection of justified expectations, (4) the basic policies underlying the particular field of law, (5) certainty, predictability, and uniformity of result, and (6) ease in the determination and the application of the law to be applied, were simply not important to the context of the particular facts of the *Seth* case.[246] In other words, good morals and natural justice prevailed over the factors described in section 6 of the Restatement.[247]

Interestingly, the *Seth* court ignored sections 283 and 285 of the Restatement. These sections specifically deal with the law governing the validity of marriage and the right to a divorce. Section 283(1) of the Restatement states that the validity of a marriage will be determined by the local law of the state that, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles set forth in section 6.[248] That section also states, however, that a marriage that satisfies the requirements of the state where the marriage was contracted will be recognized as valid everywhere unless it violates the strong public policy of another state that had the most significant relationship to the spouses and the marriage at the time of the marriage. Section 285 states that the local law of the domiciliary state in which the action is brought will apply in determining the right

243. *See* Braddock v. Taylor, 592 S.W.2d 40, 42 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (place of celebration determines validity of marriage); Nevarez v. Bailon, 287 S.W.2d 521, 522 (Tex. Civ. App.—El Paso 1956, writ ref'd) (party must show she was spouse at the place of habitation to claim as heir of deceased).

244. 694 S.W.2d at 462.

245. *Id.* at 463.

246. *Id.* at 463-64.

247. *Id.* at 463.

248. Section 283 states:

> VALIDITY OF MARRIAGE
>
> (1) the validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
>
> (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 283 (1971).

to a divorce.[249]

If a Restatement-based analysis were performed in *Seth*, the decision probably would have been the same. Comment (b) to section 283 notes that the protection of the parties' justified expectations is of considerable importance in marriage.[250] Thus, if the parties expected foreign law to apply and under that law their marriage was valid, the parties expectations are entitled to considerable weight. Even under section 283, however, if the marriage violates a strong public policy of another state having the most significant relationship to the spouses and the marriage, it may not be recognized as valid although it is valid under the laws of the place of celebration. Moreover, under section 285 the domiciliary state, which would probably also be the state having the most significant relationship to the parties and the marriage, has the dominant interest in a person's marital status.[251] If Mr. Seth had lived in Texas for several years prior to the marriage, as was apparently the case, Texas would have had an important interest in the marriage and its purported termination. On the basis of that interest a Texas court might have refused to enforce the foreign divorce. On the other hand, it is not clear that Saroj lived in the United States at that time. If she did not, the interest of Texas in the marriage would necessarily have been less. Even in that situation, of course, under section 283 a Texas court could have declined on public policy grounds to recognize the foreign marriage. Indeed, the court arguably did just that in holding that the harshness of the divorce militated against our notions of good morals and natural justice to such an extent that Islamic law need not be applied.[252]

Another recent Texas decision applying the most significant relationship test is *Commercial Credit Equipment Corp. v. West*.[253] *Commercial Credit* involved an action brought by buyers of an airplane against Commercial Credit Equipment Corporation, assignee of a security agreement and promissory note involved in the purchase. The plaintiffs argued that the contract was usurious. The plaintiffs were Texas residents who had purchased the aircraft from Denver Beechcraft, Inc., a corporation whose facilities were located in Colorado. The promissory note and security agreement did not contain choice of law clauses. Under Colorado law the contract would not have been usurious although under Texas law it was usurious.[254] The court held that Texas had the most significant relationship to the particular substantive issue involved. The court did not analyze the factors listed in section 6 of the Restatement, but simply concluded that the laws of Texas had the most significant relationship to the particular substantive issue to be resolved in the case because the contract was executed in Texas and violated

249. Section 285 states that the "local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce." *Id.* § 285.

250. RESTATEMENT *supra* note 154, at § 283 comment b.

251. RESTATEMENT *supra* note 154, at § 285 comment a.

252. 694 S.W.2d at 463.

253. 677 S.W.2d 669 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

254. *Id.* at 672-73.

the Texas statute.[255] Accordingly, Texas law applied.[256]

In the written decision the court did not analyze any other factors which could have had a bearing upon the most significant relationship test. For example, under Restatement section 203 the validity of a contract should be sustained against a usury challenge if the contract provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and that does not greatly exceed the rate permitted by the general usury law of the state of the otherwise applicable law under sections 6 and 188.[257] Almost certainly, the contract in *Commercial Credit* had a substantial relationship to Colorado. Plaintiffs purchased the airplane from a company located there and the collateral documents executed at the time of purchase stated that the seller would assign the contract to Commercial Credit Equipment Corporation. If the court had applied the Restatement's rules, it could have determined that Colorado had the most significant relationship to the contract. Surely the parties expectations were that the contract was not usurious,[258] and even if that were not the case, under section 203 Colorado law should have applied unless the rate of interest being charged greatly exceeded the rate permissible in Texas.

Several federal decisions rendered during the Survey period have also considered various aspects of the choice of law issue under Texas law. In *Life of America Insurance Co. v. Aetna Life Insurance Co.*[259] the court examined whether federal law precluded arbitration of a contract which provided for arbitration and also provided that the laws of the state of Connecticut governed the agreement.[260] The court left the issue to the arbitrator but noted that Life of America, the plaintiff-appellant, had not alleged that the choice of law clause in the agreement was induced by fraud or overreaching, which apparently would have negated its validity.[261] This decision is significant in that it indicates again that courts will generally enforce express choices of governing law in the absence of some overriding consideration to the contrary.[262]

In *Webb v. Rodgers Machinery Manufacturing Co.*[263] the plaintiff brought a products liability action against the defendant for injuries sustained while working on a machine manufactured by the defendant's predecessor, a proprietorship that was thereafter incorporated. In analyzing the issue of whether Texas law or California law should govern with respect to certain issues in the case, the court referred to *Gutierrez*.[264] The court noted that under the Restatement a court should view choice of law considerations

255. *Id.* at 674.
256. *Id.*
257. RESTATEMENT, *supra* note 154, at § 203.
258. Under section 6 the expectations of the parties are of considerable significance. *See* RESTATEMENT, *supra* note 154 at §§ 6(2)(d) comment g, 203 comment b.
259. 744 F.2d 409 (5th Cir. 1984).
260. *Id.* at 412.
261. *Id.*
262. *See* Pedersen & Cox, *supra* note 209, at 759-63.
263. 750 F.2d 368 (5th Cir. 1985).
264. 583 S.W.2d 312 (Tex. 1979).

"with respect to the particular issue to be decided".[265] As to the issue of the liability of a succeeding business entity using the trade name of a previously existing proprietorship, the court noted that all contacts relevant to that issue occurred in California.[266] The corporation and proprietorships involved in those transactions were all Californian. On that basis the court held that California had the most significant relationship with respect to the issue of whether the defendant corporation could be held liable for the torts of its predecessor. The court further held that while California had a significant interest in governing these relationships, Texas probably did not.[267] Accordingly, the court held that the district court did not err in applying California law to govern that issue.[268]

Another decision involving Texas choice of law rules is *Rosenberg v. Celotex Corp.*[269] This case involved a lawsuit brought by the wife of a shipyard worker who had died after contracting asbestosis. The lawsuit was brought against the manufacturer of the asbestos and certain other parties. The plaintiff had originally brought an action in a New York state court which had been dismissed on the basis of a New York statute of limitations. After the death of the plaintiff's spouse, the plaintiff brought a wrongful death action in federal district court in New York which was also dismissed. The plaintiff subsequently filed a wrongful death action in federal district court in Texas and the court granted summary judgment in favor of the defendant based on the prior New York decisions. The court, citing *Gutierrez*, held that Texas conflict of laws rules mandated the application of New York substantive law to the case since New York had the most significant contacts.[270]

