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Conflicts of Law

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CONFLICTS OF LAW

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CONFLICTS of law occur when foreign elements appear in a lawsuit. Nonresident litigants, incidents in sister states or foreign countries, and lawsuits from other jurisdictions represent foreign elements that may create problems in judicial jurisdiction, choice of law, or recognition of foreign judgments, respectively. This Article reviews Texas conflicts of law during the Survey period from late 1987 through 1988. The survey includes cases from Texas state and federal courts. Excluded are cases involving federal state conflicts, criminal law, intrastate matters such as subject matter jurisdiction and venue, and conflicts in time, such as the applicability of prior or subsequent law within a state.

During the Survey period, the Texas Supreme Court effected no significant changes or additions to jurisdictional jurisprudence, but the Northern District of Texas did craft a rule for personal jurisdiction in federal question cases when nationwide service of process is authorized. Cases decided during the Survey period also exhibited both the use of rule 108 as a substitute for the Texas long-arm statute and the difficulty in imputing jurisdictional contacts between parent and subsidiary corporations. Choice of law highlights include a controversial rejection of a Florida noncompetition agreement, as well as the United States Supreme Court's sequel to a 1985 opinion on legislative jurisdiction. Foreign judgments offered three noteworthy cases but no developments.

I. JUDICIAL JURISDICTION[1]

To assert jurisdiction over a nonresident defendant, a plaintiff must ensure that the defendant is amenable to the jurisdiction of the court and that jurisdiction has been properly invoked through valid service of process on the

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1. Judicial jurisdiction is distinct from legislative jurisdiction in that the latter concerns "whether the *state*, through its courts or otherwise, has power to act upon the matter in issue by using the state's rules of law to regulate or control it" while the former concerns the power of a court to act "against the particular person (usually the defendant) against whom or thing against which, the court is asked to act." R. LEFLAR, AMERICAN CONFLICTS LAW § 3, at 4 (3d ed. 1977) (emphasis in original).

defendant. In diversity cases, amenability necessitates two inquiries: (1) Is the defendant amenable to service of process under a long-arm statute or rule of the forum state? (2) Is the assertion of jurisdiction consistent with due process?[2] In federal question cases, the state long-arm statute need not be used if nationwide service is authorized, and the due process inquiry is grounded in the fifth amendment. During the Survey period, most activity in the area of judicial jurisdiction occurred in the federal courts. With one exception, each case addresses both amenability and service of process. As a result, this Article does not discuss the two concepts separately.

A. Texas Federal Courts

In *Entek Corporation v. Southwest Pipe & Supply Co.*[3] the court addressed the minimum contacts standard to be applied in a federal question case when a statute authorizes nationwide service of process.[4] Summarizing the factual allegations in the plaintiffs' complaint, the court noted that the plaintiff Turner, sole owner and president of Entek Corporation, also a plaintiff, invented Leaky Pipe, an irrigation pipe, and a process to manufacture the pipe. Entek owned three patents covering Leaky Pipe and the manufacturing process.

Entek entered into a distribution agreement with defendant Chipman, which granted Chipman the right to distribute Leaky Pipe in Florida. Chipman and defendant Mason visited the Leaky Pipe plant in Texas, where both Chipman and Mason signed confidentiality agreements, promising not to misappropriate any information they would receive. After Chipman and Mason received technical secrets on the manufacturing process, however, they used the information to apply for patents.

Defendant Chipman then formed Aquapore Corporation, also named as a defendant, which began to manufacture and market a porous pipe using the secrets obtained from plaintiffs. Both Chipman and Mason received a loan from Dasurat Enterprises PTE LTD, a defendant. Aquapore contracted with the defendant Powell Duffryn Public Limited Co. (PDPLC), among others, to market the pipe worldwide. Defendant Keysor manufactured the pipe.

In plaintiffs' suit alleging, inter alia, violations of the antitrust laws, plaintiffs served all defendants except PDPLC and Dasurat pursuant to the Texas long-arm statute. Plaintiffs personally served PDPLC and Dasurat under

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2. The two inquiries essentially collapse into one because the Texas Supreme Court has interpreted the Texas long-arm statute to reach to the very limits of due process. U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978). The United States Supreme Court divides the constitutional inquiry into two parts: whether the non-resident defendant purposefully established minimum contacts with the forum state and whether the exercise of jurisdiction results in fair play and substantial justice. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-09, 113 (1987).

3. 683 F. Supp. 1092 (N.D. Tex. 1988).

4. In a federal question case, fifth amendment due process controls, but the fourteenth amendment standards of International Shoe v. Washington, 326 U.S. 310 (1945), may be used. 683 F. Supp. at 1096 n.5.

rule 4(i) of the Federal Rules of Civil Procedure.[5] Defendants contested personal jurisdiction; the court thus addressed the standard for asserting personal jurisdiction over a defendant in a federal question case.

Summarizing the holding of *Point Landing, Inc. v. Omni Capital International, Ltd.*,[6] the court observed that when a federal question case is based upon a federal statute that is silent as to service of process, rule 4(e) adopts the state provisions for both manner and amenability of service.[7] As a result, when nationwide service is not authorized, a federal district court has no personal jurisdiction over a defendant in a federal question case, unless he can be reached by the long-arm statute of the forum statute. The court distinguished *Point Landing*[8] and noted that the statute relevant to the case *sub judice*, United States Code title 15, Section 22, authorized nationwide service as to the corporate defendants.[9] Reading *Point Landing* in conjunction with *Terry v. Raymond International, Inc.*,[10] the *Entek* court held: "In a federal question case in which nationwide service is statutorily authorized, minimum contacts with the United States will satisfy the due process prong of the personal jurisdiction test."[11] Thus, the plaintiffs in *Entek* needed to establish only that the corporate defendants had minimum contacts with the

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5. FED. R. CIV. P. 4(i) provides alternative provisions for service of process in a foreign country.

6. 795 F.2d 415 (5th Cir. 1986) (per curiam) (en banc), *aff'd sub. nom.* Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 108 S. Ct. 404, 98 L.Ed. 2d 415 (1987).

7. The court observed that not only is the case law discussing personal jurisdiction and nationwide service of process unclear, but also that the very possibility of nationwide personal jurisdiction has been questioned. Bamford v. Hobbs, 569 F. Supp. 160, 165, 168 (W.D. Tex. 1983).

8. 795 F.2d 415.

9. 15 U.S.C. § 22 (1973) provides:

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

10. 658 F.2d 398 (5th Cir. 1981), *cert. denied*, 456 U.S. 28 (1982). The court in *Terry* held that "[t]he contours of amenability [to jurisdiction] in non-diversity cases are more fluid" than the contours of amenability to jurisdiction in diversity cases. *Id.* at 401.

11. 683 F. Supp. at 1100. The court noted that the distinction between federal question cases in which nationwide service of process is statutorily authorized and those in which the statute is silent as to service is reflected in rule 4(e). *Id.* at 1100-01.

Rule 4(e) provides:

> Summons: Service Upon Party Not Inhabitant of or Found Within State.
> Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the *manner of service*, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

United States.[12]

Finding a dearth of cases on the meaning of minimum contacts with the United States, the court rejected the analysis in *Bamford v. Hobbs*,[13] which held that a court could not exercise nationwide jurisdiction over a defendant even though the law permitted nationwide service unless a defendant had adequate nationwide contacts, as opposed to regional contacts.[14] The *Entek* court rejected the *Bamford* modified nationwide jurisdiction analysis for two reasons: (1) it is inconsistent with the Supreme Court's "contacts plus" analysis of personal jurisdiction,[15] and (2) it leaves businesses wishing to avoid nationwide jurisdiction without guidance as to how many contacts are too many contacts with too many states.[16]

Without guidance itself as to the meaning of minimum contacts with the United States, the *Entek* court used the minimum contacts analysis grounded in *Burger King*[17] and applied it to the entire United States, rather than to an individual state.[18] In so doing, the court accepted the plaintiffs' allegation that PDPLC[19] had minimum contacts with the United States as true because it was uncontroverted by PDPLC, who had submitted evidence only that it lacked contacts with Texas.[20] The court further determined that the exercise of jurisdiction over PDPLC would comport with traditional notions of fair play and substantial justice.[21] With regard to PDUSA, Aquapore, Moisture Systems and Keysor,[22] the court simply noted that

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FED. R. CIV. P. 4(e) (emphasis added).

The court noted that the case *sub judice* falls under the first sentence of rule 4(e). 683 F. Supp. at 1101 n.16.

12. The plaintiffs, however, still had the burden of establishing that each individual defendant had minimum contacts with Texas. Relying primarily upon Burger King v. Rudzewicz, 471 U.S. 462 (1985), the court determined that defendants Chipman and Mason had minimum contacts with Texas through having visited the Entek plant in Texas, having signed a confidentiality agreement with the plaintiffs in Texas and having made telephone calls to plaintiff Turner in Texas. 683 F. Supp. at 1098. The court determined that both the forum state's and the judicial system's interest would be best served by exercising personal jurisdiction over both Mason and Chipman. *Id.*

13. 569 F. Supp. 160 (S.D. Tex. 1983).

14. 683 F. Supp. at 1102. The *Bamford* court observed that the rejection of sovereignty as a basis for personal jurisdiction in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982), meant that there was no compelling reason for a court to observe sovereign boundaries and to equate fair play and substantial justice with minimum contacts with the United States. 569 F. Supp. at 166

15. "Contacts plus" refers to the due process requirement of minimum contacts, plus the requirement that the maintenance of the suit comport with traditional notions of fair play and substantial justice. 683 F. Supp. at 1102 n.18.

16. *Id.* at 1102. Given the decision in *Entek*, Texas practitioners are now faced with the conflict between *Bamford* in the Southern District of Texas and *Entek* in the Northern District of Texas.

17. 471 U.S. 462 (1984).

18. 683 F. Supp. at 1102.

19. PDPLC was an English corporation. 683 F. Supp. at 1102.

20. *Id.* The court observed that all of the corporate defendants had briefed the "irrelevant issue of whether they [had] minimum contacts with Texas." *Id.* at 1099.

