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Conflict of Laws (1988)

Sharon N. Freytag

Don D. Bush

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

CONFLICT OF LAWS

by

Sharon N. Freytag, Don D. Bush,** and James Paul George****

CONFLICTS of law occur when foreign elements appear in a lawsuit. Nonresident litigants, incidents in sister states or foreign countries, and lawsuits from other jurisdictions represent foreign elements that may create problems in judicial jurisdiction, choice of law, or recognition of foreign judgments, respectively. This Article reviews Texas conflicts of law during the Survey period from late 1986 through 1987. 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, except when they relate to the personal jurisdiction inquiry, and conflicts in time, such as the applicability of prior or subsequent law within a state. During the Survey period, the Texas Supreme Court decided an important case finding jurisdiction based on contacts related to the cause of action. During the same period, the United States Supreme Court decided a case, which, although based on varying rationales, was the first unanimous decision finding a lack of personal jurisdiction since *International Shoe Co. v. Washington*.[1] Choice of law highlights include Texas's enactment of a new statute governing contractual choice of law and Texas courts' improvement in their application of the most significant relationship test from the Restatement (Second) of Conflict of Laws.[2] Foreign judgments' significant development was the declared unconstitutionality of the Uniform Enforcement of Foreign Judgments Act.[3]

I. JUDICIAL JURISDICTION[4]

To assert jurisdiction over a nonresident defendant, a plaintiff must ensure

* B.A., University of Kansas; M.A., University of Michigan; J.D., Southern Methodist University. Attorney, Haynes and Boone, Dallas, Texas.

** B.A., University of Indiana; J.D., LL.M., Southern Methodist University. Attorney, Johnson, Bromberg and Leeds, Dallas, Texas.

*** B.A., Oklahoma State University; J.D., University of Tulsa; LL.M., Columbia University. Attorney, Johnson, Bromberg and Leeds, Dallas, Texas.

1. 326 U.S. 310 (1945).

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) [hereinafter RESTATEMENT (SECOND)]. The most significant relationship test involves applying general choice principles enumerated in § 6 to subject area factors discussed in §§ 145-423.

3. *See infra* notes 336-52 and accompanying text.

4. Judicial jurisdiction is distinct from legislative jurisdiction in that the latter concerns "whether the *state*, through its courts or otherwise, has power to act upon the matter in issue by using the state's rules of law to regulate or control it" while the former concerns the power

that the defendant is amenable to the jurisdiction of the court and that jurisdiction has been properly invoked through valid service of process on the defendant. Amenability necessitates two inquiries: (1) Is the defendant amenable to service of process under the state long-arm statute? (2) Is the assertion of jurisdiction in accordance with due process?[5] Amenability is discussed in Part A, while service of process is discussed in Part B. During the Survey period, most activity in the area of judicial jurisdiction occurred in the federal courts. The Texas Supreme Court decided one noteworthy case, *Zac Smith & Co. v. Otis Elevator Co.*[6]

A. Amenability

1. Texas State Courts

In *Zac Smith & Co. v. Otis Elevator Co.*[7] the Texas Supreme Court upheld jurisdiction over a nonresident who had contracted with a Texas resident, who was not the plaintiff, because the nonresident's contract related to the plaintiff's contract. After Advanced Concrete of Texas, a Texas corporation, entered a contract with the owner of property in Austin for construction of a hotel, Herbert Watkins, president of Advanced Concrete, executed a contract with Otis Elevator Company, a New Jersey Corporation. This contract called for the manufacture, sale, delivery, and installation of four elevators for the hotel. Advanced Concrete and Zac Smith & Co., of Florida, thereafter executed a joint venture agreement for construction of the Austin hotel. Both parties shared the responsibility for and control of the construction project. Nearly five months after execution of the first contract, the property owner executed a new contract for the construction of the hotel with Advanced Concrete and Smith, a joint venture, and Austin Hotel Association, Ltd. Although the hotel was never constructed, Otis Elevator manufactured four elevators pursuant to the contract with Advanced Concrete and delivered the elevators to the empty Texas site. Otis Elevator eventually filed suit in Texas against Advanced Concrete and Zac Smith & Co. for breach of contract.