Faloona v. Hustler Magazine, Inc.[271] is an invasion of privacy lawsuit against Hustler Magazine for publishing nude pictures of children aged five and seven. The photos were originally taken for use in "The Sex Atlas," a reportedly academic study. The children's mother then signed releases authorizing the photographer to use the pictures any way he saw fit. He saw fit to sell them to Hustler. The children sued Hustler through their mother for damages of $20 million. The court first considered which law applied to the claims, dividing the choice of law analysis into (1) the children's right of privacy (tort), and (2) the mother's release (contract). The court decided that Texas law governed the right of privacy issues in accordance with Restatement section 145, the general tort choice of law principle which looks to the contacts between the parties and the interested states.[272] The court also invoked Restatement section 153 "multistate invasion of privacy," which gives priority to the plaintiffs' domicile at the time the injury occurred if the matter complained of was published in the domiciliary state.[273] The court

265. 750 F.2d at 374.
266. *Id.*
267. *Id.*
268. *Id.*
269. 767 F.2d 197 (5th Cir. 1985).
270. *Id.* at 199.
271. 607 F. Supp. 1341 (N.D. Tex. 1985).
272. *Id.* at 1352.
273. *Id.*

ruled that the Texas contacts were superior in that the plaintiffs and their divorced parents all lived in Texas at the time the pictures appeared in Hustler.[274] Thus Texas law controlled the right of privacy.[275] The court decided the contractual choice of law issue of the mother's release according to Restatement section 188, the general contract choice of law principle. Again Texas law won out because of superior contacts, particularly as to the domicile of the plaintiffs and their parents at publication time.[276] After deciding that Texas law controlled both the tort and contract issues, the court held that the mother's release was valid in Texas and the children's privacy was not invaded under alternative theories of presentation in a false light, public exposure of private facts, or commercial appropriation.[277] The court buttressed its validation of the mother's release under Texas law by noting that California law would also uphold the release.[278]

The court's choice of law exercise here is more in depth than many recent Texas choice of law decisions. In particular, *Faloona*'s choice of law analysis on the mother's release lists the place of contracting, the location of the subject matter of the contract, the parties' reasonable expectations of which law would apply, and the plaintiffs' domicile. Unfortunately, the court did not pursue all of these factors in its subsequent analysis, but did consider the plaintiffs' and parents' domicile and the place of the release's execution.[279] Interestingly, the court summarized its argument for choosing Texas law with the statement that Texas' superior contacts drawn from the Faloona family's Texas domicile gave Texas a greater interest than California in governing the release's validity.[280] This is an entirely appropriate argument, but is curious as a conclusion in that comparative state interest is a distinct factor in the more basic most significant relationship test of section 6 of the Restatement, which the court did not employ here even though it is the focus of the seminal *Gutierrez*[281] and *Duncan*[282] cases.

In *Ritzmann v. Weekly World News*[283] a Texan was injured by a national publication's alleged defamation and invasion of her privacy. Plaintiff's estranged husband scalded her with hot water, beat her, and tried to push her onto the kitchen stove burners. When she fled, he set the house on fire and died in the blaze. The incident was reported in the Dallas Times Herald, the Dallas Morning News, and the Houston Post. Two months after the Texas publications, the Florida based tabloid Weekly World News reported the incident in an article entitled "Marriage Ends in Blazing Fury," in which plaintiff alleged she was defamed and her privacy invaded. Without either party raising a choice of law argument, and with plaintiff presumably plead-

274. *Id.*
275. *See id.*
276. *Id.* at 1353.
277. *Id.* at 1356-60.
278. *Id.* at 1355.
279. *Id.* at 1353.
280. *Id.*
281. 583 S.W.2d 312 (Tex. 1979).
282. 665 S.W.2d 414 (Tex. 1984).
283. 614 F. Supp. 1336 (N.D. Tex. 1985).

ing under Texas law, the court considered choice of law *sua sponte*.[284] Noting that Texas applies the most significant relationship test, the federal court followed sections 150(2) and 153 of the Restatement, governing respectively multistate defamation and multistate invasion of privacy.[285] Both Restatement sections give priority to the law of the state of plaintiff's domicile if the matter was published in that state.[286] The court accordingly held that Texas law governed even though the defendant's conduct took place in Florida.[287] Applying Texas law, the court dismissed the defamation claim since all facts were accurately taken from the Texas newspaper articles, but retained the invasion of privacy claim for trial.[288]

B. Other Significant Cases

In a significant non-Texas case with important consequences to some Texas mineral owners, the United States Supreme Court reaffirmed the constitutional aspects of choice of law or, more appropriately, legislative jurisdiction. *Phillips Petroleum Co. v. Shutts*[289] involved a class action by Shutts and other royalty owners of Phillips' natural gas wells in eleven states. The royalty owners sued Phillips in Kansas state court seeking interest on delayed royalty payments. The resulting plaintiff class comprised some 28,000 royalty owners residing in all fifty states, the District of Columbia, and several foreign countries. Over 99 percent of the gas wells and about 97 percent of the plaintiffs had no connection with Kansas other than the lawsuit. In spite of the minimal Kansas connections, the Kansas court applied Kansas law to all claims, overruling Phillips' objection based on due process and full faith and credit. The Kansas Supreme Court affirmed.

On writ of certiorari the United States Supreme Court unanimously upheld Kansas jurisdiction, but a majority of the Court reversed the Kansas choice of law.[290] Justice Rehnquist's opinion held that the Constitution required that the Kansas forum have a "significant contact or aggregation of

284. A diligent search produced no authority forbidding a court from raising choice of law on its own motion. It may have been unnecessary in *Ritzmann*, however. The court could have reached the same result by employing any of several conflict of laws presumptions. For example, forum law is presumed to apply unless the parties plead otherwise, *see* E. SCOLES & P. HAY, *supra* note 198, at 412 n.3; parties who fail to plead and adequately prove foreign law are presumed to acquiesce to forum law or, alternatively, to have chosen forum law, *see id.* at 413 n.10; forum law is presumed to be the same as sister-state law, *see id.* at 405 n.10 (citing Etheridge v. Sullivan, 245 S.W.2d 1015 (Tex. App. 1951)). See RESTATEMENT, *supra* note 133, at § 136 comment h, Reporters' Notes to comment h, for more discussion of these and other presumptions in raising, pleading, and proving choice of law. Readers should note that although the court may employee these presumptions when parties fail to raise a choice of law question, the court is not required to do so. Thus the court appears to have the inherent power to raise choice of law on its own motion.

285. 614 F. Supp. at 1338.

286. *Id.*

287. *Id.*

288. *Id.* at 1338-41.

289. 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985).

290. *Id.* at 2981, 86 L. Ed. 2d at 649.

contacts to the claims asserted by each plaintiff class member"[291] in order to apply its law to that claim. Pertinent concerns were fairness to the defendant and the relative interests of other states, particularly Oklahoma and Texas, where the liability or calculation of damages might be different. The majority appropriately failed to indicate which state's law should apply to each class member's claim, although the court did hint that the site of the wells and the owners' residences are factors.[292]

Phillips is a good example of the distinction between legislative jurisdiction and choice of law. The former requires that Kansas law have the minimally appropriate connections for application to the lawsuit. The latter asks which state's law, of all the states having legislative jurisdiction, is the most appropriate to govern the merits of the lawsuit. Legislative jurisdiction rests on the Constitution alone; choice of law turns on the forum state's choice of law rule. The Supreme court is empowered only to decide the legislative jurisdiction question (can Kansas law be applied to non-Kansas claims?), and not the resulting choice of law questions (if not Kansas law to non-Kansas claims, then what?).