21. *Id.*

22. PDUSA was a Delaware corporation with its principal place of business in Connecticut. 683 F. Supp. at 1104. Aquapore was a Florida corporation with its principal place of business in Florida. *Id.* at 1105. Moisture Systems was an Illinois corporation with its princi-

these companies were all American corporations with the requisite minimum contacts with the United States.[23] With regard to Dasurat, a Singapore corporation, the court determined that personal jurisdiction did not exist.[24] Dasurat's only act in the United States involved the recording by Dasurat of defendant Mason's assignment of his patent application to Dasurat in the United States Patent & Trademark office. This single act did not satisfy the minimum contacts requirement.[25]

Turning to the service of process issue, the court noted that even in a federal question case in which nationwide service is authorized by statute, if plaintiffs choose to serve process by the Texas long-arm statute, they must comply with that statute's requirements.[26] Corporate defendants in an antitrust suit need not be served pursuant to the forum state's long-arm statute, but if they are so served, then the long-arm statute's requirements must be satisfied, including the requirement of minimum contacts with the state.[27] Service thus became the key to the assertion of jurisdiction in *Entek*.

The court thereafter determined that PDPLC had been properly served pursuant to rule 4(i), rather than pursuant to the Texas long-arm.[28] Of the remaining defendants served pursuant to the Texas long-arm, PDUSA and Keysor did not have minimum contacts with Texas. PDUSA was strictly a Delaware holding company that did not offer any goods or services to the public and had no contacts with any Texas residents. The court rejected the parent/subsidiary argument that PDUSA was an alter ego of Southwest Pipe & Supply Co., that Southwest was an alter ego of National, a Texas corporation, and that minimum contacts with Texas were thereby established.[29] The court, citing *Hargrave v. Fibreboard Corp.*,[30] observed that only a close relationship between a parent and a subsidiary justifies a finding that the parent does business in a jurisdiction through the local activities of its subsidiaries.[31] The court found that Keysor had no minimum contacts with Texas because it sold products FOB at its manufacturing facility in California and not directly to Texas merchants.[32] The court found, however, that Aquapore and Moisture Systems did have minimum contacts with Texas insofar as both sold products to merchants in Texas out of which sales the plaintiffs' claims arose.[33]

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pal place of business in Illinois. *Id.* Keysor was a California corporation with its principal place of business in California. *Id.*

23. *Id.* at 1103.

24. *Id.*

25. *Id.*

26. *Id.* 15 U.S.C. § 22 (1973), which authorizes nationwide service, does not specify the manner of service. A plaintiff must then turn to FED. R. CIV. P. 4, which provides alternative methods, one of which is service pursuant to the state long-arm statute. Plaintiffs in *Entek* selected this method. 683 F. Supp. at 1103 n.23.

27. 683 F. Supp. at 1104.

28. *Id.*, *see supra* note 5.

29. Both Southwest and National had withdrawn their motions to dismiss for lack of personal jurisdiction. 683 F. Supp. at 1096 n.1.

30. 710 F.2d 1154 (5th Cir. at 1983).

31. 683 F. Supp. at 1104-05.

32. *Id.* at 1106.

33. *Id.* at 1105-06.

The *Entek* case emphasizes the need for a plaintiff bringing a federal question suit to select the manner of service under rule 4 carefully. According to the *Entek* court, relying on rule 4(e) and a state long-arm statute in a case involving statutorily authorized nationwide service imposes a more stringent minimum contacts requirement than if a plaintiff relies upon the other alternatives available in rule 4(d) or rule 4(i).[34]

In *Deininger v. Deininger*[35] the court, in a diversity suit, addressed the use of rule 108 of the Texas Rules of Civil Procedure as an alternative method of service to the Texas long-arm statute.[36] The plaintiff, Eleanor Deininger, filed suit seeking a declaratory judgment that certain orders entered seventeen years earlier by the circuit court of DuPage County in Illinois be declared void because plaintiff was denied due process upon their entry. The plaintiff further claimed that the defendants—her husband, John Deininger, and his attorney, Paul McLennon—defrauded her in connection with the issuance of the orders. The plaintiff filed the complaint *pro se*. Both defendants contested personal jurisdiction.

Defendants argued that plaintiff failed to allege that the defendants had conducted business in Texas or that the alleged fraud providing the basis of plaintiff's claim had occurred in whole on in part in Texas. Thus, plaintiff had not satisfied the requirements of the Texas long-arm statute. The court observed that the defendants' argument would be correct if it were not for the existence of rule 108 of the Texas Rules of Civil Procedure, which provides an "alternative method of service" allowing a plaintiff to avoid the "doing business" requirements of the Texas long-arm statute.[37] The court emphasized, however, that rule 108, like the Texas long-arm statute, must be construed in the context of the due process requirements of the United States Constitution.[38] When analyzing the due process requirements for personal jurisdiction, the court determined that the plaintiff had failed to meet her burden of demonstrating the propriety of the exercise of either specific or general jurisdiction.[39]

Although John Deininger's employer, Signode Corporation, had some contact with Texas, the defendant himself had none. His contacts were solely those of his corporate employer, all unrelated to the cause of action

34. *See* FED. R. CIV. P. 4.

35. 677 F. Supp. 486 (N.D. Tex. 1988).

36. TEX. R. CIV. P. 108.

37. 677 F. Supp. at 489. The court, conceding that plaintiff did not allege that service was proper under rule 108, determined that it was not "an unprecedented act of judicial activism" to conclude that plaintiff's service was proper under rule 108. *Id.* at 490.

38. *Id.* The Texas Supreme Court also addressed rule 108 during this survey period, pointing out that while rule 108 may allow a plaintiff some flexibility in alleging jurisdiction over a defendant, the jurisdictional allegations must be sufficient under the Constitution of the United States. *See* Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491 (Tex. 1988).

39. 677 F. Supp. at 493-94. The United States Supreme Court first used the term "specific jurisdiction" in Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984), to refer to the exercise of "jurisdiction over a defendant in a suit arising out of or related to the defendants' contacts with the forum." *Id.* at 414 n.8. General jurisdiction exists when a state exercises jurisdiction over a defendant, and the suit does not arise out of or is not related to the defendants' contacts with the forum. *Id.* at 414 n.9.

based on the issuance of the Illinois court orders. Moreover, Paul McLennon, an Illinois attorney who had never practiced law in Texas, done business in Texas or, indeed, ever been in Texas, could not be subject to the court's jurisdiction. *Deininger*, therefore, demonstrates that while rule 108 provides a valid procedural alternative to the Texas long-arm statute, it does not, by itself, confer jurisdiction over a non-resident defendant.[40]

In *Smith v. Dainichi Kinzoku Kogyo, Ltd.*[41] the court also considered rule 108 of the Texas Rules of Civil Procedure[42], as well as the stream of commerce theory addressed by both the United States Supreme Court and the Fifth Circuit during the last Survey period.[43] Edwin Smith was injured when he was using an engine lathe manufactured in Japan by defendant Dainichi Kinzoku Kogyo, Ltd. ("Dainichi-Japan"). A Japanese export company ("Gomiya-Japan") purchased the lathe in Japan and sold it to their American subsidiary, Gomiya U.S.A., to be imported into the United States. Gomiya U.S.A. sold the lathe to an American machine tool retailer, Machinery Sales Co., Inc., a California corporation that did business exclusively in California, Arizona and Nevada. Finally, Machinery Sales Co., Inc. sold the lathe to Martin-Decker, the plaintiff's employer in California, which thereafter transported the lathe to its machine shop in Cedar Park, Texas where plaintiff Smith's injury occurred.

The defendants Dainichi-Japan, Dainichi-USA and Machinery Sales Co. moved to dismiss the complaint for lack of personal jurisdiction. The latter two defendants argued that service of process was insufficient because the plaintiff did not serve the Texas Secretary of State as defendants' agent for service of process as required by rule 4(e) of the Federal Rules of Civil Procedure[44] and the Texas long-arm statute.[45] Instead, the plaintiff mailed service to the defendants pursuant to rule 108 of the Texas Rules of Civil Procedure. The court observed that section 17.044(a) of the Texas Civil Practices and Remedies Code[46] providing for service on the Secretary of State is not a mandatory method of service that supplants rule 108.[47] Rather, section 17.044(a) provides an alternative to the method of service allowed under Rule 108, with which plaintiff complied for service upon Dainichi-U.S. and Machinery Sales Co.[48] With regard to Dainichi-Japan, the court determined that service by registered mail sufficiently complied with article 10(a) of the Haag Convention.[49]

Having deemed the service of process proper, the court turned to the con-

40. 677 F. Supp. at 490.
41. 680 F. Supp. 847 (W.D. Tex. 1988)..
42. TEX. R. CIV. P. 108.
43. See Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, (1987); Bearry v. Beech Aircraft Corporation, 818 F.2d 370 (5th Cir. 1987).
44. FED. R. CIV. P. 4(e).
45. TEX. CIV. PRAC. & REM CODE ANN. § 17.045 (Vernon 1986).
46. TEX. CIV. PRAC. & REM. CODE ANN. § 17.044(a) (Vernon 1986).
47. 680 F. Supp. at 849.
48. *Id.*
49. *Id.* at 851.

stitutional inquiry[50] and the stream of commerce analysis. "The constitutional inquiry . . . consists of two elements: (1) the non-resident must have some minimum contact with the forum which results from an affirmative act on the part of the non-resident and (2) it must be fair and reasonable to require the nonresident to defend the suit in the forum state."[51] Noting the jurisdictional facts of the case, the court determined that specific jurisdiction could not be exercised over Dainichi-Japan unless the court found that the lathe was put into the stream of commerce with an expectation of purchase or use by Texans.[52] As recounted above, defendant Dainichi-Japan sold lathes to a Japanese distributor in Japan, which then transported the lathes to the United States and distributed the lathes to independent regional retail distributors with limited sales areas. A regional retailer that served only the states of California, Arizona and Nevada sold the lathe in question. There was nothing to show that Dainichi-Japan expected the lathe to be purchased or used by Texas consumers.[53] As a result, the court determined that specific jurisdiction was lacking.[54] Plaintiff argued that the court should exercise general jurisdiction because Dainichi-Japan advertised its products in Texas. The court determined that those facts alone would not support general jurisdiction.[55] Observing that a defendant must purposefully invoke the benefits and protections of a forum state before constructively consenting to being sued there, the court emphasized that the lathe came into Texas solely because of the unilateral act of Martin-Decker, Mr. Smith's employer.[56] Dainichi-Japan had no part in bringing the lathe that injured Mr. Smith into the Texas and had no reason to expect that the lathe would be moved to Texas.[57]

Plaintiff further argued that Dainichi-U.S. was the alter ego of Dainichi-Japan and that the court should pierce the corporate veil to impute the contacts of Dainichi-U.S. with Texas to its parent company. The court observed that in order to disregard the corporate fiction and hold a parent liable for the acts of the subsidiary, "the plaintiff has the burden of proving that the corporate structure is being used as a sham to perpetuate a fraud, to avoid liability, to avoid the effect of a statute or other exceptional circumstances which would warrant an exception to the general rule of recognizing the corporate fiction."[58] Plaintiff produced no evidence to controvert the defendants' evidence that each corporation, Dainichi-U.S. and Dainichi-Japan,

50. The court noted that the Texas long-arm statute collapses into and becomes a part of the constitutional due process inquiry. *See supra* note 2. Accordingly, the inquiry is whether the exercise of jurisdiction over the defendants comports with the constitutional requirements of due process. 680 F. Supp. at 851. Dainichi-U.S. did not contest jurisdiction on due process grounds.

