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Case Notes

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Case Notes and Statute Notes

CONFLICT OF LAWS—When There is True Conflict Between the Laws of States Having Equal Interests, the Law of the Place of the Injury is to be Used. *In Re Air Crash Disaster Near Chicago, Illinois*, 644 F.2d 594 (7th Cir. 1981).

On May 25, 1979 an American Airlines DC-10, designed and built by McDonnell Douglas Corporation (MDC), crashed in a field one half mile from Chicago's O'Hare International Airport.[1] The aircraft had taken off from O'Hare at 3 p.m. on a sunny afternoon for a nonstop flight to Los Angeles.[2] Shortly after takeoff the plane's left turbofan engine broke off and fell onto the runway. All 271 aboard and two persons on the ground were killed, in what was the worst crash in U.S. aviation history.[3] As a result, one hundred and eighteen wrongful death actions were filed against American and MDC in California, Illinois, New York, Michigan, Hawaii, and Puerto Rico.[4] The plaintiffs asked for punitive as well as compensatory damages. The cases were transferred to the Northern District of Illinois for pretrial purposes by order of the Judicial Panel on Multidistrict Litigation.[5]

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[1] TIME, June 4, 1979, at 12.

[2] *Id.*

[3] *Id.*

[4] *In re* Air Crash Disaster Near Chicago, Ill., 644 F.2d 594, 604 (7th Cir. 1981).

[5] 28 U.S.C. § 1407 (1976) provides:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multi-district litigation . . . upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.
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> (d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief

American Airlines, a Delaware corporation, had its principal place of business in New York at the time of the crash. American's maintenance base, the site of the alleged misconduct, was in Oklahoma. MDC is a Maryland corporation with its principal place of business in Missouri. The aircraft was designed and manufactured by MDC in California.[6]

Both American and MDC moved to strike the claims for punitive damages for failure to state a claim on which relief could be granted.[7] The district court, following the choice of law rules of each state where the actions originally had been filed,[8] found that under the Illinois "most significant relationship"[9] test, as well as the California "comparative impairment"[10] test, the law of the principal place of business should

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Justice of the United States, no two of whom shall be from the same circuit. The concurence of four members shall be necessary to any action by the panel.

Id. § 1407(a), (d).

[6] 644 F.2d at 604-05.

[7] *Id.* at 605.

[8] In Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941), the Supreme Court held that the *Erie* doctrine requires a federal court to apply the same substantive law that a state court in the same jurisdiction would apply, including the forum state's choice of law rules. *Id.*

[9] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 (1971) provides:

Right of Action for Death

In an action for wrongful death the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 [Choice of Law Principles] to the occurrence and the parties, in which event the local law of the other state will be applied.

Illinois adopted the "most significant relationship" test in Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970). In *Ingersoll*, the administratrix of a decedent's estate filed a wrongful death action against the driver and owner of the automobile in which the decedent drowned when the automobile broke through river ice. The court stated: "Realization of unjust and anomalous results which may ensue from application of *lex loci delicti* leads us to believe that the 'most significant contacts' rule best serves the interests of the State and the parties involved . . . ." 262 N.E.2d at 596.

[10] Under the "comparative impairment" approach "the respective laws of interested states are examined to ensure that there is an apparent conflict . . . . [W]hen an apparent conflict is found to exist, the court reexamines the applicable laws and circumstances to see if a 'moderate and restrained interpretation' of both the policy and the circumstances reveals that only one state has a legitimate interest in the application of its policy. . . . [T]rue conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied." 644 F.2d at 621 (quoting Bernhard v. Harrah's Club, 16 Cal. 3d 313, 320, 546 P.2d

prevail with regard to the issue of punitive damages.[11] The district court allowed American's motion to strike the punitive damage claims but denied MDC's motion.[12]

On appeal, the Seventh Circuit agreed with the district court's findings regarding which states allowed punitive damages, but differed in its application of the choice-of-law theories. The court found that, as to each defendant, the states where the principal places of business were located and the states where the misconduct occured had the strongest interests, but these interests were equal and in total conflict.[13] The Seventh Circuit ruled that under the "most significant relationship" test, when there is a true conflict between the laws of states having equal interests, the law of the place of the injury is to be used. Likewise, under the "comparative impairment" test, when the state of the principal place of business and the state of the place of misconduct have equal interests in the application of their laws, the law of the place of injury should be applied. *Held, reversed in part and affirmed in part*: When there is a true conflict between the laws of states having equal interests, the law of the place of the injury is to be used. *In Re Air Crash Disaster Near Chicago, Illinois*, 644 F. 2d 594 (7th Cir. 1981).

I. BACKGROUND

Conflict of laws is an area of the legal system that deals with the inconsistency between the laws of different states, in cases in which a party has a relationship to more than one of these states.[14] Courts have developed "choice-of-law" rules to

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719, 723, 128 Cal. Rptr. 215, 219 (1976)).

[11] *In re* Air Crash Disaster Near Chicago, Ill., 500 F. Supp. 1044, 1049, 1051 (N.D. Ill. 1980), *rev'd*, 644 F.2d 594 (7th Cir. 1981).

[12] 500 F. Supp. at 1054.

[13] 644 F.2d at 615, 621, 628.

[14] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971) provides:

> Reason for the Rules of Conflict of Laws
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> The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution.

determine which law should be applied. The traditional choice-of-law rule that is applicable to torts is known as *lex loci delicti.*[15] Under this rule, the law of the place of the injury governs the substantive rights of the parties.[16] Thus, if the *Chicago* case had arisen twenty years ago, the choice-of-law questions confronted by the Seventh Circuit could have been solved easily.

Application of the mechanical *lex loci delicti* rule, however, often led to an inequitable result. One of the earliest tactics employed by courts and counsel to avoid the application of the rule of *lex loci delicti,* was to characterize the action as something other than a tort. The injury, for example, could be described as a breach of contract.[17] Courts and counsel also sought to avoid the *lex loci delicti* rule by characterizing the issue as procedural[18] or as one involving family law.[19]

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971) provides:

> Subject Matter of Conflict of Laws
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> Conflict of laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state.

[15] L. KREINDLER, AVIATION ACCIDENT LAW § 2.02, at 6 (9th ed. 1981) [hereinafter cited as KREINDLER].

[16] *Id.*

[17] *See* Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928). In *Levy,* the plaintiff was injured in Massachusetts as a result of his operation of an automobile rented in Connecticut. The plaintiff sued the rental company for breach of contract. The court held that the plaintiff was entitled to enforce the renter's statutory liability under Connecticut law. *See also,* Hudson v. Continental Bus System, Inc., 317 S.W.2d 584 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.), an action by a Texas citizen, who bought bus tickets in Texas, for damages he sustained when the bus had an accident in Mexico. The court held that the parties were bound by Texas contract law.

[18] *See* Wells v. American Employers' Ins. Co., 132 F.2d 316 (5th Cir. 1942), where the court held that the right to sue an insurer directly, instead of first obtaining a judgment against the insured, was a procedural question and therefore the law of the forum state applied.

[19] *See* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955). A mother and her minor daughters brought an action against her husband and minor son for the injuries the daughters sustained while they were guests in an automobile owned by the father and driven by the son. The accident occurred in Idaho, but since all parties were domiciliaries of California the court looked to California law to determine whether any disabilities or immunities existed. *See also* Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959), an action brought by a wife against her husband, both of whom were Wisconsin domiciliaries, for the injuries she sustained in an automobile accident in California. The court held that as to which law

Since 1961, states have been moving steadily away from the *lex loci delicti* rule and have been adopting more flexible rules.[20] *Kilberg v. Northeast Airlines*[21] was the case that began this trend. In *Kilberg*, a New York resident who purchased tickets in New York for a flight to Massachusetts, was killed when his plane crashed in Massachusetts. At the time, Massachusetts had a wrongful death statute that would have limited the plaintiff's claim to $15,000. New York had no such limitation. In an attempt to avoid this limitation, the plaintiff in *Kilberg* brought an action for negligent breach of contract. The plaintiff's counsel also argued that if the court rejected the contract theory, it should nevertheless refuse to apply the law of the fortuitous place of the injury, in order to do justice to the plaintiff.[22] The *Kilberg* court did not rely on the contract theory, but treated the question as procedural. They also found that, as a matter of public policy, New York Law should be applied to Kilberg's claim. The court stated that "[i]t is open to us, therefore, particularly in view of our strong public policy as to death action damages, to treat the measure of damages in this case as being a procedural or remedial question by our own State policies."[23] Because it had placed some reliance on the "procedural" device, the court claimed that it had not completely abandoned the *lex loci delicti* rule.[24]

Two years later, the *Kilberg* procedural approach was taken a step further in *Babcock v. Jackson*.[25] In *Babcock*, a New

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governs the capacity of one spouse to sue the other in tort, the law to be applied is that of the state of the domicile.

[20] As of the beginning of 1981 only twenty-four states still followed the *lex loci delicti* rule. KREINDLER, *supra* note 15, § 2.02, at 25.

[21] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

[22] The attorney for the plaintiff in *Kilberg* pointed out that Kilberg had lived his whole life in New York, that he bought the tickets in New York, that his family lived in New York, and that his estate would be administered there. The attorney argued that it made little sense to apply the Massachusetts wrongful death limitation to Kilberg and his family merely because the fortuitous site of the crash happened to be Massachusetts. He urged that the court find some way to apply New York law. L. KREINDLER, *supra* note 15, § 2.02, at 10-11.

[23] 9 N.Y.2d at 41-42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

[24] *Id.*

[25] 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

York resident was injured in Ontario, while riding in an automobile driven by another New York resident. If Ontario law had been applied, the action would have been barred by a statute prohibiting recovery by a guest from a host driver.[26] Instead of relying on public policy or a "procedural characterization," the *Babcock* court specifically rejected the rule of *lex loci delicti*.[27] The court adopted a more flexible and subjective rule, stating that they would give "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[28]

Following New York's lead, other states abandoned the *lex loci delicti* rule.[29] The Pennsylvania case of *Griffith v. United Airlines*[30] had a fact situation that was similar to *Kilberg*. A Pennsylvania resident, who had bought his ticket in Pennsylvania, was killed in a Colorado air crash. The *Griffith* court stated that "the strict lex loci delicti rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court."[31] The court, pointing out that the site of the accident was purely fortuitous, ruled that Pennsylvania had a stronger interest in having its law applied.[32]

The court in *Long v. Pan American World Airways*[33] confronted a different fact situation. In *Long*, the forum state of New York was a "disinterested third state," in that it had no interest in applying its own law to the litigation. The New York court was not deciding whether to apply its own law or that of another state, but rather which law of two other states

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[26] Highway Traffic Act of Province of Ontario, ONT. REV. STAT. ch. 172, § 105(2) (1960).

[27] 191 N.E. 2d at 283.

[28] *Id.*

[29] *See, e.g.*, Fabricus v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966); DeFoor v. Lematta, 249 Or. 116, 437 P.2d 107 (1968).

[30] 426 Pa. 1, 203 A.2d 796 (1964).

[31] 203 A.2d at 805.

[32] *Id.* at 806-07.

[33] 16 N.Y.2d 337, 213 N.E.2d 796 (1965).

it should apply. The crash was in Maryland, but the decedent's domicile, the place of the ticket purchase, and the point of departure were all in Pennsylvania. Accordingly, the court found that Pennsylvania had the dominant interest and applied that state's law.[34]

The *Restatement (Second) of Conflict of Laws* adopted a test similar to the *Babcock* test.[35] The *Restatement* states:

> The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6 [Choice of Law Principles].[36]

Many states began to follow the *Restatement's* "most significant relationship" test, including Illinois, which adopted the

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[34] 213 N.E.2d at 799.

[35] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E. 2d 279 (1963). *See supra* notes 25-28 and accompanying text.

[36] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) provides:

Choice of Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971) provides:

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

test in *Ingersoll v. Klein.*[37]

California adoped a somewhat different approach to the analysis of choice-of-law questions, using a "governmental interest"[38] test announced in *Reich v. Purcell.*[39] In *Reich*, an Ohio plaintiff brought suit against a California resident for a death that resulted from an accident in Missouri. The court held that California had no interest in applying its own rule, which would not limit the amount of damages, to the plaintiffs who were non-residents. The court also determined that Missouri had no interest in applying its rule, which would limit damages, to non-resident defendants, and therefore found that Ohio law should be applied. Thus, under the "governmental interest" test, the court does not disregard relevant contacts, but also considers the governmental policies behind the laws of the states having an interest in the litigation. The court then decides which law to apply by balancing the interests of the litigants and the interests of the states involved.[40]

The *Reich* decision was reinforced and clarified in *Hurtado v. Superior Court.*[41] In *Hurtado*, a Mexican citizen was killed in a California automobile accident. Mexican law limited the amount of damages recoverable, but California had no such limitation. The California Supreme Court refused to apply Mexican law, saying: "Since it is the plaintiffs and not the defendants who are the Mexican residents in this case, Mexico has no interest in applying its limitation of damages—Mexico has no defendant residents to protect and has no interest in denying full recovery to its residents . . . ."[42] The court stated that California, as the forum, should apply its own law when a foreign state had a lesser interest in having its law applied.[43]

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[37] 46 Ill. 2d 42, 262 N.E.2d 593 (1970). *See supra* note 9.

[38] The leading proponent of the "governmental interest" approach was Professor Brainerd Currie.*See* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Currie, *The Constitution and Choice of Law: Governmental Interests and Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

[39] 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

[40] 432 P.2d at 730, 63 Cal. Rptr. at 34.

[41] 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).

[42] 11 Cal. 3d at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110.

[43] *Id.*

The "governmental interest" approach was further refined into a "comparative impairment" approach in *Bernhard v. Harrah's Club*[44] and *Offshore Rental Co. v. Continental Oil Co.*[45] In *Bernhard* a California resident was injured in an automobile accident by another driver who had become intoxicated at a Nevada tavern. The California resident sued the owner of the Nevada tavern. The plaintiff alleged that his injuries were proximately caused by the defendant's sale of alcoholic beverages to intoxicated patrons. A "true conflict"[46] existed between the laws of California and Nevada in that California permitted a recovery and Nevada did not. Both states, furthermore, had a legitimate interest in the application of their law. The trial court, ruling that Nevada law applied because the alleged tort occurred in Nevada, dismissed the complaint. On appeal the California Supreme Court reversed and stated that, when a true conflict exists, the court should "determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. . . . [T]rue conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied."[47]

In *Offshore Rental* a California corporation sued for loss of services from an employee whom defendant negligently injured on defendant's premises in Louisiana. California law permitted a corporation to recover damages occasioned by the

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[44] 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).

[45] 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

[46] Under the "governmental interest" approach a "false conflict" exists where only one state has an interest in the application of its law. A "false conflict" was confronted by the court in *Reich v. Purcell*, 67 Cal. 2d 552, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). In *Reich*, the accident occurred in Missouri, which limited a plaintiff's recovery in wrongful death actions. Neither California, the home of the defendant, nor Ohio, the home of the plaintiff, had any limitation on damages. Because California had no limitation on damages it had no interest in protecting its resident defendant from higher recovery. Missouri's interest in imposing damage limitations was solely to protect resident defendants, of which there were none. Ohio had an interest in allowing its resident plaintiffs unlimited recovery and was therefore the only state with an interest.