The United States Supreme Court denied certiorari in four choice of law cases in 1985. *Scott v. City of Hammond*[293] was an Illinois federal court decision upholding the Supreme Court ruling in *Illinois v. City of Milwaukee*[294] that federal common law supplanted state law regarding interstate water pollution. The Seventh Circuit further held in *Scott* that the passage of federal statutory law governing interstate water pollution[295] did not supplant the application of federal common law to appropriate issues in this case. The court thus directed remand dismissal of Scott's complaint against the City of Hammond on the grounds that the complaint was based upon Illinois nuisance law inapplicable to this case. Scott petitioned for certiorari arguing that in federal diversity claims such as this, the court should fashion a federal common law choice of law rule instead of applying federal substantive law derived from a variety of state substantive laws.[296] Scott further argued that if the Illinois federal court were required to apply Indiana law to the merits of the case, then the Seventh Circuit should remand the case for the federal district court to apply the Indiana choice of law rule, that is, Scott argued for renvoi.[297] The United States Supreme Court declined review.

Arlington County v. Biscoe[298] was a negligence claim for an innocent bystander's injuries suffered in the District of Columbia when an Arlington County, Virginia policeman continued a high speed chase into the District of

291. *Id.* at 2980, 86 L. Ed. 2d at 648 (citing Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).
292. *Id.* at 2977-78, 86 L. Ed. 2d 645-46.
293. 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 980, 83 L. Ed. 2d 21 (1985).
294. 406 U.S. 91 (1972).
295. 33 U.S.C. §§ 1251-1376 (1982).
296. See 53 U.S.L.W. 3161, 3161 (Sept. 11, 1984) for a synopsis of Scott's argument to the Supreme Court.
297. *Id. See* RESTATEMENT, *supra* note 154, at § 8 for the standard view on renvoi.
298. 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 909, 83 L. Ed. 2d 923 (1985).

Columbia. The District of Columbia Circuit Court of Appeals held that the trial court was not required to honor Virginia's grant of sovereign immunity to Arlington County because of the forum's greater interest in having its law govern. *Arlington County* thus answers the question reserved by the United States Supreme Court in the similar *Nevada v. Hall* case.[299] The D.C. Circuit's answer was sufficiently proper that the Supreme Court denied certiorari.

Finch v. Hughes Aircraft Co.[300] held that the Maryland court did not have to honor the parties' choice of California law where Maryland law was identical. That is, in false conflicts cases the forum may apply its own law.[301] In *Park v. Metro-Goldwyn-Mayer/United Artists Corp.*[302] the Ninth Circuit failed to apply the parties' choice of law in construing a film distributor's general release in a licensing agreement. The distributor then unsuccessfully sought Supreme Court review arguing that due process and equal protection were violated when the parties' choice of law was ignored.[303]

C. *The Rule of Decision Statute*

In its new Civil Practice and Remedies Code Texas has recodified and reworded its Rule of Decision statute. The revised statute states: "The rule of decision in this state consists of [(1)] those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, [(2)] the constitution of this state, and [(3)] the laws of this state."[304] The predecessor statute provided: "The common law of England, so far as it is not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature."[305]

Rule of decision is a synonym for governing law and thus is a choice of law statute. The statute is not the standard choice of law rule directing the application of a foreign law to a particular case, but instead directs the inclusion of non-forum law into the substantive law of Texas in appropriate cases. Similar rule of decision provisions have been adopted by every state except Louisiana, where civil law controls.[306]

A problem in the new Texas codification, inherited from the predecessor Rule of Decision statute, is the ambiguous reference to the common law of

299. 440 U.S. 410 (1979). The question reserved in *Nevada v. Hall* is whether the forum state is constitutionally free to apply forum law and ignore important law enforcement policies of a neighboring state when the forum state's action will interfere with the other state's capacity to fulfill its own sovereign responsibilities. *Id.* at 424 n.24.

300. 57 Md. App. 190, 469 A.2d 867 (1984), *cert. denied*, 105 S. Ct. 1190, 84 L. Ed. 2d 336.

301. 469 A.2d at 887.

302. See the synopsis at 53 U.S.L.W. 3571, 3571 (Feb. 12, 1985) (unreported opinion), *cert. denied*, 105 S. Ct. 1192, 84 L. Ed. 2d 338 (1985).

303. *Id.*

304. TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (Vernon Pam. 1986).

305. TEX. REV. CIV. STAT. ANN. art. 1 (Vernon 1969) (repealed).

306. *See generally* 15A AM. JUR. 2d *Common Law* §§ 13, 14 (1976).

England as being applicable in Texas courts.[307] Does this mean one can argue current English common law if it is not inconsistent with Texas and United States law? How does American common law apply in Texas? Is it included in the term "common law of England"? Cases interpreting the old Texas Rule of Decision statute made clear that common law means the English common law as received by the American colonies and subsequently evolved here in the United States.[308] No doubt most lawyers assume this meaning when reading the statute. Nonetheless, as long as the legislature has gone to the trouble to recodify and rephrase the Rule of Decision statute, it should have provided a clearer definition for common law. For example, simply dropping the reference to England would eliminate the ambiguity of which period of English common law would apply, leaving a Texas adoption of the common law including that received by the American British colonies and its subsequent evolution in the United States.[309] Better yet, many states provide a reference date when referring to English common law.[310]

III. FOREIGN JUDGMENTS

Foreign judgments create Texas conflicts of laws in two ways: the local enforcement of non-Texas judgments, both of sister states and foreign countries, and the preclusion effect of foreign lawsuits on local lawsuits. The 1985 Survey period offered significant developments in the judgment enforcement area, and less significant but illustrative preclusion developments.

A. Enforcement

Foreign judgments include sister state and foreign country judgments, but not federal court judgments from other states, because courts summarily enforce those judgments as local federal court judgments.[311] Two methods of enforcing foreign judgments are available in Texas: the common law method of using the foreign judgment as the basis of a local lawsuit, and the more direct procedure under the uniform foreign judgment acts.

1. The Foreign Judgments Acts. Since 1981 Texas has used two uniform

307. *See* BLACK'S LAW DICTIONARY 250 (5th ed. 1979) for the variety of definitions for common law.

308. Tejas Dev. Co. v. McGough Bros., 165 F.2d 276, 279 (5th Cir. 1948); Grigsby v. Reib, 105 Tex. 597, 600, 153 S.W. 1124, 1125 (1913).

309. For examples of statutes referring only to common law see N.M. STAT. ANN. § 38-1-3 (1984) (no reference to England); OKLA. STAT. ANN. tit. 12, § 2 (West 1960) (common law as recognized in the United States).

310. *See* PA. CONS. STAT. ANN. tit. 1, § 1503 (Purdon Pam. Supp. 1985) (incorporating English common law as it existed on May 14, 1776); WIS. CONST. art. XIV, § 13 (incorporating common law, omitting the "English" prefix, as of the date of the Wisconsin constitution's adoption). The most accepted reference date for English common law is "the fourth year of the reign of James the First," which ran from March 24, 1606, to March 23, 1607. *See, e.g.*, ARK. STAT. ANN. § 1-101 (1976) (adopts English common law prior to fourth year of James the First); ILL. ANN. STAT. ch. 1, § 801 (Smith-Hurd 1980) (adds other specific English common law periods identified by the reigning English monarch); MO. ANN. STAT. § 1.010 (Vernon 1969) (uses fourth year of James the First's reign as reference point).

