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# Conflict of Law (1987)

James Paul George
*Texas A&M University School of Law*, pgeorge@law.tamu.edu

Fred C. Pedersen

# CONFLICT OF LAW

*by*

*James Paul George* and Fred C. Pedersen***

CONFLICTS of law occur when foreign elements appear in a lawsuit. Nonresident litigants, incidents in sister states or foreign countries, and lawsuits from other jurisdictions are all foreign elements that may create problems in judicial jurisdiction, choice of law, or the recognition of foreign judgments. This Article reviews Texas conflict of laws during the Survey period from late 1985 through 1986. The Survey includes cases from Texas state and federal courts, and non-Texas cases affecting Texas practice. Excluded are cases involving federal/state conflicts, criminal law, intrastate matters such as subject matter jurisdiction and venue, and conflicts in time, such as the applicability of prior or subsequent law within a state.

During the Survey period judicial jurisdiction continued its uncertain theoretical expansion, but with not as much groundbreaking case law this year from Texas courts or the United States Supreme Court. In fact, the United States Supreme Court offered no cases on judicial jurisdiction for the first time since 1983. Choice of law continued a more orderly development in Texas courts as judges became more familiar with the most significant relationship test from the Restatement (Second) of Conflict of Laws,[1] although many courts still do not apply the test correctly. The area of recognition and enforcement of foreign judgments proved less eventful than in 1985, as the occurrence of noteworthy enforcement cases diminishes with the growing use of the uniform enforcement acts.

The new Texas Civil Practice and Remedies Code[2] bears on much of this Article's discussion. Because of its recent enactment, many of this year's conflicts cases were litigated under the Code's predecessor statutes. This Article will cite to both the older statutes and the successor Code.

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* B.A., Oklahoma State University, J.D., University of Tulsa; L.L.M., Columbia University. Attorney at Law, Johnson, Bromberg and Leeds, Dallas, Texas; Adjunct Instructor of Law, Southern Methodist University School of Law.

** B.A., University of New York College at Oswego; J.D., University of Toledo; L.L.M. Columbia University; Attorney at Law, Hughes and Luce, Dallas, Texas.

1. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) [hereinafter RESTATEMENT (SECOND)]. The most significant relationship test involves applying general choice of law principles embodied in § 6 to subject area factors enumerated in subsequent sections specific to particular areas of law. *Id.* Introduction. *But see infra* note 246 (indicating which sections of the Restatement (Second) the Texas Supreme Court has expressly adopted as law).

2. (Vernon 1986).

## I. JUDICIAL JURISDICTION

During the Survey period a number of Texas state and federal cases raised questions concerning judicial jurisdiction, including nonresidents' amenability to Texas jurisdiction, notice, divorce and child custody, inconvenient forum, and sovereign immunity.

### *A. Amenability to Texas Jurisdiction*

1. *Texas Long-Arm Jurisdiction.* Long-arm jurisdiction—the forum state's authority to compel nonresidents to appear in court—is the foremost component of judicial jurisdiction for conflict of laws purposes. Two standards govern long-arm jurisdiction: the forum state's long-arm statute, and the due process clauses of the fifth and fourteenth amendments.[3] The principal Texas long-arm statute is article 2031b, now chapter 17 of the new Civil Practice and Remedies Code.[4] In addition to having two governing standards, long-arm jurisdiction has two components: amenability to service of process[5] and notice.[6] This section highlights amenability issues, notice is discussed later.[7]

In *Texas Commerce Bank v. Interpol '80 Ltd. Partnership*[8] the Corpus Christi court of appeals found Texas jurisdiction over a Colorado partnership appropriate in its dispute with a Colorado corporation. Interpol, a Colorado limited partnership, made two contracts with Lewis Energy Corporation, a Colorado corporation, regarding Texas mineral interests, including a proposed oil well. No Texas residents were parties to the contracts. The parties negotiated and executed both contracts in Colorado,

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3. The fifth amendment due process clause imposes limits on the personal jurisdiction of federal courts in federal question cases with federal service of process. The fourteenth amendment due process clause applies to state and federal courts in all other cases, including federal question cases with service of process under state long-arm statute. *See* Point Landing, Inc. v. Omni Capital Int'l, Ltd., 795 F.2d 415 (5th Cir. 1986) (discussed *infra* notes 102-122 and accompanying text).

4. As of September 1, 1985, art. 2031b is spread through §§ 17.042-.045 of the Texas Civil Practice and Remedies Code. Texas also has specific subject matter long-arm statutes, some of which are affected by the new code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.092 (Vernon 1986) (former art. 2033a) (service on the local representative of nonresident individuals or partnerships supplying public utility services); *id.* § 17.021 (former arts. 2033b, 2033c) (service of process on an agent or clerk in a county other than the principal's residence, where principal includes individual, partnership, or unincorporated association, and also encompasses nonresidents of Texas; § 17.021 also details the effects of service); *id.* §§ 17.061-.062 (formerly art. 2039a) (service of process on nonresident motorists); TEX. BUS. CORP. ACT ANN. art. 8.10 (Vernon 1980) (service of process on foreign corporations); TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1987) (acquiring jurisdiction over nonresident respondents in divorce actions); *id.* § 11.051 (Vernon 1986) (acquiring jurisdiction over nonresident respondents in child custody actions). The general procedure for serving nonresidents is set out in TEX. R. CIV. P. 108 (nonresidents in the United States); *id.* 108a (nonresidents in foreign countries).

5. Amenability must satisfy both Texas long-arm requirements and federal due process, which is currently measured by minimum contacts between the nonresident and the forum state.

6. Notice means compliance with Texas and federal constitutional standards for service of process.

7. *See infra* notes 154-68 and accompanying text.

8. 703 S.W.2d 765 (Tex. App.—Corpus Christi 1985, no writ).

although Texas was the place of performance of both agreements. Interpol had no other contacts with Texas. The two parties fell out during the drilling, the drilling stopped, and Lewis filed a petition for chapter 11 bankruptcy. Lewis assigned its accounts receivable to Texas Commerce Bank, who then sued Interpol for its share of unpaid drilling costs of $63,076.77.

Interpol entered a rule 120a[9] special appearance in the state district court, to contest personal jurisdiction. Interpol argued that Texas Commerce had pleaded insufficient facts to establish personal jurisdiction under the contract portion of article 2031b(4),[10] and that Interpol was not amenable to Texas jurisdiction because Interpol had merely contracted with a Colorado corporation and had no contacts with Texas residents or corporations.[11] The trial court held that Texas lacked personal jurisdiction over Interpol.

The court of appeals reversed, based on several jurisdictional holdings. First, as to the sufficiency of jurisdictional pleadings, the court noted that the sole issue in a special appearance is amenability to Texas jurisdiction, not whether the allegations establish that jurisdiction.[12] The court based this holding on last year's *Kawasaki Steel Corp. v. Middleton*,[13] which also held that any argument other than nonamenability to jurisdiction exceeds the scope of a special appearance and subjects the nonresident to Texas jurisdiction, thus ending the jurisdictional inquiry.[14] The *Texas Commerce* court did not seize on this issue but went on to examine Interpol's argument of nonamenability.

Interpol argued that it was not amenable to Texas jurisdiction because the contract portion of article 2031b did not include an example of jurisdiction based on contracts between nonresidents.[15] The court observed that Texas long-arm jurisdiction is not limited to the examples in article 2031b, but extends to the limits of fourteenth amendment due process.[16] According to

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9. TEX. R. CIV. P. 120a.

10. Article 2031b(4) formerly provided that:

> For the purposes 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 comitting of any tort in whole or in part in this State.

TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964) (repealed 1985). These provisions are now codified as TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.042 (Vernon 1986), which retain the same terms with a different arrangement.

11. 703 S.W.2d at 771.

12. *Id.* at 770. Challenges to the sufficiency of the jurisdictional allegations, or to the sufficiency of service of process, must be raised by a motion to quash.

13. 699 S.W.2d 199 (Tex. 1985).

14. *Id.* at 201-02. When Interpol first challenged the jurisdictional pleadings, the trial court should have noted the general appearance and, if plaintiff's jurisdictional allegations were insufficient, quashed service and given Interpol new answer time running from that point. The court of appeals should have done the same: noted the general appearance, quashed service, and given Interpol new answer time.

15. *See supra* note 10.

16. 703 S.W.2d at 770-71. *But see id.* at 771 n.2 and accompanying text, where the court observed that art. 2031b jurisdiction, in requiring a nexus between the nonresident's contacts and the lawsuit, may be narrower than fourteenth amendment due process, which allows juris-

the Texas Supreme Court, fourteenth amendment due process requires (1) minimum contacts with Texas, (2) a nexus between the nonresident's contacts and the lawsuit, and (3) fairness in requiring the nonresident to defend here.[17]

The court found sufficient Texas contacts in the subject of the Colorado parties' contract: Texas mineral interests and related benefits.[18] The court further noted that Interpol agreed to have its agents at the Texas drilling site.[19] Although this clause was never implemented, the court held that it showed Interpol's anticipation of further Texas contacts.[20] Finally the court pointed to the parties' contractual choice of Texas law as an anticipated use of Texas courts even though Texas law could be applied by another state's courts.[21] The second due process requirement, the nexus between the nonresident's contacts and the lawsuit, was obviously satisfied because the plaintiff sought unpaid Texas drilling expenses that the defendant Interpol had authorized from Colorado.[22]

Turning to the fairness requirement, the court stated that it would balance the state's interest against Interpol's inconvenience in having to defend in Texas.[23] The court found ample Texas interest present in the contracted-for Texas minerals.[24] This interest should have been sufficient for jurisdiction, but the court took the interest analysis an unfortunate step further, applying choice of law analysis. The court observed that under both Texas and Colorado choice of law rules, Texas law should apply to this case.[25] This result, the court concluded, established a Texas interest relevant to judicial jurisdiction.[26]

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diction without a nexus if the nonresident's contacts are sufficiently thorough for general jurisdiction. *See* Helicotperos Nacionales de Colombia, S.A. v. Hall (Helicol), 466 U.S. 408, 414 & n.9; Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446 (1952). In the Texas *Helicopteros* opinion, the Texas Supreme Court appeared to eliminate the nexus requirement for some cases. *See* Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870, 872 (Tex. 1982). *Helicol* also popularized other terminology for nexus and non-nexus cases. Specific jurisdiction is based upon a nonresident's single or few forum contacts, from which the lawsuit must arise. General jurisdiction is based upon the nonresident's continuous and systematic contact with the forum, so as to impute a presence in the forum, with no requirement that the lawsuit arise from these systematic contacts. *See Helicol*, 466 U.S. at 414 n.9.

17. 703 S.W.2d at 772 (citing O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966)).

18. *Id.* at 772-73.

19. *Id.* at 773.

20. *Id.*

21. *Id.* This view may be within the scope of the United States Supreme Court's analysis of this issue, but the Supreme Court has generally concluded that the parties' choice of law agreement has personal jurisdiction significance because it points to a purposeful availment of the benefits and protections of the forum state's laws. The Court does not tie the analysis to an anticipated use of forum state courts. For a discussion of the relation between personal jurisdiction and choice of law see *infra* note 28.

22. 703 S.W.2d at 771.

23. *Id.* at 773.

24. *Id.* (citing Quasha v. Shale Dev. Corp. 667 F.2d 483, 486 (5th Cir. 1982)).

25. *Id.* at 773-74.

26. *Id.* The court based this reasoning on two Fifth Circuit cases, Quasha v. Shale Dev. Corp., 667 F.2d 483, 487 (5th Cir. 1982); Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1268 n.15 (5th Cir. 1981). Both cases are contrary to United States Supreme Court precedent to the extent that they use a choice of law analysis to support judicial jurisdiction. *See infra* note 28. *Prejean*'s analysis may be appropriate; it merely holds that state interest is a factor in both

The United States Supreme Court has repeatedly struck down this line of reasoning.[27] It is understandable, though, how courts confuse this issue both because contractual choice of law agreements are legally relevant to show that the parties purposely availed themselves of the benefits and protections of forum law,[28] and because the Supreme Court has considered only the parties' choice of law agreement in evaluating long-arm jurisdiction. But the parties' contractual choice of law does not establish a state interest merely by having that state's law apply, and the choice of law analysis (as in Texas's most significant relationship test) is not relevant to judicial jurisdiction. Again, confusion arises because many choice of law analyses rely partly on state interest. Courts naturally assume that state interest *is* state interest, whether the inquiry is long-arm jurisdiction or choice of law. But the Supreme Court says it isn't so, at least for now.[29]

The *Texas Commerce* court then noted Colorado's interest in the case, but held that Texas' interest outweighed Colorado's.[30] Finally, the court considered Interpol's inconvenience in having to defend in Texas. The court con-

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judicial jurisdiction and choice of law, without using the elements of one analysis to prove the other. 652 F.2d at 1268. *Quasha* was clearly contrary to Supreme Court precedent in holding that because the nonresidents had created a situation that was foreseeably governed by Louisiana law, they had submitted to Louisiana judicial jurisdiction. 667 F.2d at 487. Ironically, *Quasha* cited Hanson v. Denckla, 357 U.S. 235 (1958), to support this conclusion. *Hanson* specifically forbade the use of state's choice of law tests to establish the due process elements of long-arm jurisdiction. 357 U.S. at 253; *see infra* notes 27-28.

27. *See* Burger King v. Rudzewicz, 105 S. Ct. 2174, 2187, 85 L. Ed. 2d 528, 546-47 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984); Kulko v. California Superior Court, 436 U.S. 84, 98 (1978); Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

28. This reasoning is a paraphrase of the holding in Hanson v. Denckla, 357 U.S. 235, 253 (1958). It was most recently invoked in Burger King Co. v. Rudzewicz, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), where the Supreme Court held that a

> choice of law *analysis*—which focuses on all elements of a transaction and not simply on defendant's conduct—is distinct from minimum-contacts jurisdictional analysis—which focuses at the threshold solely on the defendant's purposeful connection to the forum. Nothing in our cases, however, suggest that a choice of law *provision* should be ignored in considering whether a defendant has "purposefully invoked the benefits and protections of a State's laws" for jurisdictional purposes. Although such a provision standing alone would be insufficient to confer jurisdiction, we believe that, when combined with the 20-year interdependent relationship Rudzewicz established with Burger King's Miami headquarters, it reinforced this deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there.

*Id.* at 2187, 85 L. Ed. 2d at 547 (emphasis in original; footnote omitted). Readers should note that a contractual choice of law is not itself a jurisdictional contact. Rather, it is a factor that may, with the totality of other contacts with the forum state, help to illustrate a nonresident's purposeful connection with that state. The contractual choice of law clause is not itself a purposeful availment, but may be considered with other facts that add up to purposefully availing oneself of the benefits and protections of the forum state's laws.

29. *See* Shaffer v. Heitner, 433 U.S. 186, 225-26 (1977), in which Justice Brennan argued that when it is obvious that a state has an interest in having its law apply to a dispute, it should be easier for that state to acquire jurisdiction. Justice Brennan summarized by arguing that "practical considerations argue in favor of seeking to bridge the distance between choice-of-law and jurisdictional inquiries." *Id.* at 225. If state interest gains importance as a jurisdictional factor, with the demise of state sovereignty as a factor, the choice of law analysis may become relevant as Justice Brennan suggests.

30. 703 S.W.2d at 774.

cluded that because of Interpol's substantial connection to Texas in this matter, it was fair to have it defend in Texas.[31]

A second Texas case also considered choice of law in its jurisdictional analysis. In *3-D Electric Co. v. Barnett Construction Co.*[32] defendant Barnett specially appeared to challenge the trial court's personal jurisdiction. Barnett lost that challenge but won the case on the merits. Plaintiff 3-D Electric moved for a new trial, which it won. After the jury verdict for 3-D, Barnett again raised the personal jurisdiction challenge in light of the then newly issued *Helicol* decision.[33] The trial court agreed that *Helicol* defeated Texas's jurisdiction over Barnett.[34]

The jurisdictional facts were that J.C. Harville, president of Metropolitan Contractors, a Tennessee corporation, telephoned Richard Kinney, president of 3-D, a Texas-incorporated electrical contractor, in regard to electrical work in a motel to be built in Trinidad, Colorado. The general contractor was Barnett Construction Company, a Tennessee corporation solely owned by Tom Barnett, who also owned all the shares in Metropolitan. Kinney was interested and soon received the motel's plans from Barnett Construction. Kinney then met in Trinidad with Harville, Tom Barnett, and Tom's son Cooper Barnett, where Barnett Construction and 3-D made an oral contract. 3-D completed its work in Trinidad and billed Barnett Construction. Barnett did not pay the entire bill, and 3-D sued Barnett Construction in Texas, styling the defendant as Barnett Construction Co., and Barnett Construction Co. d/b/a Metropolitan Contractors, Inc.[35]

The jurisdictional issues considered on appeal were whether Barnett Construction and Metropolitan were so interwined that Metropolitan's Texas contacts were attributable to Barnett Construction, and if not, whether Barnett Construction's contacts alone were sufficient for Texas jurisdiction. In resolving the first issue of corporate intertwining, the court began by stating that the presence of a corporate subsidiary in the forum state was not jurisdictionally attributable to the parent foreign corporation unless the two had such a close relationship that, in effect, the parent was engaging in business in the forum state through its subsidiary.[36] The court added that Barnett's common ownership of all the stock in both Barnett Construction and Metropolitan, along with a commonality of officers and directors, was not enough to establish the necessary alter ego relationship between the parent and its subsidiary.[37] Rather, the parent would have to exercise a greater than normal degree of control over the subsidiary's internal operations, the court concluded.[38] The court then cited the determinative factors for identifying a

31. *Id.*
32. 706 S.W.2d 135 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
33. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).
34. 706 S.W.2d at 137. For a discussion of the retroactivity of jurisdictional decisions see *infra* note 49.
35. 706 S.W.2d at 135.
36. *Id.* at 139.
37. *Id.*
38. *Id.*

subisidary as a mere adjunct of the parent,[39] and held that 3-D's evidence failed to show that Barnett Construction was sufficiently intertwined with Metropolitan.[40] In particular, the court noted that 3-D's principal argument was that the two Tennessee corporations had common ownership and control; 3-D offered no evidence that Barnett Construction had ever done business as Metropolitan in Texas.[41]

Failing to show that Metropolitan was a mere adjunct or alter ego of Barnett, 3-D had to show that Barnett Construction itself had sufficient contacts with Texas. In fact, Barnett did have several contacts with Texas in the negotiation and performance of the contract, even though Metropolitan made the initial Texas contact and even though 3-D performed its electrical work in Colorado. 3-D argued that Barnett's Texas contacts were jurisdictionally sufficient, as held in a similar 1985 case, *Beechem v. Pippin*.[42] The court of appeals disagreed. Even though Barnett Construction mailed the plans to 3-D in Texas, and made several other contacts in Texas during the contract, these contacts did not amount to Texas jurisdiction.[43] In particular, the contacts failed the *Hanson v. Denckla*[44] standard that the nonresident must have purposely availed himself of the privileges of conducting

39. The court listed the factors as (1) whether the two corporate entities file consolidated income tax returns, (2) whether the parent finances the subsidiary's operating capital, (3) the extent to which both companies keep separate books and accounts, (4) whether they share common departments or businesses, (5) whether they hold separate meetings of shareholders and directors, (6) whether an officer or director of one corporate entity may determine the policies of the other, and (7) whether any facts exist to indicate that the subsidiary is merely a conduit. *Id.* at 139 (citing Moffett v. Goodyear Tire & Rubber Co., 652 S.W.2d 609, 613 (Tex. App.—Austin 1983, writ ref'd n.r.e.)).

40. *Id.* at 140.

41. *Id.* at 139-40.

42. 686 S.W.2d 356, 361-63 (Tex. App.—Austin 1985, no writ). For a discussion of *Beechem* see George & Pedersen, *Conflict of Laws, Annual Survey of Texas Law*, 40 Sw. L.J. 401, 406-10 (1985) [hereinafter cited as George & Pedersen, *1985 Annual Survey*].