51. *Id.*, (citing Burger King Co. v. Rudzewicz, 471 U.S. 462, 474 (1985)).

52. 680 F. Supp. at 852 (citing Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987)).

53. *Id.*

54. *Id.*

55. *Id.* at 853.

56. *Id.*

57. *Id.*

58. *Id.* at 854.

was a separate and distinct corporate entity with its own board of directors and its own financing. As a result, the court refused to pierce the corporate veil and impute the contacts of Dainichi-U.S. to Dainichi-Japan.[59]

With regard to the issue of personal jurisdiction over Machinery Sales Co., the facts revealed that it was a California corporation that sold machine tools, including engine lathes manufactured by Dainichi-Japan in California, Arizona and Nevada, was not registered to do business in Texas, maintained no office in Texas and had no officer, agent or employee in Texas. The only tenuous connection between Machinery Sales Co. and Texas was that Machinery Sales sold the lathe that injured Mr. Smith to Martin-Decker in California, and Martin-Decker removed it to Texas. As a result, it could not be said that Machinery Sales Co. had reasonably anticipated being haled into court in Texas; the court, therefore, lacked personal jurisdiction over that defendant as well.[60] The *Dainichi* court, having determined that neither Dainichi-Japan nor Machinery Sales Co. had the expectation that the lathe would reach Texas, did not face the issue left open by the Supreme Court last year in *Asahi*: is mere awareness by a foreign defendant that its goods will reach a state, without direct activity in the forum by that defendant, sufficient for the assertion of jurisdiction?[61]

InterFirst Bank Clifton v. Fernandez[62] addressed issues of both judicial jurisdiction and choice of law. In its decision related to judicial jurisdiction, the court reviewed the following jurisdictional facts. The defendant Fernandez, a Louisiana businessman, arranged for InterFirst Bank Clifton to finance the purchase of an aircraft. As part of the purchase, Fernandez signed sale and loan documents including a loan commitment agreement, a $550,000.00 promissory note and a security agreement. Unable to make payments on the note, Fernandez delivered the airplane to a broker in Pennsylvania to attempt a sale. When that attempt failed, InterFirst contacted Fernandez and informed him of an interested buyer in Texas. Fernandez thus agreed to return the plane to Texas. Thereafter, Interfirst accelerated the note and made demand for full payment. Fernandez received and signed a letter from InterFirst in which he consented to Texas foreclosure procedures and waived his rights under Louisiana law.[63] Approximately two years later, InterFirst sold the plane in a private foreclosure sale for less than half the price for which Fernandez purchased it in 1981.

When InterFirst filed suit in state district court to recover the deficiency, Fernandez removed the suit to federal court and filed a motion to dismiss for lack of personal jurisdiction. The federal district court denied the motion.[64]

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59. *Id.* at 854-55.

60. *Id.* at 854.

61. Cf. Keen v. Ashot Ashkelon, 31 Tex. Sup. Ct. J. 209 (1987) (as opposed to "mere awareness" that a product may enter a state, this court found a "reasonable expectation" that a product would enter the state to be sufficient).

62. 844 F.2d 279 (5th Cir. 1988).

63. *See infra* notes 181-190 and accompanying text.

64. The letter signed by Fernandez consented to sale under Texas foreclosure procedures and agreed to liability for any deficiency between the sale price and the amount of the note. 844 F.2d at 283-84.

On appeal, the Fifth Circuit affirmed the district court's decision.[65] The court observed that the loan agreement between Fernandez and InterFirst combined with other contacts showed a purposeful availment of the laws of Texas.[66] The court further observed that Fernandez called to Texas to purchase the plane; he voluntarily agreed to finance the plane through a Texas bank; he signed a loan agreement containing a Texas choice of law clause; he later agreed to return the plane to Texas for sale; and most significantly, he signed a letter consenting to sale under Texas foreclosure procedures and agreeing to liability for any deficiency between the sale price and the amount of the note.[67]

Further, the court determined that the assertion of jurisdiction comported with fair play and substantial justice.[68] Noting that a defendant must present a compelling case that jurisdiction is unreasonable, the court considered the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in maintaining convenient and effective relief, the interstate judidical system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental substantive social policies.[69] Considering these factors, the court noted that the burden on Fernandez to defend the action in Texas could be greater than the burden on InterFirst to bring the suit in Louisiana, but Fernandez made no showing of evidence that would be available in Louisiana but unavailable in Texas.[70] Moreover, he was only asked to travel to a neighboring state.[71] Regarding the interest of the forum state, the court noted that Texas has a legitimate concern in carrying out its own laws and protecting its own creditors.[72] In contrast to *Asahi*, the plaintiff in *Fernandez* was a Texas resident seeking protection as the creditor under the foreclosure laws of Texas.[73] The court further found, without analysis, that the exercise of jurisdiction by a Texas court was not inconsistent with Louisiana's interest.[74]

In *Southmark Corporation v. Life Investors, Inc.*[75] the court considered the application of the "effects" test of *Calder v. Jones*[76] and determined that it did not apply to the facts in *Southmark*.[77] Life, an insurance holding company organized and existing under the laws of Iowa, together with George

65. *Id.* at 282.
66. *Id.*
67. *Id.* at 284. The court emphasized that a loan agreement combined with a Texas choice of law provision does not necessarily produce the minimum contacts necessary for specific jurisdiction. *Id.* at 283. The court however, found conclusive the letter agreeing to a foreclosure sale and deficiency liability under Texas law to be conclusive. *Id.* at 284.
68. *Id.* at 283.
69. *Id.* at 284-85.
70. *Id.* at 284, (citing *Burger King*, 471 U.S. 462, 477 (1985)).
71. *Id.* at 285.
72. *Id.*
73. *Id.*
74. *Id.* at 287.
75. 851 F.2d 763 (5th Cir. 1988).
76. 465 U.S. 783 (1984). The Court held jurisdiction proper in California based on the "effects" of petitioners' Florida conduct in California. *Id.* at 789.
77. 851 F.2d at 772.

Olmsted, owned a controlling share of stock in International Bank (IB), an Arizona corporation. Olmsted and Life entered into a memorandum of understanding in which Life agreed that, if it wished to sell its IB stock, it would first offer the stock to Olmsted who had thirty days right of refusal. In early 1985 Southmark began negotiating with Life for the sale of Life's stock to Southmark. In May 1985 Life offered its shares to Olmstead who, after initially accepting, refused to purchase them. Southmark later claimed that after Olmstead's refusal, Life and Southmark reached a meeting of the minds and formed a contract of sale; Life, however, denied such a contract. Southmark brought suit against Life for breaching the alleged agreement to sell the stock to Southmark. Southmark joined USLICO, the corporation to which Life had eventually agreed to sell its shares of stock in IB corporation, claiming tortious interference. USLICO moved to dismiss the complaint based on a lack of personal jurisdiction. The district court determined that USLICO's contacts with Texas were not sufficient to establish *in personam* jurisdiction and granted the motion to dismiss.[78]

On appeal to the Fifth Circuit, Southmark relied primarily on *Calder v. Jones*,[79] contending that the district court had specific jurisdiction over USLICO because of prima facie evidence that USLICO committed an international tort against Southmark in Texas with knowledge that Southmark was a Texas resident.[80] The Fifth Circuit found Southmark's reliance on *Calder* misplaced.[81] The Supreme Court in *Calder* determined that an alleged tortfeasor's intentional actions which are expressly aimed at the forum state, with knowledge that a resident of that state will feel the brunt of any injury, may subject the tortfeasor to personal jurisdiction there.[82] In contrast, USLICO had not expressly aimed its allegedly tortious activities at Texas, nor was there evidence of USLICO's knowledge that Southmark would feel any injury there.[83] The oral agreement with which USLICO allegedly interfered was apparently negotiated and made in Atlanta and/or New York; there was no evidence that the agreement was made or to be performed in Texas. The stock that USLICO purchased was not the stock of a Texas corporation nor did USLICO do any business in Texas. USLICO was a Virginia company domiciled in Washington, D.C. Nothing in the record indicated that USLICO expressly aimed its allegedly tortious activities at Texas. Texas was not the focal point of USLICO's alleged tortious conduct. The court thus determined that specific jurisdiction was lacking.[84]

Nor were there sufficient continuous contacts to demonstrate general jurisdiction. The fact that the subsidiaries of USLICO might be subject to the jurisdiction of a Texas court did not affect USLICO.[85] Indeed, the court

78. *Id.* at 766.
79. 465 U.S. 783 (1984).
80. 851 F.2d at 772.
81. *Id.*
82. 465 U.S. at 789-90.
83. 851 F.2d at 773.
84. *Id.*
85. *Id.*

observed that USLICO's subsidiaries kept separate books, filed separate income tax returns, were managed by separate boards of directors that had overlapping but not identical memberships, and were centrally managed by the officers of the largest subsidiary, not the officers of USLICO.[86] As a result, the court did not have jurisdiction over USLICO.[87]

In *Bludworth Von Shipyard v. M.V. Caribbean Wind*[88] the Fifth Circuit emphasized the necessity of strict compliance with the requirements of the Texas long-arm statute when service on the secretary of state is made.[89] Finding service improper, the court reversed and remanded the case.[90] In the trial court, the plaintiff alleged that Westerstrom, who was a resident of Florida and did not have an office, place of business or agent for service in Texas, had entered into a contract with the plaintiffs that was to be performed in Texas; the suit arose out of this contract.