Smith filed a special appearance asserting lack of in personam jurisdiction. The trial court sustained the objection to jurisdiction, but the court of appeals reversed and held that Smith failed to meet its burden of negating all bases of personal jurisdiction.[8] The Texas Supreme Court affirmed the court of appeals, holding that Zac Smith had sufficient contacts with Texas for the assertion of jurisdiction.[9]

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of a court to act "against the particular person (usually the defendant) against whom, or the thing against which, the Court is asked to act." R. LEFLAR, AMERICAN CONFLICTS LAW § 3 at 4 (3d ed. 1977) (emphasis in original).

5. The two inquiries essentially collapse into one because the Texas Supreme Court has interpreted the Texas long-arm statute to reach to the limits of due process. U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

6. 734 S.W.2d 662 (Tex. 1986).

7. *Id.*

8. *Id.* at 663.

9. *Id.*

The supreme court analyzed the case in terms of specific jurisdiction[10] and described a bifurcated fair warning requirement.[11] The court noted that the two prongs of the fair warning requirement, purposeful direction and a nexus between the action and the litigation, constitute the first two prongs of the three-prong jurisdictional test outlined in *O'Brien v. Lanpar Co.*[12] When these two prongs are satisfied, the court indicated that the requirements for specific personal jurisdiction established in *Burger King*[13] and *Helicopteros*[14] are met.[15] The court then turned to the third prong of the *O'Brien* test, observing that an evaluation of the quality, nature, and extent of the defendant's contacts in a specific jurisdiction case must establish that the defendant's contacts with the forum result from activities the defendant actually conducts that cause a substantial connection with the jurisdiction in question.[16] Thus, the activities of the defendant must be deliberate *and* significant. This third prong augments the first insofar as the purposeful activity must be significant activity and not simply some act. Once the third prong is met, the Texas Supreme Court observed that the defendant bears the burden of demonstrating that other considerations make the assertion of jurisdiction

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

11. The court described the fair warning requirement as follows:

> Where contacts with the foreign sovereign are not continuing and systematic, but rather specific jurisdiction is alleged, the "fair warning" requirement is two-fold. First, the defendant's activities must have been "purposefully directed" to the forum, and second, the litigation must result from alleged injuries that "arise out of or relate to those activities."

734 S.W.2d at 633 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

12. 399 S.W.2d 340 (Tex. 1966). *O'Brien's* three-pronged test requires that:

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

Id. at 342.

In Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870, 872 (Tex. 1982), *rev'd on other grounds*, 466 U.S. 408 (1984), the Texas Supreme Court noted that the second prong of the three-part test, the nexus requirement, is not required in general jurisdiction cases, but is required in specific jurisdiction cases:

> The second prong is useful in any fact situation in which a jurisdiction question exists; and is a necessary requirement where the nonresident defendant only maintained single or few contacts with the forum. However, the second prong is unnecessary when the nonresident defendant's presence in the forum through numerous contacts is of such a nature . . . so as to satisfy the demands of the ultimate test of due process.

13. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

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

15. *Zac Smith*, 734 S.W.2d at 665-66.

16. *Id.* at 664.

unreasonable.[17] The *Zac Smith* opinion suggests that once the court determines that the defendant purposefully availed itself of the benefits and protections of the forum state's laws, the defendant must show "a compelling case that the presence of some other considerations would render jurisdiction unreasonable"[18] in order to negate all bases of personal jurisdiction.[19] Although Texas courts have traditionally placed the burden on the defendant to negate all bases of jurisdiction, the United States Supreme Court first shifted the burden to the defendant to demonstrate unfairness in *Burger King Corp. v. Rudzewicz*.[20] The *Zac Smith* opinion appears to embrace the *Burger King* approach, suggesting that the burden of proof in Texas jurisdictional issues is now more closely aligned with federal requirements.