43. 706 S.W.2d at 143. The *3-D* court relied partly on Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983), for the proposition that sending payments to Texas and having other contractual contacts with Texas did not amount to minimum contacts. While this reliance on *Hydrokinetics* is generally sound, it weakens upon examination. *Hydrokinetics* held that numerous Texas contacts were offset by the parties' contractual agreement that Alaska law was to govern, apparently implying that the parties' contractual choice of nonforum law showed a lack of intent to avail themselves of the benefits and protections of forum law. *Id.* at 1029-30. This differs from the Supreme Court's view in Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 2185-86, 85 L. Ed. 2d 528, 544-45 (1985). *Burger King* merely held that the parties' contractual choice of law was additional evidence of the parties' purposeful availment of forum benefits and protections. *Id.* at 2187, 85 L. Ed. 2d at 547. *Hydrokinetics*' use of the parties' choice of law arguably gives it independent probative value to offset and disprove the parties' purposeful availment of forum benefits and privileges. This is contrary to *Burger King's* notion that the parties' choice of law agreement has jurisdictional relevance only in connection with other supporting evidence of the parties' intent to avail themselves of forum benefits and protections. *Hydrokinetics* not only afforded more significance to a contractual choice of law, it also gave contractual choice of law a singular significance that the Supreme Court has thus far denied. If, however, *Hydrokinetics* is contrary to Supreme Court views, it may have been harmless to *3-D*. Although *3-D* relied on *Hydrokinetics* and cited its language about the parties' choice of non-forum law, *3-D* had no contractual choice of law agreement for the court to misapply. Credit for this analysis goes to Tom Whelan, 1987 SMU law graduate, who made these points in a term paper for Conflict of Laws.

44. 357 U.S. 235, 253 (1958).

activities within the forum state, thus invoking the benefits and protections of its laws.[45]

Although it upheld the trial court's jurisdictional dismissal, the court of appeals did not agree with the trial court that *Helicol* had a major impact on this case.[46] The court of appeals stated that, instead of changing the law, *Helicol* merely clarified it.[47] Texas, therefore, had no jurisdiction over Barnett Construction either before or after *Helicol*.[48] This holding eliminated 3-D's argument that the trial court erroneously applied *Helicol* retroactively to Barnett's jurisdictional challenge.[49]

3-D also argued that Barnett Construction made an operative choice of law by failing to object to the application of Texas law in the first trial, and that this choice of law was a compelling factor in creating Texas jurisdiction.[50] The court of appeals dismissed this argument, finding that even contractual choice of law agreements do not establish jurisdiction where none otherwise exists.[51] The court analogized that if a contractual choice of law could not establish jurisdiction, then neither could Barnett's failure to object to the application of Texas law.[52] The court's conclusion is a correct reading of the United States Supreme Court's limits on the influence of choice of law on questions of personal jurisdiction.[53]

*3-D Electric* is worth reviewing for its multiple analyses of minimum contacts facts under a variety of Texas and Supreme Court cases. Because the law of personal jurisdiction is a hybrid of case-by-case facts and amorphous standards based on those facts, *3-D*'s review is helpful. Particularly helpful is the court's distinction between the facts in *3-D* and those in *Beechem v. Pippin*.[54] Both cases involved a nonresident's contract with Texas residents for performance outside Texas. Significant differences in the facts account

45. 706 S.W.2d at 143.

46. *Id.* at 145-46.

47. *Id.*

48. *Id.* The court of appeals' only reliance on *Helicol* was to point out that *Helicol* set up two categories of nonresident jurisdiction: specific jurisdiction and general jurisdiction. The court did not use the general/specific labels, but the court was clearly referring to these two categories. *Id.* The court of appeals concluded that this was a question of specific jurisdiction because "[i]t seems clear that, in this case, the cause of action relates to Barnett's oral contract with 3-D which was initiated by the phone call to Kinney in Texas." *Id.* at 141. The court appeared to err in this statement, because the initial phone call to Kinney in Texas was not from Barnett Construction, but from J.C. Harville of Metroplitan. The court had already held that Metroplitan's actions were not attributable to Barnett Construction. *Id.* at 140. The error is harmless because Barnett had other Texas contacts with 3-D after Harville's phone call. *See id.* at 142. This lawsuit related to those contacts.

49. *Id.* at 146. The court of appeals stated that Texas Supreme Court decisions are retroactive unless they are unforeseeable. *Id.* (citing Sanchez v. Schindler, 651 S.W.2d 249, 254 (Tex. 1983)). Because the court held the Texas Supreme Court made no new law in *Helicol*, both retroactivity and foreseeability were irrelevant. Readers should note that all of *3-D*'s references to *Helicol* are to the Texas Supreme Court's opinion and not the United States Supreme Court's opinion.

50. 706 S.W.2d at 144.

51. *Id.* at 144-45.

52. *Id.* at 145 & n.9.

53. For further discussion and citations on the relation of choice of law to personal jurisdiction see *supra* notes 26-29 and accompanying text.

54. 686 S.W.2d 356 (Tex. App.—Austin 1985, no writ).

for *Beechem*'s upholding of jurisdiction and *3-D*'s denying it. Nonetheless, the fact that the *3-D* opinion distinguished the two reaffirms *Beechem*'s dictum that a nonresident is not absolutely subjected to Texas jurisdiction merely for contracting with a Texan for performance in another state.[55]

*Schaeffer v. Moody*[56] offers a variation on *3-D*'s theme of a nonresided submitting itself to Texas jurisdiction by contracting with a Texan. *Schaeffer* differed from 3-D Electric in that its contract was performed in Texas, which is specific grounds for personal jurisdiction over nonresident parties to that contract under article 2031b(4), and in this case, article 2039a, the nonresident motorist statute.[57] *Schaeffer* involved an automobile accident in which the plaintiff passenger and defendant driver were both Texas residents, but the driver's employers, also defendants, were from Georgia. *Schaeffer* illustrates that Texas' long-arm motorist statute authorizes jurisdiction not only over nonresident drivers, but also over the nonresident employees of Texas-resident drivers[58] *Schaeffer* also reiterates last year's *Kawasaki*[59] rule that challenges to the manner of service exceed the scope of a special appearance.[60] But, as in *Texas Commerce*, the court failed to follow through and base jurisdiction on defendants' misuse of the special appearance.[61]

*Strick Corp. v. Keen*[62] applied the recently created stream of commerce doctrine to establish personal jurisdiction over an Israeli-based manufacturer.[63] Plaintiff Keen was injured in Texas when a trailer fell on him. The trial court found that a defective trailer component manufactured by Ashot Ashkelon, an Israeli corporation, caused the accident. Plaintiff sued Ashot and Strick Corporation, the trailer's assembler. Ashot objected to Texas' assertion of stream of commerce jurisdiction, arguing that Ashot's lack of control over its product in Texas defeated such jurisdiction.[64] The court of appeals disagreed, stating that the essential issue to stream of commerce jurisdiction is not right of control, but the reasonable expectation that the product will be sold in Texas.[65]

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55. *Id.* at 363.

56. 705 S.W.2d 318 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

57. TEX. REV. CIV. STAT. ANN. art. 2039a (Vernon 1964) (repealed 1985). This statute is now codified as TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.061-.069 (Vernon 1986).

58. 705 S.W.2d at 321.

59. *See* Middleton v. Kawasaki Steel Corp. 699 S.W.2d 199, 201-02 (Tex. 1985).

60. 705 S.W.2d at 320.

61. For an explanation that challenging the *manner* of service constitutes a general appearance and is a voluntary submission to person jurisdiction see *supra* notes 13-14 and accompanying text.

62. 709 S.W.2d 292 (Tex. App.—Houston [14th Dist.] 1986, writ granted).

63. The stream of commerce doctrine was developed in federal circuit courts, based on dictum in World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297-98 (1980). The doctrine holds that when a nonresident manufacturer places its good in the interstate or international stream of commerce with a reasonably foreseeable chance that some of those goods will enter the forum state, the forum state acquires jurisdiction over disputes based on those goods. *See* George & Pedersen, *1985 Annual Survey*, *supra* note 42, at 405-06.

64. 709 S.W.2d at 295.

65. *Id.* (citing Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 201 (Tex. 1985)).

In *Otis Elevator Co. v. Zac Smith & Co.*[66] a Texas Court of appeals held a nonresident corporation amenable to Texas jurisdiction for the prior acts of the nonresident's joint venturer in Texas.[67] Advanced Concrete of Texas, Inc., a Texas corporation, agreed to build an Austin hotel, and contracted with Otis Elevator to purchase four elevators for the hotel. Advanced Concrete then took in Smith Company, a Florida corporation, as joint venturer in the hotel project. Smith had no continuous or systematic business activity in Texas, and its Texas contacts were limited to this joint venture. At some point the contract with Otis was breached; the court's opinion does not specify whether the breach occurred before or after Smith's entry into the joint venture. Smith argued that Texas lacked personal jurisdiction because the Otis contract was signed prior to Smith's entry into the venture, and Smith had not subsequently ratified the Otis contract.[68] The trial court agreed and dismissed Otis' claim against Smith.[69]

The court of appeals reversed, holding that Advanced Concrete's pe-joint venture acts were attributable to Smith for jurisdictional purposes.[70] Although the court did not discuss the time of the breach—before or after Smith's entry into the joint venture—it would seem relevant in attributing Advanced Concrete's actions to Smith, either for jurisdictional or liability purposes. On the other hand, the court's ruling is broad enough to bind Smith to Texas jurisdiction even if the breach occurred prior to Smith's entry.

In *Perez Bustillo v. Louisiana*[71] plaintiffs sued for injuries allegedly caused by a Louisiana prison escapee's negligence in Texas. The defendants were various Louisiana state agencies that allegedly failed to supervise and control the prisoner so as to prevent his escape. The trial court dismissed for lack of personal jurisdiction and the court of appeals affirmed, holding that the defendants lacked the necessary purposeful contact with Texas regarding this incident.[72]

2. *State Long-Arm Jurisdiction in Federal Courts*: Texas federal courts also apply Texas' long-arm statute, primarily in diversity cases.[73] This survey period produced two noteworthy federal cases using article 2031b, both offering examples of attempted jurisdiction based on a nonresident's contract with a Texas resident to be performed outside Texas.[74] In *Colwell Realty Investments, Inc. v. Triple T Inns of Arizona, Inc.*[75] TC Properties was an

66. 715 S.W.2d 806 (Tex. App.—Austin 1986, writ granted).
67. *Id.* at 809.
68. *Id.* at 808.
69. *Id.* at 807.
70. *Id.* at 807, 809.
71. 718 S.W.2d 844 (Tex. App.—Corpus Christi 1986, no writ).
72. *Id.* at 847.
73. *See* FED. R. CIV. P. 4(e).
74. The leading case is Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). Current Texas examples include 3-D Elec. Co. v. Barnett Const. Co., 706 S.W.2d 135, 142-44 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); Beechem v. Pippin, 686 S.W.2d 356, 363 (Tex. App.—Austin 1985, no writ).
75. 785 F.2d 1330 (5th Cir. 1986).

Arizona limited partnerhsip whose principal business was to develop and operate a Holiday Inn in Mesa, Arizona. TC consisted of general partner Triple T (principal place of business in Arizona, with no stated place of incorporation),[76] and limited partner Colwell Properties (incorporated and principally located in California). The limited partnership agreement stipulated that the active partner, Triple T, would not develop without Colwell Properties' consent. The formation and early functioning of this limited partnership had nothing to do with Texas.

In 1983 Mercury Savings Association, a Texas savings and loan, purchased Colwell Properties. Mercury formed a new Texas corporation, Colwell Realty. To protect the Colwell entity's participation in the limited partnership with Triple T, a California Colwell employee, Daniel Gerboth, requested that Triple T consent to the substitution of Colwell Realty (Texas Colwell) for Colwell Properties (California Colwell). Gerboth assured Triple T in writing that "[t]he transfer of of ownership will not involve a change of operations of The Colwell Company, only a change of name. Current management will remain intact under the new ownership."[77] Gerboth sent the letter from the Los Angeles office of The Colwell Company and Colwell Properties, on stationary headed Colwell Financial Services. Based on this letter, Triple T consented to the substitution.

During this time Triple T developed plans to add 165 rooms to the Holiday Inn in Mesa. Based on Gerboth's letter, Triple T continued to do business with the Colwell Properties officers in California. A month after Gerboth had requested substitution, he consented in writing to Triple T's development plans. Five months later, a Texas attorney purporting to represent Texas Colwell telephoned Triple T to tell them that Texas Colwell had not consented to the new Mesa development. Triple T temporarily stopped construction, but soon resumed. A month later Texas Colwell sued Triple T in the Southern District of Texas, claiming that the officers of California Colwell had no authority to act for Texas Colwell. Triple T objected to Texas' personal jurisdiction, and the trial court dismissed.[78]

Texas Colwell appealed, advancing three arguments for jurisdiction over Triple T: first, Triple T's consent to substitution by Texas Colwell brought Triple T within Texas' jurisdiction; second, Triple T's expansion project in Arizona was a minimum contact with Texas because Triple T knew it would require Texas Colwell's consent; and third, Triple T's further development actions in Arizona caused foreseeable injury to Texas Colwell.[79] The court of appeals disposed of plaintiff Texas Colwell's first two arguments as one. The court first noted that merely contracting with a Texas resident did not create Texas jurisdiction.[80] Rather, the court would have to look to "the factors of prior negotiations, *contemplated* future consequences, terms of the

76. The *Colwell* opinion does not include Triple T's place of incorporation.
77. 785 F.2d at 1332.
78. *Id.*
79. *Id.* at 1334.
80. *Id.*

contract, and the parties' actual course of dealing to determine whether [Triple T] *purposefully* established minimum contacts" with Texas.[81] In examining these factors the court observed that Triple T had done nothing to purposefully establish contacts with Texas.[82] To the contrary, Triple T reasonably believed that it should continue dealing with California Colwell because of Gerboth's letters. Even though Triple T consented to the substitution of the newly Texas-formed Colwell Realty in the limited partnership, Triple T believed that this consent would not create Texas contacts, the court concluded.[83]

Texas Colwell's third argument was that regardless of Triple T's reliance on Gerboth's letters, Triple T knew of the Texas connection after the Texas attorney's telephone call, and yet continued to develop the Mesa motel. This continued Mesa development, according to Texas Colwell, caused foreseeable harm. The court rejected this argument, holding that the Texas attorney's phone call was plaintiff Texas Colwell's unilateral act from Texas, not Triple T's purposeful contact with Texas.[84] The court concluded that plaintiff Texas Colwell's weak arguments did not establish Texas jurisdiction over Triple T. The court supported its finding by affidavit evidence showing that the original limited partnership had nothing to do with Texas, that no Triple T officer or agent had ever travelled to Texas in regard to these events, and that Triple T had no other connections with Texas.[85]

*Colwell* resembles last year's *Stuart v. Spademan*,[86] in which a California (later Nevada) manufacturer avoided the Texas long-arm in a lawsuit over a contract with two Texans to redesign the manufacturer's ski bindings. The manufacturer's Texas contacts included sending the bindings to Texas (after initial solicitation from Texas), letters and phone calls to Texas, having the redesign done in Texas, and advertising and marketing the product in Texas. Taken altogether, these were not enough for Texas jurisdiction.[87] *Stuart* is well reasoned, and persuasively distinguishes its facts from the somewhat analogous *Burger King Corp. v. Rudzewicz*.[88] *Stuart* also illustrated the proper use of a choice of law agreement in a jurisdictional analysis.[89]

*Stuart* and *Colwell* both use the Fifth Circuit's two-part test for personal jurisdiction, which requires that "(a) the nonresident must have some minimum contact with the forum [state] which results from an affirmative act on his part; (b) it must be fair and reasonable to require the nonresident to

81. *Id.* (emphasis in original) (quoting Stuart v. Spademan, 772 F.2d 1185, 1193 (5th Cir. 1985)).
82. *Id.*
83. *Id.*
84. *Id.* at 1334-35.
85. *Id.* at 1335.
86. 772 F.2d 1185 (5th Cir. 1985).
87. *Id.* at 1192.
88. 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). The main distinction was that the nonresident in *Burger King* entered a twenty-year contract that anticipated continue dealings with the Florida-based Burger King Corporation, unlike the short-term relationship in *Stuart*. *See* 772 F.2d at 1192-94.
89. 772 F.2d at 1194-96. For examples of the wrong way to match choice of law with personal jurisdiction see *supra* notes 26-29 and accompanying text.

defend the suit in the forum state."[90] This test differs somewhat from the United States Supreme Court's jurisdictional inquiry in its use of the second part—fairness—as a distinct inconvenient forum test after minimum contacts are found. The Supreme Court did note the relevance to jurisdiction of inconvenient forum issues in its first minimum contacts case, *International Shoe Co. v. Washington*.[91] Since then the Court has sometimes included inconvenient forum issues when testing state court jurisdiction, but not as a separate inquiry after finding that minimum contacts exist.[92] The Fifth Circuit's two-part approach may be superior in its distinct focus on contacts first, and limiting factors second. Whichever is superior, the differing approaches highlight the current controversy in personal jurisdiction. Some judges and scholars argue that the nonresident's litigation burden is irrelevant to the reasonableness of jurisdiction and should instead be raised in a forum non conveniens motion after jurisdiction is established.[93] Others argue that the jurisdictional analysis should be premised on the nonresident's litigation burden, and that minimum contacts should be discarded as the basis for personal jurisdiction.[94] Either solution is an improvement over the current patchwork of jurisdictional standards.

*Wilkinson v. Carnival Cruise Lines*[95] held that an Oklahoma plaintiff could sue a Panamanian cruise ship in Texas when the only Texas contacts were some advertisements in local newspapers, plus extensive national advertising that was calculated to reach Texas.[96] After finding jurisdiction, the court transferred the action to Florida because of the defendant's inconvenience in litigating in Texas and a contractual choice of the Florida forum on the plaintiff's cruise ticket.[97]

Late in the Survey period, the Fifth Circuit issued its opinion in *Holt Oil & Gas Corp. v. Harvey*.[98] The court affirmed the federal trial court's assertion of the Texas long-arm statute over an Oklahoma defendant regarding an oil and gas operation in Oklahoma.[99] The court found that the defendant

90. *Stuart*, 772 F.2d at 1189; *See Colwell*, 785 F.2d at 1333. Neither *Stuart* nor *Colwell* engaged in an inconvenient forum analysis because in both cases the jurisdictional analysis ended at the first part of the test when no minimum contacts were found.

91. 326 U.S. 310, 317 (1945). Judge Learned Hand framed the idea of minimum contacts in Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141-42 (2d Cir. 1930), in which he also included inconvenient forum factors as part of the minimum contacts tests. *Hutchinson* was the basis for *International Shoe*'s seminal decision.

92. *See e.g.*, Kulko v. California Superior Court, 436 U.S. 84, 97-98 (1978); Hanson v. Denckla, 357 U.S. 235, 251-52 (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 224 (1957). *But see* Shaffer v. Heitner, 433 U.S. 186, 228 n.8 (1977) (Brennan, J., dissenting) (Justice Brennan addresses inconvenient forum concerns and suggests they be resolved in forum non conveniens motion after jurisdiction is established).

93. *See e.g.* Beechem v. Pippin, 686 S.W.2d 356, 359-61 (Tex. App.—Austin 1985, no writ); Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. CT. REV. 77, 84-85.

94. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 139-45 (3d ed. 1986).

95. 645 F. Supp. 318 (S.D. Tex. 1985).

96. *Id.* at 319-21.

97. *Id.* at 321. Authority for the transfer was 28 U.S.C. §§ 1404(a) and 1406(a) (1982).

98. 801 F.2d 773 (5th Cir. 1986).

99. *Id.* at 783.

lacked sufficient Texas contacts for specific jurisdiction,[100] but had enough overall Texas contacts unrelated to the case to warrant an exercise of the somewhat rare general jurisdiction.[101]

3. *Personal Jurisdiction for Federal Claims.* Most personal jurisdiction questions in federal court involve diversity cases and the host state's long-arm statute. But occasionally disputes arise as to the federal forum's personal jurisdiction in a federal question case. This Survey period offered no significant Texas cases in this regard. Texas readers should nonetheless be interested in a Louisiana federal case, *Point Landing Inc. v. Omni Capital International Ltd.*,[102] which questions the sources and theories behind personal jurisdiction in federal question cases, and may be the most significant jurisdiction case this year. The plaintiffs, Louisiana residents, invested in silver commodities futures traded on a foreign exchange. Plaintiffs sued under both the Commodity Exchange Act (CEA)[103] and the federal securities acts[104] for fraudulent inducement and misrepresentation. The trial court held that the CEA provided the exclusive remedy for these alleged violations,[105] meaning that the plaintiffs could not sue under the federal securities acts or more importantly, could not use the 1934 Securities Ex-

100. *Id.* at 777-78. Specific jurisdiction is based on defendant's contacts with the forum. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol), 466 U.S. 408, 414 & n.9 (1984). Nonresident Harvey's contacts with Texas included (1) contracting with Holt, a Texas corporation, (2) sending other pertinent agreements from Oklahoma to Texas, (3) sending three checks from Oklahoma to Texas, and (4) telephoning and writing to Holt in Texas extensively. 801 F.2d at 778. The jurisdictionally dissuading factors were that the performance was centered in Oklahoma, and the parties' contract specified that Oklahoma law would control. *Id.* This second factor, while relevant to Oklahoma's personal jurisdiction over Texas resident Holt, seems irrelevant to Texas' jurisdiction over Oklahoman Harvey.