[47] 16 Cal. 3d at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219. The court concluded that California had an important and abiding interest in applying its law, and that that policy of California would be more significantly impaired if its law were not applied. 16 Cal. 3d at 322-25, 546 P.2d at 725-26, 128 Cal. Rptr. at 221-22.

loss of a key employee. The court found that Louisiana had stronger, more current interests in applying its law precluding a corporate employer from recovering such damages. The court stated that because "the California statute had historically been of minimal importance in the fabric of California law, and the Louisiana courts have recently interpreted their analogous Louisiana statute narrowly in light of that statute's obsolesence,"[48] Louisiana's interests would be more impaired if its law were not applied.

Commentators agree that the modern conflicts rules make predicting the results of litigation, advising clients, and settling cases more difficult,[49] and that the move away from *lex loci delicti*, in some cases, results in confusion as to the substantive law to be applied.[50] They point out further that the problems are greatly multiplied in litigation arising from the crash of a commercial airliner. In these cases a large number of plaintiffs may file actions in many different states against multiple defendants.[51] Each defendant may have to appear in several states, and if defendants cannot be sued in a single jurisdiction the plaintiffs may have to sue the defendants separately in different states.[52] As to each plaintiff and defendant, there may be several states with interests or contacts that must be considered in a conflict of laws analysis.[53] States have different substantive laws and different interpretations of various relevant legal concepts such as *res ipsa loquitur*, theories of warranty, the duty of care owed, wrongful death

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[48] 22 Cal. 3d at 169, 583 P.2d at 729, 148 Cal. Rptr. at 875.

[49] *See* Haller, *Death in the Air: Federal Regulation of Tort Liability a Must*, 54 A.B.A.J. 382 (1968) [hereinafter cited as Haller].

[50] Note, *The Case for a Federal Common Law of Aircraft Disaster Litigation: A Judicial Solution to a National Problem*, 51 N.Y.U.L. REV. 231, 235 (1976).

[51] *See* Haller, *supra* note 49, at 385. *See also* Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U.L. REV. 299 (1968) [hereinafter cited as Tydings]. *See also infra* note 124.

[52] *See, e.g., In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975). As a result of an air crash that killed all 346 aboard, two hundred lawsuits were filed all across the country. Approximately one thousand plaintiffs from twenty-one countries sued the air carrier, two manufacturers and the United States Government.

[53] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971).

and standing to bring suit.[54] There is also a variety of choice-of-law rules among the states.[55] This mass of litigation places great procedural burdens on the parties and often leads to inconsistent results.[56]

If the actions are consolidated and transferred to a single federal district court,[57] some of the procedural burdens on the parties are eased, but commentators have recognized that the possibility of obtaining inconsistent results remains.[58] A federal court is bound to apply the choice-of-law rule of the state in which it sits,[59] and a transferee court is required to apply the law the transferor court would have applied.[60] A federal transferee court is left with the problem of determining the nature and methods of application of each state's choice-of-law rule. If the transferee court's analysis causes it to apply different substantive laws in the same courtroom, substantial inequities may result. Plaintiffs situated identically and presenting the same evidence can recover different amounts in

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[54] For a more detailed discussion of differing tort rules see Comment, *Air Crash Litigation: Disaster in the Courts*, 7 SW. U.L. REV. 661, 671-74 (1975).

[55] *See* R. LEFLAR, AMERICAN CONFLICTS LAW §§ 96, 138 (1977); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 42 N.Y.U.L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

Besides the previously mentioned "most significant relationship" or "dominant contacts" test, "comparative impairment" test and the rule of *lex loci delicti*, there also exists the "choice influencing considerations" approach. Under this approach the court considers: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the rule of law. 16 Am. Jur. 2d *Conflict of Laws* § 105 (1979).

[56] *See, e.g.*, Tydings, *supra* note 52, for a discussion of the Boston Harbor crash cases in which plaintiffs suing under a Massachusetts wrongful death statute were limited to recoveries of $20,000 while plaintiffs suing under a Pennsylvania statutue recovered up to $180,000. *Id.* at 302-06.

[57] 28 U.S.C. § 1404 (1976) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Actions also may be transferred to a single federal court under the provisions of 28 U.S.C. § 1407 (1976). *See supra* note 5.

[58] Note, *The Case for a Federal Common Law of Aircraft Litigation: A Judicial Solution to a National Problem*, 51 N.Y.U.L. REV. 231, 236-37 (1976).

[59] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). *See supra* note 8.

[60] Van Dusen v. Barrack, 376 U.S. 612, 642 (1964). The Court stated that a transfer is merely a "change of courtrooms." *Id.*

damages.[61]

The Seventh Circuit in *Kohr v. Allegheny Airlines*[62] avoided analysis of a complicated conflict of laws problem and the risk of inconsistent results, by applying federal common law. The case arose out of a collision between a jet airliner and a small aircraft. Actions were instituted on behalf of eighty-one of the decedents against five different defendants in various federal district courts.[63] The cases were consolidated and transferred to the District Court for the Southern District of Indiana.[64] On appeal, the Seventh Circuit was confronted with the issue of what law to apply to the two defendants who had settled out of court and who subsequently sought contribution and indemnity from two codefendants.[65] The court justified the application of federal common law by stating:

> The basis for imposing a federal law of contribution and indemnity is what we perceive to be the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways. Moreover, the imposition of a federal rule of contribution and indemnity serves a second purpose of eliminating inconsistency of result. . . . Given the prevailing federal interest in uniform air law regulation, we deem it desirable that a federal rule of contribution and indemnity be applied.[66]

Some commentators have advocated the *Kohr* approach as the best means of overcoming the choice-of-law problems presented in aviation disaster litigation.[67] The United States

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[61] Application of different substantive laws and the unequal recoveries that result are not unlikely, considering that a substantial number of states still follow *lex loci delicti*. The rule of *lex loci delicti* will often cause the courts to apply different substantive law than would be applied under the modern conflict approaches. Kreindler states that, as of the beginning of 1981, twenty-four states still followed the *lex loci delicti* rule. KREINDLER, *supra* note 15, § 2.03, at 25.

[62] 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975).

[63] 504 F.2d at 401.

[64] *In re* Mid-Air Collision Near Fairland, Indiana, 309 F. Supp. 621 (1970).

[65] 504 F.2d. at 402-03.

[66] *Id.* at 403.

[67] *See, e.g.*, Keefe & DeValerio, *Dallas, Dred Scott and Eyrie Erie*, 38 J. AIR L. & COM. 107 (1972); Note, *The Case for a Federal Common Law of Aircraft Disaster Litigation: A Judicial Solution to a National Problem*, 51 N.Y.U.L. REV. 231, 253-57

Supreme Court, however, has indicated that the courts are not free to depart from the application of state law in air crash cases. In *Miree v. DeKalb County*[68] survivors of deceased passengers brought an action for breach of a Federal Aviation Administration contract. The Supreme Court held that, even though the United States had a substantial interest in regulating aircraft travel and promoting air travel safety, federal common law was not applicable to the question before them.

Another approach to overcoming the problems presented by air crash litigation is through Congressional action. In 1968 and 1969, the "Holtzoff Bill"[69] and the "Tydings Bill"[70] proposed the establishment of exclusive federal court jurisdiction in air crash cases.[71] The conflict of laws problems would be eliminated by the provision of a uniform body of federal law.[72] Those in favor of legislative action argue that the federal interest in, and control over, aviation activity is so strong that liability in tort should also be governed by federal law.[73] The Tydings Bill was the subject of substantial hearings[74] but died in committee, after Senator Tydings failed to gain re-election. A similar bill, providing for a federal cause of action and federal court procedures for aviation activity was introduced in

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(1976).

[68] 433 U.S. 25 (1977). *See also* Executive Jet Aviation Inc. v. City of Cleveland, 409 U.S. 249, 273-74 (1972). The petitioners in *Executive Jet* invoked federal admiralty jurisdiction under 28 U.S.C. § 1333(1) to bring a suit for damages resulting from the crash of their aircraft in the navigable waters of Lake Erie. The Court refused to apply federal admiralty jurisdiction. *Id.* at 273-74. *See also* Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978), in which the court discussed *Miree, Executive Jet*, and *Kohr* and held that the law referred to in the Federal Tort Claims Act is state law. *Id.* at 1316-17. *See also* Note, 44 J. AIR L. & COM. 635, 640-43 (1979).

[69] S. 3305 & S. 3306, 90th Cong., 2d Sess.§ 1 (1968).

[70] S. 961, 91st Cong., 1st Sess. § 2751(a) (1969).

[71] S. 961, 91st Cong., 1st Sess., 115 CONG. REC. 3111 (1969); S. 3305 & S. 3306, 90th Cong., 2d Sess., 124 CONG. REC. 9432 (1968).

[72] Senator Tydings stated, "[t]he best way to ensure a uniform and expeditious result would be to consolidate all cases arising from a single accident for pretrial purposes and also for trial of the common question of liability, applying a single body of law." Tydings, *supra* note 51, at 307.

[73] *Id.* at 308-09.

[74] *Hearings on Bill to Improve the Judicial Machinery by Providing for Federal Jurisdiction and a Body of Uniform Federal Law for cases Arising Out of Aviation and Space Activities Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. §§ 204-241 (1969).

the House by Representative George Danielson of California in 1978.[75] This bill remains in the House Judicial Committee.

II. ANALYSIS

The availability of federal common law or the existence of a federal statute applicable to aircraft disasters would have greatly eased the difficulty faced by the court in *In Re Air Crash Disaster Near Chicago, Illinois*. The applications of federal common law is apparently not acceptable, however, and no federal statute exists concerning aviation disasters; therefore, the *Chicago* court had a difficult choice-of-law question to decide. The court had to consider the choice-of-law rules of six different states[76] and the substantive law of seven states.[77] The Seventh Circuit was asked to rule on a lower court decision which had found that punitive damages were available against MDC but not against American for all but those plaintiffs who had filed their actions in Puerto Rico. The district court held that the plaintiffs filing in Puerto Rico could not recover punitive damages against either defendant.[78] The Seventh Circuit undertook the task of reaching a consistent decision among both the plaintiffs and defendants regarding the motions to strike the punitive damages claims.

The court analyzed each state's position on whether punitive damages should be allowed in wrongful death actions, and found that Illinois, the place of the injury, did not allow puni-

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[75] H.R. 10917, 95th Cong., 2d Sess., 124 CONG. REC. 3382 (1978).

[76] *In re* Air Crash Disaster Near Chicago, Ill., 644 F.2d 594, 604-05 (7th Cir. 1981). The court considered the choice-of-law rules of Illinois, California, New York, Michigan, Puerto Rico, and Hawaii. Each of these were states where actions were filed. *Id.*

[77] *Id.* The court considered the substantive law of Illinois, Missouri, California, New York, Texas, Oklahoma, and Hawaii. *Id*

[78] Because Puerto Rico applied the rule of *lex loci delicti* and the law of the place of the injury did not allow punitive damages, plaintiffs filing in Puerto Rico were to be denied recovery of punitive damages against both defendants.

The district court expressed its regret with the result by stating:

> The inconsistency of finding punitive damages available against one defendant and not the other is compelled by differences in various states' conflict of law and punitive damages rules and reflects the problems inherent in application of state law to activities of national scope, such as those of the airline industry.

In re Air Crash Disaster Near Chicago, Ill., 500 F. Supp. 1044, 1054 (N.D. Ill. 1980).

tive damages. The court further found that the laws of the states with interests in MDC were in conflict, in that one state allowed punitive damages and one state did not. The court found the same conflict with regard to the laws of the states with interests in American. Specifically, the court determined that Missouri, MDC's principal place of business, and New York, American's principal place of business,[79] both allowed punitive damages.[80] California, the place of MDC's conduct, and Oklahoma, the place of American's conduct, did not allow punitive damages. After announcing that the court would examine the choice-of-law rules precisely with regard to each state's interest in the issue of punitive damages,[81] the Seventh Circuit began its analysis of the actual conflict of laws issues.

Beginning with the actions filed in Illinois, the court found that Illinois adhered to the "most significant relationship" test of the *Restatement (Second) of Conflict of Laws*.[82] The court pointed out that the contacts to be taken into account under this test were: (1) the place of the injury; (2) the place of misconduct; (3) the domicile and place of business of the parties; and (4) the place where the relationship between the parties is centered.[83] The court stated that it was unclear whether the relationship of the parties was "centered" in Illinois, the place of departure, or California, the place of desti-

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[79] Plaintiffs contended that Texas should be considered American's principal place of business since it was American's principal place of business at the time of trial. The court found that New York was American's principal place of business on the date of the crash and as such it was the state to be considered in a conflict of laws analysis. 644 F.2d at 616-20.

[80] *Id.* at 608.

[81] *Id.* at 611. The court stated:

> Critical to conflicts analysis is the notion that we must examine the choice-of-law rules not with regard to various states' interests in general, but precisely, with regard to each state's interest in the specific question of punitive damages. Thus, we approve the concept of 'depecage': the process of applying rules of different states on the basis of the precise issue involved.

Id. Reese defines depecage as "the process of applying the rules of different states to determine different issues in the same case." Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 75 (1972).

[82] 644 F.2d at 611. *See supra* note 37 and accompanying text.

[83] 644 F.2d. at 612. *See supra* note 36 and accompanying text.

nation.[84] The court also found that the domicile of the plaintiffs had no interest in the issue of punitive damages.[85] This determination left for consideration the interests of the state where the alleged misconduct occurred, the state of the principal place of business, and the state where the injury occurred.

The court explained that states award punitive damages to deter wrongful conduct, or disallow punitive damages to protect the economic well-being of corporations in their state.[86] The court concluded that California, the place of MDC's conduct in the manufacture and design of the DC-10, and New York, American's principal place of business, had obvious interests in protecting businesses within their borders by prohibiting awards of punitive damages. These states derived "substantial sales and income taxes, as well as other revenues, directly and indirectly from a corporation's activities within the state."[87] The court noted that, by protecting these corporations, states enhance their own economic well being.[88] The court also pointed out that a state's favorable position on punitive damages may be a factor in a corporation's decision to move to the state.[89]

The court found that the states allowing punitive damages had strong interests in preventing future misconduct. By punishing the defendants, these states could deter wrongful conduct in the design, the manufacture and the maintenance of airplanes.[90] The court rejected MDC's argument that the state of a corporations's principal place of business had no interest in punishing its own corporate domiciliary.[91] Judge Sprecher

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[84] 644 F.2d at 612.

[85] *Id.* at 612-13.

[86] *Id.* at 613. The Seventh Circuit Court of Appeals was in agreement with the district court regarding the purpose for punitive damages. The district court relied on the cases of Sibley v. KLM-Royal Dutch Airlines, 454 F. Supp. 425 (S.D.N.Y. 1978), and Jackson v. Koninklijke Luchtvaart Maatschappij N.V., 459 F. Supp. 953 (S.D.N.Y. 1978).

[87] 644 F.2d at 614.

[88] *Id.* Corporations are economically beneficial to a state because they provide jobs and give the state a larger tax base.

[89] 644 F.2d at 614.

[90] *Id.* at 613.