In *Zac Smith* the court determined that the defendant had not met its burden.[21] Although Smith had no physical ties to Texas, the court pointed out that the parties formed the joint venture to build a hotel in Texas, and the elevator contract related directly to the hotel enterprise.[22] The court further noted that, even though the hotel project did not reach completion, numerous intermediate activities did occur and the parties aimed subsequent contract negotiations toward Texas residents.[23] The parties availed themselves of the benefits and protections of the laws of Texas and expected to profit from construction of the hotel.[24] The elevator contract constituted only one step necessary to complete the project, which represented the real goal of the business transaction.[25] The Texas Supreme Court concluded: "The due process clause may not be wielded as a territorial seal to avoid interstate obligations that have been assumed voluntarily."[26]

The *Zac Smith* court considered the entire business transaction in its jurisdictional analysis, including both the contract between plaintiff Otis Elevator and defendant Advanced Concrete for the manufacture and sale of the elevators and the joint venture agreement between defendant Zac Smith and defendant Advanced Concrete for the construction of the hotel.[27] The elevator contract at issue was not between the plaintiff and the defendant corporation contesting jurisdiction.

Three justices dissented: Justices Robertson, Ray and Wallace. The dissent noted that Smith's only contact with Texas was the proposed joint venture agreement with Advanced Concrete, which was not even the center of the litigation. Smith did not ratify the elevator contract and did not become

17. *Id.*
18. *Id.* (citing *Burger King*, 471 U.S. at 487).
19. *Zac Smith*, 734 S.W.2d at 664. The court does not specifically state but rather implies a shifting of burdens.
20. 471 U.S. 462, 486 (1985).
21. 734 S.W.2d at 666.
22. Both the purpose of the joint venture and the contract with the property owner were wholly performable in Texas. *Id.* at 665.
23. *Id.* at 665-66.
24. *Id.*
25. *Id.* at 666.
26. *Id.* (citing *Burger King*, 471 U.S. at 474).
27. 734 S.W.2d at 665-66.

associated with Advanced Concrete until after the elevator contract was executed. Nevertheless, the majority of the Texas Supreme Court held that specific jurisdiction may attach when a nonresident executes a contract with a Texas resident, other than the plaintiff, which relates to the contract forming the basis of the plaintiff's cause of action.[28]

Teton International v. First National Bank[29] represents a clear case of specific jurisdiction because the defendants' contact with the state formed the very basis of the tort alleged. Teton International and B & B Corporation manufactured mobile homes from their offices in Mills, Wyoming. They sold three mobile homes to K & G RV Sales in Mission, Texas. K & G paid with personal checks, which the bank returned unpaid due to insufficient funds. Teton and B & B never received payment for the mobile homes. The First National Bank of Mission had loaned K & G $51,690.00, ostensibly to pay for the mobile homes, and had deposited that sum in K & G's account. The bank took a security interest in the mobile homes. When K & G defaulted on the note, Teton and B & B repossessed the mobile homes in Texas and resold them in Arizona. The First National Bank of Mission then brought suit against Teton International and B & B, alleging conversion of collateral. The bank won on summary judgment.

On appeal, the court rejected Teton's and B & B's claims that the trial court erred in asserting personal jurisdiction over them.[30] The court determined that the defendant's actions came within the provisions of the Texas long-arm statute.[31] The court cited several facts in support of this conclusion. Because Teton & B & B agreed to sell mobile homes to K & G, to deliver the homes to Mission, Texas, and to receive payment upon delivery, and because the repossession arose out of the transaction with K & G and the cause of action stemmed from the repossession, the lower court correctly asserted personal jurisdiction over Teton and B & B.[32]

2. *United States Supreme Court and Federal Courts in Texas*[33]

The proper application of the stream of commerce theory divided the Court in *Asahi Metal Industry Co. v. Superior Court*.[34] Plaintiff Gary

28. *Id.* at 666. The Supreme Court in *Helicopteros* did not decide the "relatedness" issue. 466 U.S. at 418 n.12.