101. 801 F.2d at 778-80. General jurisdiction is based on the nonresident's forum contacts that are unrelated to the lawsuit. Harvey's general contacts with Texas included (1) attending college and formerly being employed in Texas, (2) owning a condominium in Houston, (3) traveling to Texas often to visit his children, (4) visiting Texas for recreation, and (5) transacting a great deal of business in Texas. *Id.* at 779. The classic instance of general jurisdiction is Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), in which Ohio jurisdiction was upheld over Benguet Mining, a Philippine corporation that had left the Philippines during World War II and temporarily located in Ohio. The lawsuit concerned an incident in the Philippines, and, thus, Benguet's presence in the Ohio forum was unrelated to jurisdiction there. General jurisdiction is well suited for lawsuits against nonresident corporations that have substantial presence in the forum, as did Benguet. But general jurisdiction seems less well suited for lawsuits against nonresidents, like Harvey, who live in a neighboring state and have frequent contact with Texas. On the other hand, Harvey perhaps ought to be subject to Texas specific jurisdiction for his contract solicitation and subsequent contracts in Texas concerning this dispute.

102. 795 F.2d 415 (5th Cir. 1986).

103. 7 U.S.C. §§ 1-26 (1982).

104. The federal securities claims involved alleged violations of § 17a of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1982); §§ 10b and 20 of the Securities Act of 1934, 15 U.S.C. §§ 78j, 78t (1982); rule 10b-5, 17 C.F.R. § 240-10b-5 (1986). The plaintiffs also claimed under the Louisiana blue sky law.

105. The district court dismissed all federal securities claims without a hearing on the merits, 795 F.2d at 418, but presumably the Louisiana claims remained as to the American defendants.

change Act's provisions for nationwide service of process.[106] Because the CEA does not authorize nationwide process, the trial court applied the jurisdictional requisites under the Louisiana long-arm statute.[107] The trial court's application of the Louisiana long-arm resulted in dismissal against two British defendants who lacked sufficient contacts with Louisiana.[108]

Plaintiffs appealed to the Fifth Circuit, to no avail. Sitting en banc, a divided Fifth Circuit upheld all aspects of the trial court's dismissal.[109] In particular, the majority held that the CEA was the exclusive remedy for these plaintiffs,[110] and because the CEA did not provide for nationwide process, the Federal Rules of Civil Procedure mandated use of the Louisiana long-arm statute.[111] Not only would the Louisiana long-arm statute control the manner of service, it would also govern the defendants' amenability to service.[112] Because the British defendants were not amenable to Louisiana personal jurisdiction, the CEA actions could not lie against them in this court. The court specifically rejected the notion of using federal common law to infer nationwide federal service of process under the CEA.[113]

In a dissenting opinion Judge Wisdom persuasively argued that the majority had engaged in an exercise of lawyering and not judging.[114] Wisdom argued that while federal courts ought to be tied to state long-arm statutes in diversity cases, they should not be in cases involving important national policies as in the CEA.[115] Concluding that the majority's result was irrational,[116] Wisdom called for jurisdiction over the British defendants based on their aggregate contacts with the United States.[117] To do otherwise, he argued, was to grant immunity to the British defendants, who were in the unusual position of clearly having minimum contacts with the United States as a whole, but not with any one state.[118]

Judge Wisdom reviewed the Federal Rules of Civil Procedure and concluded that they had nothing to do with defendants' amenability to personal jurisdiction, but only with the method of service and other operational rules.[119] Wisdom focused on rules 82 and 83, which he argued allow for the fashioning of service of process in a method consistent with rule 4 for unu-

106. Section 27 of the 1934 Act permits service of process wherever the defendant may be found. 15 U.S.C. § 78aa (1982).

107. 785 F.2d at 418-19.

108. *Id.* at 419. The litigants seeking jurisdiction over the British defendants included some of the defendants, who impleaded the British parties as third party defendants. One of the British parties was also a named defendant in the original action. Thus, both plaintiffs and some of the defendants had an interest in joining the British defendants. *Id.* at 417-18.

109. *Id.* at 417.

110. *Id.* at 419-22.

111. *Id.* at 422-24.

112. *Id.* at 424-27.

113. *Id.* at 423, 427.

114. *Id.* at 427 (Wisdom, J., dissenting). Judge Wisdom was joined by Chief Judge Clark and Judges Rubin, Politz, Johnson, and Williams, concurring in part and dissenting in part.

115. *Id.* at 427-28.

116. *Id.* at 428, 433.

117. *Id.* at 428, 433-34.

118. *Id.* at 427, 428, 433.

119. *Id.* at 429-31.

sual cases like *Omni*.[120] The irony here was that the British defendants had not challenged the manner of service (which was where the law failed), but only their amenability to service, which according to all judges was clearly established for the United States as a whole but not for the host state of Louisiana.

The result in *Omni* depended on crucial jurisdictional issues about which the authorities, both judges and scholars, markedly disagree.[121] Although these issues have arisen before, the facts in *Omni* distinguish it from earlier cases. For this reason *Omni* is poised for Supreme Court resolution of personal jurisdiction in federal question cases,[122] or for congressional resolution by a federal long-arm statute.

4. *Divorce and Custody*. The 1986 Survey period produced three significant family law cases addressing jurisdictional points.[123] Only one of those cases interpreted the recently adopted UCCJA.[124] Although the UCCJA is primarily a matter of subject matter jurisdiction and is thus outside of the scope of conflict of laws, its interstate character and strong resemblance to personal jurisdiction compels its discussion here.

*Grimes v. Grimes*[125] illustrated the definitions of "home state" and "person acting as parent" under the UCCJA. In 1983 a Texas divorce court named Janeann Grimes temporary managing conservator of her two daughters. Janeann Grimes placed older daughter Jennifer with the maternal grandmother in McAllen, Texas, and younger daughter Julie with the maternal grandfather in Illinois. The court orally granted the divorce in June 1983, and Janeann moved to Illinois to live with her father and Julie. The divorce decree, naming Janeann as managing conservator and the father, Joe Grimes, as possessory conservator, became official in August 1983. Jennifer remained in Texas with her maternal grandmother until July 4, 1984, when the grandmother took her to Illinois to the maternal grandfather's house. While Joe Grimes was visiting his children in Illinois in July 1984, Janeann gave him a copy of a new Illinois court order forbidding him from taking the

120. *Id.* at 429-31, 434.

121. *See* DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1266 (5th Cir. 1983) (when federal service of process is made under a state long-arm statute, that state's standards of amenability to jurisdiction control); *accord* Burstein v. State Bar, 693 F.2d 511, 514 (5th Cir. 1982). *But see* Lapeyrouse v. Texaco, Inc., 693 F.2d 581, 585 (5th Cir. 1982) (federal standards of amenability applied where service of process was made under state long-arm law). For additional cases and references see *Omni*, 795 F.2d at 424-27.

122. Defendant, third-party plaintiff Omni Capital filed its request for certiorari in the first week of November 1986. Telephone conversation with Anita Warner, attorney for Plaintiff Point Landing (Nov. 12, 1986).

123. Primary family law statutes for jurisdictional conflicts are TEX. FAM. CODE ANN. § 3.26 (Vernon Supp. 1987) (long-arm divorce jurisdiction); *id.* §§ 11.51-.75 (Vernon 1986) (Uniform Child Custody Jurisdiction Act) [hereinafter UCCJA]; 10 U.S.C. § 1408 (1982) (providing state jurisdiction over military retirement benefits in the Uniformed Services Former Spouses' Protection Act); 28 U.S.C. § 1738A (1982) Parental Kidnapping Prevention Act, imposing the jurisdictional terms of the UCCJA on state courts under the full faith and credit mandate).

124. TEX. FAM. CODE ANN. §§ 11.51-.75 (Vernon 1986).

125. 706 S.W.2d 340 (Tex. App.—San Antonio 1986, writ dism'd).

girls out of Illinois. Joe returned home to Texas and filed an action to modify child custody, seeking a contempt citation against Janeann. Janeann was personally served with Texas notice in Illinois, but did not appear at the hearing. In August 1984 the Texas court held Janeann in contempt, and in September 1984 named Joe Grimes as Jennifer's and Julie's managing conservator. Janeann appealed, challenging the Texas court's jurisdiction to modify custody.

The San Antonio Court of Appeals held that although modification jurisdiction existed for Jennifer, it did not for Julie.[126] Under Texas Family Code Section 11.53(d) the original custody court retains modification jurisdiction only if the child and managing conservator have not established a new home state.[127] The court deemed Janeann and Julie to have established a new home state in Illinois even though Janeann did not live in the same house with Julie all the time; Janeann had to work in another town periodically and was routinely absent for short periods. The court disagreed with the father that Janeann's temporary absences amounted to abandonment.[128]

Jennifer, however, had not established a new home state. To do so, she would have had to have lived in Illinois with her mother for at least six months before the modification action was filed.[129] Jennifer had moved to Illinois only two weeks before Joe Grimes filed his Texas modification action. Moreover, Texas was not Jennifer's home state; in fact, she had none. Maintaining a home state requires that the child live with "a parent, or a person acting as parent" for six consecutive months.[130] Texas law defines "a person acting as parent" as a person other than a parent "who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody."[131] The court concluded that this definition did not cover Jennifer's maternal grandmother, with whom Jennifer lived in Texas before moving to Illinois.[132]

Because Jennifer had no home state, the court turned to Family Code Section 11.53(a)(2)[133], the so-called "significant connection" jurisdiction that is subordinate to home state jurisdiction in the UCCJA's jurisdictional priority. The statute provides jurisdiction where "the child . . . and at least one contestant have a significant connection with this state other than mere physical presence in this state; and there is available in this state substantial

126. *Id.* at 343.

127. TEX. FAM. CODE ANN. § 11.53(d) (Vernon 1986). The one exception is if the parties have agreed in writing to leave jurisdiction in the original court.

128. 706 S.W.2d at 341-42.

129. *See* TEX. FAM.CODE ANN. § 11.52(5) (Vernon 1986), which defines "home state" as the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the state in which the child lived form birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period.

130. *Id.*

131. *Id.* § 11.59(9).

132. 706 S.W.2d at 343.

133. TEX. FAM. CODE ANN. § 11.53(a)(2) (Vernon 1986).

evidence concerning the child's present or future care, protection, training, and personal relationships . . ."[134] Jennifer's long connection with Texas and her father's residence in Texas met this test, the court concluded.[135]

Then the court considered the paradox of having jurisdiction over Jennifer but not Julie, and decided that it was "a wholly unacceptable situation."[136] Because Illinois also qualified for significant connection jurisdiction over Jennifer, and also had home state jurisdiction over Julie, the Texas court declined Jennifer's jurisdiction and deferred to the Illinois court to adjudicate the best interests of both children.[137]

In *Barrett v. Barrett*[138] the court of appeals held that an ex-husband's Texas divorce and later child support modification did not subject him to Texas jurisdiction for a later partitioning of his military retirement pay. Ewing Barrett, Jr., married Patricia Barrett in Georgia in 1963. The lived in Mr. Barrett's home state, Tennessee, until Mr. Barrett enlisted in the Air Force in 1967. In 1976, while Mr. Barrett was stationed at Kelly Air Force Base in San Antonio, the Barretts were divorced. Soon after the divorce Mr. Barrett was transferred out of Texas and never returned. In 1984 Mrs. Barrett petitioned for increased child support, to which Mr. Barrett agreed through local counsel. In 1985 Mrs. Barrett sued to partition Mr. Barrett's military retirement pension, which the parties had not divided in the divorce.

Military retirement benefits are partly governed by the Uniform Services Former Spouses Protection Act,[139] which allows state law to determine the division of benefits as long as certain personal jurisdiction standards are met.[140] Those standards are that the forum state must have personal jurisdiction over the military spouse by reason of (1) residence in the forum state other than because of military assignment, or (2) domicile in the forum state, or (3) consent to jurisdiction.[141] Mrs. Barrett argued that Texas had personal jurisdiction over Mr. Barrett because of the prior divorce and child support modification, the fact that this was a partition suit rather than a divorce, and the fact that her claim on the retirement benefits predated the federal act.[142] The trial court disagreed with all of Mrs. Barrett's arguments, and the court of appeals affirmed.[143]

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134. *Id.*
135. 706 S.W.2d at 343.
136. *Id.*
137. *Id.* Note that if the Texas court chose to retain jurisdiction over Jennifer and adjudicate her custody, it could not do so without first conferring directly with the Illinois court that also assumed modification jurisdiction over Jennifer. According to TEX. FAM. CODE ANN. § 11.56 (Vernon 1986), the two courts would be required to confer as to the more appropriate forum; *see also* Milner v. Kilgore, 718 S.W.2d 759 (Tex. App.—Corpus Christi 1986, no writ) (discussed post-decree establishment of a new home state and the various procedural and evidentiary points in the original forum's retention of child custody jurisdiction).
138. 715 S.W.2d 110 (Tex. App.—Texarkana 1986, no writ).
139. 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450 (1982).
140. *Id.* § 1408.
141. *Id.* § 1408(c)(4).
142. 715 S.W.2d at 111-12.
143. *Id.* at 111-13.

*Cunningham v. Cunningham*[144] raised, but erred in resolving, important jurisdictional points. The *Cunningham* court distinguished its subject matter jurisdiction over the divorce from Texas' jurisdiction over the husband, child custody, and marital property. Its subject matter jurisdiction existed because of the wife's Texas residence, but Texas' jurisdiction over the husband, child custody, and the marital property was absent for the reasons below. The parties were married in Texas in 1981, had a son in 1982, and moved to North Carolina in 1984 where the marital problems began. They entered a separation agreement in North Carolina that included custody terms. The parties reconciled once after that, but then the wife moved to Texas, taking the child in violation of the husband's joint custody rights. The husband filed in North Carolina to have sole custody rights, but the wife successfully evaded personal service in Texas. After the wife had lived in Texas for six months, she filed for divorce and custody. The husband made a special appearance in Texas to challenge the court's subject matter jurisdiction over the child custody issue. The trial court ruled in the mother's favor granting her custody and child support of $450 a month.[145] The father appealed.

The court of appeals held that Texas lacked child custody jurisdiction under the UCCJA.[146] Because North Carolina was the child's home state at the time of the North Carolina separation agreement and custody order, Texas lacked authority to supercede the North Carolina order. The fact that the wife had moved the child to Texas and lived in that state for six months before getting the Texas custody decree was irrelevant because the wife's move was unilateral and in violation of the prior North Carolina custody order.[147]

The court of appeals also agreed with the husband that insufficient contacts existed between the husband and Texas under the United States Supreme Court's decision in *Kulko v. Superior Court*[148] to establish personal jurisdiction. The husband had left Texas in 1984 to move to North Carolina. At the time of the Texas divorce action, the husband owned no Texas personal property, conducted no Texas business, was not personally served in Texas, and, according to the court did not submit to jurisdiction.[149] This finding relieved the husband of Texas court costs, attorney fees, child support, and liability under the division of marital indebtedness. No other property was at issue in the Texas case.

The court of appeals ruling is appropriate as to child custody jurisdiction, but not as to personal jurisdiction over the husband. When the husband entered his special appearance to challenge personal jurisdiction in the di-

144. 719 S.W.2d 224 (Tex. App.—Dallas 1986, no writ). [The authors thank Professors John Sampson, University of Texas, and Joseph McKnight, Southern Methodist University, for their essential counsel on this case.]

145. *Id.* at 226.

146. *Id.* at 226-28.

147. *Id.* at 228.

148. 436 U.S. 84 (1978), *cited at* 719 S.W.2d at 228.

149. 719 S.W.2d at 228.

vorce action, he also challenged the court's child custody jurisdiction. This second challenge exceeded the scope of a rule 120a[150] special appearance. The huband thereby acquiesced to Texas personal jurisdiction in the divorce. If this error were corrected, it would not alter North Caorlina's claim to exclusive child custody jurisdiction. It would merely expose the husband to liability for court costs, attorney fees, and the marital debts. It would not expose him to child support because North Carolina had jurisdiction, and had awarded him custody.

But would this result be fair? That is, would it be fair for a Texas court to hold the child for ransom by telling the nonresident father that if he shows up to litigate custody, he will be subject to the entire divorce proceeding, and if he doesn't show up, the child will remain in Texas? Yes, it is fair because of an alternative remedy for the father. The Texas Family Code allows the nonresident father to make a special appearance without subjecting himself to service of process for anything other than child custody, provided that this appearance is limited to the custody argument.[151] In this case, the husband could have filed a writ of habeas corpus based on the North Carolina decree.[152] Although the trial court in this case would probably not have granted the writ because of its dim view of North Carolina jurisdiction, the court of appeals apparently would have granted the writ since it held that the North Carolina decree preempted the Texas decree. Thus, the husband could have made a special appearance to enforce the North Carolina decree just as he made a special appearance to challenge Texas' personal jurisdiction over him in the divorce. This solution creates a problem by requiring multiple actions and multiple appearances by the nonresident parent.[153] But such is the necessary result of the UCCJA's clear severance of divorce jurisdiction from child custody jurisdiction. Perhaps the Family Code should be amended to allow future nonresident parents the luxury of a simultaneous special appearance under the UCCJA for child custody and under rule 120a for personal jurisdiction. Such an amendment would, however, create a unique and perhaps troublesome exception to rule 120a practice.

### *B. Notice*

Service of process—the constitutional notice requirement—is an essential element of judicial jurisdiction apart from the defendant's territorial contacts with the forum state. Service of process must satisfy both forum law and federal constitutional standards before a court can establish jurisdiction. Described another way, the exercise of jurisdiction requires: (1) the defendant's amenability to service based on contacts with the forum state, and (2) the valid execution of service. Failure of the first element requires dismissal, but failure of the second does not, at least not in Texas state courts.

150. TEX. R. CIV. P. 120a.

151. TEX. FAM. CODE ANN. § 14.10 (Vernon 1986).

152. If § 14.10 was used here, it is not evident in the court of appeals opinion.

153. The multiple appearances are necessary because of the requirement in TEX. FAM. CODE ANN. § 14.10(d) that the nonresident parent be in Texas solely for custody purposes.

The Texas Supreme Court reemphasized this important point about defective service in last year's ruling in *Kawasaki Steel Corp. v. Middleton*,[154] which held that if the nonresident challenges service in a special appearance, and if the nonresident is otherwise amenable to Texas jurisdiction, the only remedy is to quash the defective service, note that defendant has now entered his appearance, and allow new answer time running from that point.[155] Some Texas courts are not enforcing *Kawasaki*'s ruling.[156] This failure to follow *Kawasaki* may be because courts are unwilling to penalize lawyers and nonresident defendants who incorrectly challenged defective service in a special appearance prior to *Kawasaki*'s ruling. Even though *Kawasaki* did not make new law in this regard,[157] the ruling was contrary to a long line of Texas cases holding that a challenge to defective service in a special appearance could result in dismissal of the case.[158] Whether the currently nonabiding courts are being intentionally lenient, or are merely unaware of *Kawasaki*, the Texas Supreme Court may have to give another reminder of the difference between a special appearance challenging amenability to service, and a motion to quash challenging the manner of service.

Turning to federal service of process, this Article should correct a poorly worded statement in last year's Conflict of Laws Survey. In discussing the point made in the paragraph above, the 1985 Survey stated that *Kawasaki*'s clarification of Texas law "brings Texas state courts into line with federal practice in this area."[159] This statement was intended to point out that in federal court, curable defects in process or proof of service do not result in dismissal. To the extent that the quoted statement conveyed this message, it was generally correct.[160] But the statement goes much further than intended. It suggests that Texas special appearance practice is similar to federal practice. It is not. Federal and state jurisdictional challenges are more unlike than alike.[161] Fully contrasting the two would require a separate arti-

154. 699 S.W.2d 199 (Tex. 1985).

155. *Id.* at 201-03. That is, any challenge to the manner of service of process exceeds the scope of a rule 120a special appearance and causes the defendant to acquiesce to Texas personal jurisdiction.

156. For a discussion of *Texas Commerce Bank v. Interpol* and *Schaeffer v. Moody* see *supra* notes 8-31 and 56-61. In both cases, the courts of appeals heeded *Kawasaki* to the extent that they noted that the nonresident defendant could not raise a challenge to the manner of service in a rule 120a special appearance. But neither court followed through, as *Kawasaki* directed, by treating the nonresidents' attack on service as a general appearance that waived their challenges to personal jurisdiction. *Compare* Portland Savings & Loan v. Bernstein, 716 S.W.2d 532, 534-35 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

157. 699 S.W.2d at 202-03.