311. *See* 28 U.S.C. § 1963 (1982) (judgment must be registered).

acts for the recognition and enforcement of foreign judgments, although their adoption did not displace the common law enforcement method.[312] The Uniform Enforcement of Foreign Judgments Act[313] (UEFJA) provides for Texas enforcement of non-Texas judgments that are entitled to full faith and credit.[314] This includes sister-state judgments as well as foreign country judgments that have Texas recognition under the second uniform act, the Uniform Foreign Country Money Judgment Recognition Act (UFCMJRA).[315]

Both acts were recodified in 1985 and incorporated into the new Civil Practice and Remedies Code.[316] The UEFJA, formerly article 2328b-5, now comprises sections 35.001 through 35.008 of the Texas Civil Practice and Remedies Code. The only substantive change in the text is the deletion of former section 7, entitled "Uniformity of Interpretation" that stated "[t]his Act shall be interpreted and construed to achieve its general purpose to make the law of those states which enact it uniform."[317] Nonsubstantive changes include minor rearrangement of the text.

The UFCMJRA's former article 2328b-6 is now sections 36.001 through 36.008 of the Texas Civil Practice and Remedies Code.[318] As with the UEFJA, the only substantive change is the deletion of former section 9 entitled "Uniformity of Interpretation" and worded much the same as its counterpart in the UEFJA.[319] The text is similarly rearranged. The rearrangement and deletions in the two uniform acts by the new Civil Practice and Remedies Code are for recodification only, with no intended substantive changes.[320] The new Code went into effect on September 1, 1985.

The Survey period produced three noteworthy cases that focused on these acts. Two related cases, *Merritt v. Harless*[321] and *Brosseau v. Harless*,[322] involved distinct mandamus actions against a Texas district court judge by opposing litigants Merritt and Brosseau. The entire dispute comprises six separate legal actions excluding appeals.[323]

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312. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon Pam. 1986) (former article 2328b-5, § 6).

313. *Id.* §§ 35.001-.008 (former article 2328b-5).

314. *Id.* § 35.001 (former article 2328b-5, § 1).

315. *Id.* §§ 36.001-.008 (former article 2328b-6).

316. Act of June 16, 1985, ch. 959, § 1, 1985 Tex. Sess. Law Serv. 7043 (Vernon).

317. Act of May 25, 1981, ch. 195, § 7, 1981 Tex. Gen. Laws 464, 465, *repealed by* Act of June 16, 1985, ch. 959, § 9, 1985 Tex. Sess. Law. Serv. 7043, 7218 (Vernon).

318. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-.008 (Vernon Pam. 1986).

319. "This Act shall be construed to carry out its general purpose to make uniform the law of those states that enact it." Act of June 17, 1981, ch. 808, § 9, 1981 Tex. Gen. Laws 3069, 3071, *repealed by* Act of June 16, 1985, ch. 959, § 9, 1985 Tex. Sess. Law Serv. 7043, 7218 (Vernon).

320. Act of June 16, 1985, ch. 959, § 10, 1985 Tex. Sess. Law Serv. 7043, 7219 (Vernon) (quoted in the "Enactment" preface to TEX. CIV. PRAC. & REM. CODE ANN. (Vernon Pam. 1986)).

321. 685 S.W.2d 708 (Tex. App.—Dallas 1984, no writ).

322. 697 S.W.2d 56 (Tex. App.—Dallas 1985, no writ).

323. The six legal actions were: (1) Argos Resources, Inc. 1981-1 Partnership v. Merritt, No. 82-13602-F (116th Jud. Dist., Dallas County, Tex. filed Nov. 5, 1982); (2) Merritt v. Brosseau, No. 82-20717 (11th Jud. Cir. Ct., Fla. filed Nov. 5, 1982); (3) Merritt v. Brosseau No. 84-6317-F (116th Jud. Dist., Dallas County, Tex. filed May 15, 1984) (Merritt's Florida

Merritt, a Florida resident, entered into a partnership agreement with Texas resident Brosseau that included Merritt's purchase of $100,000 in unregistered securities from Brosseau and his business alter egos. The partnership fell out, resulting in simultaneous lawsuits in Florida and Texas filed on November 5, 1982. Merritt sued Brosseau in a Florida state court for recission of Merritt's $100,000 securities purchase and other relief. Brosseau sued Merritt in a Texas state court for a declaratory judgment, claiming fraud and misrepresentation. Brosseau filed his Texas action in Judge Fred Harless's court, which led to the two actions against respondent Harless.

On October 12, 1983 Judge Harless stayed Brosseau's Texas action in deference to Merritt's Florida litigation, in which Brosseau had already entered a general appearance. In the Florida action Brosseau contested jurisdiction and service of process and attempted several other procedural remedies. All of them failed and Brosseau then appealed personal jurisdiction. After the Florida Supreme Court denied review of Brosseau's jurisdictional challenge, the Florida trial court issued a summary final judgment against Brosseau, granting Merritt damages and interest of $135,432.25. Brosseau appealed in Florida and unsuccessfully requested that the Florida trial court stay judgment. When the Florida trial court refused, the Florida judgment became final and enforceable, which made it enforceable in Texas under the UEFJA.[324]

Merritt filed his final Florida damages judgement (FJ-1) in Texas state court under the UEFJA. The Texas court in which Merritt filed initially granted his request for enforcement. While enforcement was pending, however, FJ-1 was transferred to Judge Harless's court because of Harless's control of the stayed Brosseau action against Merritt.[325] Harless rescinded the FJ-1 enforcement order and replaced it with a stay of execution. At this point, a second Florida judgement was entered against Brosseau for attorney fees in FJ-1. The Florida attorney fees judgment (FJ-2) was also filed in Harless's court.[326] Merritt contested Harless's stay of FJ-1 by filing a mandamus action against Harless in the Dallas Court of Appeals. Brosseau responded that the Texas court lacked mandamus jurisdiction in this case, that Judge Harless had stayed within his discretion in staying the Florida judgment, and that the UEFJA authorized Harless's stay.[327]

The Dallas Court of Appeals disagreed with all of Brosseau's arguments,

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judgment in No. 82-20717); (4) Merritt v. Brosseau, No. 85-1648-J (191st Jud. Dist., Dallas County, Tex. filed Feb. 5, 1985) (Merritt's attorney fee judgment in No. 82-20717); (5) Merritt v. Harless, 685 S.W.2d 708 (Tex. App.—Dallas 1984, no writ); (6) Brosseau v. Harless, 697 S.W.2d 56 (Tex. App.—Dallas 1985, no writ). Although UEFJA actions are often no more than administrative actions involving clerical registration without litigation, in this instance the UEFJA actions (numbers 3 & 4 above) were actual litigation.

324. That is, finality is a prerequisite to UEFJA enforcement. The final judgment must satisfy the remaining UEFJA criteria as well.

325. 685 S.W.2d at 709-10.

326. *See supra* note 323.

327. 685 S.W.2d at 710. Brosseau was evidently referring to both grounds for stay under the former article 2328b-5, § 4(a) & (b), since his basis for stay was a Florida appeal (§ 4(a)) and other defenses (§ 4(b)).

holding that (1) it did have mandamus jurisdiction in UEFJA cases,[328] (2) Brosseau's personal jurisdiction in Florida could not be relitigated in Merritt's Texas UEFJA action because litigation on the merits had already occurred and gone to final judgment in Florida,[329] and (3) Brosseau could not raise again in a UEFJA action the other procedural remedies that failed in Florida.[330] The Dallas court noted that it lacked precedent for this opinion because the UEFJA was new in Texas, but nonetheless applied its own interpretation and construction of the UEFJA. That interpretation and construction held that Texas courts will give sister-state judgments the same effect as if they were rendered in Texas, and that Harless therefore lacked authority to stay FJ-1.