29. 718 S.W.2d 838 (Tex. App.—Corpus Christi 1986, no writ).

30. *Id.* at 841.

31. *Id.* at 840.

32. *Id.*

33. Federal courts deal with two categories of personal jurisdiction: (1) state long arm for federal diversity cases and state court opinions reviewed by the Supreme Court, and (2) amenability for federal question cases. The former is governed by the fourteenth amendment, the latter by the fifth. This Survey period produced no significant federal question amenability cases.

34. 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). The court phrased the issue before it as follows:

> Whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside of the United States would reach the forum state in the stream of commerce constitutes minimum contacts between the defendant and the forum state, such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.' "

Zurcher sustained injuries in a motorcycle accident in Solano County, California in 1978. His wife died in the accident. Zurcher filed a product liability action in the Superior Court of the State of California against Cheng Shin Rubber Industrial Co. and the Taiwanese manufacturer of the motorcycle, among others. Cheng Shin filed a cross-complaint seeking indemnification from the co-defendants and from Asahi Metal Industry Co., the Japanese manufacturer of a tube's valve assembly. Cheng Shin and the other defendants settled with Zurcher, leaving only Cheng Shin's indemnity action against Asahi. Asahi manufactured tire valve assemblies in Japan, sold the assemblies to Cheng Shin in Taiwan, and shipped them from Japan to Taiwan for use as components in finished tire tubes. Cheng Shin bought and incorporated into its tire tubes over 100,000 Asahi valve assemblies each year from 1978 to 1982.

Asahi moved to quash Cheng Shin's service of summons, arguing that the California court lacked personal jurisdiction. As evidence of Asahi's contacts with California, Cheng Shin's attorney emphasized his informal examination of the valve stems of tire tubes sold in one bicycle shop in Solano County, California, the site of the accident. The survey revealed that out of the approximately 150,000 tire tubes in this store, twelve had Asahi valve stems incorporated into Cheng Shin tire tubes and nine more Asahi valve stems were incorporated into other tire tubes. Further, Cheng Shin filed the affidavit of a manager whose duties involved purchasing component parts. The affidavit stated that the manager had discussed Cheng Shin's sales of tubes to the United States with Asahi representatives who were aware that the valve assemblies ended up in the United States and California. Concluding that Asahi did business on an international scale, the superior court denied the motion to quash summons.

The California court of appeals issued a peremptory writ of mandate commanding the superior court to quash service of summons, concluding it would be unreasonable to require Asahi to defend the indemnity suit in California. The California Supreme Court reversed and discharged the writ. The California Supreme Court concluded that although Asahi had no offices, property, or agents in California, solicited no business in California, and made no direct sales in California, Asahi knew that some of the valve assemblies sold to Cheng Shin would be incorporated in tire tubes sold in California. The court, thus, considered Asahi's intentional act of placing its components into the stream of commerce by delivering the components to Cheng Shin in Taiwan, coupled with Asahi's awareness that some of the components eventually found their way to California, sufficient to support state court jurisdiction.

The United States Supreme Court reversed.[35] A majority of the Court, all Justices but Justice Scalia, concluded that the exercise of jurisdiction would

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107 S. Ct. at 1029, 94 L. Ed. 2d at 100 (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

35. 107 S. Ct. at 1035, 94 L. Ed. 2d at 107.

be unreasonable and unfair.[36] Three Justices, Justice Stevens joined by Justices White and Blackmun, did not believe an examination of the minimum contacts issue was even necessary.[37] Four Justices, Justices Brennan, White, Marshall and Blackmun, believed minimum contacts existed.[38] Four Justices, Justice O'Connor, the Chief Justice, Justices Powell and Scalia, disagreed. Though the nine Justices had differing bases, they unanimously agreed that the state lacked personal jurisdiction.[39]