158. *Id.* at 202.

159. *See* George & Pedersen, *1985 Annual Survey*, *supra* note 42, at 424.

160. In federal court curable process defects may be cured by amendment under FED. R. CIV. P. 4(h). The exception is where allowing amendment will materially prejudice the substantial rights of the party subject to the process. *Id.* Professor Wright's treatise states that the likelihood of prejudicing defendant's rights by amending process is remote. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 1131, at 547 (1969 & Supp. 1985). If amendment is improper, the court will ordinarily dismiss the action for plaintiff's refiling, except when the limitations period has run. *Id.* at 550.

161. One difference is in the special appearance. Under TEX. R. CIV. P. 120a, the nonresident defendant is limited to arguing that he is not amenable to Texas jurisdiction; any other

cle, but readers should note that the similarity between Texas and federal practice for service of process is that curable defects will not lead to dismissal in Texas courts, and are unlikely to in federal courts.

In other notice developments, two 1986 cases illustrated variations on the *Whitney v. L & L Realty Corp.*[162] two-part test for a record of substituted service of process necessary to support a default judgment. *Fairmont Homes, Inc. v. Upchurch*[163] keyed on the first part of the test, that the pleadings must allege facts that if true would make the nonresident amenable to Texas service. *Fairmont* held that a petition that failed to allege the state of the defendant's incorporation, and moreover, failed to allege that the defendant was a foreign corporation, was nonetheless sufficient for default judgment where those essential facts were apparent in the pleadings.[164]

*Capitol Brick, Inc. v. Fleming Manufacturing Co.*[165] turned on the second part of the *Whitney* rule, that the record must show that defendant was served in the manner required by the statute. In *Capitol Brick*, the plaintiff sought to use substituted service through the secretary of state. The process serving officer, however, served the petition and citation on an employee in the secretary of state's office. The return of service complied with all formalities, and the secretary of state filed a certificate of substituted service showing that the petition and citation had been forwarded to the nonresident corporation. The defendant corporation did not appear and a default judgment issued.[166] The defendant then attacked the judgment on the grounds that service was defective since someone other than the secretary of state was actually served. The Texas Supreme Court rejected this argument, holding that the purpose of notice rules is to "extend in personam jurisdiction in a manner reasonably calculated to give foreign defendants fair notice and an opportunity to be heard."[167] Because this goal was not impaired by serving an employee in the secretary of state's office, the court deemed the defendant's due process rights to be intact.[168]

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argument such as insufficient jurisdictional allegations will create a general appearance and waive the nonresident's amenability challenge. In federal practice nothing is labelled a special appearance, although there are strict limits on challenging personal jurisdiction. FED. R. CIV. P. 12(b) requires that all challenges to personal jurisdiction, venue, process, and proof of service be raised prior to any responsive pleading, although rule 12(g)-(h) allows those objections to be raised with the first responsive pleading. Failure to raise those jurisdictional challenges in or before the first responsive pleading waives those objections. Thus, both Texas and federal practice require immediate pleading of jurisdictional defenses. But Texas limits the rule 120a challenge to amenability, and deems process objections to be general appearances. Federal practice has a broader range of jurisdictional challenges (e.g., process objections) and allows them to be raised concurrently with the first responsive pleading but no later. For a brief discussion of the Texas/federal practice distinction see Micromedia v. Automated Broadcast Controls, 779 F.2d 230, 231-33 (5th Cir. 1986).

162. 500 S.W.2d 94, 95-96 (Tex. 1973).

163. 704 S.W.2d 521 (Tex. App.—Houston [14th Dist.], *judgment modified as to damages only*, 711 S.W.2d 618, 619 (Tex. 1986).

164. 704 S.W.2d at 524.

165. 30 Tex. Sup. Ct. J. 104 (Dec. 10, 1986).

166. *Id.* at 105.

167. *Id.* (citing Hanson v. Denckla, 357 U.S. 235, 245 (1958); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

168. *Id.*

### C. *Inconvenient Forum*

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

*McClelland Engineers, Inc. v. Munusamy*[169] offers a noteworthy discussion of inconvenient forum and choice of law in admiralty cases. *McClelland* consolidated three separate personal injury admiralty suits for ruling on the three defendants' forum non conveniens motions. All three plaintiffs were aliens, and all three were injured in different places outside the United States. They filed their claims separately in federal district court under the Jones Act and other state and federal laws. Although the choice of law analysis usually precedes the consideration of forum non conveniens issues in admiralty cases the district court decided that choice of law in these three cases depended on facts for the jury and, thus, potponed the choice of law analysis.[170] The district court then denied defendants' forum non conveniens motion.[171] The defendants asked the court to certify the forum non conveniens question under 28 U.S.C. Section 1292(b), and after one denial and a mandamus to the Fifth Circuit, the district court certified its order postponing choice of law and denying forum non conveniens dismissal.[172]

The Fifth Circuit held that the trial court erred in deciding the forum non conveniens question before choosing the applicable law.[173] The court stated that in the Fifth Circuit it was undisputed that in deciding an admiralty forum non conveniens motion, the district court should first determine whether American or foreign law governs.[174] If American law applies, the court should retain jurisdiction; if foreign law governs and the foreign forum is accessible to the plaintiffs, the district court should decline jurisdiction and grant a forum non conveniens dismissal, the court concluded.[175] The Fifth Circuit also observed that even if the facts surrounding the choice of law determination are in dispute, the trial court should nonetheless make its choice of law decision before trial.[176] The court found that in the instant case leaving the disputed facts unresolved did not hinder the choice of

169. 784 F.2d 1313 (5th Cir. 1986).
170. *Id.* at 1315.
171. *Id.*
172. *Id.* at 1315-16.
173. *Id.* at 1316.
174. *Id.* at 1316-17. In deciding whether American law or foreign law governs the court should apply the eight-factor *Lauritzen-Rhoditis* test. *See* Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 308 (1970); Lauritzen v. Larsen, 345 U.S. 571, 583-92 (1953). If the court concludes that foreign law should govern, it should then look to Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947) to determine whether it should retain jurisdiction. Thus, the Supreme Court has held that choice of law is relevant to forum non conveniens question. *See* Gulf Oil Corp. v. Gilbert and other cases cited at E. SCOLES & P. HAY, CONFLICT OF LAWS, 368 n.4 (1982). Nevertheless, the Supreme Court has also held that the plaintiff may not defeat a forum non conveniens motion merely by showing that the law applied by the other forum would be less favorable. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981).
175. 784 F.2d at 1319.
176. *Id.*

law.[177]

The defendants also asked the Fifth Circuit to decide the choice of law question. The Fifth Circuit declined because "we have found no case where a court of appeals rendered an initial determination on a choice of law question."[178] In dictum, the court suggested that choice of law pointed to foreign law, and remanded the case to the trial court.[179]

*Christensen v. Integrity Insurance Co.*[180] offers a more dubious application of forum non conveniens. *Christensen* concerned related lawsuits in California and Texas, and resulted in a Texas court allowing the plaintiff Integrity to raise affirmatively the convenience of the Texas forum.[181] According to the *Christensen* dissent, plaintiff's purpose was to relitigate the inconvenience of the California forum, an issue plaintiff had already lost in California.[182] Plaintiff won the argument in the Texas trial court, resulting in the Texas court's enjoining Christensen from pursuing her California litigation until the Texas action concluded.[183] The court of appeals upheld the injunction against Christensen under the principle of preventing multiple litigation.[184] The dissent argued that this was simply Integrity's improper relitigation of the inconvenience of the California forum.[185] The Texas Supreme Court reversed and dissolved the injunction against Christensen, citing the full faith and credit owed to the California ruling on forum non conveniens.[186] The case is further explained in the Judgments section below.[187]

In *Haley v. Haley*[188] a court of appeals upheld the trial court's deferral of child custody jurisdiction to an Alaska court. The respondent-mother had taken the children from Texas within three months of the Texas case's filing, making Texas the children's home state and creating Texas jurisdiction over child custody.[189] But the court was persuaded to decline jurisdiction under the inconvenient forum provisions of the Family Code[190] because the three children were born in Alaska, and after returning, had lived there two years at the time of the trial court's decision.[191]

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177. *Id.* 1318-19.

178. *Id.* at 1319. The Fifth Circuit overlooked such cases as Duncan v. Cessna 665 S.W.2d 414 (Tex. 1984) (Texas Supreme Court adopted the most significant relationship test and then performed a choice of law analysis not done in the lower court).

179. *Id.*

180. 709 S.W.2d 724 (Tex. App.—Houston [14th Dist.], rev'd, 719 S.W.2d 161 (Tex. 1986).

181. *Id.* at 731; *id.* at 733 (Sears, J., dissenting). For further discussion of this issue see *infra* note 467.

182. *Id.* at 733 (Sears, J., Dissenting).

183. *Id.* at 727.

184. *Id.* at 728, 732.

185. *Id.* at 733 (Sears, J., dissenting).

186. 719 S.W.2d 161, 163 (Tex. 1986).

187. *See infra* notes 458-473.

188. 713 S.W.2d 801 (Tex. App.—Houston [1st Dist.] 1986, no writ).

189. *See* TEX. FAM. CODE ANN. § 11.53 (Vernon 1986), *discussed at* 713 S.W.2d at 803-04.

190. *See* TEX. FAM. CODE ANN. § 11.57 (Vernon 1986).

191. 713 S.W.2d at 803-05.

### D. Sovereign Immunity

Sovereign immunity is a customary rule[192] of international law requiring inaction by courts in protection of diplomatic personnel and foreign governmental agencies engaged in noncommercial activities. The United States has codified this international rule in the Foreign Sovereign Immunities Act,[193] although the earlier customary rules were binding as federal common law. The Restatement (Second) of Conflict of Laws provides that "[a] state will not exercise judicial jurisdiction when inaction on its part is required by international law."[194]

Texas courts produced two cases during the Survey period with notable rulings on sovereign immunity. *Grass v. Credito Mexicano, S.A.*[195] is an echo of last year's *Callejo v. Bancomer, S.A.*,[196] in which Dallas depositors unsuccessfully challenged a Mexican bank's adherence to the 1982 Mexican bank nationalization decree. The *Grass* plaintiffs were United States citizens living in El Paso. In 1976 they opened a U.S. dollar account with Credito Mexicano, then a privately owned bank. They continued to invest there, mostly with certificates of deposit, until the Mexican bank nationalization in 1982. The plaintiffs' original agreement with the bank was that their deposits and investments were denominated and payable in United States dollars. In 1982 the Mexican Government decreed that all Mexican bank obligations were payable only in the rapidly diminishing peso. Because of this currency switch, the plaintiffs lost an alleged $210,262.96 and sued to recover. They claimed breach of contract (for not paying in dollars), conversion, federal securities violations, deceptive trade practices, negligent misrepresentation, and violations of Mexican law.[197] The federal trial court dimissed the claims under the act-of-state doctrine, and the plaintiffs appealed.[198]

The Fifth Circuit first dealt with the defendant bank's claim that the Foreign Sovereign Immunities Act barred the lawsuit because the defendant was now part of the Mexican Government.[199] Citing *Callejo*, the court noted that the claims related to Credito Mexicano's commercial activities directly affecting United States citizens, thus exempting the bank from the protection of the Foreign Sovereign Immunities Act.[200] *Callejo*, however, cut both ways in this case. Although Callejo resolved sovereign immunity in the

192. Custom, defined as general practice accepted as law, is a principle source of international law. *See* The Paquete Habana, 175 U.S. 677, 700 (1900); RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102(1)(a) & 102(2) (Tent. Draft No. 6, 1985).

193. 28 U.S.C. §§ 1602-1611 (1982).

194. RESTATEMENT (SECOND), *supra* note 1, § 83. For examples of sovereign immunity see comments a and b following § 83(f).

195. 797 F.2d 220 (5th Cir. 1986).

196. 764 F.2d 1101 (5th Cir. 1985); *see* George & Pedersen *1985 Annual Survey, supra note* 42 at 427-28 (discusses *Callejo*); *see also* De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1391-92 (5th Cir. 1985) (same).

197. 797 F.2d at 221.

198. *Id.*

199. *See* 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-07 (1982).

200. *Grass*, 797 F.2d at 221-22. For the text of the commercial activities exception to the Foreign Sovereign Immunities Act see 28 U.S.C. § 1605(a)(2) (1982).

plaintiff's favor, *Callejo* also held that the act-of-state doctrine barred a United States court from inquiring into claims arising from the nationalization of the Mexican bank.[201] This holding eliminated plaintiff's claims for breach of contract, conversion, and violations of Mexican law.[202] Three of plaintiffs' remaining claims also failed, but the court remanded the negligent misrepresentation allegation because it related to the bank's alleged actions prior to the nationalization, which the act-of-state doctrine did not affect.[203]

A 1986 case also illustrated the waivability of sovereign immunity under the federal act. *United States v. Crawford Enterprises, Inc.*[204] combined criminal and civil actions against Crawford Enterprises, Inc. (CEI) and Donald Crawford for alleged multiple violations of the Foreign Corrupt Practices Act.[205] In particular, CEI and Crawford were accused of obtaining contracts from Petroleos Mexicanos (Pemex) for multi-million dollar purchases of equipment by bribing Mexican officials. Pemex is an instrumentality of the Mexican government. After indictment, CEI and Crawford pleaded that their actions were legal, and they sought proof in Pemex's records through letters rogatory.[206] Pemex did not supply the requested records, but did file a civil damages action against CEI and Crawford based on the criminal allegations.[207] CEI and Crawford then filed a subpoena duces tecum for the Pemex documents, and a discovery battle ensued.[208] In several discovery and contempt hearings over sixteen months, Pemex defended on the merits of its nonproduction, claiming variously that the requested documents were either unlocatable or were destroyed by fire.[209] After sixteen months of nonproduction, the court ordered a third contempt hearing for Pemex. At the hearing Pemex asserted its immunity for the first time in the lawsuit.[210]

Citing precedent, the federal district court held that Pemex waived its sovereign immunity by failing to assert it in earlier contempt hearings,[211] even though Pemex's right to such immunity had been established in other cases.[212] The court further held that defendants' attorney was entitled to assert charges of criminal contempt against Pemex for not producing the

201. *Grass*, 797 F.2d at 222.

202. *Id.* The elimination of claims under Mexican law did not mean that the court could not hear any such claims under Mexican law. It merely meant that plaintiffs' challenge under Mexican law was, in this case, an impermissible attack on the validity of the Mexican bank nationalization laws.

203. *Id.* at 222-23.

204. 643 F. Supp. 370 (S.D. Tex. 1986).

205. *See* 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (1982). Defendants CEI and Crawford eventually entered nolo contendere pleas, *see* 643 F. Supp. at 374, but the criminal case was undecided as of the issuance of the court's contempt order against Pemex in the civil case.

206. 643 F. Supp. at 372.

207. *Id.*

208. *Id.* at 372-78.

209. *Id.* at 374 (documents destroyed by fire); *id.* at 375 (documents unlocatable).

210. *Id.* at 378.

211. *Id.*

212. *Id.* (citing Zernicek v. Petroleos Mexicanos, 614 F. Supp. 407, 410 n.4 (S.D. Tex. 1985)).

documents.[213] The court found Pemex guilty of criminal contempt and liable for civil contempt.[214] No remedy seemed adequate since the court could not incarcerate a corporate entity like Pemex, and probably could not enforce a money sanction against Pemex's assets in Mexico. The court, however, seized upon Pemex's property interest in the forum—the damages it might win from CEI and Crawford—and held that unless Pemex promptly complied with the court's discovery orders, that court would dismiss the Pemex lawsuit.[215]

### *E. Comity*

Comity is a nonbinding custom of international law suggesting restraint in judicial jurisdiction. It is the international attempt at full faith and credit.[216] Comity applies to foreign acts, both legislative and judicial. Here, as in other areas of conflicts law, "foreign" means sister states as well as foreign countries. The instant discussion relates only to comity's role in encouraging Texas courts to refrain from exercising judicial jurisdiction in deference to non-Texas courts. Comity may also justify recognition of foreign country judgments.

Comity is a weak legal doctrine and has never been reliable as an advocate's tool, although it has given many judges a nail on which to hang tough decisions. Comity's weakness derives form its nonbinding nature,[217] designed merely to promote friendly relations between sovereigns and not to protect litigants' rights and interests. Accordingly, comity has suffered a barrage of criticism for years, both on theoretical[218] and practical[219] grounds. Its omission from the Restatement (Second) of Conflict of Laws[220] and its brief mention in the drafts of the Revised Restatement of the Foreign

213. *Id.* at 379-80 (citing FED. R. CRIM. P. 42 and cases).

214. *Id.* at 380.

215. *Id.* at 381-83.

216. Some will disagree with equating comity with full faith and credit because the latter is a binding rule and the former is not. The two are similar, however, in that (1) both seek the forum's recognition of foreign law and judgments, and (2) both rest upon underlying theories of political good will and respect for the judicial acts of other governments. But as explained in notes 218 & 219 *infra*, comity may lack judicial validity.

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

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

219. Comity is entirely discretionary, leading to arbitrary judicial applications and erratic precedents. The early American conflict of laws scholar, Samuel Livermore, described comity as "a phrase, which is grating to the ear, when it precedes form a court of justice." De Nova, *The First American Book on Conflict of Laws*, 8 AM. J. LEGAL HIST. 136, 141 (1964). Cheshire said of comity, "The term is, indeed, frequently found in English writings and judgments, but on analysis it will be found to be either meaningless or misleading." G. CHESHIRE & P. NORTH, *supra* note 218, at 4. *See also* E. SCOLES & P. HAY, *supra* note 174, at 12-16 (tracing the development and criticism of comity in the United States); R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 1-8 (3d ed. 1981).

220. RESTATEMENT (SECOND) *supra* note 1, fails to mention comity in section 83 (concerning limits on judicial jurisdiction imposed by international law), section 86 (pendency of foreign actions), or section 98 (recognition of foreign judgments).

Relations Law of the United States reflect comity's legal weakness and disfavor.[221]

In spite of its poor reputation, comity manages a few mentions each year in Texas cases. In 1986 the Texas Supreme Court used comity to reverse a 1985 court of appeals decision in *Gannon v. Payne*.[222] The *Gannon* dispute involved parallel lawsuits in Canada and Texas regarding unpaid oil profits. In the Texas action, plaintiff Payne asked the trial court to enjoin defendant Gannon from pursuing his Canadian litigation in the same matter. The trial court refused, but the court of appeals granted Payne's request.[223]

The question of enjoining foreign country litigation was one of first impression for the Texas Supreme Court, which reversed the court of appeals in an appropriate discussion of comity's limits. The supreme court noted that Texas has no power to exercise its laws beyond its own borders and concluded that comity was the only means of having a Texas antisuit injunction against Gannon honored in Canada.[224] If comity is to have any meaning, the court continued, the principle must not be misused by requesting Canada's jurisdictional deference to Texas merely because of parallel lawsuits.[225] Thus the supreme court ordered Payne's injunction against Gannon dissolved.[226]

In *Lee v. Miller County*[227] the Fifth Circuit used, or misused, comity to hold an Arkansas county immune in a personal injury action by two Texas residents from Texarkana who were injured in a civil defense helicopter crash in Texas. The Fifth Circuit resorted to comity over the preferable Interstate Civil Defense and Disaster Compact,[228] which had been used by the trial court.[229] The Fifth Circuit drew strained inferences from two Texas cases and *Nevada v. Hall*,[230] and misused comity as a secondary choice of

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221. *See* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 491 reporters' note 1 (Tent. Draft No. 4 1982).

222. 706 S.W.2d 304 (Tex. 1986), *rev'g* 695 S.W.2d 741 (Tex. App.—Dallas 1985).

223. 695 S.W.2d at 743.

224. 706 S.W.2d at 306. This statement is true insofar as a state has no power to enforce its laws extraterritorially. But a state can order a person over whom it has personal jurisdiction to perform an act, or to refrain from an act, outside the state's territory. If the person disobeys, the state can issue sanctions enforceable inside its borders, seizing the person or his property.

225. *Id.* at 307.

226. *Id.* at 308.

227. 800 F.2d 1372 (5th Cir. 1986).

228. The Interstate Compact is in force in both Texas, *see* TEX. REV. CIV. STAT. ANN. art. 6889-5 (Vernon 1960 & Supp. 1987), and Arkansas, *see* ARK. STAT. ANN. § 11-2002 (1976).