Upon returning to Judge Harless's trial court, Brosseau sought to block the enforcement of FJ-1 by asking Judge Harless to stay FJ-1 execution because of a possible set-off in his unprosecuted claims against Merritt in the stayed Texas action. Brosseau also filed a motion seeking a retrial of FJ-2 in Harless's court and requesting that Judge Harless enjoin the sale of Brosseau's property to satisfy FJ-2. Harless denied all of Brosseau's requests, leading to Brosseau's mandamus action against Harless.[331] In the mandamus action Brosseau asked the Dallas court to order Judge Harless to grant the relief just denied him. Brosseau argued that Judge Harless lacked authority to stay the original Texas action against Merritt, that Brosseau should have a chance to litigate those claims against Merritt, and that the court should stay the execution of FJ-1 and FJ-2 pending that litigation.[332] The court of appeals agreed with Brosseau, but only in part. The court decided that Judge Harless should determine the amount of damages in Brosseau's untried counterclaims against Merritt, and stay enforcement of FJ-1 as to that amount only.[333] As to Merritt's FJ-2 judgment for Florida attorney fees, the court noted that FJ-2 was final in Florida with no supersedeas bond from Brosseau, and accordingly held that no grounds existed to stay enforcement of FJ-2.[334]

In a perfect world the Merritt/Brosseau dispute would require one lawsuit, assuming that the perfect world had legal disputes. In a near-perfect world with state boundaries, enforcement of the judgment in another forum might require a second lawsuit, and a third lawsuit might result if each litigant filed in his home forum. In a less-than-perfect world struggling with the application of a new UEFJA statute, a judgment debtor might need a mandamus action to correct quickly an erroneous trial court ruling before an improper execution against assets occurred. But in the real world, it took six lawsuits to resolve the Merritt/Brosseau dispute.[335] That is not what the

328. *Id.*
329. *Id.* at 710-11.
330. *Id.* at 711.
331. 697 S.W.2d at 57-58.
332. *Id.* at 58.
333. *Id.* at 59.
334. *Id.*
335. *See supra* note 323.

UEFJA drafters had in mind.

A second 1985 highlight for foreign judgment enforcement, *Hennessy v. Marshall*,[336] involved both the UEFJA and its companion, the Uniform Foreign Country Money Judgment Recognition Act (UFCMJRA). This case raises interesting questions about both uniform acts. How long after notice does the debtor have to respond? Does due process require a pre-enforcement hearing if the debtor does not respond?

Hennessy v. Marshall was a mandamus action seeking vacation of a trial judge's discovery order in pursuit of enforcement of an English judgment.[337] The plaintiffs filed the English default judgment with the District Clerk of Dallas County. After filing and without a hearing, Judge Marshall signed an order stating that the judgment met the requirements of the UEFJA and the UFCMJRA, concluding that the UFCMJRA recognized the English judgment, which was therefore enforceable under the UEFJA.[338] Judge Marshall then issued an order for nonparties Hennessy and Hartfield to provide post-judgment discovery in pursuit of the judgment debtor's assets.

Hennessy and Hatfield moved to quash their subpoenas. Judge Marshall denied their motion, whereupon Hennessy and Hatfield filed a mandamus action against the judge on the ground that under the UFCMJRA the English judgment was not valid absent a plenary hearing. The court of appeals agreed with Hennessy and Hatfield, holding that a court cannot enforce a foreign country money judgment until it is recognized under the UFCMJRA.[339] The court further held that recognition of a foreign country money judgment requires compliance with UFCMJRA sections 5 and 6.[340] Sections 5 and 6 provide criteria for the judgment's jurisdiction, validity, public policy conflicts, and other recognition factors. Some factors are affirmative defenses that the judgment debtor must raise, and others are elements that the judgment creditor must establish regardless of the judgment debtor's responses.[341] Both the debtor's affirmative defenses and the creditor's burden of recognition require a plenary hearing.[342] If the foreign judgment is proven recognizable, then enforcement is appropriate under the UEFJA. Because no plenary hearing occurred in this case, the court held that the English judgment was neither recognizable under the UFCMJRA nor enforceable under the UEFJA.[343] The court therefore invalidated Judge Mar-

336. 682 S.W.2d 340 (Tex. App.—Dallas 1984, no writ).

337. No further information was given on the English lawsuit or the judgment debtor, but we can infer that he has assets in Texas.

338. 682 S.W.2d at 342.

339. *Id.* at 343 (referring to former article 2328b-6, § 4, now TEX. CIV. PRAC. & REM. CODE ANN. § 36.004 (Vernon Pam. 1986)).

340. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.005-.006 (Vernon Pam. 1986).

341. 682 S.W.2d at 344. The court did not distinguish the affirmative defenses from the elements to be proven by the judgment creditor, although it did state that all defenses in § 5(b) are affirmative defenses. *Id.*

342. That is, the elements to be proven by the judgment creditor cannot be assumed in his pleadings or in the existence of the foreign judgment, but must be proven in court. Similarly, the debtor's affirmative defenses require notice and an opportunity to present these defenses. *Id.*

343. *Id.* at 344-45.

shall's discovery order.[344]

In addition to requiring a plenary hearing, the *Hennessy* court held that subpoenaed nonparties have standing to contest enforcement proceedings.[345] If *Hennessy* is correct that a plenary hearing is necessary for foreign country judgments, do sister-state judgments under the UEFJA also require such a hearing? The answer is not clear. The advantage of a mandatory hearing lies in its assurance of judgment validity on essential issues such as personal and subject matter jurisdiction, as well as the opportunity for the judgment debtor to raise affirmative defenses. Although the UEFJA does not expressly provide all the defenses to enforcement that are provided in the UFCMJRA,[346] sections 35.001[347] and 35.003[348] do imply many of those defenses. If these defenses require a plenary hearing for foreign country judgments, why not for sister-state judgments? One might respond that full faith and credit affords sister-state judgments a presumption of validity[349] that foreign country judgments do not automatically receive. The full faith and credit doctrine, however, does not override due process[350] and, according to *Hennessy*, the due process underlying a plenary hearing assures that execution of the judgment does not unfairly deprive the debtor of his assets.[351]

Thus we are left with two questions. First, does the UEFJA require a plenary hearing? If not, does due process require a hearing? The answer to both questions is unclear. The literal language of the UEFJA does not mandate a hearing. The Act merely authorizes a hearing if the judgment debtor requests a stay.[352] As to whether due process requires a hearing before enforcing a sister-state judgment under the UEFJA, no state has so required and the United States Supreme Court has not yet considered the question.[353]

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344. *Id.* at 345.

345. *Id.* at 343. The court premised its conclusion on standing, based on the fact that Hennessy and Hatfield had no viable alternative to resist answering the subpoena. Subpoenaed parties in future UFCMJRA cases will presumably be in the same position to challenge the judgment's validity.

346. The UFCMJRA itemizes its defenses to recognition in TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001, .002, .005, .006, .007 (Vernon Pam. 1986). The UEFJA's only express defense is *id.* § 35.006(a), allowing for stay of enforcement pending a foreign appeal.

347. This limits the UEFJA to foreign judgments entitled to full faith and credit.

348. This subjects foreign judgment filed under the UEFJA to the same defenses and proceedings as for unenforced Texas judgments.

349. *See* McFadden v. Farmers & Merchants Bank, 689 S.W.2d 330, 332 (Tex. App.—Fort Worth 1985, no writ); *see also* R. LEFLAR, *supra* note 212, at 158 (courts indulge in assumption that proceedings producing judgments are valid). It is possible to retain the presumption of sister-state judgment validity under full faith and credit and still require a hearing. The trend, however, is toward simple clerical registration of sister-state judgments.