Pursuant to rule 4(c)(2)C)(i) of the Federal Rules of Civil Procedure,[91] plaintiff attempted to serve defendants in accordance with the Texas long-arm statute, which allows service upon the secretary of state. The plaintiff served a copy of the citation and petition on the secretary of state, who forwarded copies by certified mail, return receipt requested, to the address alleged in the complaint. The citations, however, were each returned unclaimed. Plaintiff again served the secretary of the state and provided a different address for the defendants; the post office, again, returned the citations unopened. The district court entered a default judgment against the defendants in September, 1984, nine months after the return of the citations.[92]

In April 1986 plaintiff noticed a deposition of Westerstrom in aid of execution of the judgment. At that time Westerstrom filed both an answer and a motion to set aside the default judgment. The answer denied that Westerstrom had entered into a contract with the plaintiff and alleged that any acts which Westerstrom did were as an agent for a disclosed principal. In the motion to set aside the default judgment, Westerstrom asserted that the plaintiff had not served him and that the court therefore lacked personal jurisdiction. The Fifth Circuit considered the issue of personal jurisdiction properly raised, noting that the defendant concurrently filed the answer and the motion to set aside the default judgment. Furthermore, the plaintiff had not raised the issue of possible waiver pursuant to rule 12(h) of the Federal Rules of Civil Procedure.[93] The court then held that the district court erred in denying Westerstrom's motion to set aside the default judgment for lack of personal jurisdiction, noting that rule 60(b)(4) authorized Westerstrom to

86. *Id.*
87. *Id.* at 774.
88. 841 F.2d 646 (5th Cir. 1988) (per curiam).
89. *Id.* at 650.
90. *Id.* at 647.
91. FED. R. CIV. P. 4(c)(2)(C)(i) states that a summons and complaint may be served upon certain defendants pursuant to the law of the state in which the district court is held.
92. 841 F.2d at 648.
93. 841 F.2d at 648. FED. R. CIV. P. 12(h) pertains to the waiver or preservation of certain defenses.

move for relief of judgment based upon the fact that the judgment was void.[94]

The Fifth Circuit determined that an out-of-date address given to the secretary of state did not meet the requirement of strict compliance with the Texas long-arm statute authorizing service on the secretary of state, and therefore, plaintiff did not comply with section 5 of article 2031(b), now codified in section 17.045(a) of the Civil Practices & Remedies Code.[95] The court further noted only two exceptions to the rule of strict construction requiring a current address: the first exception is when a company breaches the duty to maintain a registered office, and the second exception applies in situations where the defendant attempts to evade service.[96] In sum, the court held that because the plaintiff did not meet the strict requirement of providing a current address, with the result that service of process never reached the defendant, the district court did not have personal jurisdiction over the defendant and the default judgment was void.[97]

Considering Westerstrom's amenability to service, the court noted that the Texas Court of Appeals had recently held that a non-resident is not subject to personal jurisdiction unless he personally enters into a contract with a Texas resident.[98] Citing *Ross F. Meriwether & Associates, Inc. v. Aulbach*,[99] the Fifth Circuit observed that whenever the non-resident acts as an agent on behalf of a principal, only the principal does business in the state.[100] The Fifth Circuit commented, however, that it need not resolve whether the *Aulbach* decision is consistent with the general rule that the Texas long-arm statute extends to the limits of due process.[101] The Fifth Circuit noted that the district court may well have to determine whether Westerstrom acted solely as an agent once the plaintiffs properly served him.[102]

B. Texas State Courts

In *Runnels v. Firestone*[103] the court, in the context of a jurisdictional challenge, addressed the merits of the plaintiff's contract and tort claims. Nancy Morgan Runnels filed suit against her former husband, David Morgan Firestone, alleging breach of an agreement to pay their son's medical expenses

94. 841 F.2d at 650. Whenever a district court lacks jurisdiction over the defendant because of lack of service of process, the judgment is void and must be set aside regardless of whether the movant has a meritorious defense. *Id.* at 649. *See also* Peralta v. Heights Medical Center, 108 S. Ct. 896, 99 L. Ed.2d 75 (1988) (appellant was entitled to have judgment set aside on ground that he did not receive proper service of process even though he did not have meritorious defense).

95. 841 F.2d at 650. The court observed that both article 2031(b) and the newly codified TEX. CIV. PRAC. & REM. CODE ANN. § 17.045(a) (Vernon 1986) would "apparently require a current address". 841 F.2d at 650 n.9.

96. *Id.* at 650 n.8.

97. *Id.* at 650.

98. *Id.* at 651.

99. 686 S.W.2d 730 (Tex. App.—San Antonio 1985, no writ).

100. 841 F.2d at 651.

101. *Id.*

102. *Id.*

103. 746 S.W.2d 845 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

and breach of a statutory duty regarding the same omissions. She contended that her husband had done business in Texas within the meaning of section 17.042(1) of the Texas Civil Practice & Remedies Code by contracting with her to share the burden of David's medical expenses.[104]

Mr. Firestone had never lived in Texas. He moved to Canada in 1966 and had been a Canadian citizen since 1971. The son, David, was a Texas resident, who at the time of the special appearance hearing resided in Maryland at a treatment center for mental disorders. Firestone filed a special appearance.[105]

The court observed that in order to determine whether long-arm jurisdiction existed pursuant to section 17.042(1), it was necessary for the trial court to resolve the threshold fact issue of whether the parties had entered into a contract.[106] The appellate court found that the trial court had impliedly determined that Firestone had never agreed to reimburse Runnels indefinitely for one-half of David's medical expenses.[107] The appellate court further found the implied findings well supported in the record.[108] The court emphasized that in a hearing on a special appearance motion a trial court should not reach the merits of the case.[109] In actions brought pursuant to section 17.042, however, the existence of a contract is the purposeful act or fact on which jurisdiction must be based. Texas courts have, therefore, permitted nonresidents to offer proof that no contract existed even though the plaintiff bears the ultimate burden of proving the existence of a contract at a trial on the merits.[110]

The court also rejected Runnels' argument that section 423 of the Texas Probate Code established a legal duty to supply support to David, which Firestone allegedly breached.[111] the court determined that, as a matter of law, Firestone's failure to pay David's medical expenses did not amount to negligence *per se* in violation of section 423, which sets up a hierarchy of family financial responsibility for an incompetent's maintenance.[112] Having

104. Runnels actually relied upon the doing business clause of former Article 2031(b), now codified at TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986).

105. In assessing Mr. Firestone's special appearance, the court followed the three prong test set forth in O'Brien v. Lampar Co., 399 S.W.2d 340, 342 (Tex. 1966), the first prong of which requires the non-resident to have purposefully performed some act in Texas. The court commented that since only the second prong of the *O'Brien* test was at issue in Hall v. Helicopteros Nacionales de Colombia S.A., 638 S.W.2d 870, 872 (Tex. 1982), *rev'd*, 466 U.S. 408 (1984), the Supreme Court's reversal of *Hall* does not remove the requirement that prong one of the test is a threshold jurisdictional requirement when a plaintiff asserting jurisdiction relies on specific subsections of § 17.042 of the TEX. CIV. PRAC. & REM. CODE (Vernon 1986).

106. 746 S.W.2d at 849. The court treated Ms. Runnels' argument on appeal as a challenge to the sufficiency of the evidence in the trial court. Because the trial court had not entered findings of fact and conclusions of law, the appellate court could infer findings necessary to sustain the trial court's decision to deny jurisdiction under § 17.042(1) and uphold that decision under any legal theory which the evidence supported. 746 S.W.2d at 849-50.

107. *Id.* at 851.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 852. TEX. PROB. CODE ANN. § 423 (Vernon 1980).

112. 746 S.W.2d at 852.

established that the purposeful act that Runnels asserted was not a tort under Texas law, the court affirmed the trial court's granting of the special appearance.[113] The *Runnels* case provides a good example of a court's threshold merits determination of the existence of a contract or tort before resolving the jurisdictional issue.

McFee v. Chevron International Oil Co., Inc.[114] was one of several cases during the Survey period that considered the imputation of a subsidiary's contacts to a parent company, or vice versa. Plaintiffs, British subjects, brought suit in Harris County, Texas, against several defendants based upon their claim that the defendants' gross negligence caused the death of their son, Andy McFee, who was killed by political rebels in the Sudan. Seiscom Delta, Chevron Corporation (the parent company), Chevron Oil Co. of Sudan, Chevron Overseas Petroleum, Inc., Chevron Petroleum (U.K.), Ltd. and three other related corporations, including Chevron U.S.A., were named as defendants. The district court granted appellees' special appearances and dismissed the claims against Chevron Corporation, Chevron Oil Company of Sudan, Chevron Overseas Petroleum, Inc. and Chevron Petroleum (U.K.), Ltd. based on lack of personal jurisdiction.[115] The court then granted summary judgments in favor of the three related corporations, including Chevron U.S.A., and it stayed the claims against Seiscom Delta due to bankruptcy.[116]

On appeal, the McFees challenged the trial court's granting of the special appearances. The McFees argued that Chevron U.S.A.'s business activities in Texas could be imputed to the parent corporation, Chevron Corporation, and in turn, to the other appellees. The facts revealed that Chevron Corporation owned 100% of the shares of three other Chevron appellees, including Chevron U.S.A. Further, all of the revenues of Chevron Oil Co. of Sudan flow back to the parent company, and its expenses were paid directly or indirectly by the parent company. The boards of directors of the various Chevron subsidiaries overlapped, and payroll for the subsidiaries came out of the central payroll in San Francisco, California, the location of the parent corporation. Officials of Chevron Oil Co. of Sudan, Chevron Overseas Petroleum, Inc. and the parent, Chevron Corporation, shared security information, including decision-making about safety in Sudan. The court decided that the relationships between Chevron U.S.A. and the parent corporation Chevron Corporation and the relationship between Chevron U.S.A. and its sibling subsidiary corporations, Chevron Oil Co. of Sudan, Chevron Overseas Petroleum, Inc. and Chevron Petroleum (U.K.), Ltd. were too attenuated to support personal jurisdiction.[117]

None of the four appellees was incorporated in Texas, had an office in Texas or was qualified to do business in Texas. The appellants nonetheless

113. *Id.* at 853.
114. 753 S.W.2d 469 (Tex. App.—Houston [1st Dist.] 1988, no writ).
115. *Id.* at 470.
116. *Id.*
117. *Id.* at 472.

argued that under the *O'Brien* test[118] Chevron Oil Co. of Sudan did several acts in Texas that related directly to McFee's death. First, they argued that Chevron Oil Co. of Sudan contracted with Seiscom Delta, a Texas company, for the performance of seismic work in Sudan. Second, they asserted that the contract was partly performed in Texas because logistical support, purchasing, shipping and management personnel services for the contract were handled in Houston, Texas.