Focusing on the constitutional touchstone first announced in *Hanson v. Denkla*,[40] that to establish minimum contacts the defendant must purposefully avail itself of the privilege of conducting activities in the forum,[41] Justice O'Connor, joined by Chief Justice Rehnquist and Justices Powell and Scalia, determined that the mere act of placing the valve assemblies in the stream of commerce did not constitute purposeful availment.[42] The plurality noted the two lines of decisions that had developed after *World-Wide Volkswagen Corp. v. Woodson*[43] suggested the stream of commerce theory and rejected those decisions, such as *Bean Dredging Corp. v. Dredge Technology Corp.*,[44] which concluded that mere awareness that the product could be sold in the forum was sufficient to permit the exercise of jurisdiction. These Justices concluded that the substantial connection between the defendant and the forum required by *Burger King*[45] and *McGee*[46] to support a finding of minimum contacts must result from activities the defendant deliberately directed towards the forum state.[47] The plurality observed that merely placing a product in the stream of commerce does not constitute an act of the defendant deliberately aimed at the forum state.[48] The plurality cited additional conduct by the defendant that may indicate an intent to purposefully direct its actions toward the forum state, such as advertising in the forum state, designing the product for market in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who serves as a sales agent in the forum state.[49] The plurality did not find these factors present in

36. *Id.* Justice O'Connor announced the judgment of the Court and delivered the Court's opinion regarding the unfairness of the assertion of jurisdiction. *Id.* Justice Scalia did not join the Court's opinion on the fairness of the assertion of jurisdiction, but he did join the plurality's opinion, delivered by Justice O'Connor, in deciding that minimum contacts were lacking. *Id.*

37. *Id.* at 1038, 94 L. Ed. 2d at 109.

38. *Id.* at 1037-38, 94 L. Ed. 2d at 109.

39. *Asahi* is the first unanimous Supreme Court decision finding no personal jurisdiction since International Shoe Co. v. Washington, 326 U.S. 310 (1945).

40. 357 U.S. 235, 253 (1958).

41. *Asahi*, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104.

42. *Id.* at 1035, 94 L. Ed. 2d at 107.

43. 444 U.S. 286, 298 (1980).

44. 744 F.2d 1081, 1085-86 (5th Cir. 1984).

45. Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985).

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

47. *Asahi*, 107 S. Ct. at 1033, 94 L. Ed. 2d at 104.

48. *Id.*

49. *Id.*

the case.[50]

A majority of the Court[51] joined in determining that the exercise of jurisdiction over Asahi was unreasonable. The majority concluded that the burden an assertion of jurisdiction placed on the defendant Asahi was severe.[52] The Court further held that the foreign plaintiff's interest and California's interest in asserting jurisdiction over Asahi was slight because the case only involved an indemnification dispute based on a Taiwanese transaction between Cheng Shin, a Taiwanese corporation, and Asahi, a Japanese corporation.[53]

Four Justices, Justices Brennan, White, Marshall, and Blackmun, who joined the majority in concluding that the assertion of jurisdiction was unreasonable and unfair, disagreed with the plurality's interpretation of the stream of commerce theory. These Justices did not see a need for additional conduct beyond a defendant's placing a product into the stream of commerce before jurisdiction may attach.[54] In their opinion, *Asahi* represented the rare case in which even though the defendant deliberately engaged in forum activities, the minimum contacts requirements within the idea of fair play and substantial justice undermined the reasonableness of jurisdiction.[55] According to these four Justices, a defendant who places goods in the stream of commerce benefits economically from the retail sale in the forum state, and as long as he is aware of marketing in the forum, he cannot be surprised when a lawsuit results.[56] These Justices believed Asahi had sufficient minimum contacts with California.[57] They believed that the plurality retreated from the Court's analysis in *World Wide Volkswagen v. Woodson*,[58] in which the Court made the distinction between goods reaching the forum state through a chain of distribution and goods reaching the state because the consumer took them there.[59]

Justice Stevens, joined by Justices White and Blackmun, concurred in part and concurred in the judgment. These Justices did not join in the plurality's stream of commerce theory because they believed it was unnecessary for the decision.[60] These three Justices stated that the minimum contacts analysis was not always necessary to determine whether a state court acted constitutionally in asserting personal jurisdiction.[61] The majority found that the ex-

50. *Id.*

51. This majority included Justice O'Connor, who authored the opinion, Chief Justice Rehnquist, Justices Brennan, White, Marshall, Blackmun, Powell, and Stevens.