[91] *Id.*

stated that this view would "gut the very concept of corporate accountability."[92] The court explained further that if all courts looked solely to the place of conduct, corporations could attempt to structure major operating, manufacturing and design decisions so that a court would not find that the conduct occurred in a punitive damages state.[93] The court concluded that the state of the principal place of business and the state of the defendants' misconduct had strong interests in the issue of punitive damages, but that the court was unable to say which one had a stronger interest than the other.[94]

The court reached a similar conclusion in its analysis of the actions filed in California. Following California's "comparative impairment"[95] approach, the court had to decide which state's interest would be more impaired if its law were not applied.[96] In making this decision, the court examined two factors to determine the relative commitment of each state to the law involved. These factors were: "(1) the current status of a statute and the intensity of interest with which it is held; and (2) the 'comparative pertinence' of the statute: the 'fit' between the purpose of the legislature and the situation in the case at hand. . . ."[97] The court found that the states of MDC's and American's principal places of business and the states of their misconduct all had strong current interests in their punitive damage laws, and that there was a good "fit" between the purpose of each law and the facts of the case.[98] The court could not say, however, that one state's interest would be more im-

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[92] *Id.* Judge Cudahy pointed out a weakness in this reasoning in his concurrence, in which he stated that "[t]he finding of such a Missouri interest may impute an unusual level or [sic] altruism to Missouri policy and may overstate the commitment of Missouri (or any other state) to 'corporate accountability' in circumstances where both the misconduct and the injuries took place outside the borders of the domiciliary state." 644 F.2d at 633 (Cudahy, J., concurring).

[93] 644 F.2d at 613-14.

[94] *Id.* at 615, 621.

[95] *Id.* at 621.

[96] *Id. See supra* notes 38-48 and accompanying text.

[97] 644 F.2d at 622. The court extracted this rule from Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 166-67, 583 P.2d 721, 727, 148 Cal. Rptr. 867, 873 (1978).

[98] 644 F.2d at 623, 625, 627-28.

paired than the other's if its law was not applied.[99]

The district court also had found that the states of the principal places of business and the places of misconduct both had strong interests in the application of their own law.[100] The lower court resolved this conflict by applying the law of the principal place of business, stating: "[r]esponsibility for corporate conduct should be uniform regardless of where the operation took place."[101] The court's reasoning was that application of the law of the place of misconduct would involve an extensive examination of the particular employees and operations involved, and a determination of the location of employees or corporate officers ultimately responsible for the type of conduct in question.[102] This kind of analysis, the lower court decided, would detract from the certainty, predictability, and uniformity of result.[103] The Seventh Circuit Court rejected this lower court rule because it found that the district court had looked only at the purpose behind a state's decision to allow punitive damages and had failed to consider the reason behind a state's decision *not* to allow punitive damages.[104]

The court of appeals resolved what it called a "total and genuine conflict"[105] between the laws of the principal place of business and the place of misconduct by turning to the law of Illinois, the place of the injury.[106] Accordingly, it granted both American's and MDC's motion to strike punitive damage claims.[107] No plaintiff in any jurisdiction would be allowed to recover punitive damages.[108] The justification for application

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[99] *Id.* at 625, 628.

[100] *In re* Air Crash Disaster Near Chicago, Ill., 500 F. Supp. 1044, 1048-51 (N.D. Ill. 1980).

[101] *Id.* at 1049-50.

[102] *Id.* at 1050.

[103] *Id.*

[104] 644 F.2d at 615.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 633.

[108] The Court found that the New York test was the functional equivalent of the *Restatement (Second)* test used by Illinois. Thus, the conflict analysis with regard to New York was the same as that applied to Illinois. *Id.* at 629. Recent Michigan decisions indicated Michigan would also follow the "most significant relationship" test. The court stated that if this test did not resolve the question, Michigan courts would

of Illinois law was that, although the interests of Illinois were inferior to those of the other states considered,[109] it nevertheless had strong interests.[110] The court listed Illinois' interests as encompassing: (1) the shock wave suffered and the expenses incurred by the state of Illinois on account of the crash; (2) the fact that, with regard to the actions filed in Illinois, all but two of the decedents resided there; and (3) the fact that Illinois, as home of one of the world's busiest airports, had a strong interest in encouraging air transportation companies to do business within the state.[111]

The court stated that its rule was a "principled means of decision"[112] that lent itself to "certainty, predictability, uniformity of result, and ease in the determination and application of the law to be applied."[113] Recognizing the problems involved in resolving conflict of laws issues in airplane crashes,[114] the court concluded its opinion with a plea to Congress for the passage of a uniform federal law to govern tort liability. Judge Sprecher stated:

> Along with the district court, we conclude that it is clearly in the interests of passengers, airline corporations, airplane manufacturers, and state and federal governments, that airline tort liability be regulated by federal law. Of course, we are well aware of the fact that it is up to Congress, and not the courts, to create the needed uniform law.[115]

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turn to the law of the place of the injury, relying on their precedents of following the *lex loci delicti* rule. *Id.* at 630. Puerto Rico follows *lex loci delicti*; therefore, it also would apply the law of Illinois. *Id.* at 630. The court was unable to determine the choice-of-law rule of Hawaii, and concluded that, in this situation, it should presume that the forum would apply its own law. Finding that Hawaii law does not authorize punitive damages, the court granted the motions to strike the Hawaiian punitive damages claims against both defendants. *Id.* at 630-32.

[109] *Id.* at 615. The other states considered were Missouri, California, New York and Oklahoma. *Id.* at 610-20.

[110] *Id.* at 615.

[111] *Id.*

[112] *Id.* at 616.

[113] *Id.* The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) lists these factors as relevant to the choice of the applicable rule. *See supra* note 36.

[114] 644 F.2d at 632-33.

[115] *Id.*

III. CONCLUSION

In examining the states' interests in the issue of punitive damages in the *Chicago* case,[116] it seems that Illinois is no more than the fortuitous place of the injury. The expenses that Illinois incurred in rescue operations, clean-up operations, notifying next-of-kin and other procedures related to the crash were no greater than the expenses any other state would have incurred had the crash taken place within its boundaries. Illinois law does not allow punitive damages, so Illinois had no interest in the application of its law for the purpose of deterring air crashes.

The fact that a large number of the decedents resided in Illinois does not appear to add much to Illinois' interest in the issue of punitive damages. The court explained in an earlier part of its opinion:

> The domiciliary states do not have an interest in disallowing punitive damages because the decision to disallow such damages is obviously designed to protect the interest of the resident defendants, not to effectuate the interest of the domiciliary states in the welfare of plaintiffs. *E.g., Hurtado v. Superior Court.*[117]

The fact that Illinois is the home of O'Hare International Airport, one of the world's busiest airports, also does not seem to be a strong indication of Illinois' interest in the application of its law regarding punitive damages. The court claimed that the presence of the large airport indicated that Illinois had a strong interest in encouraging air transportation corporations to do business within the state.[118] Illinois does not seem to have an interest in protecting MDC, the manufacturer, however, because MDC is headquartered in Missouri and performed its alleged misconduct in California. In addition, an airline's decision to schedule flights to a particular city probably would not be affected significantly by that state's punitive

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[116] *See supra* note 81.

[117] 644 F.2d at 612.

[118] *Id.* at 615.

damages rule.[119] In deciding whether to fly to and from Chicago, an air carrier probably gives greater consideration to the geographic location of the city and the customer demand for flights. The legislative purpose behind Illinois' punitive damages statute does not seem to "fit"[120] the facts of this case.

The court claims that its analysis is more than just a "tabulat[ion of] the states pro and con"[121] on the issue of punitive damages. It also warns that its decision is not a return to the mechanical, wooden law of *lex loci delicti*.[122] Yet, even if the argument is accepted that Illinois had a strong interest in the application of its law, the court is still applying the law of the state with a less significant relationship than that of the other states considered.[123] Illinois is the state whose interest would be the least impaired if its law were not applied.

The apparent weaknesses in the court's reasoning are actually an indication of the Seventh Circuit's ingenuity in reaching an equitable result. In applying the law of Illinois, the court of appeals was able to avoid the inequity of allowing punitive damage claims against one defendant and not against the other. The court also avoided the situation in which some plaintiffs would be able to recover punitive damages and others would not, even though their injuries were similar and their claims arose out of the same tortious conduct.

The importance of the place of the injury rule laid down in this case is that it will allow future courts to escape inconsistent results. The reasoning behind the rule is also important because it is an example of the difficulty modern courts face in reaching equitable results under our current aviation acci-

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[119] Texas allows punitive damages in wrongful death actions, yet Dallas-Ft.Worth International Airport ranks fourth in the world in air carrier operations. Interview with Jim Street, Department of Public Information of Dallas-Ft.Worth International Airport, in Dallas, Texas (July, 1980).

[120] *See supra* text accompanying note 97.

[121] 644 F.2d at 613.

[122] *Id.* at 621.

[123] *Id.* at 615. The court stated "[b]ecause the place of the injury is much more fortuitous than the place of misconduct or the principal place of business, its interest in and ability to control behavior by deterrence or punishment, or to protect defendants from liability, is lower than that of the place of misconduct or principal place of business". *Id.*

dent law system. In Congress a bill that is presently before the House Judicial Committee[124] would alleviate the problems confronting courts in air disaster cases. Passage of this bill, which calls for a federal cause of action and federal court procedures, would provide the much needed uniformity in aviation accident law. A federal statute, uniform as to liability and damages, would enhance judicial economy and reduce the chance of inconsistent results. Many of the problems encountered in litigating the *Chicago* case could be avoided if Congress enacts a federal law to govern this type of action.

Chris Cage

CIVIL PROCEDURE—IN PERSONAM JURISDICTION IN TEXAS—Article 2031b, the Texas long-arm statute, requires a nexus between the defendant's contacts with Texas and the plaintiff's cause of action, such that in personam jurisdiction over a non-resident defendant cannot properly be predicated solely upon the defendant's activities within the state, absent a showing that those activities gave rise to the cause of action sued upon. *Prejean v. Sonatrach*, 652 F.2d 1260 (5th Cir. 1981).

In October, 1975, John Prejean and Alphonse Mouton, em-

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[124] *See supra* note 75 and accompanying text. Conflicts scholars have recognized the need for a federal law for aviation torts. Robert Leflar stated that "[t]here are many situations in which it does not make sense to struggle over the question of which state's law to apply. Airborne collisions of commercial passenger planes illustrate the problem vividly. Midair crashes may occur close to state lines so that it is difficult to determine where, jurisdictionally, particular events occurred, and the location if determined may have little relevance to the interests affected by the crash. The persons affected may be residents of 20 to 50 different states or foreign nations. Air travel is in interstate or international commerce, and what is needed is national law applicable to all such claims to which the laws of the United States may properly be applied. It is a federal substantive law, not conflicts law, that is needed." Leflar, *Choice of Law: A Well-Watered Plateau*, 41 L. & CONTEMP. PROBS. 10, 24-25 (1977).

ployees of a Dallas engineering firm, were stationed in Algeria for the purpose of carrying out the terms of an alleged contract between their employer and Sonatrach, Inc., the Algerian national oil company. While performing their duties in this connection, the two engineers boarded an airplane allegedly chartered by Sonatrach and owned by Air Algerie. The airplane, which had been manufactured in the United States by Beech Aircraft Corporation, crashed due to unknown causes. The accident resulted in the deaths of Prejean and Mouton, and their widows brought an action for wrongful death in the Federal District Court for the Southern District of Texas.[1] Named as defendants in the suit were Sonatrach, Inc., Air Algerie and Beech Aircraft Corporation. All three defendants were served with process under the Texas long-arm statute,[2] and all promptly challenged the existence of *in personam* jurisdiction in the Texas courts. The district court granted each defandant's motion to dismiss.[3]

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[1] Prejean v. Sonatrach, 652 F.2d 1260, 1264 (5th Cir. 1981).

[2] Tex. Rev. Civ. Stat. Ann. art. 2031b (Vernon 1964 & Supp. 1982). The relevant portions of the statute read:

> Sec. 3. Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State . . . , the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.
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> Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. The act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas shall be deemed doing business in this State.

Id. §§ 3-4.

[3] 652 F.2d at 1264.

Plaintiffs appealed the dismissals to the Fifth Circuit Court of Appeals, urging both that long-arm jurisdiction was proper, since the Texas statute is coextensive with the limits of the due process clause of the Fourteenth Amendment of the United States Constitution, and that each defendant had sufficient contacts with the state to satisfy due process requirements.[4] Defendants countered that contacts sufficient for purposes of federal due process are not necessarily adequate for purposes of the Texas statute because the statute requires that the plaintiff's cause of action arise from the defendant's contacts with the state. They further maintained that this requirement was not met as to any of them because all of their contacts were unrelated to the plaintiff's suit.[5] In this respect, defendants asserted, the Texas statute is more restricted in its reach than the due process clause requires. *Held, affirmed in part*: Article 2031b, the Texas long-arm statute, requires a nexus between the defendant's contacts with Texas and the plaintiff's cause of action, such that *in personam* jurisdiction over a non-resident defendant cannot properly be predicated solely upon the defendant's activities within the state, absent a showing that those activities gave rise to the cause of action sued upon. *Prejean v. Sonatrach*, 652 F.2d 1260 (5th Cir. 1981).

I. Due Process Limitations

The ultimate delineation of the permissible reach of a state's long-arm statute is drawn by the due process clause of the United States Constitution.[6] The clause, as construed by the United States Supreme Court, mandates that certain fairness requirements be met before a defendant is haled into the courts of a state in which he does not reside.[7] Assuming, however, that such conditions are met, the state is free to impose still further constraints upon the reach of its own long-arm jurisdiction. It may thus draft the long-arm statute so as to

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[4] *Id.*
[5] *Id.*
[6] *See* Milliken v. Meyer, 311 U.S. 457 (1940).
[7] *Id.* at 463.

make its reach narrower than, or contiguous with, the requirements of federal due process.

Limitations imposed by the Fourteenth Amendment on state assertions of *in personam* jurisdiction over non-residents were outlined by the United States Supreme Court in *International Shoe Co. v. Washington*[8] and its progeny. In its decision in *International Shoe*, the Supreme Court espoused the now-familiar requirement that the non-resident defendant "if he be not present within the . . . forum . . . have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[9] In *International Shoe* the State of Washington sought to collect unemployment taxes based on commissions paid by the defendant firm to its Washington-based salesman. The defendant corporation had its principal place of business in Missouri, but its Washington salesman generated $31,000 total commissions annually.[10] The Court was, therefore, confronted with a situation in which the substantial activities of the defendant within the forum state directly gave rise to the plaintiff's cause of action.[11] The Supreme Court found that these activities of the non-resident defendant within Washington were sufficient "minimum contacts" to justify the state court's assertion of jurisdiction.[12]

Seven years later, the Supreme Court addressed a case in which the defendant-corporation maintained substantial contacts with the forum state, but where those contacts did not give rise to the plaintiff's cause of action. In *Perkins v. Benguet Consolidated Mining Co.*,[13] the plaintiff-shareholeder sued to recover dividends she claimed were due her from the company's mining operation in the Philippines.[14] She brought suit against the defendant corporation in Ohio, where the corporate president and principal stockholder conducted busi-

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[8] 326 U.S. 310 (1945).
[9] *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
[10] 326 U.S. at 313.
[11] *Id.* at 320.
[12] *Id.*
[13] 342 U.S. 437 (1952).
[14] *Id.* at 439.

ness of the corporation unrelated to the Philippines operations.[15] The Supreme Court held that a non-resident defendant constitutionally may be subjected to *in personam* jurisdiction on an unrelated cause of action if its activities within the forum state are "continuous and systematic."[16] The Court reasoned that there was no unfairness in subjecting a corporation to the jurisdiction of the courts of a state in which the corporation maintained an authorized representative.[17] This fact was held to be dispositive, regardless of where the cause of action arose.