229. 800 F.2d at 1373-74.

230. 440 U.S. 410 (1979). *Hall* upheld a California court's application of its own law to a California accident involving a Nevada defendant driving a car owned by the State of Nevada. The *Lee* trial court read *Hall* as validating its decision not to apply comity. The Fifth Circuit disagreed, holding that *Hall* only addressed whether California could refuse comity to Nevada, not whether it should. Citing *Hall's* dictum that interstate harmony was a proper reason for a state to extend comity if it chose to do so, the Fifth Circuit concluded that *Hall* "counsels the state to extend immunity as a matter of comity." 800 F.2d at 1377. The Fifth Circuit also noted that since *Hall*, a "substantial minority" of states have extended immunity in such cases. *Id.* Contrary to the Fifth Circuit's reading of *Hall*, *Hall* did not counsel immunity by comity. The Supreme Court compels constitutional rules, but it does not counsel matters that are within the states' discretion. To the extent that the Supreme Court appears to do so, it is acting ultra vires. *Hall* merely stated that states are not constitutionally required to grant tort

law device after the bona fide choice of law analysis directed the application of Texas law.[231]

Late in 1986 the supreme court applied *Gannon* to *Christensen v. Integrity Insurance Co.*,[232] a dispute involving related lawsuits in Texas and California. Citing Texas's need to exercise comity toward California, the supreme court dissolved a lower court injunction against the related California litigation, and allowed both cases to proceed.[233] *Christensen* is discussed at length in this article's Choice of Law and Judgments sections.[234]

If comity is a poor doctrine for solving problems that arise from simultaneous litigation, how should those problems be resolved? The answer is partly forum non conveniens, partly full faith and credit. Full faith and credit, like comity, focuses on the relations between states, although it is limited to states and territories in the United States. As noted in the court of appeals' *Christensen* dissent,[235] full faith and credit limits a state's power to enjoin parties from parallel litigation in another of the United States. It does so by requiring that states honor the sovereign acts of sister states, including their assertions of judicial jurisdiction.[236] Like comity, full faith and credit is a flexible doctrine that permits injunctions in some cases and forbids them in others, both largely within the trial court's discretion. But unlike comity, the federal constitution imposes full faith and credit. This background pro-

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immunity to sister states, although they may do so if they wish. This reading of *Hall* supports the *Lee* trial court as much as it supports the appellate opinion.

The two Texas cases were McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961), and Robertson v. Estate of McKnight, 609 S.W.2d 534 (Tex. 1980). *McElreath* used comity to enforce an Oklahoma divorce decree that was inconsistent with Texas law, holding that the promotion of federalism called for such enforcement unless the sister-state decree was contrary to Texas public policy. 162 Tex. at 194, 345 S.W.2d at 725. *McElreath* noted that full faith and credit was the governing standard for enforcing sister-state judgments, *id.*, but continued that full faith and credit was a difficult doctrine best applied by the Supreme Court. *Id. Robertson* does not use the term "comity," but is merely a post-*Gutierrez* (*see infra* note 243 and accompanying text) choice of law case holding that Texas courts would apply contrary foreign laws unless they violated strong Texas policy. "Comity" does appear in the lower *Robertson* appellate opinion, 591 S.W.2d 639, 642 (Tex. App.—Tyler 1979), *rev'd*, 609 S.W.2d 534 (Tex. 1980), where the court used comity in a pre-*Gutierrez* choice of law analysis and in doing so misstated the legal nature of conflict of laws rules as being discretionary and not a matter of legal right. The Texas Supreme Court's reversal does not discuss that error.

231. The *Lee* court concluded that Texas should extend comity to apply Arkansas law rather than Texas law, even though Texas law had been chosen by the trial court and upheld by the Fifth Circuit. 800 F.2d at 1374 & n.6. Several paragraphs later the Fifth Circuit concluded that interstate harmony required the application of Arkansas law, which though different from Texas law, was not so different as to violate Texas public policy. *Id.* at 1375-79. Interstate harmony may be a proper goal, but when it relates to choice of law it should be evaluated within the choice of law analysis. The Restatement (Second)'s most significant relationship test has two components that would have considered interstate harmony in this case. RESTATEMENT (SECOND), *supra* note 1, § 6(2)(a) focuses on the needs of the interstate system. Similarly, *id.* § 6(2)(c) looks to the relevant interests of states and the relative significance of those interests. Texas and Arkansas harmony is a mutual interest; thus both states' interests pointed to applying Arkansas law.

232. 719 S.W.2d 161 (Tex. 1986).

233. *Id.* at 163-64.

234. *See infra* notes 271-83 and 458-80 and accompanying text.

235. 709 S.W.2d 724, 732 (Tex. App.—Houston [14th Dist.] 1986) (Sears, J., dissenting).

236. *See* U.S. CONST. art. IV, § 1. The federal statutory version of full faith and credit is 28 U.S.C. § 1738 (1982).

vides a clearer mandate than comity's weak authority.[237]

Full faith and credit may resolve sister-state disputes as in *Christensen*, but what about transnational disputes like *Gannon*? Comity may be necessary here, but forum non conveniens is probably a superior resolution. Forum non conveniens focuses on the litigants' interests, instead of focusing on intergovernmental relations as do comity and full faith and credit. Even though a Texas court of appeals apparently misused forum non conveniens in *Christensen*,[238] that doctrine shows promise for resolving disputes as to vexatious parallel litigation. Because the United States Supreme Court recently held that state sovereignty is no longer the basis for personal jurisdiction in the United States,[239] our courts should look to more people-oriented doctrines such as forum non conveniens to resolve jurisdictional disputes.[240]

Problems may arise where other countries lack a forum non conveniens doctrine. In those instances the Texas court should consider the other court's nonreciprocity as well as the moving party's chances for a fair hearing in the distant forum. To some extent, these situations may require a court to fall back on comity, but in most transnational situations a forum non conveniens inquiry should suffice.

Of course, forum non conveniens is also applicable to the *Christensen* situation, in which simultaneous litigation is proceeding in Texas and another state in the United States. Forum non conveniens should work well with the full faith and credit analysis suggested above. Forum non conveniens addresses the litigants' interests, and full faith and credit addresses the states' interests.

If forum non conveniens can replace comity in conflicts of judicial jurisdiction, what can replace comity's usefulness in encouraging states to honor foreign judgments? One answer is that enforcement statutes and treaties, or common law methods, should manage the enforcement of foreign judgments.[241] The reason is the same as with judicial jurisdiction and comity: statutes and treaties for enforcing foreign judgments focus on the parties and the issues, and they have fixed standards. Comity, by contrast, focuses on good will between states and can apply or not at the court's whim, making comity too unreliable for judicial precedent. Comity will no doubt continue its irregular appearances for some time yet. Litigators seeking more reliability for questions of jurisdiction and foreign judgments should use full faith and credit, and for jurisdiction only, forum non conveniens.

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237. To refer to comity's authority as weak is not to disparage all doctrines in international law, many of which have exemplary records of adherence by governments. Comity's weakness has more to do with its own invalidity as a judicial doctrine, its hightly discretionary nature, and its focus on executive instead of judicial powers.

238. *See infra* notes 458-480 and accompanying text.

239. *See* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

240. While forum non conveniens factors are not clearly part of due process standards for personal jurisdiction, convenience factors do relate to the courts' occasional need to decline the exercise of jurisdiction. In this sense, forum non conveniens is a jurisdiction-related doctrine.

241. For a discussion of methods for enforcing foreign judgments, see *infra* notes 373-454 and accompanying text.

## II. CHOICE OF LAW

In 1986 the recently adopted most significant relationship test[242] continued its slow development in Texas, principally through the decisions of the federal district courts and the Fifth Circuit Court of Appeals. The few Texas decisions that considered the issue of choice of law and the few federal decisions to consider Texas choice of law principles gave lip service to the application of the most significant relationship test. The Texas Supreme Court previously adopted the test, for application in tort matters in *Gutierrez v. Collins*[243] and in contract matters in *Duncan v. Cessna Aircraft Co.*[244] As in 1985, however, cases decided in 1986 failed to apply the rule carefully, opting instead for a perfunctory analysis of the relationships between the transaction and the states whose laws might be applicable. In most cases purporting to conduct an analysis the court simply counted the contacts between the transaction and the interested jurisdictions in order to determine the jurisdiction most substantially related to the action.

A number of critical choice of law issues remain to be resolved in the courts. The most important of these issues arise in transactions permitting the least tolerance for uncertainty: commercial contracts involving multiple parties in various jurisdictions. Those contracts almost invariably include choice of law clauses whereby the parties seek to establish, in the event of dispute, which jurisdiction's law will govern fundamental matters such as the validity of their contract and its interpretation and construction. Readers of last year's Survey will recall that the Texas Supreme Court's decision in *Duncan* left open the question of whether some or all of the choice of law rules of the Restatement (Second) of Conflict of Laws[245] would apply to determine the enforceability of express choices of governing law.[246] Another unresolved issue of great importance involves determining the correct interplay between Texas choice of law principles and section 85 of the National

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242. For a discussion of the most significant relationship analysis see George & Pedersen, *1985 Annual Survey*, *supra* note 42, at 430-41.

243. 583 S.W.2d 312, 318 (Tex. 1979).

244. 665 S.W.2d 414, 421 (Tex. 1984).

245. RESTATEMENT (SECOND), *supra* note 1, § 6 and passim.

246. George & Pedersen, *1985 Annual Survey*, *supra* note 42, at 432 n.218. The authors noted:

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

*Id.*

Bank Act.[247]

### A. Contracts and Non-Torts Issues

In *Ossorio v. Leon*[248] the San Antonio court of appeals heard an interpleader action in which the International Bank of Commerce of Laredo interpled funds held in a bank account in the names of Edna Ossorio and her late husband, Adolfo Ossorio, citizens of Mexico. Mr. and Mrs. Ossorio had deposited the funds, which were the proceeds of the liquidation of Mexican properties held by the Ossorios during their marriage, in an account styled "Joint Account—Payable to Either or Survivor." Upon Mr. Ossorio's death, Mrs. Ossorio sought to withdraw the funds. Gloria Leon and Adolfo Leon, children of Mr. Ossorio by a prior marriage, challenged the withdrawal contending that they had a right to a portion of the funds under the descent and distribution laws of the state of Texas. The trial court applied Texas law and granted the Leons motion for summary judgment.[249] Mrs. Ossorio appealed, arguing that the trial court erred when it applied Texas law instead of Mexican law to determine the ownership of the funds.[250] The appellate court saw the pivotal issue as whether the gift by Mr. Ossorio to his wife constituted a valid interspousal gift.[251] The court noted that if Texas law applied, the gift would be invalid and the estate of Mr. Ossorio would own half of the funds deposited in the Texas bank.[252] On the other hand, if the court applied Mexican law, the gift would be valid and Mrs. Ossorio would own the entire sum as her separate property.[253]

Relying upon dated Texas authority, the court held that in choice of law questions dealing with ownership of personal property, a court should apply the law of the domicile of the parties.[254] The court relied upon the Texas Supreme Court's decision in *King v. Bruce*[255] in holding that all of the relevant contacts were contacts between the Ossorios and the jurisdiction of their domicile, Mexico, and not between the Ossorios and Texas.[256]

The Leons argued that the choice of law issue revolved around a contract and that, as such, the law of the place where the contract was made gov-

247. 12 U.S.C. § 85 (1976). For a discussion of this issue see Pedersen & Cox, *Choice of Law and Usury Limits Under Texas Law and the National Bank Act*, 34 SW. L.J. 755, 779-87 (1980).

248. 705 S.W.2d 219 (Tex. App.—San Antonio 1985, no writ).

249. *Id.* at 221.

250. *Id.*

251. *Id.* at 222.

252. *Id.* (citing Hilley v. Hilley, 342 S.W.2d 565 (Tex. 1961)).

253. *Id.*

254. *Id.*

255. 201 S.W.2d 803 (Tex.), *cert. denied*, 332 U.S. 769 (1947). (*King v. Bruce*) involved an attempt by a married Texas couple to partition certain of their property via a contract executed by them in New York. In that case the Texas Supreme Court held that although the usual Texas rule would require application of the law of the place of contracting and performance (both New York), the "rule of the domicile predominates as between the spouses." 201 S.W.2d at 809. The court also held that foreign law would not be applied if to do so would contravene an established rule of Texas public policy. *Id.*

256. 705 S.W.2d at 223.

erned.[257] The court rejected the Leons' argument, citing *Duncan v. Cessna Aircraft Co.*,[258] which, the court held, "abandoned [the place of contracting rule] in favor of the 'most significant relationship' rule as set forth in section 6 of the *Restatement (Second) of Conflict of Laws (1971)*."[259] The court, however, only briefly analyzed section 6. The court noted that the resolution of the controversy between Mrs. Ossorio and the Leons "will have no effect whatsoever on the State of Texas or any of its citizens."[260] The court was apparently referring to subsection (2)(c) of Restatement (Second) section 6 which requires an analysis of the relative interest of the interested states in the determination of the particular issue.[261] The court also noted, in reference to subsection (2)(d), that "the Ossorios' justified expectations deserved to be protected."[262] Subsection (2)(d) lists the protection of justified expectations as a factor relevant to the determination of applicable law.[263] On that basis the court held that Mrs. Ossorio had established that Mexico possessed a more significant relationship to the issue of ownership of the deposit than Texas.[264] The court did not analyze or cite the other factors listed in section 6 of the Restatement (Second) as relevant to the choice of applicable law.[265]

The *Ossorio* court did not refer to sections 258 or 259 of the Restatement (Second), which address, respectively, interests in moveables acquired during marriage and removal of moveables of spouses to another state.[266] Under Restatement (Second) section 258 the interest of a spouse in a moveable acquired by the other spouse during marriage is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the moveable under the principles

257. *Id.*

258. 665 S.W.2d 414 (Tex. 1984).

259. 705 S.W.2d at 223. Section 6 states:

§ 6. Choice-of-Law Principles

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

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

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

(b) the relevant policies of the forum,

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

(d) the protection of justified expectations,

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

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

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

RESTATEMENT (SECOND), *supra* note 1, § 6. According to the Restatement (Second), the list of factors is not exclusive. *Id.* Comment c.

260. 705 S.W.2d at 223.

261. RESTATEMENT (SECOND), *supra* note 1, § 6(2)(c).

262. 705 S.W.2d at 223. Interestingly, in King v. Bruce, 201 S.W.2d 803 (Tex.), *cert. denied*, 332 U.S. 769 (1947), the expectations of the parties, indeed, their goal in executing and performing their contract in New York, were overridden by application of Texas law.

263. RESTATEMENT (SECOND), *supra* note 1, § 6(2)(d).

264. 705 S.W.2d at 223.

265. *See supra* note 320.

266. RESTATEMENT (SECOND), *supra* note 1, §§ 258, 259.

of section 6.[267] Section 258 also provides that in the absence of an effective choice of law by the spouses, a court should usually accord greater weight to the state where the spouses were domiciled when they acquired the moveable than to any other contact in determining the state of applicable law.[268] Restatement (Second) section 259 provides that mere removal of the moveable property to another jurisdiction would not affect a marital property interest in a moveable previously acquired.[269] An analysis of those sections, then, would have yielded precisely the same result as he court reached in *Ossorio* under its *King v. Bruce*[270] analysis and under its analysis of section 6.

In *Christensen v. Integrity Insurance Co.*[271] the court of appeals in Houston analyzed another case involving the choice of law issue in the contractual context. In that case, Integrity, a New Jersey corporation, had insured a Texas apartment project against property damage. Integrity's agent issued the policy in California and forwarded it to Christensen, a California resident, who owned the project. Hurricane Alicia and subsequent cold weather damaged the project. Integrity instituted suit in Texas against Christensen, the construction company repairing the project and certain other parties, alleging, among other things, fraud, misrepresentation, negligence, and breach of warranty.[272] Christensen and the other defendants immediately filed suit in California alleging violations of California insurance regulatory laws.[273] When the California Superior Court denied Integrity's motion to dismiss the California action, Integrity filed an application for a temporary restraining order and injunctive relief in Texas to enjoin the defendants from prosecuting their California action.[274] The court granted Integrity's application, and the defendants appealed.[275]

Appellants argued as one of their points of error that Texas law was so dissimilar from California law as to deny them complete relief concerning the causes of action asserted in their California suit.[276] The court rejected their argument, concluding first, that under *Duncan v. Cessna Aircraft Co.*[277] Texas had the most significant relationship to the transaction,[278] and second, that the causes of action asserted by appellants were not so alien to Texas law as to preclude their prosecution in Texas.[279] With respect to the former conclusion, the court noted factors that indicated the strength of Texas' relationship to the action.[280] First, the project was located in Texas, where the

267. *Id.* § 258(1).
268. *Id.* § 258(2).
269. *Id.* § 259.
270. 201 S.W.2d 803 (Tex.), *cert. denied*, 332 U.S. 769 (1947).
271. 709 S.W.2d 724 (Tex. App.—Houston [14th Dist.]), *rev'd*, 719 S.W.2d 161 (Tex. 1986). *See supra* notes 232-237 and *infra* notes 458-480 for further *Christensen* discussion.
272. 709 S.W.2d at 727.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at 727-28.
277. 665 S.W.2d 414 (1984).
278. 709 S.W.2d at 730.
279. *Id.*
280. *Id.*

repair work occurred. Second, the work involved Texas architects, workers, and contractors. Third, the claim adjustment procedure occurred in Texas where the construction contract was also signed. Also, witnesses and evidence were located in Texas and two of the appellants were not amenable to process in California. Thus, the court determined that Texas possessed the most significant relationship to the transaction and the parties.[281]

The Texas Supreme Court recently reversed the decision of the court of appeals.[282] The supreme court found that the trial court had abused its discretion by enjoining Christensen from prosecuting the California suit.[283] The supreme court, however, did not discuss the court of appeals' contention that Texas possessed the most substantial relationship to the matter.

In *American National Insurance Co. v. Huckleberry*[284] the United States District Court for the Northern District of Texas considered a case involving a claim for life insurance proceeds. American National Insurance Company interpled to resolve claims among several parties, including an individual convicted of murdering the decedent, the child of the convicted murderer, the mother of the decedent, and the attorney who represented the convicted murderer in the murder trial. Although the court did not state on what basis Colorado law might have been applicable, it did analyze the question of whether Texas or Colorado law should control the issue of entitlement to the insurance proceeds.[285] Apparently, the insurance company was a Colorado insurer and the murder had taken place in Colorado.

The court commenced its analysis by correctly holding that a federal court sitting in diversity must apply the choice of law rules of the forum state.[286] After so holding and determining that the matter involved a contractual choice of law issue, the court proceeded to ignore completely the Restatement (Second). Instead, he court fell back upon pre-*Duncan*[287] law that "in the absence of a contrary manifestation, an initial presumption is that the parties intended for the law of the jurisdiction where the contract is made to govern,"[288] but "where the contract is made in one jurisdiction, but to be performed in another, the presumption arises that the parties contracted with reference to the place of performance."[289] In an amazing post-*Duncan* decision the court basically paraphrased its 1983 decision in *New*

281. *Id.*
282. 719 S.W.2d 161 (Tex. 1986).
283. *Id.* at 164. The court held that no circumstances indicated a clear equity that would allow the Texas court to interrupt the prosecution of the California proceeding. The court pointed out that the issues and parties involved in each suit differed to some degree, and nothing indicated that Christensen had filed in California merely for purposes of harassment. Also, one parallel action in another jurisdiction did not necessarily indicate a multiplicity of suits. *Id.* at 163. The court, therefore, could not justify straying from the normal procedure of allowing both actions to proceed. *Id.* at 164 (citing Gannon v. Payne, 706 S.W.2d 304 (Tex. 1986)).
284. 638 F. Supp. 233 (N.D. Tex. 1986).
285. *Id.* at 235.
286. *Id.* (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 498 (1941).
287. 665 S.W.2d 414 (Tex. 1984).
288. 638 F. Supp. at 235.
289. *Id.*

*York Life Insurance Co. v. Baum*[290] and simply ignored the impact of *Duncan*, a 1984 decision.[291]

In *United States v. Mercantile National Bank*,[292] a decision of the Fifth Circuit Court of Appeals, the court had to determine what law governed the issue of whether the United States committed fraud in presenting to Mercantile National Bank certain documents under a letter of credit issued by Mercantile in connection with the sale of crude oil. Under the facts of the case the Department of Energy (DOE) had entered into a contract in 1980 with OKC Corporation pursuant to which the DOE was to ship oil to OKC through a pipeline belonging to the Amco Pipeline Company. Because the contract required a payment guarantee, OKC requested that Mercantile issue a letter of credit in favor of the DOE. One of the documents to be presented under the letter of credit was a certification that the DOE had delivered oil for which OKC had not paid or had wrongfully rejected delivery. In 1981 OKC sold its refinery division to Basin Refining, Inc. and informed the DOE of the sale, requesting that the DOE release it from its obligations to purchase crude oil. Additionally, OKC asked the DOE to terminate its letter of credit, as soon as Basin furnished the DOE with an acceptable letter of credit.