The court noted, however, that Chevron Oil Co. of Sudan and United Geophysical Corporation, a Delaware corporation acquired in 1981 by Seiscom Delta, executed the original contract for the performance of seismic work in Sudan in 1976.[119] They negotiated the contract in Khartoum, Sudan and San Francisco, California. The McFees presented no evidence or testimony that when Chevron Oil Co. of Sudan entered into the contract with United Geophysical, a California corporation, it could have foreseen that three years later United Geophysical would be purchased by Seiscom Delta, a Texas company. As a result there was no intent by Chevron Oil Co. of Sudan to do business in Texas and, consequently, no personal jurisdiction.[120]

Onda Enterprises v. The Honorable Jack Pierce[121] emphasizes the recurring problem of the erroneous use of a motion to quash rather than a special appearance. Onda Enterprises, a Japanese corporation, chose to contest service of process in the trial court by filing a motion to quash the service of process, followed by a motion to dismiss the action on the basis of lack of personal jurisdiction. The trial court granted the motion to quash and denied the motion to dismiss.[122] The plaintiff filed a motion for leave to file a

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118. The Supreme Court of Texas in O'Brien v. Lampar Co., 399 S.W.2d 340 (Tex. 1966), stated the three requirements for exercising jurisdiction over a nonresident corporation:

1. The non-resident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
2. The cause of action must arise from, or be connected with, such act or transaction; and
3. The assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws the forum state afforded the respective parties, and the basic equities of the situation.

Id. at 342.

119. 753 S.W.2d at 470.

120. *Id.* at 473. The appellants also argued that the appellees conspired with the other defendants to hide the dangerous working situation in Sudan from the employees. The court held that the appellants did not meet the threshold requirement of showing a conspiracy in connecting the acts of the resident conspirators with those of nonresident conspirators. *Id.* The managing director of Chevron of Sudan provided the only evidence of conspiracy when he testified that security information and decision-making concerning safety and operations in the Sudan was shared by officials of the parent corporation and two of its subsidiaries. The ultimate decision to leave or withdraw employees would have been made by Seiscom's top management in Houston. The court determined that the evidence did not signify either a conspiracy or a connection between the acts of Seiscom and the appellees. *Id.* As a result, the court affirmed the judgment granting appellees' special appearances. *Id.*

121. 750 S.W.2d 812 (Tex. App.—Tyler 1988, no writ).

122. *Id.* at 813.

petition for writ of mandamus, seeking to compel the court of appeals to set aside the trial court's order denying the motion to dismiss. The appellate court concluded that mandamus was not proper.[123] The plaintiff had made the mistake of filing a motion to quash rather than a special appearance and thus became subject to the court's jurisdiction. The court admonished that the plaintiff should have filed a special appearance under rule 120a of the Texas Rule of Civil Procedure[124] to avoid a general appearance.[125] Certainly, mandamus was not proper.

II. CHOICE OF LAW

A. Contracts

The Survey period's most noteworthy and precedential Texas conflicts case is *DeSantis v. Wackenhut*,[126] in which the Texas Supreme Court tentatively held that Florida law could not be applied to uphold a noncompete agreement as such clauses are strictly governed under Texas law as a matter of public policy.[127] Wackenhut, a Florida-based corporation specializing in furnishing security guards, hired Edward DeSantis to manage its Houston office in 1981. DeSantis had fourteen years' experience at the time he took the job. Their contract included a clause calling for the application of Florida law to any disputes over the contract.

By 1984 the employment relationship had broken down. DeSantis claimed that Wackenhut had promised him increased opportunity after spending one year learning the Houston operation. Wackenhut denied this. DeSantis then resigned in March, 1984, claiming that Wackenhut forced him out after a dispute with company headquarters over the Houston office's profitability. Wackenhut claimed it fired DeSantis over unethical business solicitations.

After leaving Wackenhut, DeSantis invested in a company that marketed security electronics and formed Risk Deterrence, Inc. ("RDI"), which provided consulting services and security guards. In April 1984, DeSantis sent out letters promoting his new businesses to "twenty to thirty" companies, including Wackenhut clients. The letter included DeSantis's disclaimer of any intent to interfere with Wackenhut's business. Wackenhut soon lost two clients to DeSantis, and sued him for injunctive relief and monetary damages for breaching the noncompete clause. DeSantis counterclaimed for fraud and tortious interference, wrongful injunction, and a claim under the Texas Free Enterprise and Antitrust Act.[128]

The trial court upheld the noncompete clause, but reduced the area of noncompetition from forty counties to thirteen counties surrounding Hous-

123. *Id.* at 814.
124. TEX. R. CIV. P. 120a.
125. 750 S.W.2d at 814.
126. 31 Tex. S. Ct. J. 616 (July 13, 1988).
127. *Id.* at 619. The July 13, 1988, opinion is not final. The supreme court has not yet ruled on Wackenhut's motion for rehearing. *See* note 137, *infra*.
128. TEX. BUS. & COM. CODE ANN. § 15.01 (Vernon 1987).

ton, and reduced the time to two years.[129] The court then enjoined RDI from disclosing any of Wackenhut's confidential or proprietary information and from hiring DeSantis for two years.[130] The trial court denied all of DeSantis's counterclaims, and the court of appeals affirmed on all counts.[131]

The supreme court reversed on the key points.[132] First, the court held that the parties contractual choice of Florida law was unenforceable in Texas because of Texas' strongly supported policies regarding noncompete agreements.[133] In so holding, the court traced Texas law concerning the enforcement of choice of law clauses.[134] The court found that Texas statutory and case law provided that express choice of law agreements were to be given effect (1) if the contract bears a reasonable relationship to the chosen state, and (2) if no countervailing Texas policy demands otherwise.[135] The court noted that this test for choice of law agreements was substantially the same as that found in Section 187 of the Restatement (Second) of Conflict of Laws.[136] The court then adopted section 187 to govern contractual choice of law clauses in Texas.[137] In spite of the court's adoption of section 187, readers should recall the additional choice of law requirements for contracts governed by the Texas Business and Commerce Code.[138] Those contracts should use bold print for choice of law even if Texas law is not the substantive law chosen or ultimately applied.

In holding Florida law inapplicable, the court also provided a definitive reading on public policy as a grounds for denying the application of a sister state's law.[139] The court cited to section 187 of the Restatement (Second)

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129. 31 Tex. Sup. Ct. J. at 617.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 620. Texas places substantial restrictions on the reinforcement of non-compete agreements as a matter of fundamental policy. *Id.*
134. *Id.* at 617-18.
135. *Id.* at 618.
136. *Id.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1981). The supreme court erred in equating RESTATEMENT (SECOND) § 187 with Texas common law regarding choice of law agreements. Although Texas law requires that the parties' chosen law consistent with Texas public policy, section 187 does not address forum public policy. Rather, section 187 requires that the parties' chosen law not be contrary too "a fundamental policy of a state which has a *materially* greater interest than the [parties'] chosen state in the determination of the particular issue, and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice by the parties." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (emphasis added). Section 188 is the general choice of law rule for contracts without valid choice of law agreements. While the factors of § 188 may point to Texas law as the appropriate choice of law for the *Wackenhut* dispute (thus vindicating the court's results, but not its reasoning), the court nonetheless erred to the extent it perceived section 187 as requiring the parties' chosen law to be compatible with forum policy. The court erred further in ignoring section 187's requirement that the parties' chosen law be displaced only by the law of a state with a materially greater interest. Although forum policy is a factor in the RESTATEMENT (SECOND) § 6's most significant relationship test, forum policy is not preemptive. Dallas attorney James Wallenstein agreed to these points in an amicus brief filed in *Wackenhut*. The court will presumably address these points in ruling on the Motion for Rehearing. Author's conversation with James Wallenstein, April 26, 1989.
137. *Id.*
138. TEX. BUS. & COMM. CODE ANN. § 35.53 (Vernon 1987).
139. 31 Tex. S. Ct. J. at 618-19.

and the seminal *Gutierrez v. Collins* case,[140] and noted that the forum could not reject another law on public policy grounds merely because a different result would obtain.[141] Rather, the other state's law must "differ in such a way as to directly impinge upon rights created in support of a fundamental policy of the State of Texas."[142]

The supreme court upheld the lower courts' dismissal for lack of evidence of DeSantis's counterclaims of fraud and tortious interference.[143] The court reversed, however, as to violations of the Texas Free Enterprise and Antitrust Act,[144] finding that Wackenhut's actions had violated the Act.[145] DeSantis was thus entitled to costs and attorney fees, but not to treble damages as he had shown no damages.[146] *DeSantis* is noteworthy for its clear mandate that Texas law will govern noncompete agreements in Texas, and for the adoption of yet another Section in the Restatement (Second) of Conflict of Laws. Readers should note, however, that the *DeSantis* opinion may be revised.[147]

American Home Assurance Co. v. Safeway Steel Products Co.[148] considers the applicability and constitutionality of article 21.42 of the Texas Insurance Code.[149] The court's analysis is the most thorough of any choice of law opinion this year, but reaches a questionable conclusion. In *American Home* the plaintiff insurers brought a declaratory action for a finding that their insurance policies did not cover punitive damages. The trial court applied Texas law and found that the policies did cover punitive damages.[150] The court of appeals agreed[151] under the following analysis.