A state court's assertion of *in personam* jurisdiction over a non-resident was again upheld in *McGee v. International Life Insurance Co.*[18] In *McGee* an out-of-state insurer sent a reinsurance certificate to the insured in the forum state, and the insured mailed all premiums on the policy from the forum state. The defendant had no offices in that state, nor had it done any other business there.[19] The beneficiaries under the policy brought suit against the insurer for wrongful refusal to pay benefits under the policy. *McGee* thus represented the situation in which the defendant's minimal contacts with the forum state gave rise to the plaintiff's cause of action. The Court found these minimal contacts sufficient for purposes of due process and agreed with the state's assertion of jurisdiction.[20]

In *Hanson v. Denckla*[21] the United States Supreme Court invalidated a state court's asserted jurisdiction over a foreign corporation, when the cause of action sued upon did not arise out of the foreign corporation's minimal contacts with the forum state. The Florida plaintiffs in *Hanson* sued a Delaware trustee for a declaratory judgment that the proceeds from the trust should pass to them.[22] The trust had been created by the

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[15] *Id.* at 438.
[16] *Id.* at 445.
[17] *Id.* at 444.
[18] 355 U.S. 220 (1957).
[19] *Id.* at 221-222.
[20] *Id.* at 223.
[21] 357 U.S. 235 (1958).
[22] *Id.* at 238.

plaintiff's mother in Pennsylvania, and the trustee was a Delaware bank that had few contacts with Florida.[23] It was against this setting that the Supreme Court set forth its widely quoted "purposeful availment" test, saying that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State. . . ."[24] Finding that the defendant in *Hanson* had not by its minimal activities in the forum state "purposely avail[ed] itself of the privilege of conducting activities within the forum state,"[25] the Supreme Court, for the first time since its decision in *International Shoe*, held an assertion of personal jurisdiction unconstitutional.[26]

Four factual paradigms emerge from the Supreme Court decisions which illustrate the extent of the defendant's contacts and the origin of the cause of action. In the first of these paradigms, formulated in *International Shoe*, the non-resident's substantial activities in the forum gave rise to the plaintiff's cause of action.[27] In the second paradigm the cause of action was unrelated to the defendant's substantial contacts with the forum.[28] In the third, the cause of action arose out of the defendant's casual or slight activities within the forum state.[29] Finally, in the fourth paradigm, the plaintiff's cause of action arose apart from the defendant's insubstantial forum contacts.[30] In only the last of these situations was the assertion of jurisdiction found to be violative of due process. Nevertheless,

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[23] *Id.*

[24] *Id.* at 253. *See, e.g.*, Walker v. Newgent, 583 F.2d 163, 168 (5th Cir. 1978); Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1268 (5th Cir. 1978), *rev'd on other grounds sub nom.*, Leroy v. Great W. United Corp., 443 U.S. 173 (1979); Barnstone v. Congregation Am Echad, 574 F.2d 286, 288 (5th Cir. 1978); Rockwell Int'l Corp. v. KND Corp., 83 F.R.D. 556, 563 (N.D. Tex. 1979).

[25] 357 U.S. at 253.

[26] *Id.* at 251.

[27] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[28] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

[29] McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

[30] Hanson v. Denckla, 357 U.S. 235, 252 (1958).

the Supreme Court has never required that a nexus exist between the cause of action and the defendant's forum contacts. To the contrary, the *Perkins* decision disavows such a requirement by allowing the exercise of personal jurisdiction over the non-resident on a cause of action unrelated to the forum contacts.

II. STATUTORY LIMITATIONS

While federal due process requirements define the outermost boundaries of state long-arm jurisdiction, a particular state's long-arm statute may itself impose further constraints upon the courts in the exercise of jurisdiction over non-residents.[31] The doctrine of *Erie Railroad v. Tompkins*[32] dictates that the construction of state statutes be left to the state courts, so that federal courts sitting in a particular state must give the statute the same construction as would that state's highest court.[33] Because the statute conferring jurisdiction may be more restricted in its reach than required by due process, the federal court, prior to applying the principles of the Supreme Court's minimum contacts decisions, must examine the long-arm statute in light of the state courts' decisions construing it.[34] If the statute is construed to confer jurisdiction upon the courts of a particular state in a given case, the federal court must then proceed to inquire whether the grant of

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[31] *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945). For another example of Supreme Court invalidation of a state's asserted jurisdiction over a non-resident, *see* Kulko v. Superior Court, 436 U.S. 84 (1978), in which the Court refused to allow the mother of a minor child, residing with her mother in California, to bring an *in personam* action against the child's father, who lived in New York.

[32] 304 U.S. 64 (1938).

[33] *See* Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 489 (5th Cir. 1974).

[34] *See, e.g.*, Coulter v. Sears, Roebuck & Co., 426 F.2d 1315 (5th Cir. 1970) (exercise of jurisdiction by Texas over a non-resident television manufacturer, which had sold to retailers with the knowledge that a portion of its products would be shipped directly to Texas, was not violative of due process of law); Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966) (Fifth Circuit allowed assertion of jurisdiction over a Washington corporation which had contracted with several Texas hatcheries for the sale and lease of certain breeding stock, reserving supervisory rights to exploit the economic potential of the Texas market and occasionally sending field representatives into Texas); Hearne v. Dow-Badische Chem. Co., 224 F. Supp. 90 (S.D. Tex. 1963) (court allowed the exercise of jurisdiction over the foreign manufacturer of a valve that was shipped to Texas where it caused a fatal injury).

jurisdiction is also constitutional.[35]

A. *O'Brien v. Lanpar Co.*

The Texas Supreme Court's first occasion to address the issue of state long-arm jurisdiction was in the 1966 case of *O'Brien v. Lanpar Co.*[36] In *O'Brien,* the court had to decide whether to give full faith and credit to an Illinois judgment, and whether the Illinois court had jurisdiction over the Texas corporation against whom it had rendered a default judgment. In assessing the propriety of the Illinois court's assertion of jurisdiction, the Texas Supreme Court noted that "[t]he validity of the Illinois judgment is controlled by the law of Illinois but must satisfy the due process clause."[37] After quoting from the relevant portions of the Illinois long-arm statute,[38] the court acknowledged that "Illinois has repeatedly held that the quoted sections reflect a purpose to assert jurisdiction over non-resident defendants to the extent permitted by the due process clause."[39]

The *O'Brien* court proceeded to analyze due process principles and concluded with a quote from *Tyee Construction Co. v. Dulien Steel Products, Inc.*,[40] a Washington Supreme Court case that purported to set forth the "three basic factors which should coincide if jurisdiction [over the non-resident] is to be entertained."[41] Those factors, as outlined by the Washington Court, were as follows:

> (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 assump-

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[35] *See* Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966). *See also* Eyerly Aircraft Co. v. Killian, 414 F.2d 591, 593 (5th Cir. 1969).

[36] 399 S.W.2d 340 (Tex. 1966).

[37] *Id.* at 341.

[38] The statute under consideration was substantially similar to the Texas long-arm statute in that it required the cause of action to arise out of the business done within the state. *See* Ill. Rev. Stat. ch. 110, § 17 (1960) (amended 1977).

[39] 399 S.W.2d at 341.

[40] 62 Wash. 2d 106, 381 P.2d 245 (1963).

[41] *Id.* at 251.

> tion of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.[42]

These factors, while they have been widely cited in Texas by both state and federal courts,[43] are of dubious precedential value for purposes of defining Texas long-arm jurisdiction. The obvious limitation is that the *O'Brien* court was not construing Article 2031b, but rather, was engaging in a discussion of due process limits in the context of the Illinois long-arm statute.[44]

The Fifth Circuit Court of Appeals was careful to make this distinction in *Eyerly Aircraft Co. v. Killian*[45] and thereby rid itself of the *O'Brien* factor requiring a nexus between the cause of action and the forum contacts.[46] In *Eyerly*, the nonresident defendant manufactured a carnival ride upon which the plaintiff's daughter was injured in Texas.[47] The ride was manufactured in Oregon, sold to a Chicago Company, and then sold to a North Dakota Company that toured with it throughout the United States, and eventually brought it to Texas.[48] The defendant had substantial contacts with Texas through other business transactions.[49] The court found that

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[42] *Id.*

[43] *See, e.g.*, Barnstone v. Congregation Am Echad, 574 F.2d 286 (5th Cir. 1978); Wilkerson v. Fortuna Corp., 554 F.2d 745 (5th Cir. 1977), *cert. denied*, 434 U.S. 939 (1977); Docutel Corp. v. S.A. Matra, 464 F. Supp. 1209 (N.D. Tex. 1979); Helicopteros Nationales De Columbia v. Hall, 616 S.W.2d 247 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); Gathers v. Walpace Co., 544 S.W.2d 169 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); Estes Packing Co. v. Kadish & Milman Beef Co., 530 S.W.2d 622 (Tex. Civ. App.—Fort Worth 1975, no writ).

[44] *See* McBride v. Owens, 454 F. Supp. 731 (S.D. Tex. 1978).

[45] 414 F.2d 591 (5th Cir. 1969).

[46] *See supra* note 43 and accompanying text.

[47] 414 F.2d at 592.

[48] *Id.* at 593.

[49] *Id.* at 594. The defendant's business transactions within the state included sales and deliveries of amusement devices and parts in the state, the extension of credit in the state, the retention of liens on items sold within the state, the filing of such liens with state authorities, the servicing of machinery within the state, and the solicitation of business in the state. *Id.*

the defendant corporation purposefully conducted business activities in Texas but that the plaintiff's cause of action had not arisen out of those contacts.[50]

The Fifth Circuit found the question to be whether the unrelated business contacts, plus the introduction of the ride into interstate commerce were sufficient to support Texas *in personam* jurisdiction over Eyerly Aircraft.[51] In holding the contacts sufficient, the court distinguished *O'Brien* on three grounds. First, the court explained that *O'Brien* was a construction of the Illinois long-arm statute and not of Article 2031b.[52] Secondly, it stated that the three factors from the Washington decison in *Tyee* were set forth in the context of due process limitations on long-arm service of process and were not intended to represent statutory limits.[53] Finally, the Fifth Circuit reasoned that the *Tyee* case was implicitly referring to the situation in which a non-resident defendant is sued in one state for a tort committed in a third state, and this situation was not the case in *Eyerly*.[54] Thus, having diminished the value of the *O'Brien* decision as precedent, the Fifth Circuit concluded that the exercise of *in personam* jurisdiction over the ride manufacturer was proper.

The Fifth Circuit again circumvented the *O'Brien* factor, requiring a nexus between the cause of action and the defendant's forum contacts, in *Jetco Electronic Industries, Inc. v. Gardiner*.[55] In *Jetco*, the defendant's contacts with the forum state were "admittedly neither as 'substantial' nor as 'continuous' as those of the defendants in *Eyerly*,"[56] and, in addition, the plaintiff's cause of action did not arise from those contacts.[57] Nonetheless, the court held that the defendant's unrelated contacts were sufficient to sustain the district court's ex-

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[50] *Id.* at 595.

[51] *Id.*

[52] *Id.* at 599 n.12. In *O'Brien*, the Texas Supreme Court stated that it was "the Illinois law and not the Texas law that [was on] point." O'Brien v. Lanpar Co., 399 S.W.2d 340, 343 (Tex. 1966).

[53] 414 F.2d at 599-600 n.12.

[54] *Id.*

[55] 473 F.2d 1228 (5th Cir. 1973).

[56] *Id.* at 1234.

[57] *Id.* at 1232.

ercise of *in personam* jurisdiction.[58] The court cited *Eyerly* for the proposition that:

> When a nonresident defendant introduces a product into interstate commerce under circumstances that make it reasonable to expect that the product may enter the forum state, the forum may assert jurisdiction over the defendant in a suit arising out of injury caused by the product in the forum, if the defendant's other activities within the forum, even though wholly unrelated to the suit, satisfy the minimum contacts requirement.[59]

Under this "foreseeable effects" theory it became apparent that a nexus was not required.

The Fifth Circuit's second rationale in *Jetco*, which is often reiterated in federal cases,[60] was to the effect that Article 2031b represents a legislative effort to authorize *in personam* jurisdiction to the extent permitted by federal due process.[61] The Fifth Circuit restated this proposition in *Product Promotions, Inc. v. Cousteau.*[62] In defining what it believed due process would "permit," the *Cousteau* court enunciated a dual test.[63] First, the court required that "there be some minimum contact with the state that results from an affirmative act of

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[58] *Id.* at 1234.

[59] *Id.*

[60] *See, e.g.*, Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); Gurley v. Lindsley, 459 F.2d 268 (5th Cir. 1972) (Fifth Circuit allowed a Texas plaintiff to bring an action for an accounting of past oil royalties from oil production due under a lease and to recover interest in the lands by reason of the claimed beneficial interest of plaintiff's predecessor); Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966).

[61] 473 F.2d at 1234. *See* Lone Star Motor Import, Inc. v. Citroen Cars Corp., 288 F.2d 69 (5th Cir. 1961), in which the court stated that, "[i]t seems likely that, as is true for similar legislation in many other states, . . . the Texas purpose was to exploit to the maximum the fullest permissible reach under federal constitutional restraints." *Id.* at 73-74. *See generally* Thode, *In Personam Jurisdiction; Article 2031b, the Texas "Long Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279 (1964).

[62] 495 F.2d 483 (5th Cir. 1974). The court in *Cousteau* stated, "Article 2031b represents an effort by Texas to reach as far as federal constitutional requirements for due process will permit in exercising jurisdiction over the persons of non-resident defendants." *Id.* at 491.

[63] *Id.* at 494.

the defendant."[64] Second, it required that it "be fair and reasonable to require the defendant to come into the state and defend the action."[65] The federal court ignored the *Obrien* nexus requirement in formulating this test.

The Fifth Circuit, nonetheless, resurrected the *O'Brien* test in *Wilkerson v. Fortuna Corp.*,[66] and the court held that the nexus requirement of that test had been satisfied. The plaintiff in *Wilkerson* was a Texas horse-trainer who brought suit against the operator of a New Mexico race-track that was located just across the boarder from El Paso, Texas.[67] The plaintiff alleged that the defendant's refusal to furnish the plaintiff with stalls at the track constituted a tort under New Mexico law.[68] In addressing the jurisdictional question, the Fifth Circuit observed that the race-track was strategically placed at the Texas border, and that the defendant actively solicited Texas business.[69] The court held that these "broad-based" activities gave rise to the asserted cause of action, and thus fulfilled the *O'Brien* requirement of a nexus between the cause of action and the forum contacts.[70] The court reasoned that "[b]ecause [the defendant] projected itself into Texas daily, and because its very reason for being was to deal constantly and mostly with customers from the forum state, it is not appropriate that Wilkerson demonstrate some specific local act which created the cause of action."[71]

The decisions following *O'Brien* indicate the Fifth Circuit's ambivalence as to whether the *O'Brien* criteria remained viable. On the one hand, the court devised the "foreseeable effects" theory on the premise that under this doctrine it was unnecessary for the cause of action to arise from the forum contacts. On the other hand, in the *Wilkerson* case the Fifth

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[64] *Id.*
[65] *Id.*
[66] 554 F.2d 745 (5th Cir.), *cert. denied*, 434 U.S. 939 (1977).
[67] *Id.* at 746-47.
[68] *Id.* at 747.
[69] *Id.* at 748.
[70] *Id.* at 749.
[71] *Id.* The court went on to address the issue of whether due process required that the cause of action arise from the forum contacts, and concluded that it did not. *Id.* at 749-50.