Basin never provided the necessary letter of credit; consequently, the DOE never returned the OKC letter of credit. The DOE continued as before to tender oil at the Amoco pipeline and to invoice OKC, which forwarded the bills to Basin. Basin made payments for the shipments until mid-1981 when it filed a voluntary petition in bankruptcy court. To recoup money owed for certain shipments that had not been paid for by Basin, the DOE sought to draw on OKC's letter of credit. Knowing that OKC no longer owned the refinery and upon information from OKC that the delivery certification was fraudulent, Mercantile refused to honor the draft. The DOE brought an action against Mercantile for wrongful dishonor. The district court, assuming that Texas law governed the case, applied the principles established by section 5.114 of the Texas Business and Commerce Code.[293] On the basis of that section it entered summary judgment for Mercantile.

On appeal, the appellate court first entered an interesting warning: "The district court and the parties assumed that Texas law governs this case. Agreeing, we nevertheless warn all to reach choice of law conclusions only after due deliberation."[294] The court of appeals held that since the district court's jurisdiction stemmed from 28 U.S.C. section 1345,[295] which empowered the district court to hear cases in which the United States was a plaintiff, the requirements of *Erie Railroad v. Tompkins*[296] did not apply. The

290. 700 F.2d 928 (5th Cir. 1983).
291. 638 F. Supp. at 235.
292. 795 F.2d 492 (5th Cir. 1986).
293. TEX. BUS. & COMM. CODE ANN. § 5.114 (Vernon 1986). Section 5.114 relates to an issuer's right to dishonor drafts drawn under letters of credit in certain cases.
294. 795 F.2d at 494.
295. 28 U.S.C. § 1345 (1982).
296. 304 U.S. 65 (1938).

court, therefore, was not required to look to state choice of law principles.[297] Nevertheless, the court held that although it might formulate its own rule of decision, that "does not necessarily preclude the application of state law."[298] Instead, the court was free to borrow state law dependent "upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law."[299] On that basis the court determined that "borrowing Texas law . . . [was] appropriate. [Texas] law on letters of credit stems from Article V of the Uniform Commercial Code, now the law in all fifty states."[300] Moreover, Texas case law on the defense of fraud in letter of credit cases appeared to be "in line with the decisions of other states."[301] Thus, "[b]ecause uniformity of the Government's obligations appears unthreatened by applying Texas law," the court chose to do so.[302]

In *Austin v. Servac Shipping Line*[303] the Fifth Circuit Court of Appeals considered the issue of applicable law in an admiralty case. The matter involved an action brought by the owner of a vessel against a hull insurer to recover for damage to the vessel and also sought statutory penalties for unfair claims settling practices. The insurance policy was issued to and was payable to Texas plaintiffs. The district court held that this factor was sufficient to subject the insurer to the provisions of the Texas Insurance Code.[304] The insurance company argued that the court should have applied a federal rule to resolve the question of the availability of treble damages. The insurer also argued that if the court decided not to apply federal law, then it should apply Florida law, since the insured damage occurred during a voyage from Florida to Egypt.[305] On the basis of *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*[306] the court held that in the absence of a controlling federal admiralty rule, the court should apply state law.[307] Since the court could

297. 795 F.2d at 494.
298. *Id.*
299. *Id.* at 494-95 (quoting United States v. Little Lake Misere Land Co., 412 U.S. 580, 595 (1973)).
300. *Id.* at 495.
301. *Id.*
302. *Id.*
303. 794 F.2d 941 (5th Cir. 1985), *cert. denied*, 107 S. Ct. 578, 93 L. Ed. 2d 581 (1986).
304. *Id.* at 948.
305. *Id.* at 942.
306. 348 U.S. 310 (1955). In *Wilburn Boat* the U.S. Supreme Court held:

> In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States. As later discussed in more detail, this state regulatory power, exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.
>
> Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this does not answer the questions presented, since in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admirality. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress.

*Id.* at 313-14 (footnotes omitted).
307. 794 F.2d at 948.

find no federal rule controlling the damages issue, it turned to state law for the answer. The court found it unnecessary to resolve the issue, however, because the result with the same under each state's law.[308]

Finally, in *Atlantic Mutual Insurance Co. v. Truck Insurance Exchange*[309] the Fifth Circuit Court of Appeals followed *Duncan v. Cessna Aircraft Co.*[310] and applied the most significant relationship rule. *Atlantic Mutual* involved an action brought by one insurer, Atlantic, against a second insurer, Truck, seeking contribution for settlement funds and defense costs incurred in connection with an action against the insured for damage to certain equipment that the insured packed and stored. Atlantic brought the diversity action in Texas. The district court, applying New York law, required Truck to share the liability with Atlantic.

Truck first challenged the court's decision on the basis that Texas law should have applied.[311] The court held that in diversity matters a federal court must follow the choice of law rules of the state in which it sits.[312] It noted that Texas had adopted the most significant relationship test of section 6 of the Restatement (Second) for determining the applicable law in contracts cases, other than those in which the parties had agreed upon the governing law.[313] Applying this same principle, the district court had concluded that New York had the most significant contact and interest in the case since New York was the principal place of business of the claimant under the insurance policy and New York, therefore, had a strong interest in seeing that the claimant recovered under the policy.[314] The district court listed six state contacts with the insurance policy contract between Truck and the insured. These included the following (1) the insurer issued the insurance policy in Kansas, (2) the insurer had offices in Kansas and those offices notified the insurer of the claim, (3) the principal place of business of the insured was in New York, (4) the principal place of business of the insurer was in California, (5) the bulk of the insured's operations and the apparent focus of the risk covered were in New York, and (6) both the insured and insurer had offices in Texas.[315]

In affirming the district court's determination on the choice of law issue the Fifth Circuit Court of appeals focused on certain additional contacts with New York, most particularly the fact that the insurer seeking contribution was incorporated and had its principal place of business in New York.[316] Thus, New York possessed an interest not only in the insured's recovery, but also in the application of New York insurance laws to the other insurer's claim against Truck. The court also focused upon the expec-

308. *Id.*
309. 797 F.2d 1288 (5th Cir. 1986).
310. 665 S.W.2d 414 (Tex. 1984).
311. 797 F.2d at 1291.
312. *Id.* (citing Stuart v. Spademan, 772 F.2d 1185 (5th Cir. 1985)).
313. *Id.* at 1291.
314. *Id.*
315. *Id.* at 1291 n.2.
316. *Id.* at 1291.

tations of the parties to the insurance policies and concluded that the parties expected that New York law would apply to each party.[317] The court noted that even though the insurance policy contained no choice of law provision, the insurer must have known that the insured maintained its principal place of business in New York and carried out the bulk of its operations there.[318] The court therefore concluded that although Texas had a strong interest in the recovery by the injured party from the insured party, New York had a more significant relationship to the issues that would determine the first insurer's right to contribution from Truck.[319]

Interestingly, although the court in *Atlantic Mutual* cited the most significant relationship test and quoted section 6(2) of the Restatement (Second),[320] it conducted to real analysis of the policies listed in section 6. Instead, the court's analysis seems to have focused strictly upon counting the contacts between the transaction and the affected jurisdictions.

In *Ismail v. Ismail*[321] the court of appeals upheld a division of marital property in the divorce of two Egyptian citizens. The parties married in Egypt in 1966 and soon thereafter moved to Texas, where they lived until 1972. The parties returned to Egypt and were living in Egypt when they separated in 1981. After the separation the wife moved back to Houston, where she filed for divorce in 1982. The husband filed a general denial. The trial court declined custody jurisdiction because the children still lived in Egypt and the husband had already filed for custody there.[322] The court did, however, divide all the marital property, giving the husband all the Egyptian property and the wife all the Texas property. In so doing, the court characterized the Texas property as quasi-community under Texas law. The parties had bought the Texas property in the mid-1970's when both were living in Egypt. Under pre-1981 Texas law the parties' Texas property would be characterized under the law of the parties' domicile at the time of acquisition, that is, Egyptian law. In 1981, however, Texas statutorily mandated the application of Texas law for characterizing such property as quasi-community or separate.[323] The court also denied the husband's due process challenges to the application of Texas marital property law.[324]

*Great National Life Insurance Co. v. Davidson*[325] applied the choice of law rule that issues of evidentiary privilege are controlled not by forum law, but by the law chosen by the forum's choice of law rule. Readers should note that the forum's substantive evidence law controls all other evidentiary issues. In *Great National* no privilege applied because plaintiff failed to prove the existence of the privilege under pertinent foreign law.[326]

317. *Id.* at 1291-92.
318. *Id.* at 1292.
319. *Id.*
320. *Id.* at 1291 n.1.
321. 702 S.W.2d 216 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)
322. *Id.* at 218.
323. TEX. FAM. CODE ANN. § 3.63(b) (Vernon Supp. 1987).
324. 702 S.W.2d 219-22.
325. 708 S.W.2d 476 (Tex. App.—Dallas 1986, writ granted).
326. *Id.* at 478.

### B. Torts

In the torts area the Texas Supreme Court in 1986 decided *Total Oil Field Services, Inc. v. Garcia*.[327] The *Garcia* case involved a wrongful death action brought by survivors of Jose Garcia, a Texas resident hired in Oklahoma to work there for Total Oil Field Services, a Texas corporation. He died in an industrial accident in Oklahoma while working for Total. After his death his survivors received workers compensation benefits under Oklahoma law. The survivors then sued in Texas for exemplary damages and for wrongful death under the provisions of article XVI, section 26 of the Texas Constitution[328] and the Texas Wrongful Death Act.[329] Total filed a motion contesting the trial court's subject matter jurisdiction, and the trial court dismissed the action on the ground that, under Oklahoma law, workers compensation benefits constituted the exclusive remedy.[330] The court of appeals reversed the remanded the case to the trial court, holding that the Texas Wrongful Death Act had extraterritorial application.[331]

The Texas Supreme Court refused the application for writ of error, finding no reversible error.[332] In doing so, however, the supreme court took the unusual step of disapproving the following language used in the court of appeals opinion:

> However, the case before us, does not present a choice of law question and the "most significant relationship" rule is not applicable in this instance. As we stated above, the appellants have a statutorily-created right to bring their wrongful death action in the courts of this State under the laws of this State; therefore, it must necessarily and logically follow that the appellant's right is not precluded or defeated by an application of the common-law created choice-of-law rule.[333]

The supreme court stated that the former Texas Wrongful Death Act had provided that "courts shall apply such rules of substantive law as are appropriate under the facts of the case."[334] While the former Act was in effect the Texas Supreme Court had held that the Act did not apply to deaths that occurred outside of Texas.[335] In describing recent amendments to the Texas Wrongful Death Act, however, the chairman of the Senate Jurisprudence Committee stated that it adopted the "most significant contact theory of

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327. 711 S.W.2d 237 (Tex. 1986).

328. TEX. CONST. art. XVI, § 26 states:

> Every person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

329. TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 (Vernon 1986).

330. 711 S.W.2d at 238.

331. *Id.*

332. *Id.*

333. *Id.* 703 S.W.2d 411, quoting the lower court's opinion in 415 (Tex. App.—Amarillo 1986).

334. 711 S.W.2d at 238 (quoting former TEX. REV. CIV. STAT. ANN. art. 4678, now TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986)).

335. *Id.*, (citing Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 187 (Tex. 1968).

conflicts of law."[336] In *Gutierrez v. Collins*[337] the Texas Supreme Court had previously considered the amendment to the Texas Wrongful Death Act and had adopted the most significant relationship test of section 145 of the Restatement (Second). On that basis the Texas Supreme Court in *Garcia* disapproved of the statement by the court of appeals that the most significant relationship test did not apply, but noted that since the court of appeals had applied the most significant relationship test in any event, the court refused the application for writ of error.[338]

In *Moorhead v. Mitsubishi Aircraft International, Inc.*[339] the United States District Court for the Eastern District of Texas considered a choice of law issue in the context of a wrongful death action. The survivors of passengers killed in an airplane crash brought the action against the manufacturer of the airplane, the United States, and the pilot. The airplane crash occurred in Texas. The decedents and the plaintiffs resided in other states. Mitsubishi Aircraft International, Inc., a corporation organized and existing under Texas law, manufactured the aircraft. With respect to the liability of the United States, the Federal Tort Claims Act[340] provides that federal district courts are to apply the law of the place where the act or omission giving rise to the Government's liability occurred. Courts have interpreted this requirement to include the whole law of the state where the cause of action arose, including the state's choice of law rules.[341] Since the crash occurred in Texas, the court held that the whole law of Texas applied to the claims against the United States.[342] With respect to the other defendant, the court applied the familiar rule that in a diversity action the law of the state where the district court sits governs the substantive and choice of law issues in the case.[343] Thus, with respect to the other defendants, the district court was also required to apply the whole law of the state of Texas to the issues in the case.[344]

The court noted that Texas had adopted the most significant relationship approach embodied in sections 6 and 145 of the Restatement (Second).[345] It noted that "in weighing the factors listed, trial courts are cautioned to conduct qualitative rather than a quantitative analysis."[346] Applying section 145, the court noted that the injury and the conduct causing the injury oc-

336. *Id.* at 239 (citing *hearings on H.B. 974 before the Senate Comm. on Jurisprudence*, 64th Leg. (May 27, 1975).
337. 583 S.W.2d 312, 318 (Tex. 1979).
338. 711 S.W.2d at 239.
339. 639 F. Supp. 35 (E.D. Tex. 1986).
340. 28 U.S.C. § 2671 (1982).
341. 639 F. Supp. at 390. As support for this proposition the court cited Richards v. United States, 369 U.S. 1, 11 (1962) (Missouri law held to apply since the accident occurred in Missouri, even though action filed in federal court in Oklahoma) and Johnson v. United States, 576 F.2d 606, 611 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018 (1980) (George law applied since act or omission occurred there, even though suit filed in federal court in Florida).
342. 639 F. Supp. at 390.
343. 304 U.S. 65 (1938).
344. 639 F. Supp. at 390 (citing Erie R.R. v. Tompkins, 304 U.S. 64 (1938) and Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)).
345. *Id.*
346. *Id.*

curred in Texas, the defendant Mitsubishi resided in Texas, but nearly all of the plaintiffs and the pilot, who was also a defendant, resided in Georgia at the time of the crash.[347] The court applied the criteria of section 6 of the Restatement (Second) as a means for qualitatively weighing the contacts set forth in section 145 of the Restatement (Second).[348] The court noted that Georgia had a legitimate interest in assuring that its citizens are adequately compensated for injuries suffered. The court noted, however, that this interest assumes importance only when Georgia will be forced to bear the burden of providing for injured citizens who are inadequately compensated.[349] On the other hand, the court held that Texas has a strong interest in preventing harmful acts of negligence from occurring within its boundaries.[350] Texas also has a strong interest in deterring the design or use of unreasonably dangerously defective products in the state.[351] Finally, the court held, that Texas law would be easier to apply and would better protect the expectations of the parties.[352] Accordingly, the court found Texas law applicable.[353]

The decision in *Moorehead* is praiseworthy if only because the district court followed the rules of the Restatement (Second) more or less as they are written. It determined the relevant contacts under section 145,[354] and it evaluated those contacts according to their relative importance with respect to the particular issue in light of the choice of law principles listed in section 6 of the Restatement (Second).[355] The court arguably reached the correct conclusion based upon those principles. Undoubtedly, in terms of ease in the determination and application of the applicable law, a district court located in Texas would prefer Texas law. Also, applying Texas law to prevent harmful acts of negligence from occurring within Texas would further important Texas policies. On the other hand, on the basis of the court's opinion, it is not clear that Texas law would have any greater deterrent effect than would Georgia law. Since Georgia law also provides for damages in wrongful death cases, although calculated in a somewhat different fashion than would be permissible under Texas law, the defendants would be equally punished or deterred by application of Georgia law. The court either did not consider the needs of the interstate and international systems or simply did not mention that consideration in its opinion. In all probability, application of either state's law would not have hampered harmonious relations between the states. Application of either state's law would also foster the principle of certainty, predictability, and uniformity of result.

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347. *Id.*.
348. *Id.*
349. *Id.* at 391.
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. RESTATEMENT (SECOND), *supra* note 1, § 145 lists several factors a court should consider in making a choice of law decision in the tort context: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile of the parties, and (4) the place where the relationship, if any, between the parties was centered.
355. *See supra* note 259.

The United States District Court for the Eastern District of Texas analyzed a choice of law question in the context of a tort case in *Johansen v. E.I. DuPont DeNemours & Co.*[356] during late 1985. That case involved an English plaintiff who was injured while working in Libya for an American corporation when a casing gun discharged during loading. He filed an action against DuPont and several other parties seeking damages. DuPont moved for summary judgment on the basis that all of the plaintiff's claims for relief were time barred under the relevant statutes of limitations.[357]

The court followed well-established law in holding that the law of the forum state governs the determination of the substantive law to be applied in a lawsuit. Since the plaintiff commenced this action in federal district court in Texas, Texas law governed those issues, including the conflict of laws issues. Texas law provides that courts must apply Texas procedural law and the appropriate substantive law to out-of-state injuries tried in Texas.[358] Statutes of limitations are generally deemed procedural and, therefore, are usually dictated by Texas law when the case is heard by a state or federal court in Texas. In its analysis the court noted that Libya looked like the jurisdiction with the most significant relationship to the accident and Libyan substantive law would, therefore, apply to the case.[359] Because of the procedural nature of the statute of limitations, however, the court applied Texas law.[360]

*Wall v. Noble*,[361] a decision of the Texarkana Court of Appeals, involved a medical malpractice action by a Texas resident plaintiff against a Louisiana doctor. The doctor had offices in both Louisiana and Texas. The trial court rendered a verdict in favor of the plaintiff and the defendant appealed. In one of the points of error the defendant argued that the trial court should have applied Louisiana law rather than Texas law.[362] Under Louisiana law the plaintiff would have been required to present her claim to an advisory panel for an opinion prior to pursuing other legal remedies.[363] The court rejected the defendant's argument. Applying the most significant relationship rule, the court held that although the surgery in question occurred in Louisiana, that contact was "of little significance as surgical skill and hospital care" were not issues in the case.[364] The court also noted that the defendant probably expected that Louisiana law would apply to him.[365] Nevertheless, since the defendant "offered his medical specialty and skill in a Texas setting to people in the locality of his Texas offices"[366] and merely

356. 627 F. Supp. 968 (E.D. Tex. 1985). [*Editor's Note*: Since the printing of this Article, this case was affirmed in part and vacated in part by the Fifth Circuit. 810 F.2d 1377 (5th Cir. 1987).]
357. *Id.* at 969.
358. TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon 1986).
359. 627 F. Supp. at 971.
360. *Id.*
361. 705 S.W.2d 727 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.).
362. *Id.* at 733.
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*

went to Louisiana to perform the surgery, and since the "injury and negligence charged was referable to action, conduct, and omissions that occurred principally in Texas,"[367] Texas law should govern.

In *Randall v. Aramco*[368] the Fifth Circuit considered the district court's dismissal of a wrongful termination action arising in Saudi Arabia. The district court dismissed the action because of its view that Saudi law controlled as the place where the firing occurred.[369] Saudi law directed that the Saudi Labor Commission be the exclusive forum for such matters. In reversing the district court's dismissal, the Fifth Circuit held that the Saudi jurisdictional limitation was procedural only and not part of its substantive labor law.[370] The court noted the parties' agreement that Saudi law would govern, but emphasized that Saudi law could not divest United States courts of their power to provide a forum for this transitory action.[371]

## III. FOREIGN JUDGMENTS

Foreign judgments create conflicts of laws in two ways: the local enforcement of foreign judgments, and the preclusive effect of foreign lawsuits on local lawsuits. The 1986 Survey period offered significant developments in the enforcement of foreign judgments, particularly regarding the due process requirements of the Uniform Enforcement of Foreign Judgments Act.[372] The survey period offered less significant but illustrative developments in the area of preclusion. In this Article foreign judgments include sister state and foreign country judgments.

### *A. Enforcement*

Two methods of enforcing foreign judgments in Texas state courts prevail. Under the common law method the foreign judgment forms the basis of a new local action. The uniform foreign judgments acts, on the other hand, provide a more direct procedure. In Texas federal courts the judgments from other federal courts are summarily enforced as local judgments,[373] while judgments from foreign countries require a separate suit for enforcement.