350. *See* RESTATEMENT, *supra* note 154, at § 104.

351. 682 S.W.2d at 344.

352. The availability of a hearing is implied in TEX. CIV. PRAC. & REM. CODE ANN. § 35.003 (Vernon Pam. 1986), which subjects foreign judgments to the same defenses and procedures as Texas judgments, and *id.* § 35.006, which provides for stay of enforcement pending appeal. This is an issue that could require a hearing to prove the existence of the foreign appeal.

353. Professor Weintraub has said that the United States Supreme Court has granted certiorari on this issue, but the cases have become moot prior to consideration by the court. Telephone conversation with Professor Weintraub (January 22, 1986). *But cf.* R. Leflar, *supra* note 212, at 155-58.

Until this is resolved in Texas we can assume that the UFCMJRA will require a hearing, and that the UEFJA will not because of its literal language and its presumption of sister-state judgment validity.

A further distinction between the UEFJA and the UFCMJRA is the UEFJA's requirement of judgment security when staying enforcement;[354] this distinction reaffirms the UEFJA's underlying presumption of sister-state judgment validity. The presumption of validity expedites the enforcement of American judgments across state lines and thereby increases judicial efficiency. On the other hand, this presumption may short circuit due process by allowing judgment creditors to execute on assets before the judgment debtor has had an opportunity to defend. By equating the enforcement of out-of-state judgments with that of local judgments, the UEFJA assumes that the judgment debtor is equally prepared to defend against both. Preparation against enforcement of a local judgment, however, is more likely than preparation against enforcement of a sister-state judgment whose existence may surprise the debtor.

Other problems with the UEFJA remain. After a judgment creditor files a foreign judgment in Texas under the UEFJA and the debtor receives notice, how long does the debtor have to request a stay? The UEFJA fails to address this crucial point. Due process requires a reasonable time before enforcement, but how much time is reasonable for a foreign judgment that may surprise the debtor? The UEFJA provides that a court may enforce a valid foreign judgment after filing and notice the same as a Texas judgment.[355] Does this mean that the debtor would have no more time to resist enforcement than for a locally-rendered judgment? Clearly the debtor should have more time for a foreign judgment because of the possible surprise factor and the time needed to retain local counsel. The answers to these questions are important both to debtors with valid defenses and to creditors who might face undue enforcement delays from overcompensating courts. If the UEFJA is to fulfill its purpose of facilitating foreign judgment enforcement, it should specify the response time.

Another UEFJA ambiguity is the Texas court's method of endorsing the foreign judgment. Does the court issue its own order incorporating the foreign judgment or merely endorse the foreign document? This is a relatively minor problem that will rarely affect the outcome, but it could delay enforcement and in some instances allow the debtor to dispose of assets before a freeze order could issue.

2. *Common Law Enforcement*

Before the adoption of the uniform acts in Texas, judgment creditors enforced foreign judgments by the common law method of using the foreign judgment as the basis for a new action in Texas. The UEFJA specifically

354. TEX. CIV. PRAC. & REM. CODE ANN. § 35.006(b) (Vernon Pam. 1986) (former article 2328b-5, § 4(b)).

355. *Id.* § 35.003 (former article 2328b-5, § 2).

preserves the common law method as an alternative, and four Survey period cases reflect that alternative.[356] The underlying mandate for common law enforcement is the full faith and credit clause of the United States Constitution.[357]

The first case is paired with a companion case filed under the UEFJA. *McFadden v. Farmers and Merchants Bank*[358] and *Weakley v. Chandlers Furniture Co.*[359] are California default judgments against Barney and Carol Weakley (formerly Carol McFadden). In *McFadden* the California bank took a default judgment against Carol McFadden, then filed a common law enforcement action in Texas where McFadden defaulted again. Execution issued, and McFadden made her first appearance with a motion to quash execution for lack of subject matter jurisdiction in the California court and invalidity of the California judgment for lack of a judge's signature. The Texas trial court rejected McFadden's motion to quash, and she sued for mandamus in the court of appeals where she lost again. The court of appeals held that the California court had subject matter jurisdiction to render the judgment in spite of being a mere municipal court.[360] McFadden argued that unpleaded foreign law is presumed to be the same as Texas law, and that the court should therefore presume that the California municipal court lacked subject matter jurisdiction over collection actions, as do Texas municipal courts. The court of appeals rejected this argument by pointing out that the full faith and credit clause presumed the validity of sister-state judgments unless proven otherwise, and that only California law could disprove the municipal court's lack of subject matter jurisdiction.[361] Since McFadden offered no proof of California law, the court presumed that a proper court rendered the California judgment. McFadden also argued that the lack of a judges signature voided the California judgment on its face. The court of appeals rejected this argument, noting that McFadden's supporting case law did not pertain because of all her cases concerned instances of non-signing where the court heard the case on the merits, which did not happen with McFadden's California judgment, and where the objection was a direct attack on the case.[362] Collateral attacks[363] on foreign judgments must prove them void, not merely voidable. Foreign judgments, the court observed, can be proven void on the grounds of lack of subject matter jurisdiction and lack of personal jurisdiction; therefore, concluded the court, an unsigned judg-

356. *Id.* § 35.008 (former article 2328b-5, § 6).

357. U.S. CONST. art. IV, § 1. The federal statutory implementation of full faith and credit is 28 U.S.C. § 1738 (1982), which provides authentication requirements for sister-state judgments and occasionally plays a determining role in these cases. *See infra* notes 369-70 and accompanying text.

358. 689 S.W.2d 330 (Tex. App.—Fort Worth 1985, no writ).

359. 689 S.W.2d 339 (Tex. App.—Fort Worth 1985, no writ).

360. 689 S.W.2d at 332.

361. *Id.*

362. *Id.*

363. A direct attack on a foreign judgment occurs when the foreign judgment is first litigated for enforcement purposes in Texas or another enforcing state. McFadden defaulted on the initial Texas enforcement action for the California judgment, and only challenged enforcement at the execution phase, which is a collateral attack.

ment is merely voidable as shown by the Texas cases relied upon by McFadden.[364] McFadden thus lost her late challenge to the California judgment, as did Barney Weakley on identical grounds.[365]

The second common law enforcement is similar to *McFadden* and *Weakley*. *Cal Growers, Inc. v. Palmer Warehouse and Transfer Co.*[366] sought enforcement of a California default judgment. After filing suit in Texas as a full faith and credit enforcement of a sister-state judgment, the judgment debtor objected on the ground that a judge had not signed the California judgment, and thus a California judge had not rendered or adopted the decision. Instead, the California judgment was simply signed by a California court clerk, who is authorized to enter default judgments under section 585 of the California Code of Civil Procedure.[367] Judgment debtor Palmer Warehouse moved for summary judgment against Texas enforcement of the California judgment on the grounds noted above, and the trial court agreed. Judgment creditor Cal Growers appealed, arguing that the trial court should have taken judicial notice of California Code section 585 as required by Texas Rule of Civil Procedure 184a.[368] Cal Growers had so moved in the trial court, and contended that it attached a copy of section 585 to its trial motion. The appellate record, however, had no copy of section 585 with the trial motion, giving the appearance that Cal Growers had not included one at trial. Palmer Warehouse argued that by failing to provide a copy of the California statute, Cal Growers failed to prove California law and the motion was therefore insufficient to allow judicial notice of foreign law. A Houston court of appeals disagreed, holding that sufficient notice for foreign law occurred if Cal Growers cited the statute and described its substance.[369] The trial judge was thus required to take judicial notice of section 585, which validated the California clerk-signed judgment.