Circuit was careful to apply the *O'Brien* test and to explain how the defendant's contacts with Texas related to the plaintiff's cause of action. In other cases, the court has simply distinguished the *O'Brien* decision on the ground that it was not a construction of the Texas long-arm statute, and, therefore, was not binding on the federal courts in Texas.

B. *U-Anchor Advertising, Inc. v. Burt*

Shortly after the Fifth Circuit decison in *Wilkerson*, the Texas Supreme Court was again confronted with a question of the limits of state long-arm jurisdiction, this time in the context of Article 2031b. In *U-Anchor Advertising, Inc. v. Burt*,[72] the plaintiff, U-Anchor, sued Burt, an Oklahoma resident, for breach of contract. The contract in question was solicited by U-Anchor and negotiated in Oklahoma.[73] It called for the plaintiff to place highway advertising displays for thirty-six months throughout Oklahoma on Burt's behalf.[74] The nonresident defendant's only contact with Texas was its mailing of the monthly payments called for under the contract to U-Anchor's Texas office.[75] The Texas Supreme Court found that these contacts with the state "fell short of the requirements of due process."[76]

In addressing the propriety of the assertion of personal jurisdiction over the defendant, the court's analysis was reminiscent of its approach in *O'Brien*.[77] The court initially quoted the relevant statutory provisions,[78] and then stated that "Article 2031b reaches as far as the federal constitutional requirements of due process will permit . . . [i]t is limited only by the United States Constitution."[79] In making this observation, the Texas Supreme Court noted that this construction was

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[72] 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).
[73] *Id.* at 761.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *See supra* notes 36-44 and accompanying text.
[78] *See supra* note 2.
[79] 553 S.W.2d at 762.

the one given the statute by the federal courts.[80] The court deemed this interpretation proper since it "allow[ed] the court to focus on the constitutional limitations of due process rather than to engage in technical and abstruse attempts to consistently define 'doing business' "[81]

The court, after defining the reach of the Texas long-arm statute to the limits of due process, turned to a consideration of those limits. It first discussed the *Cousteau* two-part test,[82] but then quoted from *O'Brien*, citing the three requisite elements for *in personam* jurisdiction over non-residents.[83] With regard to the *O'Brien* factor requiring a nexus between the cause of action and the forum contacts, the court stated that "[i]t is evident that U-Anchor's cause of action against Burt is connected with the contractual obligation assumed by Burt and partially performable in Texas."[84] Nevertheless, the Texas Supreme Court held that the first element, which required the defendant to "purposefully do some act or consummate some transaction in the forum state,"[85] had not been fulfilled.[86] The court finally concluded that defendant Burt's contacts with Texas were too "minimal and fortuitous" to sustain jurisdiction.[87]

The Fifth Circuit Court of Appeals, with the Texas Supreme Court's construction of Article 2031b before it as precedent, again addressed the issue of the extent of Texas long-arm jurisdiction in *Great Western United Corp. v. Kidwell.*[88] The specific question was whether due process would permit a Texas court to exercise jurisdiction over an Idaho official, charged under Idaho law with preventing a Texas-based corporation, from proceeding with the take-over of an Idaho-based corporation. The Fifth Circuit's analysis commenced

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[80] *See supra* notes 59-60 and accompanying text.
[81] 553 S.W.2d at 762.
[82] *See supra* notes 61-64 and accompanying text.
[83] 553 S.W.2d at 762.
[84] *Id.*
[85] *See supra* note 25 and accompanying text.
[86] 553. S.W.2d at 763.
[87] *Id. See supra* notes 21-26 and accompanying text.
[88] 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom.*, Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

with the proposition that Article 2031b reached to the limits of due process, citing *U-Anchor* and *Cousteau*[89] as authority for this conclusion. The court responded to the defendant's argument that jurisdiction was improper because all of his activity had taken place in Idaho, by concluding that " '[m]inimum contacts' . . . need not arise from actual physical activity in the forum state; activities in other forums with foreseeable effects in the forum state will suffice."[90] The precedents cited for the "foreseeable effects" doctrine were the Fifth Circuit's pre-*U-Anchor* decisions in *Cousteau* and *Eyerly*,[91] indicating that the doctrine survived the Texas Supreme Court's *U-Anchor* opinion, despite the fact that the "foreseeable effects" doctrine disavowed a nexus requirement.

The foreseeable effects doctrine was also relied upon by the Fifth Circuit in a suit under the federal antitrust laws in *Black v. Acme Markets, Inc.*[92] The plaintiffs, Texas cattle producers and feeders, brought suit in Texas against several super-market chains, alleging antitrust violations.[93] The trial court granted a motion to dismiss as to one defendant, a Massachusetts corporation, stating that there was no proof by the plaintiff that the defendant's conspiracy to depress beef prices caused injury to the plaintiff's business in Texas.[94] The Fifth Circuit Court of Appeals reversed,[95] finding that the effects of the defendant's conspiracy were produced in Texas and that this, coupled with the defendant's substantial business contacts in Texas, was sufficient for *in personam* jurisdiction in Texas.[96]

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[89] 577 F.2d at 1266.

[90] *Id.* at 1266-67.

[91] *See supra* notes 45-64 and accompanying text.

[92] 564 F.2d 681 (5th Cir. 1977).

[93] *Id.* at 682.

[94] *Id.*

[95] *Id.* at 686.

[96] *Id.* at 685-86. The defendant's contacts with Texas consisted of purchasing aluminum foil from Carrollton, salad oil from Dallas, and turkeys from Lampassas, for an aggregate price of some $1.5 million. In reversing the dismissal, the Fifth Circuit stated that it was certain that Texas courts would construe the statute to reach an out-of-state corporation that had purchased products worth a total of $1.5 million from Texas in a single year, where the corporation was alleged to have engaged in a conspiracy whose effects would almost certainly be felt in Texas. *Id.* at 685.

In *Walker v. Newgent*,[97] however, the Fifth Circuit expressly required a nexus between the cause of action and the forum contacts in the context of a contract case. *Walker* involved the question of whether a United States citizen could sue General Motors and its subsidiary, Opel, in Texas for injuries arising out of a car accident in Germany. Opel, the manufacturer, was a German corporation with "no assets, office, agents [or] employees in Texas."[98] Although Opel did sell cars to a division of General Motors in Texas, the car in question was a model not manufactured for export.[99] Because the automobile was designed and manufactured in Germany and the accident occurred in Germany, the court held that a tort was not committed in whole or in part within the state, and thus the tort provision of the Texas long-arm statute was inapplicable.[100]

Turning to the contract provision of Article 2031b, the Fifth Circuit found it likewise inapplicable. The court explained that in order for that provision to govern, the plaintiff must demonstrate that "(1) a contract to be performed in whole or in part within Texas existed between itself and [the defendant] and (2) the present suit *arose out of* that contractual arrangement."[101] Finding no contract between the plaintiff and the defendant, the court held that Opel was not amenable to jurisdiction in Texas.[102]

Against this dichotomy in the Fifth Circuit decisions concerning whether and in what circumstances a nexus was required by the statute, as this requirement was construed in *U-Anchor*, the lower federal courts attempted to distinguish the

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[97] 583 F.2d 163 (5th Cir. 1978).

[98] *Id.* at 166.

[99] *Id. See supra* note 2.

[100] *Id.* at 166. *See* Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 491 (5th Cir. 1974).

[101] 583 F.2d at 166 (emphasis added) (quoting Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974)).

[102] 583 F.2d at 166. The court intimated, however, that jurisdiction would have been upheld had the plaintiff succeeded in showing that an agency relationship existed between General Motors and Opel, thus qualifying Opel as "doing business" within Texas. *Id.* at 167.

U-Anchor decision. In *Navarro v. Sedco, Inc.*,[103] the federal District Court for the Southern District of Texas addressed a case factually similar to the principal case. The plaintiffs were the personal representatives of several Spanish citizens who were killed in a helicopter crash that occurred while they were working on a drilling rig off the West African coast.[104] The plaintiff predicated *in personam* jurisdiction over the defendant, a Canadian helicopter service, upon the defendant's substantial activities in Texas.[105] These contacts included the purchasing of goods and services from U.S. companies and the transaction of business with five Texas corporations.[106] In response to the defendant's jurisdictional challenge, the district court stated that it found "no merit in defendant's contention that, in order to be amenable to service under article 2031b, plaintiff's cause of action must arise directly out of defendant's contacts with Texas."[107]

The court went on to explain that both the Fifth Circuit Court of Appeals and the Texas Supreme Court had construed the long-arm statute as "going to the limits of due process."[108] Also, in the language of the district court, "the due process clause has never been interpreted as requiring in all cases that the plaintiff's cause of action arise directly from the defendant's contacts with the forum."[109] In support of this contention the court cited the *Eyerly*, *Black* and *Wilkerson* opinions as examples of the Fifth Circuit's reliance upon unrelated contacts to sustain *in personam* jurisdiction.[110]

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[103] 449 F. Supp. 1355 (S.D. Tex. 1978). *See* Long v. Vessel "Miss Ida Ann," 490 F. Supp. 210 (S.D. Tex. 1980); Edwards v. Gulf Mississippi Marine Corp., 449 F. Supp. 1363 (S.D. Tex. 1978).

[104] 449 F. Supp. at 1357.

[105] *Id.* at 1357-59.

[106] *Id.*

[107] *Id.* at 1359-60.

[108] *Id.* at 1360 (citing Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978)).

[109] *Id.* (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446 (1952); International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)) *Accord*, Bland v. Kentucky Fried Chicken Corp., 338 F. Supp. 871 (S.D. Tex. 1971).

[110] 449 F. Supp. at 1360. *But see*, Gutierrez v. Raymond Int'l, Inc., 484 F. Supp. 241 (S.D. Tex. 1979), in which the District Court for the Southern District of Texas

Moreover, the district court in *Sedco* found that the Fifth Circuit in *Eyerly* had rejected the contention that *O'Brien v. Lanpar Co.*, the origin of the nexus requirement, was a construction of Article 2031b. In a footnote to its opinion the court observed that the nexus language in the *O'Brien* and *U-Anchor* opinions appeared in the context of due process limitations and not in the context of Article 2031b requirements.[111] The court therefore concluded that it was "not bound to follow Texas' interpretations of the due process clause."[112]

The District Court for the Northern District of Texas in *Docutel Corp. v. S.A. Matra*[113] adopted a similar rationale when confronted with the question of "how the Texas Supreme Court would construe article 2031b."[114] The court noted that the Texas Supreme Court in *U-Anchor* cited both federal and state precedent and expressly followed its own decision in *O'Brien*.[115] The district court did not believe, however, that the *O'Brien* test was intended as the "exclusive determinant of due process" under Article 2031b.[116] To the defendant's argument that the *O'Brien* nexus factor referred to the language of the statute,[117] the court replied that this was unconvincing for two reasons. First, the test was utilized in the construction of another state's long-arm statute.[118] Secondly, it was intended merely as a "general rule for judging whether jurisdiction exists but does not encompass all fact sit-

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distinguished each of the cases cited by *Navarro* as approving unrelated contacts for purposes of long-arm jurisdiction. It reasoned that "[i]n all the cases in which jurisdiction was supported by the existence of a contract, the court has held that the lawsuit must arise from that contractual relationship . . . . The cases cited in *Navarro* . . . in no way repudiate that requirement." *Id.* at 247.

[111] 449 F. Supp. at 1360 n.2.

[112] *Id. See* Rockwell Int'l Corp. v. KND Corp., 83 F.R.D. 556 (N.D. Tex. 1979).

[113] 464 F. Supp. 1209 (N.D. Tex. 1979).

[114] *Id.* at 1219.

[115] *Id.*

[116] *Id.*

[117] Defendant asserted that the nexus requirement had its origin in section three of the statute providing for service of process upon non-residents "in any action, suit, or proceedings arising out of business done" within Texas. Tex. Rev. Civ. Stat. Ann. art. 2031b, § 3 (Vernon 1964).

[118] 464 F. Supp. 1219.

uations."[119] In its final observation that *U-Anchor* "cannot be read to preclude a court from following federal precedent in determining due process for purposes of article 2031b,"[120] the court noted that the most recent Fifth Circuit interpretations[121] of Article 2031b cited federal precedent exclusively, omitting any reference to the *O'Brien* test.[122]

In 1980, just one year prior to its decision in *Prejean v. Sonatrach Inc.*, the Fifth Circuit distinguished *U-Anchor* on its facts in *Southwest Offset, Inc. v. Hudco Publishing Co.*[123] In dicta, however, the court purported finally to put the Texas Supreme Court's *U-Anchor* decision to rest for purposes of interpreting the Texas long-arm statute. After holding that the defendant's Texas contacts were considerably more substantial than were defendant Burt's in *U-Anchor*,[124] the court declared that there was another ground that would independently support its assertion of jurisdiction.[125] The Fifth Circuit stated that it was not bound by the Texas Supreme Court's decision in *U-Anchor* because that holding was "predicated on the due process clause of the United States Constitution, and the federal courts are not bound by state court determinations of what the Constitution requires."[126] In a footnote the court recognized that this conclusion could possibly lead to disparate results in state and federal courts.[127] It concluded, however, that this possibility did not relieve federal courts of their duty of "authoritatively interpreting our

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[119] *Id.*

[120] *Id.*

[121] *See* Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom.*, Leroy v. Great W. United Corp., 443 U.S. 173 (1979); Walker v. Newgent, 583 F.2d 163 (5th Cir. 1978).

[122] 464 F. Supp. at 1219.

[123] 622 F.2d 149 (5th Cir. 1980).

[124] *Id.* at 151. The Fifth Circuit found the case to be controlled by its decision in *Cousteau*, rather than by the Texas Supreme Court's decision in *U-Anchor*, because defendant Hudco was found more clearly to "resemble" the defendant in *Cousteau* than defendant Burt in *U-Anchor*. *Id.* at 152.