*1. The Uniform Foreign Judgments Acts.* Since 1981 Texas has used two uniform acts for recognizing and enforcing foreign judgments, although

367. *Id.*
368. 778 F.2d 1146 (5th Cir. 1985).
369. *Id.* at 1149.
370. *Id.* at 1149-50.
371. *Id.* at 1151-53. The court pointed out that Saudi Arabia's legislative jurisdiction did not extend beyond its borders, that is, the Saudi exclusive labor forum rule was preemptive only in Saudi Arabia. *Id.* at 1150. The court distinguished Saudi's legislative power from plaintiff's right to bring this transitory action in any proper forum. *Id.* at 1151-53. The court also noted plaintiff's allegations that his attempts at a remedy in Saudi Arabia were thwarted by threats. *Id.* at 1149.
372. *See* TEX. CIV. PRACT. & REM. CODE ANN. §§ 35.001-.008 (formerly art. 2328b-5).
373. *See* 28 U.S.C. § 1963 (1982).

their adoption did not replace the common law enforcement method.[374] The Uniform Enforcement of Foreign Judgments Act (UEFJA)[375] provides for Texas enforcement of non-Texas judgments that are entitled to full faith and credit. This includes sister-state judgments[376] as well as foreign country judgments that Texas recognizes under the second uniform act, the Uniform Foreign Country Money Judgment Recognition Act (UFCMJRA).[377]

Both acts were recodified in 1985 and incorporated into the new Texas Civil Practice and Remedies Code, effective September 1, 1985.[378] The UEFJA, formerly article 2328b-5, now comprises sections 35.001 through 35.008 of the Texas Civil Practice and Remedies Code, with no significant changes.[379] UFCMJRA, former article 2328b-6, now constitutes sections 36.001 through 36.008 of the Civil Practice and Remedies Code, also with no significant substantive changes.[380]

The 1986 Survey period produced only one significant UEFJA case and no UFCMJRA cases. In *Schwartz v. F.M.I. Properties Corp.*[381] a Texas court of appeals noted the UEFJA's lack of an express remedy for challenging a foreign judgment and held that the judgment debtor nonetheless had the right to challenge the foreign judgment's finality or underlying jurisdiction.[382] F.M.I. obtained a deficiency judgment against Mr. and Mrs. Schwartz in a New York court, then registered the New York judgment in Harris County, Texas, under the UEFJA. The court clerk sent the Schwartzes notice of the New York judgment's registration. Then the Texas court unnecessarily issued an order to enforce the New York judgment, but no one sent notice of this order to the Schwartzes.[383] The Schwartzes did not discover the enforcement order until Mr. Schwartz was deposed about his assets.[384] The appeal time had run on the Texas enforcement order, so the Schwartzes filed a bill of review to challenge the Texas court's order to

374. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon 1986) (former art. 2328b-5). For discussion of common law enforcement see *infra* notes 397-427 and accompanying text.

375. TEX. CIV. PRAC. & REM. CODE §§ 35.001-.008 (formerly art. 2328b-5).

376. Full faith and credit also applies to judgments from federal courts, the District of Columbia, and United States territories.

377. *See* TEX. CIV. PRAC. & REC. CODE ANN. §§ 36.001-.008 (formerly art. 2328b-6).

378. Act of June 16, 1985, ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3274-77.

379. The only substantive change in the text is the deletion of former § 7, entitled "Uniformity of Interpretation," stating "This Act shall be interpreted and construed to achieve its general purpose to make the law of those states which enact it uniform." Act of May 25, 1981, ch. 195, § 7, 1981 Tex. Gen. Laws 464, 465, *repealed by* Act of June 16, 1985, ch. 959, § 9, 1985 Tex. Gen. Laws 3242, 3322. Nonsubstantive changes included minor rearrangement of the text.

380. As with the UEFJA, the UFCMJRA's only substantive change is the deletion of former § 9 entitled "Uniformity of Interpretation" worded much the same as its UEFJA counterpart. The UFCMJRA text is also rearranged in the Civil Practice and Remedies Code. The uniform judgment acts' move to the Civil Practice and Remedies Code was for recodification only, with no intended substantive changes. *See* Act of June 16, 1985, ch. 959, § 10, 1985 Tex. Gen. Laws (quoted in the "Enactment" preface to the Civil Practice and Remedies Code).

381. 714 S.W.2d 97 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

382. *Id.* at 100.

383. *Id.* at 98.

384. Readers should note that the enforcement order was unnecessary, so the Schwartzes' claim of lack of notice was frivolous.

enforce the New York judgment. F.M.I. moved for summary judgment on the bill of review, which the court granted.[385] The Schwartzes appealed the bill of review's dismissal.[386]

In discussing the Schwartzes' challenge by bill of review the court commented on the UEFJA's lack of any clear remedy for the Schwartzes.[387] Because due process requires that the Schwartzes have a chance to challenge the New York judgment's enforceability,[388] the court held that the Schwartzes could show that the New York judgment did not merit full faith and credit either when F.M.I. sought to register the judgment or by bill of review.[389] In so holding, the court of appeals did not enlarge the Schwartzes' remedy. It merely noted that the Schwartzes should have some chance to challenge the foreign judgment, whether under a bill of review or some other process. Thus, even though the Schwartzes' aimed their challenge at the Texas trial court's unnecessary enforcement order, their ultimate goal of challenging the New York judgment deserved a hearing.

The court of appeals stated that prevailing on a bill of review required a showing that the prior judgment was rendered as a result of fraud, accident, or mistake to which the Schwartzes did not contribute.[390] The Schwartzes

385. 714 S.W.2d at 99.

386. *Id.* at 98. The Schwartzes appealed on five points of error, directed against the trial court's (1) granting F.M.I.'s motion for summary judgment, (2) failing to find any genuine and material issue of fact on the adequacy of the Texas trial court's notice, (3) holding as a matter of law that the Schwartzes were not entitled to a bill of review, (4) holding that the UEFJA did not require notice of the trial court's order in accordance with TEX. R. CIV. P. 21a, 306d and (5) accepting transfer of the bill of review proceeding and ruling on the summary judgment motion without jurisdiction.

387. While the UEFJA lacks an express remedy for challenging enforcement, a remedy is implied in § 35.003, which states "[a] filed foreign judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying a judgment as a judgment of the court in which it is filed." TEX. CIV. PRAC. & REM. CODE ANN. § 35.003(c) (Vernon 1986) (permitting a stay for any reason a stay would be granted for a Texas judgment). In discussing the implied remedy the *Schwartz* opinion erroneously quoted the end of § 35.003(c) as "a judgment of the court in which it is *rendered*." 714 S.W.2d at 100 (emphasis added). This changes the meaning from using Texas enforcement procedure to using foreign enforcement procedures, which is not done.

388. 714 S.W.2d at 100. It is curious that the court of appeals' sole authority for due process protection against foreign judgments is Pennoyer v. Neff, 95 U.S. 714 (1878). The *Schwartz* opinion stated that "[i]f article 2328b-5 is read as a pure registration statute under which no provision is made for the debtor to defend himself against the enforcement of foreign judgments in Texas, then the teachings of *Pennoyer v. Neff* and its progeny regarding personal jurisdiction become a nullity." 714 S.W.2d at 100 (citation omitted). In fact, *Pennoyer* and progeny have become a nullity. International Shoe Co. v. Washington, 326 U.S. 310 (1945), eroded *Pennoyer* by creating new standards for personal jurisdiction. Shaffer v. Heitner, 433 U.S. 186 (1977), and its progeny made clear that in rem and quasi in rem jurisdiction are to be governed by *International Shoe*'s minimum contacts standard. Finally, Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982), held that state sovereignty—*Pennoyer*'s rationale—was no longer relevant to state court jurisdiction, thus driving what has been called the last nail in *Pennoyer*'s coffin. In *Schwartz*, *Pennoyer* may have risen from its grave. The *Schwartz* opinion continued its due process analysis with the statement that "[t]he basic principle set forth in *Pennoyer* is that no State may exercise direct jurisdiction and authority over persons or property outside its territory." 714 S.W.2d at 100. This statement has not been true as to personal jurisdiction since Hess v. Pawloski, 274 U.S. 352 (1927), approved of long-arm motorist statutes.

389. 714 S.W.2d at 100.

390. *Id.* at 99.

would also have to present a meritorious defense to the prior judgment.[391] The prior judgment in question was not the New York judgment, but the Texas trial court's enforcement order for the New York judgment. Thus, the Schwartzes' attack would have to be against the Texas court's granting full faith and credit to the New York judgment rather than against the validity of the New York judgment itself. This rule restricted the Schwartzes' challenge to the full faith and credit issues, namely, the New York judgment's finality and underlying jurisdiction.[392] Noting that the Schwartzes had not presented any such evidence in the summary judgment, the court held they were not entitled to relief under a bill of review.[393]

The Schwartzes' tortuous route in challenging the New York judgment's enforcement in Texas reveals the need for specific due process remedies in the UEFJA in place of the vague remedies now in place. Even though the Schwartzes may not have had a genuine challenge, no doubt some judgment debtors will. When that happens courts and attorneys should clearly understand the process. *Schwartz v. F.M.I.* produced a partial answer by holding that whether the UEFJA implied the right to a hearing or not, due process guaranteed that right. This holding does not relieve the legislature of its responsibility to make the UEFJA specify that right.[394]

Readers should note the distinction between the UEFJA's hearing requirement, as implied in the statute and held by *Schwartz*, and the UFCMJRA's hearing requirement as held in *Hennessy v. Marshall*[395] last year. In *Hennessy* the court of appeals held that the UFCMJRA required a plenary hearing in all cases before the UEFJA would permit enforcement.[396] This holding means that the UEFJA merely must offer a hearing if the judgment debtor affirmatively requests one, while the UFCMJRA requires a hearing in all cases. The reason for this distinction is that UEFJA judgments are entitled to full faith and credit, while UFCMJRA judgments are not. Full faith and credit presumes the validity of sister-state judgments.

*2. Common Law Enforcement.* Before the adoption of the uniform acts in Texas, courts enforced foreign judgments by the common law method of using the foreign judgment as the basis for a new action in Texas. The underlying mandate for common law enforcement is the full faith and credit clause of the United States Constitution.[397] The UEFJA specifically pre-

391. *Id.*
392. *Id.*
393. *Id.*
394. For additional discussion of UEFJA shortcomings see George & Pedersen, *1985 Annual Survey*, *supra* note 42, at 449-50.
395. 682 S.W.2d 340 (Tex. App.—Dallas 1984, no writ).
396. The UFCMJRA contains both affirmative defenses that the judgment debtor must raise, and elements the judgment creditor must establish regardless of the judgment debtor's response. The judgment creditor may not assume these latter elements in his pleadings but must prove the elements in court. And even though the affirmative defenses are waived if not raised, they require notice and opportunity to be heard. For further discussion of this matter see George & Pedersen, *1985 Annual Survey*, *supra* note 42, at 448-49.
397. U.S. CONST. art. IV, § 1. The federal statutory implementation of full faith and credit is 28 U.S.C. § 1738 (1982), which provides authentication requirements for sister-state judg-

serves the common law method as an alternative,[398] and three Survey period cases reflect that alternative.

*First National Bank v. Rector*[399] offers a discussion of stating a prima facie case for enforcing a sister-state judgment, and the resulting presumptions, burdens, and adequacy of proof. Ken and Pauline Rector, Texas residents, entered into a joint venture with Samuel and Janet Jones (presumably Montana residents) to purchase Montana real estate that included a bar and restaurant. First National Bank of Libby, Montana, financed the purchase and held a promissory note signed by the Rectors and the Joneses. After the purchase, the seller reneged on his promise to convey the bar's liquor license, and Mr. Rector sued him through a Montana attorney.

After discovery in the case Rector's Montana attorney recommended adding the bank as defendant, but had to withdraw as Rector's counsel because of conflicting representation of the bank. Mr. Rector contacted several other Montana attorneys seeking a replacement. During this time Mr. Rector sent at least one mortgage payment to the bank. The Rectors and the Joneses then defaulted on their promissory note. The bank foreclosed and filed a deficiency action against the Rectors and Joneses in which the Rectors defaulted. The bank then sued the Rectors in Texas to enforce their Montana judgment. The Texas trial court gave summary judgment for the Rectors, from which the bank appealed.[400]

On appeal the Rectors argued that the Montana default judgment was not entitled to Texas enforcement because it lacked valid service on the Rectors in Texas. They argued further that the exercise of Montana jurisdiction violated due process. The court of appeals disagreed, reversed the trial court's decision, and entered judgment for the bank.[401] The court of appeals began by noting that there are two means of challenging foreign judgments. First, the defendant may show that service of process was defective under the rules of the sister-state.[402] Second, he may assert that the sister-state may not exercise in personam jurisdiction because the state does not meet the requirements of due process of law.[403] Actually, other means of challenging foreign judgments are available,[404] but the Rectors raised only these two points.

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ments and occasionally plays a determining role in these cases. *See infra* notes 399-406 and accompanying text; *see also* Starzl v. Starzl, 686 S.W.2d 203, 205 (Tex. App.—Dallas 1984, no writ). (28 U.S.C. 1738 implements full faith and credit clause by providing uniform standards for introducing into evidence foreign judgments).

398. TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (former art. 2328b-5).

399. 710 S.W.2d 100 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

400. *Id.* at 102.

401. *Id.* at 107.

402. *Id.* at 104.

403. *Id.*

404. For example, the converse of the court's statement are also grounds for challenging foreign judgments. That is, the defendant may demonstrate that service of process was constitutionally deficient even if it satisfied the sister-state's law. Also, the defendant may defeat enforcement by showing that the sister-state lacked personal jurisdiction under its own long-arm statute, regardless of constitutional due process considerations. *See, e.g.*, Escalona v. Combs, 712 S.W.2d 822 (Tex. App.—Houston [1st Dist.] 1986, no writ), discussed *infra* notes 407-19 and accompanying text. Several other grounds exist for challenging enforcement, including lack of subject matter jurisdiction (in both the foreign court and the Texas enforcing

The Rectors' challenge to service of process was that the bank could not prove that both Mr. and Mrs. Rector were each served with citation. The court reviewed applicable Montana law and found that this situation required service of the complaint on only one of the Rectors, but service of citation on both. The record showed that the bank had forwarded service documents to the Comal County (the Rectors' home) sheriff's office. Mrs. Rector admitted that she was served, but Mr. Rector claimed that he could not recall being served and that to the best of his knowledge he had not been served. The serving deputy's testimony and return of service were inconclusive as to whether Mr. Rector had been served or not.[405]

Sister-state judgments, however, are entitled to full faith and credit, which created a presumption of validity and shifted the burden of proof to the Rectors. The court of appeals cited precedent that defendants' nonservice testimony alone did not defeat the Montana judgment's presumption of validity, and that the deputy's inconclusive return of service did not satisfy the Rectors' burden of proving that Mr. Rector had not been served.[406]

As for Montana's personal jurisdiction over the Rectors, the court of appeals held that Montana had sufficient contacts even though the Rectors had not set foot in Montana during these events. The court held that their extensive Montana business relationship in purchasing Montana land through the Joneses, Mr. Rector's dealings with Montana attorneys, and the Rectors' mortgage payment to the Montana bank established a Montana interest and sufficient ties with the Rectors to justify Montana's assertion of personal jurisdiction.[407]

In *Escalona v. Combs*[408] a Houston court of appeals faced a similar question to that in *First National*, but reached the opposite result by denying enforcement of a New York judgment due to lack of New York personal jurisdiction.[409] Another distinction from *First National* is that *Escalona*'s jurisdictional analysis rested upon New York's long-arm statute and not upon constitutional due process. The dispute began when Mr. and Mrs. Escalona financed a car with Family Motors in Houston and then moved to New York with the car. The published *Escalona* opinion is unclear whether the

court) and lack of finality. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 81-82 (1982); RESTATEMENT (SECOND), *supra* note 1, §§ 103-21; E. SCOLES & P. HAY, *supra* note 174, at 937-61. Readers should note that these challenges to foreign judgment enforcement are limited by res judicata. Judgment debtors who have litigated jurisdiction or other issues in the sister state or foreign country court generally may not relitigate them.

405. 710 S.W.2d at 104-05.

406. The court quoted Burger King v. Rudzewicz, 105 S. Ct. 2174, 2184, 85 L. Ed.2d 528, 543 (1985), for the point that physical presence is unnecessary where the defendant transacts substantial business across state lines 710 S.W.2d at 106. Interestingly, the court began its jurisdictional analysis with a citation to Pennoyer v. Neff, 95 U.S. 714 (1878), as did the *Schwartz* case. *See supra* note 388. Unlike *Schwartz*, *First National*'s citation to *Pennoyer* is valid on the limited point that the fourteenth amendment limits states' power to assert personal jurisdiction over nonresidents.

407. 710 S.W.2d at 106-07.

408. 712 S.W.2d 822 (Tex. App.—Houston [1st Dist.] 1986, no writ).

409. *Id.* at 826-27.

Escalonas in fact defaulted,[410] but Family Motors hired Combs and his Lone Star Adjusters to repossess the car, believing it was still in Houston. Combs learned that the Escalonas and the car were in New York and returned the repossession assignment to Family Motors. Family Motors decided to get the car in New York but, not knowing the procedures for arranging an interstate repossession, had Combs contact Commercial Services Corporation (CSC) in New Jersey. Combs called CSC from the Family Motors office and requested the repossession; Family Motors paid Combs for the Houston search but not for the call to CSC in New Jersey.

CSC repossessed the Escalonas' car, and the Escalonas sued everyone in a New York court for wrongful repossession.[411] The Escalonas won an $8957 judgment against CSC, Family Motors, and Combs, and then registered the New York judgment in a Houston court under the UEFJA, seeking collection from Combs and Family Motors. What happened with the judgment against Family Motors is unclear, but the UEFJA filing failed against Combs.[412] The Escalonas then attempted a common law enforcement action against Combs, but the trial court dismissed the action due to New York's lack of personal jurisdiction over Combs.[413]

The court of appeals upheld the trial court's dismissal, basing its analysis on New York's long-arm statute without applying fourteenth amendment due process standards (which is perfectly appropriate).[414] After reviewing the New York long-arm statute, the court held that only the contract section applied since the Escalonas had not alleged tortious conduct or land ownership by Combs in this action.[415] The New York contract long-arm statute allows New York jurisdiction over any nondomiciliary who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services within the state.[416] Combs proved that his only connection with CSC was his subscription to their newsletter, which he had never actually received, and his agreement to take their referrals for Texas collections, which CSC never made.[417] From these tenuous connections, and from Combs' lack of compensation from Family Motors for contacting CSC, the court held that Combs lacked sufficient control over CSC to have an agency relationship.[418] Other than the phone call to CSC, Combs

410. One can assume the Escalonas did something to trigger Family Motors' repossession action. But the Escalonas' victory in a New York wrongful repossession action creates doubt as to Family Motors' right to repossession.

411. 712 S.W.2d at 823.

412. *Id.*

413. *Id.*

414. *Id.* at 826. The *Escalona* opinion invoked due process standards from International Shoe Co. v. Washington, 326 U.S. 310 (1945) (minimum contacts) and Hanson v. Denckla, 357 U.S. 235 (1958) (purposeful availment). 712 S.W.2d at 824-25. But the *Escalona* court did nothing further with these standards, and limited its jurisdictional analysis to the New York standards. Although the court properly based the jurisdictional inquiry solely upon the New York statute, *Escalona* would read better if it either excised or employed *International Shoe* and *Hanson* standards instead of merely citing them without purpose.

415. 712 S.W.2d at 825.

416. N.Y. CIV. PRAC. L. & R. § 302(a)(1) (McKinney Supp. 1987).

417. 712 S.W.2d at 826.