The insurers' declaratory action involved two underlying Texas cases: a

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140. 583 S.W.2d 312 (Tex. 1979).

141. 31 Tex. S. Ct. J. at 618.

142. *Id.* The court further quoted from § 187 that "[t]o be 'fundamental,' a policy must . . . be a substantial one. . . . [A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of bargaining power." *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment g (1971). The court then drew from a 1967 case enforcing a Mexican lottery ticket for $40,000. *Id.* (citing Castilleja v. Camero, 414 S.W.2d 424 (Tex. 1967)). The court of civil appeals in *Castilleja* had held the agreement unenforceable as against public policy. The supreme court in that case then reversed, describing the public policy exception as:

> To justify a court in refusing to enforce a right of action which accrued under the laws of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other reason the enforcement of it would be prejudicial to the general interest of our own citizens.

Castilleja v. Camero, 414 S.W.2d 424, 427 (Tex. 1967). *Castilleja* did not involve a contractual choice of law, but the court felt it appropriate as to the requirements for public policy to override an otherwise controlling foreign law.

143. 31 Tex. S. Ct. J. at 621-22.

144. TEX. BUS. & COM. CODE ANN. § 15.02 (Vernon 1987).

145. 31 Tex. Sup. Ct. J. at 621.

146. *Id.*

147. *See supra* note 127.

148. 743 S.W.2d 693 (Tex. App.—Austin 1987, writ denied).

149. TEX. INS. CODE ANN. art. 21.42 (Vernon 1981).

150. 743 S.W.2d at 695.

151. *Id.*

1973 action against Rawlings Sporting Goods Company for failure to warn about their football helmets' limited protection,[152] and a 1977 action against Safety Steel Products for a defective scaffold.[153] The insured parties received punitive damages in each case. The insurers then brought the declaratory action to avoid paying punitive damages. The geographical contacts were as follows: in the *Rawlings* case, the insurer was a New York corporation with New York as its principal place of business; Rawlings had its principal place of business in Missouri; the parties negotiated the policy between Missouri and New York, the policy was issued in New York and countersigned in Missouri; the premiums were payable in New York through Rawlings' Ohio agent; and the insurer's last affirmative act occurred in New York.[154] In the *Safeway* case, the insurer was a Pennsylvania corporation with its principal place of business in New York; Safeway's principal place of business was Wisconsin; the premiums were payable in New York; and the last affirmative act by the insurer was in New York.[155]

The Texas contacts in both cases were based upon the underlying personal injury cases. The two injured parties were both Texas residents, who suffered injuries and filed their lawsuits in Texas. The injured parties, however, were fully paid their punitive damages prior to the insurer's declaratory action. The court thus focused on the actual awarding of the contested punitive damages in Texas.[156]

In its choice of law analysis, the court first noted that Texas had a statutory choice of law rule, thus obviating the application of the Restatement (Second) of Conflict of Laws, as requested by the insurers.[157] Article 21.42 of the Texas Insurance Code[158] required the application of Texas law in this case apparently because of the prior punitive damages awards from Texas courts. It could be argued that article 21.42 did not apply since the insurance was not payable directly to the injured parties, but instead to Rawlings and Safeway, neither of whom was a Texas citizen or inhabitant as required by article 21.42. The policies were not payable to Texas citizens or inhabitants since Rawlings and Safeway already paid the insured parties by the time of the action. As if in response to this criticism, the court argued the applicability of Texas law under the Second Restatement's choice of law rules and the Constitution.[159]

First addressing the constitutional issues, the court noted that article 21.42 had been upheld as constitutional.[160] The court determined that the

152. *Id.*
153. *Id.* at 695-96.
154. *Id.* at 696.
155. *Id.*
156. *Id.* at 699.
157. *Id.* at 697.
158. TEX. INS. CODE ANN. art. 21.42 (Vernon 1981).
159. 743 S.W.2d 697-700.
160. *Id.* at 697. The court cited Austin Bldg. Co. v. National Union Fire Ins. Co. 432 S.W.2d 697 (Tex. 1968); and Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924) for the point that the only limitation on article 21.42 is that it may not be given extraterritorial effect. 743 S.W.2d at 697.

contacts with Texas in this case also supported the constitutionality of applying Texas law under *Allstate Insurance Co. v. Hague*.[161] The court then employed an interest analysis to support its findings.[162]

The court next considered false conflicts.[163] The court found that the only true conflict was between Texas law and Missouri law, since Wisconsin law was identical to Texas, and New York refused to consider the issue on public policy grounds.[164] The court's labeling of New York law as a false conflict was confusing. If New York refused to enforce insurance contracts for punitive damages, then it is contrary to Texas law, which would enforce such contracts. The court concluded this was a false conflict by focusing on New York's refusal to interpret such contracts.[165]

Narrowing the analysis to Texas and Missouri (and thus limiting the case at this point to the Rawlings matter), the court found Texas's interests were greater than Missouri's because Texas courts imposed the punitive damages.[166] Thus the court held that the Missouri contacts (Rawlings's home and the place where the policy was countersigned) were less important, not on the issue of personal injury liability to Texas residents, but on the issue of interpreting a contract between New York and Missouri parties.[167] The result of applying Texas law over Missouri law is particularly troubling when one considers that both Missouri and New York—the homes of the two contracting parties—would have held the punitive damages to be outside the insurance contract.

The court got around this troubling aspect by arguing that it had to apply Texas law—as the state in which the punitives were awarded—so as to prevent forum shopping.[168] That is, if the court applied any state's law other than the one awarding the punitive damages, then the insurer could merely seek the most favorable state after the conclusion of the liability trial. This argument confuses forum shopping with choice of law. Even though forum shopping is likely to result in the application of a favorable forum law, it does not guarantee it. In fact, the insurers here did the opposite. The insurers came to Texas asking that Texas law not be applied. The court imposed Texas law arguing that it did so to discourage forum shopping, while ironically encouraging forum shopping in the future.[169] Had American Home gone to either Missouri or New York courts, it would have avoided punative damages, unless the Missouri or New York court chose to apply Texas law—an unlikely result since the sole question was the interpretation of a contract between Missouri and New York parties.

American Home is reminiscent of Justice Powell's concurrence in *Allstate*

161. 743 S.W.2d at 697 (citing 449 U.S. 302 (1981)).
162. 743 S.W.2d at 697-99.
163. *Id.* at 698-99.
164. *Id.* at 699.
165. *Id.* at 698.
166. *Id.*
167. *Id.* at 699.
168. *Id.*
169. *Id.*

v. Hague.[170] In *Allstate* Justice Powell found the Minnesota court's application of Minnesota law constitutionally sound but nevertheless a bad choice of law decision.[171] Texas may have the necessary constitutionally minimal connection to the Rawlings matter to apply Texas law, but *American Home* is a questionable choice of law analysis for applying Texas law to interpret a contract between New York and Missouri parties.

American International Trading Corporation v. Petroleos Mexicanos[172] held that a party could not argue for the first time on appeal that the trial court should have applied a different law.[173] The case concerned American International's action against Petroleos Mexicanos ("Pemex") for breach of contract for the purchase of 105,000 tons of barite. Pemex placed the order for the barite in September 1981. Pemex contended that in a later meeting, in October 1981, it renegotiated for 50,000 tons instead of 105,000 tons. American International disagreed and sued for Pemex's failure to schedule delivery of the 105,000 tons. Neither party raised choice of law at trial, and the federal district court in Houston applied Texas law.[174] On appeal, Pemex argued for Mexican law, claiming that resolving the case under Texas law resulted in a manifest injustice, and alternatively, that Texas choice of law rules called for Mexican law.[175] The Fifth Circuit held that Pemex failed to show a manifest injustice.[176] The court explained that showing that a different result would obtain under Mexican law was not a manifest injustice.[177] The appellate court did not address the question of which law Texas choice of law rules would apply, finding instead that Pemex could not argue Mexican law on appeal because it failed to raise the issue at trial.[178]

In *InterFirst Bank Clifton v. Fernandez*[179] the Fifth Circuit upheld a Texas choice of law agreement between a Texas bank and a Louisiana borrower.[180] The debtor argued against the application of Texas law on the grounds that only the loan agreement included the choice of law clause, not the Louisiana security agreement. The court pointed out that the debtor, Fernandez, also signed a Texas security agreement and then agreed to Texas foreclosure procedures in a letter.[181] The court held that these facts, taken with the choice of law clause in the loan agreement, sufficiently evidenced the parties' intention to be bound by Texas law.[182] The court thus held that the security agreement had an implied choice of Texas law, supported by the

170. 449 U.S. (1981) (Powell, J., concurring). *Id.* at 332-40.
171. *Id.*
172. 835 F.2d 536 (5th Cir. 1987).
173. *Id.* at 540.
174. *Id.* at 538, 540.
175. *Id.* at 540.
176. *Id.*
177. *Id.*
178. *Id.*
179. 844 F.2d 279 (5th Cir. *aff'd on rehearing*), 853 F.2d 292 (5th Cir. 1988). The entire opinion on all issues appears in the former citation. The latter opinion only addresses superseding choice of law.
180. *Id.* at 382.
181. 853 F.2d at 293.
182. *Id.*

express choice of Texas law in the loan agreement and other communications between the parties.[183]

Fernandez also challenged the application of Texas law on two other grounds. He argued that the Louisiana Deficiency Judgment Act,[184] which had an unwaivable requirement that a deficiency judgment be based on a judicial sale with appraisement, precluded the parties choice of Texas law.[185] The Fifth Circuit found, however, that the Louisiana Deficiency Judgment Act did not apply because the parties had chosen Texas law in their contract, and because Texas choice of law rules (binding on federal courts) honored that choice of law clause.[186]

Fernandez next argued that Texas choice of law rules were precluded by a federal choice of law rule. Fernandez urged that section 506 of the Federal Aviation Act[187] required the application of the law where delivery of the security instrument took place—in this case, Louisiana. The court found, however, that section 506 applied only to issues of substantive validity, such as the sufficiency of consideration for the underlying contract.[188] Foreclosure proceedings did not constitute matters of substantive validity, the court reasoned, and section 506 was therefore inapplicable.[189] Thus, the parties' choice of Texas law survived Fernandez's three-part assault.