[125] *Id.* at 152. The court stated that "even if we were to assume arguendo that the facts of this case were closer to those found in *U-Anchor*, we would not be bound by that court's holding. . . ." *Id.*

[126] *Id.*

[127] *Id.* n.5.

federal Constitution when that document's meaning must be found . . . ."[128]

III. The Prejean Decision

Despite the broad dicta of *Hudco*, indicating the federal court's intention to abandon as precedent the state cases requiring a nexus, the Fifth Circuit Court of Appeals in *Prejean v. Sonatrach, Inc.*[129] held that Article 2031b "unambiguously requires a nexus between the plaintiff's cause of action and the defendant's contacts with Texas."[130] In so holding the court emphasized that this conclusion was mandated by the literal wording of the statute: "The Texas statute . . . expressly limits its personal jurisdiction to causes of action arising out of activities or business done within the state . . . . The statute thus unambiguously reaches only suits arising out of contacts with Texas."[131]

In a footnote to the opinion, the court distinguished opinions in which it previously held that Article 2031b was intended by the Texas legislature to reach the limits of due process.[132] The court explained that the cases upon which plaintiffs relied, including *Cousteau*, *Eyerly*, and *Jetco*, had "proclaimed this maximum statutory reach in the context of what were sufficient contacts, not whether the statute required a nexus."[133] Moreover, the Fifth Circuit found that, even assuming that the Texas legislature had intended the statute "in its entirety" to reach constitutional limits, this fact could not "serve to change the unambiguous language of the statute."[134]

Absent legislative history on the statute, the court examined the legal background against which Article 2031b was enacted. It observed that the long-arm statute was passed in 1959, one year after the United States Supreme Court deci-

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[128] *Id.*
[129] 652 F.2d 1260 (5th Cir. 1981).
[130] *Id.* at 1265.
[131] *Id. See supra* note 17.
[132] *See supra* note 60 and accompanying text.
[133] 652 F.2d at 1266 n.7.
[134] *Id.*

sion in *Hanson v. Denckla*.[135] The court found it "clear from the face of the statute" that it was drafted in light of the *Hanson* and *McGee* decisions.[136] Thus, it concluded that the statute was designed to "best *approximate* due process limits within the shortcomings of drafting specific criteria that provide guidelines to litigants."[137] Despite this perceived intent of the legislature, the Fifth Circuit determined the statute to be narrower than due process in two respects. First, jurisdiction might still be held constitutional in certain cases of unrelated contacts and slight forum contacts, depending upon the nature and quality of those contacts. Secondly, when the defendant's contacts with the forum are substantial and continuous, due process does not require that the cause of action arise from those contacts.[138] The Fifth Circuit believed, however, that the Texas statute did not contemplate extending the asserted jurisdiction to either of these cases.

The Fifth Circuit dealt with the plaintiff's reliance on the "limits of due process" language of *U-Anchor* by explaining that this language addressed only the meaning of "doing business."[139] Further, the court noted that in *U-Anchor* the cause of action had arisen out of the business done in Texas, a connection noted by the Texas Supreme Court.[140] The Fifth Circuit court acknowledged that the case was unclear as to whether the source of the nexus requirement was statutory or constitutional, and the court attributed this confusion to the *O'Brien* decision.[141] With regard to the "borrowed" *O'Brien* test, the Fifth Circuit concluded, "[a]lthough the Washington Supreme Court announced the test as a synthesis of the constitutional tests and the requirements of the Washington statute, which also required that the cause of action arise out of

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[135] *See supra* notes 21-26 and accompanying text.

[136] 652 F.2d at 1266 n.7. *See supra* notes 19-26 and accompanying text.

[137] 652 F.2d at 1266 n.7 (emphasis added). *See also* Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process Is Due*, 30 Sw. L.J. 747 (1976).

[138] 652 F.2d at 1266 n.7.

[139] *Id.* at 1265.

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

[141] 652 F.2d at 1266 n.8.

the contacts with the forum, the Texas Supreme Court seemed to adopt it as a test for due process."[142] The court added that this was, at least, the view taken by some of the cases, citing its own opinion in *Eyerly*.[143] The court reasoned, however, that the "confusion over the source of that requirement—constitutional or statutory—cannot dictate a different result." It concluded that, "[a]lthough due process does not require a nexus, this Court is confident that the Texas Supreme Court would require it solely on the basis of the statute."[144]

The Fifth Circuit dealt with its own precedential cases summarily. In a footnote, the court observed that some Fifth Circuit cases expressly required a nexus, citing *Wilkerson*, *Cousteau* and *Eyerly*.[145] The court maintained that in the other cases, such as *Walker*, the issue was never reached.[146] Still other cases, the court said, did not address the nexus requirement because in those cases the requirement was obviously met.[147] Finally, the Fifth Circuit "expressly disapprove[d] *Navarro's* language refusing to require a nexus" and demanded that the district court opinion no longer be followed.[148]

IV. Implication for the Future

Perhaps the greatest impact of the *Prejean* decision will be observed in its clarification of the proper construction to be afforded the Texas long-arm statute by the Texas federal courts. The decision will likely obviate the disparate results that were certain to occur between state and federal courts in Texas if the federal courts had persisted in their refusal to require a nexus in construing Article 2031b; for plainly the language of the statute does require such a nexus. It is difficult to imagine that the Texas Supreme Court would ignore

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[142] *Id.*
[143] *Id. See supra* notes 45-54 and accompanying text.
[144] 652 F.2d at 1267 n.8.
[145] *Id.* n.10.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 1267. *See supra* notes 103-12 and accompanying text.

the "arising out of" language when confronted with a situation in which the cause of action did not arise from the defendant's forum contacts.

The force of the court's language disapproving the *Navarro* decision[149] ensures that the federal district courts in Texas will henceforth require that the plaintiff's cause of action arise from the non-resident defendant's forum contacts before *in personam* jurisdiction will be asserted. As a practical matter, this will mean that many Texas plaintiffs will be left without a forum, or without a convenient forum, for their grievances. Thus, a plaintiff in Mrs. Prejean's position will be forced to pursue her defendant in the courts of a foreign state or country. She may no longer predicate *in personam* jurisdiction over the non-resident defendant upon that defendant's continuous and substantial activities in Texas, absent a showing that her cause of action arises from those activities.

A second possible impact of the *Prejean* decision may be seen in future legislation. Throughout its opinion, the Fifth Circuit Court of Appeals acknowledged that the probable legislative intent of Article 2031b was to "approximate" the limits of due process.[150] The court, however, found the actual language of the statue inoperative to implement this intent. This statutory inadequacy was attributed to the constraints inherent in the attempt to draft "specific criteria" as guidelines for litigants.[151] The court noted that "specific criteria, unlike [a] comprehensive concept of jurisdiction, may provide litigation guidelines but are less likely to include [the] full extent due process permits."[152] At one point during its opinion, the Fifth Circuit suggested that the legislature effectuate its original intent by amending the statute.[153] It also hinted that Texas should adopt a long-arm statute providing for a comprehensive due process concept of jurisdiction "so as to always in-

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[149] *Id.* at 1267.

[150] *Id.* at 1266 n.7.

[151] *Id.*

[152] *Id.* (citing Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process Is Due*, 30 Sw. L.J. 747, 770-71 (1976).

[153] 652 F.2d at 1267 n.7.

clude the full reach permitted by due process."[154] The court suggested that the "proposed statute would not require but only take into account any relation between the claim for relief and the contacts with Texas."[155] The obvious message to the Texas legislature is that the federal courts will no longer coalesce with the legislature in its supposed intent, in the face of the statute's literal wording to the contrary. Thus, it is in the hands of the Texas legislature to remedy the problem of the Texas plaintiff without a forum.

V. CONCLUSION

The Texas long-arm statute for many years has been a source of needless confusion in the state's courts. In construing the statute, the federal courts have refused to look to the literal wording of Article 2031b, preferring instead to rely upon the Texas Supreme Court's interpretation of that article. In so doing, the federal courts were attempting to fulfill the mandate of *Erie Railroad Co. v. Tompkins*, requiring their deference to state interpretations of state law. This adherence to the *Erie* doctrine, however, presented the Fifth Circuit with the dilemma of having to construe a state statute as would the state's highest court, in the absence of any explicit pronouncements on the subject by that court. The federal courts were forced to extract inferences as to the statute's meaning from the Texas Supreme Court opinions and to engage in speculation as to whether those opinions were construing Article 2031b or were analyzing due process limitations.[156] The outcome of this confusion was, in several cases, a frustration of the wording of the statute. The fact that the statute "unambiguously" requires a nexus, regardless of what the drafters may have intended, was ignored by the courts, which were focusing on the "limits of due process" language of *O'Brien* and *U-Anchor*. While such language is no doubt indicative of the Texas Supreme Court's view of the statute, it

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[154] *Id.* (citing Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process Is Due*, 30 SW. L.J. 747, 770-73 (1976)).

[155] *Id.*

[156] *See supra* notes 125-26 and accompanying text.

is totally irreconcilable with the language of a statute limiting personal jurisdiction to causes of action arising out of activities or business transacted within the state. As the Supreme Court decisions indicate, due process has been held to encompass unrelated causes of action where the defendant's contacts are substantial and, in the proper case, even where those contacts are slight.

Thus, in the context of unrelated causes of action the federal courts were confronted with the nexus requirement of the statute on the one hand and the "limits of due process" language of the Texas Supreme Court on the other. It is highly improbable, however, that the Supreme Court of Texas, by stating that the statute reached the limits of due process, ever intended to edit the words "arising out of" from the statute. The Fifth Circuit in *Prejean* offers a more likely explanation for the use of that language in *U-Anchor*: that case simply did not address the question of where the cause of action arose; rather, it discussed the sufficiency of the defendant's contacts with Texas. The origin of the cause of action is addressed by the statute itself, which explicitly requires that the cause of action arise out of the defendant's transactions in the state.[157]

The *Prejean* decision thus purports to resolve these irreconcilable differences between the court's pronouncements and the statutory language. It accomplishes this by limiting the broad due process language of *U-Anchor* to the specific factual context of that case, leaving the statutory nexus requirement undisturbed. Henceforth, the federal courts sitting in Texas are to construe the statute to reach due process limits only in the context of what is considered "doing business" and in determining the sufficiency of the forum contacts.

Julie McCoy

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[157] Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1266 (5th Cir. 1981).

AIRCRAFT FORFEITURE—ILLEGAL ACTIVITIES—Substantive Due Process under the Alaska Constitution Requires that a Procedure be Available for Remission of an Aircraft which has been Forfeited Pursuant to a Criminal Violation in which an Innocent Party has a Security Interest in such Aircraft. *State v. Rice*, 626 P.2d 104 (Alaska 1981).

Wilder Rice, a big game guide, was arrested and charged with transportation of game taken illegally[1] and was sentenced to thirty days in jail, a $500 fine, and forfeiture of a Cessna airplane used in committing the alleged offense.[2] Rice appealed his conviction to the superior court of Alaska on the grounds that some form of intent must be implied in the regulation that he was convicted of violating.[3] Meanwhile, Cessna Finance Co. (Cessna) which possessed a security interest in the airplane was granted leave to intervene in the superior court proceedings.[4] The plea in intervention alleged violations of Cessna's substantive and procedural due process rights because it was not given formal notice of the sentencing proceeding which involved forfeiture of the airplane.[5] The superior court overturned Rice's conviction and vacated the sentence.[6] The superior court also held that procedural due process requires "that in order to forfeit a third party's interest in this aircraft or in any other particular item, that notice and an opportunity to be heard must be given."[7] The state then filed for appeal of this procedural due process ruling.

The state also filed a civil action for damages in the supe-

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[1] ALASKA ADMIN. CODE tit. 5, § 81.070(b) (1973) provides, in part:

> (b) The illegal methods and means of taking big game . . . are
> (6) a person who has been airborne may not thereafter take or assist in taking big game until after 3:00 a.m. following the day in which the flying occurred . . . .

ALASKA ADMIN. CODE tit. 5, § 81.140(b) (1973) provides, "No person may possess or transport any game or parts of game illegally taken."

[2] State v. Rice, 626 P.2d 104, 106 (Alaska 1981).

[3] *Id.* at 106.

[4] *Id.* at 110. Cessna Finance Co. had a security interest in the aircraft of $36,953.16 plus a substantial amount of interest. *Id.*

[5] *Id.* at 106.

[6] *Id.*

[7] *Id.*

rior court against Rice and another co-defendant, which also asked for forfeiture of the airplane.[8] The state issued a notice of complaint for forfeiture which was sent to Cessna. Cessna moved for summary judgment asking, *inter alia*, that the Alaska statute be held unconstitutional as violating substantive due process.[9] The superior court denied the motion for summary judgment stating the statute did not violate substantive due process; Cessna petitioned for review of this ruling.[10] The Alaska Supreme Court granted review and the two cases were consolidated.[11] The court agreed to first consider whether substantive due process was violated by the act of

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[8] ALASKA STAT. § 16.05.195 (1980) provides:

> Forfeiture of equipment. (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in and in aid of a violation of this title, or regulation promulgated under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation promulgated under it, may be forfeited to the state
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> (1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or
>
> (2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation promulgated under it.
>
> (b) Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.
>
> (c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value or fish and game or parts of them or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title or a regulation promulgated under it.
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> (d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.
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> (e) No forfeiture may be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.
>
> (f) An item forfeited under this section shall be disposed of at the discretion of the department.

Id.

[9] 626 P.2d at 106.

[10] *Id.* at 107.

[11] *Id.*

forfeiture itself, since such a finding would require return of the airplane and thus render the question of procedural due process moot.[12] *Held, reversed in part*: Substantive due process under the Alaska Constitution[13] requires that a procedure be available for remission of an aircraft which has been forfeited pursuant to a criminal violation in which an innocent party has a security interest in such aircraft. *State v. Rice*, 626 P.2d 104 (Alaska 1981).

I. THE DEODAND AND THE TRANSFORMATION INTO FORFEITURE

The history of forfeiture is rooted in the ancient institution of deodands.[14] It was said as early as biblical times that "[i]f an ox gore a man or a woman, and they die, he shall be stoned, and his flesh shall not be eaten."[15] The offending res[16] was therefore considered to be the offending party and a detriment to society.[17] The res was generally forfeited to the sovereign who was considered to be the true representative of the transcendent power and was the means to a "religious expia-

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[12] *Id.* at 110.

[13] ALASKA CONST. art. I, § 7 provides: "No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed."

U.S. CONST amend. V provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

[14] The word "deodand" is derived from the Latin term deo dandum, a thing to be given to god. Parker-Harris v. Tate, 135 Tenn. 509, 188 S.W. 54 (1916). *See* W. HOLDSWORTH, HISTORY OF ENGLISH LAW 85 (7th ed. 1956); O. HOLMES, THE COMMON LAW 23 n.3, Lecture 1 (M. Howe ed. 1963); F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 473 (2d ed. 1909); Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeiture, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973) [hereinafter cited as Finkelstein].

[15] *Exodus* 21:28 (King James). The biblical case of an ox that had gored a person to death was not considered within the strict sense of forfeiture because the animal was to be put to death and not returned to the sovereign or society as payment for the death.

[16] Derived from Latin and meaning in the civil law a thing or object. The term has a wide and extensive significance including not only things which are objects of property, but also such as are not capable of individual ownership. BLACK'S LAW DICTIONARY 1172 (rev. 5th ed. 1979).

[17] Finkelstein, *supra* note 14, at 185-86.

tion" of the lost human life.[18] The practice, however, began to gradually evolve into one that served both as "religious expiation" and as a source of increasing the King's revenues.[19] The justification for the transcending of religious expiation was founded on the belief that the value of the offending res forfeited to the King would be redistributed for the good of the dead man's soul, or to insure that the deodand was put to charitable purposes.[20] The deodand, therefore, served as a basis for redress of the loss of a human being.

With the advent of the Industrial Revolution, however, the rate of accidental deaths increased dramatically and the redress of the deodand became an intolerable remedy for compensating the families of the lost individual.[21] Accordingly, in 1846 the institution of deodands was abolished with the passage of the Act for Compensating the Families of Persons Killed by Accidents (Act).[22] The purpose of the Act was to provide an adequate civil remedy for the accidental death of a human being.[23] The passage of the Act, however, did not completely extinguish the institution of deodand by the Crown.[24] The same year that the Act was passed the Court of the Exchequer decided the case of *Regina v. Woodrow*.[25] This case established the principle that the offending res could be confiscated for the preservation of the Crown's revenue without regard to the criminal or negligent culpability of the owner.[26] The holding of the case marked a dramatic departure from

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[18] *Id.*

[19] *Id.*

[20] 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 301 (T. Cooley 4th ed. 1899).