Starzl v. Starzl[370] is the attempted Texas enforcement of a sister-state support order by an ex-wife. The ex-husband raised no objections to the filing or the prosecution of the foreign support judgment, but did appeal the resulting Texas judgment on the ground that the ex-wife's foreign judgment lacked proper authentication[371] and therefore did not deserve full faith and credit. The ex-wife argued that the ex-husband waived this evidentiary ob-

364. 689 S.W.2d at 332.

365. 689 S.W.2d at 340-41. *Weakley*, unlike *McFadden*, was filed under the UEFJA in 1984. *McFadden* was brought to Texas in 1981, prior to the UEFJA's Texas implementation. The cases are otherwise identical.

366. 687 S.W.2d 384 (Tex. App.—Houston [14th Dist.] 1985, no writ).

367. *See* CAL. CIV. PROC. CODE § 585 (West Supp. 1986).

368. TEX. R. CIV. P. 184a.

369. 687 S.W.2d at 386.

370. 686 S.W.2d 202 (Tex. App.—Dallas 1984, no writ).

371. Authentication criteria was based on 28 U.S.C. § 1738 (1982), which is the statutory implementation of the full faith and credit clause of the federal constitution. Section 1738 requires that a copy of a foreign judgment be certified by the official custodian from the rendering court, usually the court clerk, and that the rendering judge verifiy the custodian's certification. The court of appeals also noted that failing to meet § 1738 authentication requirements was not crucial if the foreign judgment met Texas authentication requirements under TEX. REV. CIV. STAT. ANN. art. 3731a (Vernon Supp. 1986). Petitioner also failed to meet art. 3731a requirements, which are substantially similar to § 1738. Note that art. 3731a has been

jection by failing to raise it at trial. The Dallas Court of Appeals disagreed and held for the ex-husband. The court noted that by not objecting to authentication at trial, the ex-husband waived his right to exclude the foreign judgment as hearsay evidence, but did not waive his right to an appellate challenge to the sufficiency of the evidence on which the trial court based its judgment. Accordingly, the court of appeals found that the improperly authenticated foreign judgment provided insufficient evidence for enforcement in Texas.

Fender v. Delta Mud & Drilling Co.[372] is the attempted enforcement of a Louisiana default judgment. Fender, the judgment debtor, contested enforcement on the ground that plaintiff Delta had fraudulently told him that it would not pursue the Louisiana action without further notice to him, that Delta in fact got a default judgment without further notice to Fender, and that his reliance on Delta's statements caused him to forgo his defense in Louisiana. Delta argued that Fender had the burden of showing that Louisiana permitted his fraud-in-procurement defense in attacking the default judgment, and that absent such a showing the Texas court could not allow the defense. Neither Fender nor Delta had come forward with the relevant Louisiana law, causing the Texas trial court to grant summary judgment for Delta. The Tyler Court of Appeals disagreed on three grounds. First, absent proof to the contrary, the Texas court would presume that Louisiana law was the same as Texas law.[373] Because no one had proven relevant Louisiana law, the court would presume that Louisiana would allow the defense if Texas did.[374] Second, Texas does allow Fender's defense that he had no chance to defend the Louisiana action because of Delta's assurance that it would not pursue the action without further notice to him.[375] Finally, Fender's fraud allegations raise a factual question which the Texas trial court must determine on remand.[376]

3. Child Custody Enforcement. Texas statutorily enforces sister-state child custody awards under Texas Family Code sections 11.63 and 11.64(a).[377] In addition, the federal mandate under full faith and credit is found in the Federal Parental Kidnaping Prevention Act (PKPA),[378] a corrollary to the statutory full faith and credit imperative.[379] The PKPA sets out both jurisdictional and judgment enforcement standards for interstate child custody disputes.

Texas produced three notable custody enforcement cases in the 1985 Survey period. All are discussed at length in the judicial jurisdiction section and

repealed by TEX. R. EVID. 202, effective Sept. 1, 1983, to the extent that art. 3731a affects court procedure. To the extent that art. 3731a is a substantive rule, it remains in effect.

372. 697 S.W.2d 655 (Tex. App.—Tyler 1985, no writ).
373. *Id.* at 657.
374. *Id.*
375. *Id.*
376. *Id.* at 658.
377. TEX. FAM. CODE ANN. §§ 11.63, .64(a) (Vernon Pam. Supp. 1986).
378. 28 U.S.C. § 1738A (1982).
379. *See supra* notes 116-35 and accompanying text.

briefly here.[380] *Lundell v. Clawson*[381] is a Minnesota/Texas dispute in which the Austin Court of Appeals held that the Minnesota resident father was entitled to immediate habeas corpus custody because of his controling Minnesota custody award, but that the Texas resident mother could pursue her Texas litigation if she could show that Minnesota had lost or declined jurisdiction under the PKPA.[382] In *Bolger v. Bolger*[383] the Corpus Christi Court of Appeals held that it could not litigate child custody in the Texas father's divorce action because New York, the children's home state, had accepted jurisdiction in an action filed after the father's Texas action.[384] Finally, in *Irving v. Irving*[385] the Fort Worth Court of Appeals gave full faith and credit to an Illinois custody decree, thereby undercutting a Texas custody decree, because Illinois was the children's home at the time of the Texas filing.[386]

International custody disputes are governed by section 23 of the UCCJA, which makes:

> The provisions of [the UCCJA] relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.[387]

No cases under this provision were decided in the 1985 Survey period. International custody enforcement may soon be supplemented by the Hague Convention on the Civil Aspects of International Child Abduction, completed in 1980, approved by the United States' Secretary of State Advisory Committee, and submitted to the Senate where it awaits ratification. Canada, France, Switzerland, and Portugal have ratified the proposal.

B. Preclusion by Res Judicata

The United States Constitution requires that Texas courts give full faith and credit to the judicial proceedings of sister states.[388] In addition to providing the basis for the enforcement of sister-state judgments in Texas, full faith and credit also precludes legal issues or entire claims through res judicata[389] in subsequent Texas litigation in the same manner that Texas courts would treat prior Texas judgments. Under stricter standards, preclusion is extended to foreign country judgments according to the longstanding policy

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380. 28 U.S.C. § 1738 (1982).

381. 697 S.W.2d 836 (Tex. App.—Austin 1985, no writ). *See supra* notes 116-20 and accompanying text.

382. 697 S.W.2d at 841.

383. 678 S.W.2d 194 (Tex. App.—Corpus Christi 1984, no writ). *See supra* note 121 and accompanying text.

384. 678 S.W.2d at 196.

385. 682 S.W.2d 718 (Tex. App.—Fort Worth 1985, writ dism'd). *See supra* notes 132-34 and accompanying text.

386. 682 S.W.2d at 721.

387. TEX. FAM. CODE ANN. § 11.73 (Vernon Pam. Supp. 1986).

388. U.S. CONST. art. IV, § 1.

389. Res judicata includes claim preclusion (merger and bar) and issue preclusion (direct and collateral estoppel).

against repetitive litigation.[390]

The most interesting of this year's preclusion cases is *Martin v. United States Trust Co.*,[391] a twenty-four year old Texas lawsuit for the escheat of an 1887 trust certificate worth over $2 million. The variety of factual and legal issues are too lengthy to describe succinctly here, so this discussion will therefore focus on a brief recital of *Martin*'s conflict issue caused by an 1899 New York judgment purporting to establish title to the trust certificate. The Dallas Court of Appeals held that the 1899 New York judgment was entitled to full faith and credit in Texas, which might preclude, by collateral estoppel, relitigation of the certificate's ownership.[392] The court further held, however, that the 1899 judgment would be given no greater collateral estoppel effect in Texas than it would have in New York.[393] In New York, collateral estoppel requires a showing that (1) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the prior action, (2) the issue decided in the first action was identical to the issue in the pending action, (3) the parties actually litigated the issue, (4) the opposing party had a full and fair opportunity to litigate the merits of the issue, and (5) the issue was finally determined on the merits and was necessary, essential, and material to the outcome of the prior action.[394] The Dallas court found that although the parties were identical, the issues were not identical, the decision was not final, and the precluded issue was not a necessary component of the prior New York action.[395] Thus the 1899 New York decision as to the certificate's owner had no effect on the 1985 Texas decision.