418. *Id.*

had no contact with New York regarding this action. The court held that the one phone contact, without the right of controlling CSC's actions, was insufficient for jurisdiction under New York's long-arm statute.[419]

*Keller v. Nevel*[420] raised two important conflict of laws issues. First is the requirement of finality for enforcing foreign judgments; second is the proper Texas procedure for offering sister-state law to prove a foreign judgment's finality. Suzette Keller obtained a New Hampshire divorce from Donald Nevel, then sought to enforce it in Texas. The trial court granted judgment for Mrs. Keller. The court of appeals reversed, holding that Mrs. Keller failed to prove that her right to payment was vested and unmodifiable, that is, that it was final.[421] Finality is a requisite for enforceable foreign judgments,[422] and family law has special finality rules.[423]

Finality, however, was not the real issue in the Texas Supreme Court's view. According to the court of appeals, the only reason Keller failed to prove finality was that she failed to place relevant New Hampshire law before the trial court.[424] Mrs. Keller had filed a rule 184 motion, however, asking the trial court to take judicial notice of New Hampshire law.[425] This motion, according to the supreme court, was sufficient to require the trial court to acknowledge all pertinent New Hampshire law.[426] Because the record lacked any evidence that Keller failed to provide copies of the pertinent New Hampshire laws, the supreme court held that New Hampshire law was properly before the trial court, thus upholding the trial court's enforcement of Keller's New Hampshire decree.[427]

*3. Child Custody Enforcement.* Texas statutorily enforces sister-state child custody awards under the Uniform Child Custody Jurisdiction Act (UCCJA).[428] In addition, federal law mandates full faith and credit for sister-state custody orders under the Parental Kidnapping Prevention Act of 1980 (PKPA),[429] a corollary to the statutory full faith and credit imperative for general state court judgments.[430] The UCCJA and the PKPA provide

419. *Id.* The court cited three New York cases that found no jurisdiction over nonresidents who had telephone contacts with New York, and in one case, a continued medical consultation by telephone. *Id.* at 826-27.

420. 699 S.W.2d 211 (Tex. 1985).

421. *Id.*

422. *See* Barber v. Barber, 323 U.S. 77, 79-80 (1944); Washington v. Williams, 584 S.W.2d 260, 261-62 (Tex. 1979); *see also* RESTATEMENT (SECOND) *supra* note 1, §§ 107, 108, 109, & 111 (judgments will not be recognized in other states unless final, fixed as to amount, not subject to modification and unconditional).

423. *See* Gard v. Gard, 150 Tex. 347, 350-51, 241 S.W.2d 618, 619-20 (1951).

424. 699 S.W.2d at 211.

425. *Id.* at 211-12 (citing TEX. R. CIV. P. 184, stating "[t]he judge upon the motion of either party *shall* take judicial notice of the common law, public statutes, . . . and court decisions of every other state, territory, or jurisdiction of the United States." (emphasis in *Keller* opinion)).

426. *Id.* at 212.

427. *Id.*

428. TEX. FAM. CODE ANN. §§ 11.63-.64(a) (Vernon 1986).

429. 28 U.S.C. § 1738A (1982); 42 U.S.C. §§ 654, 655, 663 (1982).

430. 28 U.S.C. § 1738 (1982).

both jurisdictional and enforcement standards for interstate child custody disputes. This Survey period produced no significant cases, which may be a sign that the UCCJA is working to reduce appealable disputes.

*4. Federal Court Enforcement of Foreign Judgments.* Most instances of nonlocal judgment enforcement in federal court are the enforcement of judgments from another federal district. Simply by filing a certified copy of the judgment with the local federal court clerk the litigant may have the district court enforce the judgment as a local one.[431] Because the federal system is unitary in this regard (and considered a single forum), these instances do not present a conflict of laws problem. If diversity jurisdiction exists, federal courts may be used for common law enforcement of nonfederal judgments, both from state courts and foreign country courts.[432]

In the Survey period two federal cases illustrated other novel ways to use federal courts to enforce or suppress a foreign judgment. One succeeded and one did not. *In re Civil Rogatory Letters*[433] concerned the Mexican Government's efforts to enforce a Mexican judgment in Texas by means of letters rogatory.[434] A Mexican court had awarded Sergio Ochoa a two million peso judgment against Juan Perez Flores. Both parties were Mexican Nationals, but Flores lived in Laredo, Texas. The Mexican consulate in Laredo presented the letters rogatory to the Laredo federal court with the Mexican judgment. The federal court noted that even though issuing the letters rogatory directly from court to court was proper,[435] the letters did not authorize the enforcement of foreign judgments.[436] In declining the request the court held that the proper remedy was for Ochoa to file a lawsuit in the same court.[437] Ochoa could also use the Uniform Foreign Country Money Judgment Recognition Act[438] to pursue his Mexican judgment in a Texas state court.

This year's other unusual method of challenging judgment enforcement

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431. *See id.* § 1963.

432. For rules for pleading foreign judgments see FED. R. CIV. P. 9(e).

433. 640 F. Supp. 243 (S.D. Tex. 1986).

434. Letters rogatory are an international evidentiary device, sent by one court to a foreign court requesting the testimony of a witness under formal conditions supervised by the foreign court. *See* BLACK'S LAW DICTIONARY 815 (5th ed. 1979). Under United States federal rules letters rogatory may be transmitted through the Department of State. *See* 28 U.S.C. § 1781 (1982).

435. The court also noted that the normal international procedure was to send letters rogatory through the Department of State, pursuant to 28 U.S.C. § 1781 (1982), but added that the United States was party to international agreements that authorized direct transmittal to the United States court. 640 F. Supp. at 243-44.

436. The court based this conclusion on a letter from the United States Department of State, dated February 3, 1976, to all federal judges, advising that letters rogatory were not valid for enforcing foreign judgments. The State Department was interpreting 28 U.S.C. § 1782 (1982). *See* 640 F. Supp. at 244.

437. 640 F. Supp. at 244.

438. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-.008 (Vernon 1986). Once the foreign country judgment is proven valid under the UFCMJRA, it is entitled to the summary enforcement proceedings of the UEFJA. *Id.* §§ 35.001-.008. For a discussion of these acts see *supra* notes 374-396 and accompanying text.

involved one of 1986's most newsworthy cases—*Texaco v. Pennzoil*.[439] *Texaco v. Pennzoil* is the New York federal court injunction against Pennzoil regarding its enforcement of the Texas judgment in *Pennzoil v. Texaco*.[440] The New York case is not purely within the scope of conflict of laws since it involves a federal/state conflict and not a territorial conflict. But a territorial conflict nonetheless lurks in the case and appears outright in the Texas *Pennzoil* opinion.

In the controversial Texas opinion, Pennzoil won an unprecedented $11 billion judgment against Texaco for contract infringement; Texaco allegedly undermined Pennzoil's attempt to buy out Getty Oil, which Texaco then purchased.[441] The Texas opinion was based on a controversial application of New York contract law.[442] Texaco's only remedy for the Texas trial court's decision (and possible error in applying New York law) was to appeal in Texas. Meanwhile, Texas law required Texaco to post a supersedeas bond in the amount of the $11 billion judgment to prevent Pennzoil from executing on that judgment.[443] Because Texaco could afford neither the bond nor the loss of $11 billion in assets, it sought to block Pennzoil's execution on the Texas judgment. Texaco apparently doubted its chances of blocking execution in Texas state courts, both as to punctuality and outcome,[444] so it filed a novel action in federal district court. Possibly reflecting a further territorial concern, Texaco chose a federal court in New York (Texaco's home) rather than in Texas (Pennzoil's home), not only because of the home court advantage, but no doubt because New York federal judges were thought more likely to disapprove of Texas' supersedeas law than Texas federal judges.

Texaco argued in federal court that the Texas supersedeas law violated Texaco's civil rights by jeopardizing their corporate existence while awaiting appeal.[445] While the constitution does not guarantee the right to appeal, Texaco argued that if Texas law allowed an appeal, the appeal had to be

439. 626 F. Supp. 250 (S.D.N.Y.), *injunction aff'd on appeal*, 784 F.2d 1133 (2d Cir. 1986).

440. No. 84-05905 (151st Dist. of Harris County, ——, 1986) (unpublished opinion), *modified*, Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, no writ) (not yet reported). For an in-depth discussion of the Texas *Pennzoil* case see Baron & Baron, *The Pennzoil-Texaco Dispute: An Independent Analysis*, 38 BAYLOR L. REV. 253 (1986).

441. *See* 784 F.2d at 1136, which reviewed the facts better than the federal district court's opinion. For a discussion of the litigants' choice of law claims see Baron & Baron, *supra* note 440, at 259-62.

442. *See* 626 F. Supp. at 254-55; *see also* Baron & Baron, *supra* note 440, at 270-77 (another analysis of how New York law perhaps should have been applied in the Texas *Pennzoil v. Texaco* case).

443. TEX. R. CIV. P. 364 requires a supersedeas bond. Additionally, TEX. PROP. CODE §§ 52.001-.006 (Vernon 1984) provides for a judgment lien on Texaco's property.

444. According to the New York federal district court and the Second Circuit, the Texas trial court had no power to stay enforcement other than through the supersedeas bond, *see Texaco*, 626 F. Supp. at 257-58, or to litigate fully Texaco's constitutional challenge to the Texas supersedeas law, 784 F.2d at 1150-52. The federal opinions did not discuss Texaco's choice of a federal court in New York as opposed to Texas, but that choice is no doubt partly due to Texaco's belief that it had a better chance of challenging Texas law in a territorially distinct forum.

445. 626 F. Supp. at 251-52.

realistic for all parties. In this instance, Texaco's appeal would be meaningless if Texaco lost its assets before final appellate judgment. This predicament, Texaco argued, violated due process.[446]

The New York federal trial court granted an immediate temporary restraining order, and upon hearing, a preliminary injunction forbidding Pennzoil from executing on the $11 billion Texas judgment.[447] As a basis for this relief, which arguably infringed on state power,[448] the federal district court reviewed the merits of the Texas trial court's opinion and concluded that the Texas decision was wrong and that Texaco ought to win on appeal in Texas.[449] The ostensible purpose for the federal district court's review of the Texas decision's merits was to establish Texaco's likelihood of success on the merits—a necessary prerequisite for injunctive relief. But the federal appellate court doubted this purpose in the trial court's criticism of the Texas opinion.

On Pennzoil's federal appeal the Second Circuit upheld the injunction but chastised the lower court for reviewing the Texas decision.[450] In upholding the injunction against Pennzoil the Second Circuit stated that Texaco had stated a claim under 42 U.S.C. section 1983, including a finding that Pennzoil's execution attempts were attributable to the state of Texas for section 1983 purposes.[451] The court further held that constitutional concerns overcame federal abstention principles in this case.[452] The court concluded that Texaco would suffer irreparable harm if not protected from execution during its Texas appeal,[453] and that the Texas supersedeas and judgment lien laws were unconstitutional as applied.[454] Pennzoil sought Supreme Court review of the Second Circuit's opinion, and the Court considered it in the October 1986 term. The Court's decision was not reported in time for discussion here.

The Texas court's *Pennzoil v. Texaco* opinion is significant only because of the size of its verdict; the Texas court's apparent misapplication of New York law is nothing new to the judicial process. But the federal *Texaco v. Pennzoil* case is more significant in opening a new, though possibly rare remedy for imposing due process safeguards in the execution of both local and

446. Texaco also claimed other violations of the constitution, federal statutes, and New York law. *See* 784 F.2d at 1136-37; 626 F. Supp. at 251. The Second Circuit ordered the dismissal of all Texaco claims except the due process and equal protection challenges to the Texas supersedeas and lien laws. 784 F.2d at 1157.

447. 626 F. Supp. at 261.

448. Federal courts are limited in enjoining state court action by the Anti-Injunction Act (state courts), 28 U.S.C. § 2283 (1982), and the federal abstention doctrines in Younger v. Harris, 401 U.S. 37 (1971); Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). *See* 784 F.2d at 1147-52; 626 F. Supp. at 259-61. These limits on federal power were overcome in *Texaco* by the overriding constitutional concerns in Texas' supersedeas law.

449. 626 F. Supp. at 254-56.

450. 784 F.2d at 1143.

451. *Id.* at 1145-47.

452. *Id.* at 1147-52.

453. *Id.* at 1152-56.

454. *Id.* at 1157.

foreign judgments. The federal *Texaco* case may also be significant in encouraging the corporate plaintiff dimension in civil rights litigation.

### *B. Preclusion by Res Judicata*

The United States Constitution requires that Texas courts give full faith and credit to the judicial proceedings of sister-states.[455] In addition to providing the basis for enforcing sister-state judgments in Texas, full faith and credit also precludes legal issues or entire claims through res judicata[456] in subsequent Texas litigation in the same manner that Texas courts would treat prior Texas judgments. Under stricter standards preclusion is extended to foreign country judgments according to the longstanding policy against repetitive litigation.[457]

The 1986 Survey period produced only one case regarding the preclusive effect of foreign judgments. *Christensen v. Integrity Insurance Co.*[458] concerned related lawsuits in Texas and California, and the collateral estoppel effect Texas should give to a California ruling on forum non conveniens. Diane Christensen and others, all California residents, owned and managed the Town Lake Village Apartments in Houston. In 1983 the apartments suffered hurricane damage, followed by freeze damage. Christensen made a property damage claim on Integrity, a New Jersey corporation that had issued an "all risks" policy on the Houston property. Integrity had issued the policy to Christensen in California through Integrity's managing agent there. Christensen and Integrity disagreed on the damages, but were negotiating without litigation when Integrity unexpectedly sued Christensen in Texas state court,[459] alleging that Christensen and others were guilty of fraud and other tort and contract violations in their claims on the apartments. Four days after the Texas suit was filed, Christensen sued Integrity in California state court for breach of the insurance contract, violations of the California Insurance Code and the California Unfair Insurance Practices Act, and other tort claims.[460] Integrity moved to dismiss the California

455. U.S. CONST. art. IV, § 1.

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

457. *See generally* E. SCOLES & P. HAY, *supra* note 174, at 722-23 (policies favoring conclusive end of litigation are same in international as in interstate setting). The stricter Texas standards for recognizing foreign country money judgments are set out in the Uniform Foreign Country Money Judgment Recognition Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.002, .005, .006 (Vernon 1986). Although the Act applies only to money judgments, its recognition standards are instructive of the preclusive effect of all foreign country lawsuits on subsequent Texas actions.

458. 709 S.W.2d 724 (Tex. App.—Houston [14th Dist.], *rev'd*, 719 S.W.2d 161 (Tex. 1986); *see supra* notes 232-237 and 271-281 for further *Christensen* discussion.

459. The dissent states that the facts show that Christensen was intending to sue in California, and that Integrity lulled Christensen into settlement complacency so that Integrity could have time to file first in Texas. 709 S.W.2d at 733 (Sears, J., dissenting).

460. *Id.* at 727. Christensen's claims under California law included breach of the implied covenant of good faith and fair dealing, and unfair insurance settlement practices. Christensen argued that these causes of action were not available under Texas law. The appellate court disagreed, holding that Texas had not entirely abolished the implied covenant of good faith and fair dealing, that the Texas Insurance Code and the Deceptive Trade Practices law offered

action based on forum non conveniens, which the California court denied.[461] Integrity then asked the Texas court to enjoin Christensen from prosecuting the California action further. Christensen objected, arguing that the two lawsuits involved different parties and issues, and that Christensen could not get full relief for the California claims in a Texas court. The Texas trial court disagreed and enjoined Christensen.[462]

Christensen appealed, but the court of appeals upheld the injunction. The basis for the appellate court's decision were that the two lawsuits were substantially similar,[463] that Texas law offered potential remedies for Christensen's claims that equalled or exceeded California law,[464] and that Texas law was the most appropriate law for this dispute.[465] The court concluded that the judicial interest in preventing multiple lawsuits justified the injunction against Christensen's California lawsuit.[466]

In reaching these decisions the court of appeals had to consider whether the California ruling on Integrity's forum non conveniens motion should have any preclusive effect on Integrity's Texas motion for injunctive relief. The reason for the possible preclusion, specifically collateral estoppel, was that Integrity had raised the issue of forum non conveniens in its Texas injunctive motion.[467] The court of appeals held that collateral estoppel did not apply because the issue litigated in California was Integrity's inconvenience

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suitable alternatives, and that Christensen could sue for claims under California law in a Texas court. *Id.* at 729-30. The court, however, also ruled that Texas law had the most significant relationship to the disputed insurance claim. *Id.* at 730. Although that choice of Texas law would not necessarily prevent the court from applying Texas law to parts of the insurance claim and California law to other parts (if the Texas court deemed California law to have a more significant relationship to certain issues in the insurance claim), it reveals that the court was inclined toward Texas law for the insurance claims, and away from Christensen's claims unde California law.

461. *Id.* at 727.

462. *Id.*

463. *Id.* at 728.

464. *Id.* at 729-30. For a discussion of this holding see *supra* note 460.

465. 709 S.W.2d at 730. The court's choice of law conclusion may be valid under Texas choice of law principles, but the court misapplied these principles. The court listed several situs factors such as Texas being the situs of the apartments, the repair work, the negotiation of the repair contracts, the home of witnesses. *Id.* These factors are on point for the lex loci choice of law formerly used on Texas courts, but these situs factors are but a small portion of the current Texas choice of law analysis under the most significant relationship test. *See* RESTATEMENT (SECOND) *supra* note 1, at § 6. The court's choice of law analysis also included factors such as the construction company and architects being amenable to jurisdiction in Texas but not California, witnesses residing in Texas, and records being located in Texas. 709 S.W.2d at 703. The sum of the court's choice of law factors looks much more like a forum non conveniens than a choice of law analysis. A proper choice of law analysis is impractical here without more facts, but it is plausible that California law applies to some or all of the issues here, particularly the insurance issues. Even though this dispute concerned Texas real property, the issue is not the title to that property but the contractual duty to indemnify the California owners for property damages. That contractual duty arose in California and to some extent should be performed in California when the owners are repaid.

466. 709 S.W.2d at 728, 732.

467. *Id.* at 731 ("[a]ppellee's [Integrity's] injunction application filed in its Texas suit addressed the issue of *Texas* as a convenient forum for *appellee's* action" (emphasis in original)). The dissent made the point more clearly by stating that "[a]fter losing on the issue in California, appellee [Integrity] again pleaded forum non conveniens in Texas, not as a defendant asking the Texas court to decline jurisdiction, but as a plaintiff using an improper tool to

in having to defend Christensen's action in California; in that argument the California court did not consider the convenience of the Texas forum for Integrity's action. On the other hand, the Texas court of appeals continued, the issue in the Texas court was the convenience of the Texas forum for Integrity's action against Christensen. Because the forum non conveniens issues differed, the court concluded, Integrity was not estopped from arguing forum convenience in its Texas motion.[468]

A virogous dissent pointed out that the majority apparently misunderstood forum non conveniens, which is a defendant's objection to jurisdiction and not a device to be raised by plaintiffs, as the Texas court allowed Integrity to do.[469] The dissent continued that Integrity was clearly rearguing the convenience of the two forums,[470] in spite of the majority's statement that it was not ruling on the convenience of the California forum, but only that of the Texas forum.[471] The dissent concluded that full faith and credit required that Texas honor the California decision to allow Christensen to proceed in California.[472] In addition to its collateral estoppel holding, the court of appeals' *Christensen* decision is noteworthy for holding that a court may enjoin a defendant from pursuing a related action in another state even though the parties and issues are not identical.[473]

Noteworthy holdings are sometimes shortlived. Late in the Survey period the Texas Supreme Court reversed the court of appeals' *Christensen* holding and ordered the injunction against the California lawsuit dissolved.[474] The supreme court observed that although Texas courts are definitely empowered to enjoin parties from pursuing litigation in other states, that power had to be exercised sparingly and only in very special circumstances.[475] Those special circumstances, the court held, were not present in this case.[476] Specifically, the supreme court held that a single lawsuit in another state did not per se amount to the multiplicity of lawsuits that might justify an injunction.[477] The supreme court also pointed out that these suits, though related, involved different issues and different parties, militating against the Texas injunction.[478] The court further noted that if Christensen were attempting to stop the Texas litigation, which was filed first, Ingegrity might have a valid argument; since Christensen was not attacking the Texas litigation, but only wanted to go forward with the California lawsuit, Integrity had no grounds to justify an injunction against the California action.[479] The

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support the issuance of an injunction against the California action." *Id.* at 733 (Sears, J., dissenting.)

468. *Id.* at 730-31.
469. *Id.* 733-34 (Sears, J., dissenting); see *supra* note 467.
470. 709 S.W.2d at 733 (Sears, J., dissenting).
471. *Id.* at 731.
472. *Id.* at 733 (Sears, J., dissenting).
473. *Id.* at 728-30.
474. 719 S.W.2d 161, 164 (Tex. 1986).
475. *Id.* at 163.
476. *Id.*
477. *Id.*
478. *Id.*
479. *Id.*

supreme court concluded by stating that "the totality of the circumstances shown in this record negates any possibility that a clear equity justified the Texas trial court's intervention in the California proceedings."[480] From this conclusion readers should note that the factors cited by the court (the nonmultiplicity of the two lawsuits, the lack of parallelism, or Christensen's not attacking the Texas lawsuit) were cumulative. The supreme court did not hold that any one of these factors standing alone would prevent an injunction.

480. *Id.*