[21] Finkelstein, *supra* note 14, at 172.

[22] 1846, 9 & 10 Vict., ch. 62.

[23] Finkelstein, *supra* note 14, at 170-71. In fact, there were two bills passed within a few days of each other. The first, which was passed on August 18, 1846, provided for the abolition of deodand, and the second, which was passed on August 26, 1846, provided relief for the dead man's survivors. The two bills were linked together because Lord Campbell was unwilling to eliminate the deodand institution. Lord Campbell thought the deodand was an effective deterent to carelessness, especially for the railroads, and that this form of redress should not be destroyed unless the survivors were granted some form of action. *See* 77 PARL. DEB. (3rd ser.) 1039 (1845).

[24] Finkelstein, *supra* note 14, at 198-212.

[25] 15 M. & W. 403, 153 Eng. Rep. 907 (Exch. 1846).

[26] *Id.*

the rudimentary religious foundation of deodand and established a revenue preservation theory for deodand.[27] Therefore, although the deodand might have ceased to be recognized officially by virtue of the Act, its effect was still apparent.[28]

The first United States Supreme Court case to consider the forfeiture of rights in property was *The Palmyra*,[29] decided in 1827. The Palmyra, a ship acting under a commission from the King of Spain, was captured by the United States and accused of being used by its crew in acts of piracy on United States' vessels.[30] The counsel representing the interests in the ship argued that the Court could not permit forfeiture because there was not an act of Congress that provided for personal punishment of offenders who committed "piratical aggression."[31] The Court refuted this argument, stating that the proceeding was in rem[32] and that the innocence of the owner was not a defense because the ship was the offending party.[33]

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[27] *Id.*

[28] The evolution of the deodand from "religious expiation" to its justification as a source of revenue for the Crown has been characterized by Mr. Justice Holmes:

> The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

O. HOLMES, THE COMMON LAW 5, Lecture 1 (1881).

[29] 25 U.S. 1 (1827).

[30] *Id.* at 7.

[31] *Id.* at 14.

[32] In the strict sense of the term, a proceeding "in rem" is one which is taken directly against the property or one which is brought to enforce a right in the thing itself. Pennoyer v. Neff, 95 U.S. 714, 734 (1877).

[33] 25 U.S. at 14-15. The court held:

> It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or, at least, a consequence, of the judgment or conviction . . . . [Therefore i]n the contemplation of the common law, the offender's right was not devested [sic], until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily consid-

In *Dobbin's Distillery v. United States*,[34] the government confiscated a leased building when the lessee, a distiller, with the intent to avoid the revenue taxes, failed to maintain the proper records as required by law.[35] The lessor averred that he had no knowledge of the illegal acts and therefore his building should not be confiscated.[36] The Court held:

> [The] legal conclusion must be that the unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself. Power to that effect the law vests in him by virtue of his lease; and, if he abuses his trust, it is a matter to be settled between him and his lessor; but the acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner.[37]

The Court recognized the in rem fiction adopted in *The Palmyra*[38] and allowed the owner only to have recourse against the culpable party.[39]

The first Supreme Court case to consider the innocent owner's fifth amendment protection in forfeited property was *Goldsmith-Grant Co. v. United States*,[40] which involved revenue statutes.[41] The innocent owner was a car dealer who had

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> ered as the offender, or rather the offense is attached primarily to the thing . . . . [So] the court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by, any criminal proceeding in personam.

Id.

[34] 96 U.S. 395 (1878).

[35] Act of July 20, 1868, ch. 186, 15 Stat. 125 (1869) (repealed 1939) provided, in general, for the taxation and collection procedures for such taxes on distilled spirits and tobacco. Section 19 of that Act provided that if any false entries were made in the records, or omitted therefrom, the distillery, distilling apparatus, land and personal property upon such land should be forfeited to the United States.

[36] 96 U.S. at 397.

[37] *Id.* at 404.

[38] 25 U.S. 1 (1827). *See supra* note 29 and accompanying text.

[39] 96 U.S. at 404.

[40] 254 U.S. 505 (1921).

[41] The statute in question, Act of July 13, 1866, ch. 184, 14 Stat. 98 (1867) (repealed 1939) states:

> Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, . . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, . . . shall be for-

sold an automobile but retained the title as security for the unpaid purchase price.[42] The purchaser of the automobile then illegally transported distilled spirits in violation of the revenue laws, and at the trial following his apprehension, the government sought forfeiture of the automobile.[43] The innocent owner asserted that the in rem proceeding, whereby the thing is considered the offender, irrespective of the guilt or innocence of the owner, was a mere fiction.[44] He asserted that due process, as protected under the fifth amendment, requires an opportunity to present the defense of innocence and thereby protect his interest in the forfeited property.[45]

The Court recognized the severity of the law and its possible conflict with the fifth amendment.[46] The Court then balanced the possible conflict with the fifth amendment against the government's interest in preserving its "revenues and policies."[47] Citing *Dobbin's Distillery*, the Court stated, "[b]ut whether the reason for [the law] be artifical or real, it is too firmly fixed in the punitive and remedial jurisprudence of this country to be now displaced."[48] The Court, thus recognizing the conflict with the fifth amendment, was nevertheless unwilling to establish new legal precedent based on the legislation being challenged and the facts of the case.[49] The Court

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> feited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively shall be forfeited.

Id.

[42] 254 U.S. at 509.

[43] *Id.* at 508.

[44] *Id.* at 506.

[45] *Id.* at 505-06.

[46] *Id.* at 510, where the Court stated: "And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner who was without guilt." *Id.*

[47] *Id.*

[48] *Id.* at 511.

[49] The Court noted that under a different set of facts the result of the decision might be different:

> It is said that a Pullman sleeper [rail car] can be forfeited if a bottle of illicit liquor be taken upon it by a passenger, and that an ocean

qualified its opinion, however, as to whether it would apply "to property stolen from the owner or otherwise taken from him without his privity or consent."[50]

Five years later, in *Van Oster v. Kansas*,[51] the Supreme Court affirmed the view that statutory forfeiture of an innocent owner's property is not in violation of the due process clause of the fifth amendment.[52] In this case an automobile was forfeited after it had been used for transporting intoxicating liquor in violation of a Kansas statute.[53] The owner had authorized the general use of the automobile but was unaware of its involvement in a criminal activity.[54] The Court allowed the forfeiture but again qualified the opinion stating,

> [i]t is unnecessary for us to inquire whether the police power of the state extends to the confiscation of the property of innocent persons appropriated and used by the law breaker without the owner's consent, for here the offense of unlawful transportation was committed by one entrusted by the owner with the possession and use of the offending vehicle.[55]

In *United States v. One Ford Coach*,[56] the Supreme Court gave a liberal interpretation to a statutory remissions procedure[57] for forfeited property. The statute at issue[58] allowed

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> steamer can be condemned to confiscation if a package of like liquor be innocently received and transported by it. Whether the indicated possibilities under the law are justified we are not called upon to consider. It has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made it will be time enough to pronounce upon it.

Id. at 512.

[50] *Id.*

[51] 272 U.S. 465 (1926).

[52] *Id.* at 468-69.

[53] *Id.* at 466.

[54] *Id.*

[55] *Id.* at 467.

[56] 307 U.S. 219 (1939).

[57] The petition for remission or mitigation is the remedy most often sought by innocent parties whose property interests are subject to forfeiture. The petition is a statutory process and generally allows the party to protect his interest in forfeited property upon a showing that he was not negligent or was unaware of any criminal activity involving the forfeited property. *See* Smith, *Modern Forfeiture Law and Policy: A Proposal For Reform*, 19 WM. & MARY L. REV. 661, 671-72 (1978).

[58] Liquor Law Repeal and Enforcement Act, Pub. L. No. 74-347, § 204, 49 Stat.

the court exclusive jurisdiction to remit or mitigate the forfeiture upon a finding that the innocent party acted in good faith and without negligence.[59] In its appeal of the mitigation, the government averred that the statute should be given strict construction and further that the innocent owner failed to fulfill all the requirements of the statute.[60] In the opinion, the Court stated, "[t]he forfeiture acts are exceedingly drastic. They were intended for protection of the revenues, not to punish without fault."[61]

The next case in which the Supreme Court considered an innocent party's rights in a forfeiture proceeding was thirty-two years later in *United States v. United States Coin & Currency*.[62] The claimant had been convicted of failure to register as a gambler and to pay the related gambling tax required by federal law.[63] The United States instituted the forfeiture proceeding to obtain money which the claimant had in his possession at the time of his arrest.[64] The claimant was subsequently acquitted of the criminal charges and the court of appeals ordered the money returned.[65] The government appealed this ruling to the Supreme Court.[66]

The Court again recognized "the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the fifth amendment."[67] The Court, quoting Blackstone, characterized the seizure of property of the innocent "as based upon a 'superstition' inherited from the 'blind days' of feudalism."[68] The Court further stated that the broad lan-

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872, 878-79 (1935) (current version at 18 U.S.C. § 3617 (1976)). This statute allowed remission of the forfeited item upon a showing (1) that the innocent party acquired the interest in the property in good faith, (2) that he was unaware of its use in criminal activity, and (3) that he made a reasonable inquiry into the background of the party who actually committed the crime. *Id.*

[59] 307 U.S. at 221.

[60] *Id.* at 225-26.

[61] *Id.* at 236.

[62] 401 U.S. 715, 721 (1971).

[63] *Id.* at 716.

[64] *Id.*

[65] *Id.* at 717.

[66] *Id.*

[67] *Id.* at 721.

[68] *Id.* at 720-21.

guage of the forfeiture statutes has to be read in conjunction with the other statutes which regulate forfeiture proceedings.[69] The regulating statutes permit the innocent owner to prove to the Secretary of the Treasury that the "forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to violate the law. . . ."[70] This regulating statute, the Court concluded, indicated that the forfeiture statutes were intended to impose a penalty only upon those significantly involved in the criminal enterprise.[71] The forfeiture was, therefore, stayed pending outcome of the criminal conviction of the accused.[72]

II. THE MODERN COMMON LAW DEVELOPMENT OF FORFEITURE

The next major decision by the Supreme Court was thirty-five years later in *Calero-Toledo v. Pearson Yacht Leasing Co.*,[73] wherein the Court upheld the forfeiture of a pleasure yacht which the lessee used in violation of the Puerto Rican drug laws.[74] The lessor protested the forfeiture on the basis that the statute unconstitutionally deprived it of property without just compensation.[75] The Court made a thorough review of the history of forfeiture in this country and then

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[69] *Id.*

[70] *Id.* The regulating statute involved was the remission statute discussed in note 58, *supra*.

[71] 401 U.S. at 721-22.

[72] *Id.*

[73] 416 U.S. 663 (1974).

[74] P.R. LAWS ANN. tit. 24, § 2512(a)(4) (1979) provides:

> (a) The following shall be subject to forfeiture to the Commonwealth of Puerto Rico:
>
> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this chapter, ...
>
> . . . .
>
> (4) All conveyances, including aircraft, vehicles, mount or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in clauses (1) and (2) of this subsection. . . .

Id.

[75] 416 U.S. at 668.

noted the fifth amendment conflict.[76] This conflict was balanced against the purposes of the statute, which were identified as the prevention of further illicit use of the forfeited property and imposition of an economic penalty, thereby rendering illegal behavior unprofitable.[77] The Court found that this purpose, as applied to innocent lessors or secured parties, "may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."[78]

The lessor in *Calero-Toledo* asserted, and the three-judge district court below agreed, that the Supreme Court's ruling in *United States v. United States Coin & Currency*[79] mandated that the owner's innocence was a defense to the forfeiture proceeding.[80] The Supreme Court disagreed, stating that the forfeiture statute at issue in *United States Coin & Currency* had to be read in conjunction with another statute that allowed remission of the forfeiture.[81] The presence of the remissions statute indicated that, under the challenged forfeiture statute, the innocence of the owner would be a valid defense.[82] Thus, *United States Coin & Currency* did not overrule prior decisions sustaining application of forfeiture statutes to innocent owners.[83] The Court in *Calero-Toledo* noted that Puerto Rico's statutes did not contain a remissions provision; therefore, the innocence of the lessor was irrelevant.[84] After determining that the forfeiture would be constitutional, the Court then proceeded, in dictum, to postulate two possible exceptions to the constitutionality of the forfeiture statutes, one based on the lessor's lack of knowledge of or involvement in the illegal activity, and the other based on his reasonable precautions against such use.[85]

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[76] *Id.* at 680-88.
[77] *Id.* at 686-87.
[78] *Id.* at 688.
[79] 401 U.S. 715 (1971). *See supra* text accompanying notes 62-68.
[80] 416 U.S. at 688-89.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 689-90. The Court stated:

> It therefore has been implied that it would be difficult to reject the

It was conceded that the lessor was not given notice of the seizure, that he was in no way involved in the criminal enterprise carried on by the lessee, and that he did not have knowledge that the yacht was being used for such purposes.[86] Moreover, the lessor had inserted a provision in the lease agreement prohibiting the use of the yacht in unlawful activities.[87] Based on these facts and the dictum cited above, the Court stated that "in this case appellee [lessor] voluntarily entrusted the lessee with possession of the yacht, and no allegation has been made or proof offered that the company did all that it *reasonably* could to avoid having its property put to an unlawful use."[88]

Rejection of a plea for relief under the fact situation of *Calero-Toledo* makes it difficult to imagine a situation that would fit within the two possible exceptions enumerated by the Supreme Court. In fact, the Court's narrow interpretation indicates the burden of proof required by the innocent owner could render the possible exceptions moot.[89] Indeed, the subsequent case law in federal and state courts has been in conflict in defining the scope of the exceptions.

In *United States v. One 1951 Douglas DC-6 Aircraft*,[90] a holder of a security interest[91] in an aircraft challenged the forfeiture proceeding on the grounds that it deprived him of his

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> constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. (citations omitted).

[86] *Id.* at 692 (Douglas, J., dissenting). The facts of the case indicate that the lessor was unaware of the seizure until the lessee became in arrears on the rental payments and attempted repossession. *Id.* at 668.

[87] *Id.* at 693.

[88] *Id.* at 690 (emphasis added).

[89] *See infra* text accompanying notes 128-29.

[90] 475 F. Supp. 1056 (W.D. Tenn. 1979).