B. Torts

Coakes v. Arabian American Oil Company[190] was a British citizen/resident's action for misrepresentation and breach of employment contract. Coakes alleged that Aramco misled him as to the legality of the making and drinking of alcohol in Saudi Arabia.[191] Coakes had interviewed with an employment agency in England and then with Aramco in the Netherlands. He signed his employment contract in London in 1973 and moved with his wife to Saudi Arabia to assume his job. Coakes and his wife lived on the Aramco compound in Saudi Arabia. In 1983 Saudi authorities arrested him and imprisoned him for the illegal manufacture and sale of alcohol. The country deported him in 1984, and in 1987 he filed this action in a Houston federal court. Neither Coakes nor his wife had ever been to the United States. The district court held that English law governed and that the case should be dismissed on forum non conveniens grounds, with the condition that plaintiff had 120 days to refile in England.[192]

The Fifth Circuit upheld both the choice of law and the forum non con-

183. *Id.* The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) provides that both express and implied choice of law agreements should be honored.
184. LA. REV. STAT. ANN. §§ 13:4106-4108 (West 1968).
185. *Id.* § 13:4106.
186. 853 F.2d at 294.
187. 49 U.S.C. § 1406 (1976).
188. 853 F.2d at 295.
189. *Id.*
190. 831 F.2d 572 (5th Cir. 1987).
191. *Id.* at 573.
192. *Id.* at 574.

veniens dismissal.[193] It is unclear, however, why the trial and appellate courts found it necessary to engage in a choice of law analysis prior to dismissing the case. Because Aramco filed the forum non conveniens objection as part of its original answer, the choice of law analysis appears unnecessary. The court went through such an analysis, however, and found that the United States had only a minimal interest in the controversy.[194] Although Aramco was a Texas-based corporation, all pertinent contacts were made in England, the Netherlands, or Saudi Arabia.[195]

Coakes presented two further arguments for retaining the case in the district court. First, thirteen of his witnesses were in the United States, requiring greater expense for transporting them to England to testify. Sympathizing with this argument, the district court made special provisions for discovery prior to the dismissal.[196] The Fifth Circuit also noted a solicitor's affidavit from England stating that the American-made depositions might not be admissible in English courts.[197] The affidavit, however, did not persuade the court that this compelled retention of the case because of the similar testimony available from witnesses in England.[198] The second argument was that plaintiff's litigation burden would be increased in England because of the absence there of a contingent fee system. This, too, provided insufficient grounds to retain the case.[199]

Crisman v. Cooper Industries[200] concerned a wrongful death action against a Houston-based company for an automobile-related death in Florida. The Texas trial court applied Florida law and dismissed the action under Florida's statute of repose,[201] which requires all actions for products liability to be brought within twelve years of manufacture.[202] The alleged

193. *Id.* at 576. The court's choice of law analysis appears both thorough and correct. There is no indication, however, that the court actually considered the RESTATEMENT (SECOND) OF CONFLICT OF LAWS' most significant relationship test, as required by Texas law. *See* Duncan v. Cessna, 665 S.W.2d 414, 421 (Tex. 1984). The court did not mention either § 6 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (detailing the seven factors of the most significant relationship test) or any of the specific tort or contract choice of law sections, such as §§ 145 and 188. The court did consider several of the factors from §§ 6, 145 and 188, such as the place of the negotiation, the place of performance, the place of injury, and the interests of the respective states. 831 F.2d at 575-76. But it omitted other pertinent considerations such as the parties' expectations, the policies (as opposed to the interests) of England and the United States, and the needs of the International legal system. These may not have changed the outcome, and are not necessarily worthy of mention. But it would be reassuring to know that the court did consult the RESTATEMENT (SECOND) OF CONFLICT OF LAWS for this otherwise valid analysis.

Another interesting point is the court's making a choice between English law and United States law. *Id.* at 575. Plaintiff was interested in having Texas law applied, since his claim was for fraud, breach of contract, loss of consortium and mental anguish. For these purposes, Texas is a "state" comparable to England in the choice of law analysis.

194. 831 F.2d at 574.

195. *Id.* at 573-74.

196. *Id.* at 574-75.

197. *Id.*

198. *Id.*

199. *Id.* at 575-76.

200. 748 S.W.2d 273 (Tex. App.—Dallas 1988, writ denied).

201. *Id.* at 280-82. FLA. STAT. ANN. § 95.031(2) (West 1982).

202. 748 S.W.2d at 275-76, 280 (citing FLA. STAT. ANN. § 95.031(2) (West 1982).

defective product was a trailer, manufactured in Illinois and originally sold in Florida in March 1963. The accident occurred in 1984, at which time a Florida corporation owned the trailer and a Florida resident pulled the trailer behind his pickup truck. The accident occurred at night, allegedly as a result of the trailer's lack of stop lights, brake lights, turn signals or license plate lights.[203]

The deceased was from Tennessee and her husband, the plaintiff, still lived in Tennessee at the time of the action. The manufacturer was an Ohio corporation whose trailer subsidiary had its principal place of business in Texas. The trailer's owner and the truck driver were not parties to the action.[204]

The court of appeals upheld the trial court's choice and application of Florida law.[205] First, the court held that the Texas choice of law rules—the most significant relationship test of the Restatement (Second) of Conflict of Laws—called for Florida law.[206] The court examined the seven factors of the most significant relationship test in section 6 of the Restatement (Second) along with section 145, the general tort principle.[207] Under the various factors, the court concluded that the Florida accident situs took precedence over the manufacturer's location in Texas, particularly because nothing had occurred in Texas relative to the design or manufacture of the trailer.[208]

The analysis included a review of the respective policies of Texas and Florida. The court found that Texas had no overriding interest since nothing related to the trailer's manufacture had occurred in Texas.[209] Florida, on the other hand, seemed to have a strong interest in applying its statute of repose, since that law specifically pertained to products liability, and because the trailer was in the Florida stream of commerce.[210]

Plaintiff also argued that Florida had amended its statute of repose and that the current version should apply; alternatively, he asserted that the statute of repose was procedural. The court of appeals disagreed with both contentions.[211] Finally, plaintiff maintained that the statute of repose violated the Texas constitution's open courts guarantee. The court of appeals dismissed this by noting that because Florida law controlled, the Texas constitution did not apply.[212]

In *Dorety v. Avondale Shipyards*[213] a federal district court applied a federal choice of law rule. The case involved plaintiff's October 23, 1979 injury on an offshore drilling rig. On October 21, 1981 plaintiff sued Avondale, who was not her employer, on a personal injury claim.[214] The trial granted

203. 748 S.W.2d at 275.
204. *Id.*
205. *Id.* at 278-82.
206. *Id.* at 278.
207. *Id.* at 278-79.
208. *Id.* at 279.
209. *Id.*
210. *Id.*
211. *Id.* at 280-81.
212. *Id.* at 282.
213. 672 F. Supp. 962, 963 (S.D. Tex. 1987).
214. *Id.*

Avondale's motion for summary judgment on the grounds that the Outer Continental Shelf Lands Act[215] called for the statute of limitations of the adjacent state.[216] Louisiana, the adjacent state, had a one year limitation period for personal injury suits.[217] Plaintiff unsuccessfully argued that the Longshoremen and Harbor Workers Compensation Act[218] should apply, but the court disagreed because the Longshoremen Act applied only to actions against employers, and Avondale was not her employer.[219]

McClure v. Duggan[220] illustrates the application of depecage, or the use of two or more states' laws in a single case, as called for by *Duncan v. Cessna*.[221] In *McClure* a Texas buyer sued a California racehorse seller for breach of oral agreements, fraud, deceptive trade practices, conversion and breach of fiduciary duty.[222] The federal district court held that section 188 of the Restatement (Second),[223] which called for California law, governed the contract claims because of the overwhelming contacts with California.[224] Texas law, however, governed the deceptive trade practice claims for several reasons. First, the parties pleaded only Texas law on this issue.[225] Second, the court found that Texas public policy mandated the application of Texas law.[226] The court's analysis here is unclear. This author is unaware of any mandate under the Texas DTPA that would preclude the application of another state's consumer law. The point is not capable of analysis in this case because the parties did not plead any other law on the deceptive trade practice issues. The court noted a false conflict between Texas and California on the fraud claim, and it applied Texas law to the conversion and breach of fiduciary duty claims without a choice of law discussion.[227]

C. Other Cases

The United States Supreme Court offered the most important choice of law case in the Survey period involving the equitable duty to pay interest on mineral royalties. *Sun Oil Company v. Wortman*[228] is factually similar to *Phillips Petroleum v. Shutts*,[229] which was decided by the United States Supreme Court in 1985. Both cases involved gas royalty owners class actions to compel interest on royalty payments that were temporarily withheld pending governmental approval of price increases. Sun Oil's proposed price increases had to be approved by the Federal Power Commission, but pend-

215. 43 U.S.C. § 1333(a) (1986).
216. 672 F. Supp. at 963.
217. LA. CIV. CODE ANN. art. 3536 (West 1953).
218. 33 U.S.C. §§ 903-905 (1986).
219. 672 F. Supp. at 963.
220. 674 F. Supp. 211 (N.D. Tex.. 1987).
221. 665 S.W.2d 414, 421 (Tex. 1984).
222. 674 F. Supp. at 213-14.
223. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).
224. 674 F. Supp. at 215-16.
225. *Id.* at 219 n.2.
226. *Id.*
227. *Id.*
228. 108 S. Ct. 2117, 100 L. Ed. 2d 743 (1988).
229. 472 U.S. 797 (1985).

ing such approval, Sun Oil could charge consumers the proposed higher price. Sun Oil was also permitted to withhold from the royalty owners the royalty on the increased prices until the increases were approved. The interest issue was not addressed in these cases.[230]

In July 1976, and again in April 1978, Sun Oil paid the royalty owners their royalty payments based on prior price increases but did not pay any interest. In August 1979, Richard Wortman and Hazel Moore filed a class action in Kansas state court seeking interest on those royalty increases for the period that Sun withheld the money awaiting the price increase approval. The affected properties were located in Texas, Oklahoma and Louisiana. The laws of these states did not clearly require interest, and if those states required interest, the rates were lower than that of Kansas.