In a simpler collateral estoppel illustration, *Fuji Photo Film Co. v. Shinohara Shoji Kabushiki Kaisha*,[396] the Fifth Circuit held that a prior California consent decree did not warrant collateral estoppel or res judicata effect in a subsequent Texas federal court action because the parties were not identical.[397] The action involved a trademark infringement action by the makers of Fuji photography products against the defendant manufacturer of printing presses. Fuji Photo Film Company and one of Shinohara's distributors approved the prior California consent decree. Since Shinohara was not a party to the California action, the court held that collateral estoppel or res judicata would apply only if Shinohara's distributor was in privity with, or

390. *See generally* SCOLES & HAY, *supra* note 198 at 916. The stricter Texas standards for recognizing foreign country money judgments are set out in the Uniform Foreign Country Money Judgments Recognition Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.002, .005, .006 (Vernon Pam. 1986). Although the UFCMJRA applies only to money judgments, its standards for recognition are probably appropriate to all foreign country judgments vis-a-vis their preclusion effect in Texas courts. For example, the UFCMJRA includes forum public policy as non-recognition grounds. According to the RESTATEMENT, *supra* note 154, at §§ 98, 117, forum public policy is grounds for non-recognition of all foreign country judgments, for enforcement or preclusion purposes.

391. 690 S.W.2d 300 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

392. *Id.* at 307.

393. *Id.* at 308.

394. *Id.*

395. *Id.*

396. 754 F.2d 591 (5th Cir. 1985).

397. *Id.* at 598-99.

was the virtual representative of Shinohara.[398] Although the Fifth Circuit doubted the trial court finding that the distributor was not Shinohara's virtual representative, it did not disturb that factual conclusion.[399]

Judgments from foreign countries may also have a precluding effect on Texas lawsuits, as illustrated in the dicta and dissent of *Gannon v. Payne*.[400] *Gannon* is a Texas sequel to Canadian litigation over proceeds from an oil and gas partnership between Canadian Gannon and Texan Payne. Payne had originally sued Gannon in Canada and prevailed on most claims in a 1979 ruling. In 1982 Payne again sued Gannon in Texas over the same dispute, seeking the damages denied in the Canadian court and additional damages not requested earlier. Gannon answered and counterclaimed in the Texas action, then filed a Canadian lawsuit seeking to thwart Texas jurisdiction.[401] Payne asked the Texas court to enjoin Gannon from pursuing the Canadian litigation, and the Texas trial court complied. Appealing the Texas injunction, Gannon argued that the 1979 Canadian judgment should, by res judicata, preclude Payne's current Texas litigation, and that the court should therefore deny the injunction against Gannon.

The Dallas court held that it could not consider the 1979 Canadian judgment in Payne's injunctive motion aginst Gannon because the application of res judicata is a decision on the merits of the Texas lawsuit, which is inappropriate when considering Payne's interlocutory injunctive relief.[402] The negative inference, of course, is that the Canadian judgment might be given res judicata effect once the Texas case is considered on the merits. The dissent foresaw the likelihood that the Canadian judgment would preclude Payne's legal claims against Gannon, and argued that the court should deny Payne injunctive relief because of the unlikelihood of his success on the merits of the Texas case.[403]

IV. CONCLUSION

Judicial jurisdiction is in a state of flux, with continual redefining of the constitutional aspects of personal jurisdiction. In dealing with the disparate jurisdictional theories and their chimerical components,[404] Texas courts raised compelling questions in 1985. Does a defendant's litigation convenience represent a jurisdictional factor or merely a nonjurisdictional venue

398. *Id.*

399. *Id.*

400. 695 S.W.2d 741 (Tex. App.—Dallas 1985, writ granted). *See supra* notes 155-64 and accompanying text for a fuller discussion of *Gannon*.

401. 695 S.W.2d at 743. The court of appeals decision did not explain how the Canadian court could divest Texas of jurisdiction.

402. *Id.* at 744.

403. *Id.* at 749 (Akin, J., dissenting).

404. A chimera is a mythical monster made of a lion's head, a goat's body, and a serpent's tail, all perfectly appropriate to our current standards for nonresident jurisdiction. A secondary meaning for chimera is "an organism, especially a plant, containing tissues from at least two genetically distinct parents," which is even more appropriate for the many distinct sources supplying current jurisdictional theory. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 234 (1969).

matter? Is fairness a synonym for minimum contacts, or does due process require a separate fairness test after a court has found minimum contacts?

In addition to these questions, 1985 reaffirmed the need to clarify the scope of general and specific jurisdiction. Is the world divided into general and specific jurisdiction? That is, are all cases either (1) based on the defendant's case-related contacts with the forum (specific jurisdiction), or (2) based on the defendant's general presence in the forum for lawsuits unrelated to the defendant's forum activities (general jurisdiction)? This seems to cover all instances of personal jurisdiction.[405] If so, where does stream of commerce jurisdiction fit in? Stream of commerce jurisdiction resembles specific jurisdiction in that it specifically relates to injuries caused by the defendant's product in the forum. But does specific jurisdiction require a defendant to have committed an affirmative act aimed at the forum? If it does, then stream of commerce jurisdiction less resembles specific jurisdiction, in that stream of commerce jurisdiction can exist when a defendant has merely turned his product over to a distributor with some foreseeability that it would enter the forum state. In this example, the defendant's only affirmative act is the manufacture of the product and its release to the distributor. These seem to be activities that ought to require the more thorough contacts, or presence, of general jurisdiction.

Questions about the interplay of stream of commerce jurisdiction with general/specific jurisdiction are only a few of the many problems posed by the current confusion in personal jurisdiction. This confusion will continue to produce uneven precedents and erode the predictability of exposure to distant litigation. We need a unified theory of personal jurisdiction. The simplicity of a *Pennoyer*-like model is unlikely in today's complex social and economic setting, but we can certainly improve upon the current morass of jurisdictional paradigms.

Unlike the uncertain components of judicial jurisdiction, the components of Texas choice of law are clearly spelled out in the most significant relationship test in section 6 of the Restatement (Second) of Conflict of Laws. The 1985 Survey indicates that some Texas courts are using the section 6 factors as solitary tests instead of the cumulative balancing factors they are meant to be. The courts should analyze each choice of law problem in light of all factors rather than picking the one factor that stands out or best fits the desired conclusion.

The recognition and enforcement of foreign judgments in Texas has been simplified by the uniform acts, now in place for two years. Possible problems arise, however, with the UEFJA's administrative recognition of sister-state judgments without a preenforcement hearing, resulting in due process problems where the local judgment debtor had no warning of the foreign judgment's existence. The UEFJA's failure to specify the debtor's time to request a stay of enforcement exacerbates this problem. Finally, this year's holding that the UFCMJRA requires a hearing for recognition pro-

405. Status jurisdiction is one exception. *See supra* notes 124-31 and accompanying text. *See also* RESTATEMENT, *supra* note 154, at §§ 69-79.

tects the local judgment debtor from surprise enforcement of foreign country money judgments.