[91] A security interest means an interest in personal property or fixtures which secures payment or performance of an obligation. U.C.C. § 1-201(37) (1976).

property without due process of law.[92] The secured party further claimed he was innocent and unaware of any criminal wrongdoing.[93] In response to this claim the district court held that the secured party was entitled to a hearing to assert the narrow exceptions discussed in *Calero-Toledo*.[94]

The slightly different fact pattern in *United States v. One 1976 Chevrolet Corvette*,[95] concerned a claimant who purchased an automobile after its use in the sale of illegal narcotics.[96] In that case it was stipulated that the claimant was neither involved in nor aware of the criminal activity concerning the automobile.[97] Though the government sought to have the automobile forfeited, the court, citing the exception in *Calero-Toledo*, held that the forfeiture of the claimant's vehicle would constitute an unconstitutional deprivation of property.[98]

The question has also arisen in the context of a shipper's erroneous routing of contraband through the United States. In *Carpenter v. Andrus*,[99] the Fish & Wildlife Service confiscated the skin and skull of a leopard, the importation of which was forbidden under the Endangered Species Act.[100] The owner of the specimen brought an action against the Secretary of the Department of the Interior to enjoin forfeiture of the skin and skull and to compel the return of the items to their point of origin in West Germany.[101] The owner had given the shipper, Lufthansa-German Airlines, specific instructions not to ship the skin and skull through the United States.[102] In acknowledging this fact, the court held that "to construe this statute in a manner which would allow federal authorities to obtain the forfeiture of plaintiff's property, based upon a vio-

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[92] 475 F. Supp. at 1057.
[93] *Id.*
[94] *Id.* at 1060.
[95] 477 F. Supp. 32 (E.D. Pa. 1979).
[96] *Id.* at 33.
[97] *Id.* at 33-34.
[98] *Id.* at 34-35.
[99] 485 F. Supp. 320 (D. Del. 1980).
[100] 16 U.S.C. §§ 1531-1543 (1976).
[101] 485 F. Supp. at 321.
[102] *Id.*

lation by Lufthansa, would raise a very serious constitutional issue of due process."[103]

In contrast to these decisions, however, is that of *Commonwealth v. One 1978 Ford Van.*[104] In that case, the Ford Motor Credit Company challenged the forfeiture of an automobile in which the company had a security interest.[105] The court found that the secured party had done all that could be expected to prevent the misuse of the automobile. Nevertheless, the court, citing *Calero-Toledo*, held that the forfeiture of the secured party's interest was not unconstitutional because the secured party, a sizable commercial financing house, must have foreseen and taken into account the occasional loss of a security interest to forfeiture.[106] The court stated, "[t]here is no contention Ford's [Motor Company] losses to forfeiture might become so quantitatively serious that they will impede commerce or that those losses will prevent Ford from making a reasonable return on its investment in this category of loan taken as a whole."[107] The court did not address the narrow exceptions discussed in *Calero-Toledo.*

The cases after *Calero-Toledo*, discussed above, illustrate a conflict in defining the scope of possible exceptions to a forfeiture proceeding.[108] This conflict is understandable in light of the actual decision in *Calero-Toledo.* Cases allowing forfeiture narrowly construe the possible exceptions of *Calero-Toledo.* These cases generally indicate that under the facts of the particular case the claimant either did not do all that was practicable to prevent the criminal activity[109] or was aware of such activity.[110] Other cases, such as *Commonwealth v. One 1978*

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[103] *Id.* at 323.

[104] 419 N.E.2d 1060 (Mass. App. Ct. 1981).

[105] *Id.* at 1061. The automobile had been seized by the police following the arrest of its owners on a charge of possession of a controlled substance with intent to distribute. The automobile was forfeited pursuant to the Massachusetts drug laws.

[106] *Id.* at 1064.

[107] *Id.*

[108] *See supra* text accompanying notes 90-104.

[109] *See* United States v. Six Thousand Seven Hundred Dollars, 615 F.2d 1 (1st Cir. 1980); United States v. Four Pinball Machines, 429 F. Supp. 1002 (D. Hawaii 1977); United States v. One 1971 Chevrolet Corvette, 393 F. Supp. 344 (E.D. Pa. 1975).

[110] *See* United States v. One 1977 Cherokee Jeep, 639 F.2d 212 (5th Cir. 1981);

Ford Motor Van,[111] do not recognize the dictum in *Calero-Toledo* and adhere to the rule that the forfeiture is not unconstitutional as applied to innocent parties.[112] The cases that disallow forfeiture take a more expansive reading of the exceptions in *Calero-Toledo* and thereby allow the claimants an opportunity to challenge the proceeding.[113] It was against this background of increasing judicial confusion over the rights of an innocent party in property subject to forfeiture that the Alaska Supreme Court decided *State v. Rice*.[114]

III. STATE v. RICE

In *State v. Rice*, Cessna Finance Co. asserted that, given its innocence with respect to the criminal offense upon which the forfeiture was based, the Alaska statute deprived it of a property right without just compensation.[115] In light of the long history of United States Supreme Court decisions,[116] the Alaska court found little relevance for Cessna's position of innocence.[117] Cessna then argued that the statute violated both the right to due process as protected by the fourteenth amendment and the state constitution in its failure to provide

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United States v. One 1975 Pontiac Lemans, 621 F.2d 444 (1st Cir. 1980); United States v. One 1973 Buick Riviera Auto, 560 F.2d 897 (8th Cir. 1977); United States v. One 1973 Pace Arrow M300 Motor Home, 379 F. Supp. 223 (C.D. Cal. 1974).

[111] *See supra* note 104.

[112] *See, e.g.*, United States v. Twenty-Eight "Mighty Payloader" Coin Operated Gaming Devices, 623 F.2d 510 (8th Cir. 1980); United States v. One 1909 Plymouth Fury Auto, 509 F.2d 1324 (5th Cir. 1975); United States v. Four Pinball Machines, 429 F. Supp. 1002 (D. Hawaii 1977); United States v. One 1971 Chevrolet Corvette, 393 F. Supp. 344 (E.D. Pa. 1975). *See also* United States v. One 1975 Pontiac Le Mans, 621 F.2d 444 (1st Cir. 1980); United States v. Six Thousand Seven Hundred Dollars, 615 F.2d 1 (1st Cir. 1980).

[113] *See, e.g.*, United States v. One 1972 Chevrolet Blazer, 563 F.2d 1386 (9th Cir. 1977); United States v. One 1969 Plymouth Fury Auto, 509 F.2d 1324 (5th Cir. 1975) (Wisdom, J., dissenting); United States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383 (W.D. Pa. 1979); United States v. One 1974 Mercury Cougar XR7, 397 F. Supp. 1325 (C.D. Cal. 1975); Moore v. Timmerman, 276 S.E.2d 290 (S.C. 1981).

[114] 626 P.2d 104 (Alaska 1981).

[115] *Id.* at 110-11. Cessna did not contend that the forfeiture statute was unconstitutional with respect to the criminal offenders. *Id.* at 111.

[116] *See supra* notes 29-61 and accompanying text.

[117] 626 P.2d at 111-13. The court, however, did not exclude the possibility that the innocence of the party *alone* would be a valid defense to the forfeiture under the Alaska Constitution.

a statutory remissions procedure such as that interpreted in *United States v. One Ford Coach.*[118] It was upon this point that Cessna finally prevailed.

The Alaska court determined the underlying purpose of forfeiture to be the removal of the dangerous res from society, thereby ensuring that the res could inflict no future harm on society.[119] The court quoted one prominent commentator:

> The ox that gored a person to death was treated as a real felon . . . and was duly executed. The procedure was the natural consequence of a bona fide concern about a human life and not a subterfuge by means of which the authorities were aiming to penalize the owner of the beast.[120]

Recognizing the significance of the legal fiction in biblical times, the court tempered the doctrine with modern realities.[121] Since the airplane is not a dangerous res, per se, the court concluded there was no purpose or justification for the forfeiture without considering the innocent party's constitutionally protected rights.[122]

The fourteenth amendment states that no state shall deprive any person of life, liberty, or property, without due process of law.[123] In *Calero-Toledo* the United States Supreme Court stated the justification for forfeiture to be the prevention of further illicit use of the forfeited property and the imposition of an economic penalty, thereby rendering illegal behavior unprofitable.[124] As applied to innocent lessors or

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[118] 307 U.S. 219 (1939), *noted in* State v. Rice, 626 P.2d 104, 112 (Alaska 1981).

[119] 626 P.2d at 114.

[120] Finkelstein, *supra* note 14, at 252.

[121] *Id.* at 252, where the court noted:

> An automobile that has been used to violate the revenue laws, or the narcotics laws is not a "dangerous" res. . . . It is neither more or less dangerous to the public welfare or safety than any other automobile. The simple proof of the distinction, of course, is that such confiscated automobiles are not in fact destroyed, but are ultimately sold, their proceeds going to the public treasury, while the cars themselves, having been publicly "expiated" for being "offending reae," may resume their normal "life" on the public highways.

Id.

[122] 626 P.2d at 114.

[123] U.S. CONST. amend. XIV.

[124] Colero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-87 (1974).

secured parties, the United States Supreme Court felt these justifications could induce them to exercise greater care in transferring possession of their property.[125] The Alaska court adopted a somewhat more pragmatic view by noting these justifications are well served when the property is not returned to the criminal party, but results in undue hardships when the statute allowing forfeiture is applied to non-negligent and innocent third parties.[126]

The Alaska court recognized that the United States Supreme Court enumerated two possible defenses to the forfeiture proceedings as applied to innocent or non-negligent third parties.[127] The court, however, doubted the efficacy of these defenses in light of the actual holding in *Calero-Toledo*. As noted above, the cases defining the scope of the possible defenses in *Calero-Toledo* are in conflict.[128] The conflict has arisen, not because the wording of the defenses in *Calero-Toledo* is ambiguous, but rather because of the inconsistency of the holding in that case when it is measured against the criteria enumerated therein.[129] Justice Douglas, dissenting in *Calero-Toledo*, concluded that the holding in that case was an aberration,[130] and that its application was as severe as the law of deodands.[131]

The Alaska Supreme Court recognized the conflict under the *federal* constitution and therefore concluded that *Calero-*

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[125] *Id.* at 687-88.

[126] 626 P.2d at 114.

[127] *Id.* at 112.

[128] *See supra* notes 108-13.

[129] *See infra* text accompany notes 130-31.

[130] 416 U.S. at 693-95, wherein Douglas, J. stated in dissent:

> If the yacht had been notoriously used in smuggling drugs, those who claim forfeiture might have equity on their side. But no such showing was made; and so far as we know only one marihuana cigarette was found on the yacht. We deal here with trivia where harsh judge made law should be tempered with justice. I realize that the ancient law is founded on the fiction that the inanimate object itself is guilty of wrongdoing. *United States v. United States Coin & Currency*, 401 U.S. 715, 719-720. But that traditional forfeiture doctrine cannot at times be reconciled with the requirements of the Fifth Amendment. *Id.* at 721. Such a case is the present one.

Id. at 693 (Douglas, J., dissenting).

[131] *See supra* text accompanying notes 14-28.

Toledo stood for the proposition that forfeiture of the interest of an innocent security holder is not violative of *federal* substantive due process.[132] The court, however, did interpret the exceptions of *Calero-Toledo* as protecting the rights of an owner as opposed to a security holder.[133] The court arrived at this conclusion from the statement in *Calero-Toledo* that the purposes of forfeiture can be served by its application to "lessors, bailors, or secured creditors" by inducing them to use greater care in transferring possession of their property.[134] In *Calero-Toledo*, however, the innocent party was the "lessor" as well as the owner of the property.[135] The United States Supreme Court, therefore, did not draw a distinction between owners and "lessors, bailors, or secured creditors" in enumerating the possible defenses.[136] Accordingly, the Alaska Supreme Court erred in its interpretation of the United States Supreme Court's decision.

The import of the Alaska Supreme Court's analysis of *Calero-Toledo* and its progeny in the federal courts is that the judicial guidance is somewhat less than clear, and therefore, that the federal constitution cannot be relied on as a firm basis for decision.[137] This conclusion led the court to resort to the Alaska Constutition wherein the court incorporated the defenses of *Calero-Toledo*, without a distinction between the owners and "lessors, bailors and secured parties."[138] The distinction was not important, as noted above,[139] but resort by the court to the Alaska Constitution meant that the case was, in effect, unreviewable by the United States Supreme Court.[140] By relying on the state constitution the court

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[132] 626 P.2d at 112.

[133] *Id.*

[134] 416 U.S. at 687-88.

[135] *Id.* at 665.

[136] *Id.* at 690.

[137] *See supra* notes 108-13 and accompanying text.

[138] 626 P.2d at 112-13.

[139] *See supra* text accompanying note 136.

[140] The Supreme Court does not review state court decisions resting upon "adequate and independent state grounds." Any effort to obtain review of such decisions is dismissed for lack of jurisdiction. Justice Jackson, in Herb v. Pitcair, 324 U.S. 117-125 (1945), summarized the rule as follows:

avoided the necessity of drawing distinctions between various innocent parties, and more importantly also avoided the threshold question of whether the defenses in *Calero-Toledo* were *obiter dictum* or law.[141]

IV. CONCLUSION

Rice represents an attempt on the part of the Alaska court to finally step forward and discard the legal fiction of the "offending res."[142] The doctrine derived from the "goring ox" is anachronistic and should be tempered in light of present day realities. This is not to say that forfeiture has no place in today's society. The goals of the doctrine, however, should be examined and merged with the constitutional requirements.

The basic premise of the deodand was to remove the offending res from society.[143] This goal can be achieved when

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> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . [The] reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge *federal rights.*

Id. (emphasis added). *See generally* HART AND WECHSLER, FEDERAL COURTS, ch. 5 (2d ed. 1973); WRIGHT, FEDERAL COURTS, ch. 12 (3d ed. 1976).

[141] *See supra* notes 108-13 and accompanying text. The court held:

> [I]f a party can show "the manner in which the property came into possession of such other person" and that "prior to parting with the property he did not know, nor have reasonable cause to believe [either] that the property would be used to violate [the law or,] . . . that the violator had a criminal record or a reputation for commercial crime," substantive due process under the Alaska Contstitution requires that a procedure be available for remission of the forfeited item.

626 P.2d at 114.

[142] The progressive opinion of the courts is reminiscent of the often quoted Vice Chancellor Jayne:

> It is the peculiar genius and strength of the common law that no decision is stare decisis when it has lost its usefulness in our social evolution; it is distinguished, and if times have sufficiently changed, overruled. Judicial opinions do not always preserve the social statics of another generation.

Carroll v. Local No. 269, Int'l Bd. of Elec. Workers, 133 N.J. Eq. 144, 31 A.2d 223, 225 (N.J. Ch. 1943).

[143] *See supra* notes 14-28 and accompanying text.

the res is taken from the perpetrator of the crime. Drug-smugglers are certainly deterred when their modes of transportation are confiscated, thereby rendering them immobile or financially incapable of acquiring new assets.[144] Certainly the game hunter in *Rice* will think twice before he transports illegally killed wildlife again. Additionally, the deterrent goal is justifiably achieved when an "innocent" party is not criminally liable but remains culpable. The law should not draw a distinction between actual perpetrators of crime and those that knowingly supply the "tools of the trade." The exceptions of *Calero-Toledo* certainly took these individuals into account. The desire to deter crime and protect society is also served by confiscating property sold to individuals with known criminal records, but the justifications when an innocent and non-negligent lienor is involved must be critically analyzed.

The courts should allow forfeiture only when it will result in the removal of the dangerous res from society or punishment of the criminally culpable party. It is upon this basis only that the forfeiture statutes should be justified. There may be cases wherein the forfeiture of the property rights of the innocent party could be justified. The person that supplies the res with full knowledge of its intended use is as culpable as the perpetrator of the crime. Under these circumstances the goals of the forfeiture are justified, but these exceptions must be merged with the constitutional requirements of the fifth amendment. This balance can only be achieved through a definite statutory scheme outlining remission and mitigation in a manner that is effectively reviewable by the courts. This mode of analysis assures the innocent property owner that his property rights will not be infringed, and it was this method that the Alaska court adopted.

Daniel W. Rabun

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[144] *See* Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976); Smith, *Modern Forfeiture Law and Policy: A Proposal For Reform*, 19 WM. & MARY L. REV. 661 (1978); Note, 62 CORNELL L. REV. 768 (1977).