The trial court ruled that Kansas law applied to all claims, even those claims for mineral properties in other states owned by residents of other states.[231] Under Kansas law, the court ruled that class members were entitled to interest on the withheld royalties at the same rates that would have been paid to consumers if the price increase had been disapproved.[232] The trial court based this ruling on the Kansas Supreme Court's holding in *Shutts v. Phillips Petroleum* (*Shutts I*),[233] which the Kansas Supreme Court reaffirmed in *Shutts II*[234] and *Wortman v. Sun Oil Co.* (*Wortman I*).[235] The losing gas companies in *Shutts II* and *Wortman I* petitioned the United States Supreme Court, which granted certiorari.[236] The Supreme Court reversed *Shutts II* insofar as the Kansas court had applied Kansas law to non-Kansas claims and remanded both *Shuts II* and *Wortman I* to the lower courts for further consideration under the appropriate states' laws.[237]

On remand, the *Wortman* trial court (*Wortman II*) held that Texas, Oklahoma and Louisiana laws reached the same results as Kansas law, requiring royalty interest at the same rate due consumers under federal regulations.[238] The trial court further held that nothing in *Shutts III* (the Supreme Court's decision)[239] prevented the application of Kansas' five year limitation period, thus validating royalty owners' claims on royalty payments made in 1976.[240] The Kansas Supreme Court upheld the first of these findings in *Shutts IV*[241] and upheld both findings in *Wortman III*.[242]

The United States Supreme Court granted certiorari on *Wortman III* on two questions: (1) Does an alleged misapplication of other states' laws vio-

230. 108 S. Ct. at 2120-21, 100 L. Ed. 2d at 751.
231. *Id.* at 2120, 100 L. Ed. 2d at 751.
232. *Id.* at 2120, 1006 Ed. at 751.
233. 222 Kan. 527, 567 P.2d 1292 (1977) *cert. denied*, 343 U.S. 1068 (1978).
234. 235 Kan. 195, 679 P.2d 1159 (1984).
235. 236 Kan. 266, 690 P.2d 385 (1984).
236. 108 S. Ct. at 2121, 100 L. Ed. 2d at 751.
237. *Id.* at 1221, 100 L. Ed. 2d at 751-52.
238. *Id.* at 2121, 100 L. Ed. at 752.
239. 472 U.S. 797 (1985).
240. 108 S. Ct. at 2121, 100 L. Ed.2d at 752.
241. Shutts v. Phillips Petroleum Co., 240 Kan. 764, 732 P.2d 1286 (1987).
242. 241 Kan. 226, 734 P.2d 1190 (1987).

late the Constitution? (2) Does the forum's application of its own statute of limitation violate the Constitution?[243] The Supreme Court upheld the Kansas decision on both counts.[244] Addressing the statute of limitation question first, Justice Scalia found that neither full faith and credit nor due process prevented Kansas from applying its own statute of limitations.[245] The Court cited an 1839 case, *M'Elmoyle v. Cohen*,[246] along with other cases[247] for the proposition that statutes of limitation are procedural and thus governed by forum law regardless of which state's substantive law governs.[248] According to Justice Scalia, this was the law at the time the Fourteenth amendment was adopted and there was no indication that it had changed.[249] Sun Oil disagreed, citing *Guaranty Trust Company v. York*[250] for the point that statutes of limitation are substantive law in *Erie* cases.[251] The majority rejected this, concluding that what is substantive for *Erie* purposes is not necessarily substantive for choice of law purposes.[252] As for due process preventing the application of the Kansas statute of limitation, the majority again concluded that neither the practice at the time of the Fourteenth amendment's adoption nor the succeeding developments prevented the Kansas court's practice in this case.[253]

The majority then turned to Sun Oil's argument that full faith and credit and due process required Kansas to apply other states' laws correctly. The Court first noted that the mere misconstruction of another state's law did not violate the Constitution.[254] A violation occurred only if the misconstruction violated clearly established laws that had been recognized by the Court.[255] The Court examined the laws of Texas, Oklahoma and Louisiana and found that Kansas's implementation of those laws was not a clear contradiction of those laws.[256]

Justice O'Connor, joined by Chief Justice Rehnquist, filed a well-reasoned dissent.[257] O'Connor concurred in the finding on the limitations question, but she noted that if Texas, Oklahoma or Louisiana had regarded their own limitation periods as substantive, then the result should be different.[258] O'Connor thus disapproved with the majority's reasoning, but concurred in

243. 108 S. Ct. at 2120-21, 100 L. Ed. 2d at 750-52.
244. *Id.* at 2128, 100 L. Ed. 2d at 760.
245. *Id.* at 2121-25, 100 L. Ed. 2d at 752-75.
246. 38 U.S. (13 Pet.) 312 (1839).
247. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Townsend v. Jemison, 50 U.S. (9 How.) 407 (1850).
248. 108 S. Ct. at 2122, 100 L. Ed. 2d at 753.
249. *Id.* at 2122-23, 100 L. Ed. 2d at 753-55.
250. 326 U.S. 99 (1945).
251. The *Erie* doctrine is taken from Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), land dictates choice of law for federal/state conflicts of law in federal diversity cases.
252. 108 S. Ct. at 2124-26, 100 L. Ed. 2d at 755-57.
253. *Id.* at 2126, 100 L. Ed. 2d at 757.
254. *Id.*, 100 L. Ed. 2d at 758.
255. *Id.*, 100 L. Ed. 2d at 758.
256. *Id.* at 2126-28, 100 L. Ed. 2d at 758-60.
257. *Id.* at 2133, 100 L. Ed. 2d at 766.
258. *Id.*, 100 L. Ed. 2d at 766.

the result.[259] On the question of the constitutionality of misconstruing other states' laws, O'Connor and Rehnquist dissented vigorously.[260] Attacking both the Kansas Supreme Court's analysis of the other states' laws and the majority's reasoning in upholding the Kansas decision, the dissent concluded that the *Sun Oil* opinion omitted key sections of *Shutts III* and ignored the full faith and credit clause.[261] *Sun Oil* upholds the Supreme Court's long tradition of reluctance to interfere with state court choice of law processes. The two-justice dissent, reflecting more current thinking on choice of law, will not likely move the Court in the near future.

In *Richardson v. State*[262] the unusual instance of choice of law in a criminal case arose. Facing murder charges, defendant Richardson sought to preclude the crucial testimony of his alleged common law wife, who had seen the bodies of Richardson's victims immediately after the shooting. Their alleged marriage occurred in Oklahoma; therefore, Oklahoma law determined its validity.[263] The court noted, however, that while Oklahoma law governed the marriage's validity, Texas law governed the procedural issue of who had the burden of proving the marriage.[264] Plaintiff had the burden and failed to meet it, thus allowing the testimony against him.[265]

III. FOREIGN JUDGMENTS

Foreign judgments create conflicts of laws in two ways: the local enforcement of foreign judgments, and the preclusive effect of foreign lawsuits on local lawsuits. The 1988 Survey period offered no significant developments for either enforcement or preclusion. Three 1988 cases, however, illustrate noteworthy points for the enforcement of foreign judgments.

In *Strick Lease, Inc. v. Cutler*[266] the El Paso Court of Appeals upheld the stay of execution of a Pennsylvania judgment that had been entered by confession.[267] Pennsylvania law authorizes clerks to enter judgment after an attorney of a court of record confesses a defaulting debtor to judgment in accordance with the parties' prior contractual agreement..[268] The plaintiff's attorney signed the confession as "Attorney for the Defendant," which is authorized under Pennsylvania law.[269] The Pennsylvania court subsequently entered judgment against the defendant.[270] The Texas court, however, held that the Pennsylvania judgment was void for want of jurisdiction.[271] The court emphasized that the debtors' attorney did not sign

259. 108 S. Ct. at 2133-36, 100 L. Ed. 2d at 766-70.
260. *Id.* 108 S. Ct. at 2133-36, 100 L. Ed. 2d at 766-70.
261. *Id.* 108 S. Ct. at 2133-36, 100 L. Ed. 2d at 766-70.
262. 744 S.W.2d 65 (Tex. Crim. App. 1987).
263. *Id.* at 73.
264. *Id.* at 73-74.
265. *Id.*
266. 759 S.W.2d 776 (Tex. App.—El Paso 1988, no writ).
267. *Id.*
268. *Id.* at 777.
269. *Id.*
270. *Id.*
271. *Id.* at 778.

the confession, which it held to be a necessary step to acquire personal jurisdiction.[272]

Citicorp Real Estate v. Banque Arabe Internationale D'Investissement[273] is instructive on the point that merely filing a foreign judgment with the clerk's office pursuant to the Uniform Enforcement of Foreign Judgments Act (UEFJA) does not create a judgment lien. In *Citicorp* Interwest and Banque Arabe, two creditors of the late Clint Murchison, abstracted their foreign judgments omitting Murchison's address and the manner of citation.[274] In a dispute concerning the validity of these judgments, the district court found that they were all valid judicial liens.[275] Citicorp, one of the competing creditors for the dwindling Murchison estate, however, contended that Interwest and Banque Arabe substantially failed to comply with the Texas Property Code.[276] The court of appeals agreed with Citicorp and concluded that the UEFJA required a foreign judgment creditor to comply with statutory lien requirements just as a Texas judgment creditor would.[277]

In *Gaston v. Chaney*[278] a Texas court of appeals held that venue for the enforcement of an Arkansas child support decree did not lie in the county of the father's former residence, in that none of the affected parties lived there at the time the action was filed.[279] The court so ruled despite the fact that the father had missed some child support payments under the Arkansas order during his residence in that county. The court of appeals thus reversed the trial court's denial of the father's motion to transfer venue, and remanded.[280]

272. *Id.*
273. 747 S.W.2d 926 (Tex. App.—Dallas 1988, writ ref'd).
274. *Id.* at 928-31.
275. *Id.* at 926.
276. *Id.*, TEX. PROP. CODE ANN. § 52.003 (Vernon 1984).
277. *Id.* at 931.
278. 734 S.W.2d 735 (Tex. App.—Eastland 1987, no writ).
279. *Id.* at 736-37.
280. *Id.* at 737.