52. 107 S. Ct. at 1034, 94 L. Ed. 2d at 105. The Court stated, "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.*

53. *Id.* 94 L. Ed. 2d at 106.

54. *Id.* at 1035, 94 L. Ed. 2d at 107.

55. *Id.* (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985)).

56. *Id.* at 1038, 94 L. Ed. 2d at 110.

57. *Id.*

58. 444 U.S. 286 (1980). Justice White authored the opinion in *World-Wide Volkswagen*.

59. *Asahi*, 107 S. Ct. at 1037, 94 L. Ed. 2d at 108.

60. *Id.* at 1038, 94 L. Ed. 2d at 110.

61. *Id.*

ercise of jurisdiction would be unreasonable and unfair and that finding alone required reversal. Nonetheless, even assuming the purposeful direction test used by the plurality applied, these Justices believed that the plurality misapplied the test.[62] They asserted that a regular course of dealing, which resulted in the delivery of over 100,000 units by Asahi to Cheng Shin annually, constituted purposeful availment.[63]

A deciding factor here, of course, was the nature of the claim and the claimant in the California court, an indemnification claim by a Taiwanese corporation. Had the injured motorcycle driver attempted to assert jurisdiction over Asahi, the result would have probably differed because of California's increased interest in the issue. Even on these facts, five Justices, Justices Brennan, White, Marshall, Blackmun, and Stevens, would apparently find sufficient minimum contacts through an indirect stream of commerce.

Regrettably, in *Asahi*, the Supreme Court merely muddied the stream, leaving the question before it to be resolved by the lower courts: Is mere awareness by a foreign defendant that its goods will reach a state, without direct activity in the forum by that defendant, sufficient for the assertion of jurisdiction? *Asahi* does demonstrate, however, that the minimum contacts and reasonableness inquiries are separate, and that at least three Justices would not even consider the minimum contacts question in some cases.

The Fifth Circuit in *Bearry v. Beech Aircraft Corp.*[64] recognized that the stream of commerce theory had divided the Supreme Court and observed that the *Asahi* opinion involved specific, not general, jurisdiction and thus did not affect the outcome in *Bearry*. *Bearry* raised the issue of whether a federal court in Texas had jurisdiction over Beech Aircraft for claims unrelated to the forum solely because a large quantity of products manufactured by Beech had flowed through the stream of commerce into Texas over the preceding five-year period. The *Bearry* court emphasized that *Asahi* involved an indemnification dispute arising from the defendant's contacts, and, regardless of the Supreme Court's position on the proper application of the stream of commerce theory, the *Asahi* decision did not affect the distinction between general and specific jurisdiction.[65] A continuous stream of commerce into a state may be sufficient for the assertion of specific jurisdiction when the cause of action arises from that commerce but be insufficient for the assertion of general jurisdiction based on unrelated claims.[66]

Lonnie Bearry and Alva Mills, both Louisiana residents, purchased a Beech aircraft in Louisiana. The aircraft crashed in Mississippi. After the product liability suit filed in Louisiana was dismissed for lack of personal jurisdiction, the survivors of Bearry and Mills filed separate suits in Texas state court. The suits were removed to federal court and consolidated. The

62. *Id.*, 94 L. Ed. 2d at 111.
63. *Id.* Asahi's deliveries, however, arrived in the states indirectly through Cheng Shin's marketing.
64. 818 F.2d 370, 375 (5th Cir. 1987).
65. *Id.*
66. *Id.*

plaintiff alleged jurisdiction over Beech through the Texas long-arm statute.[67]

Beech, a Delaware corporation, maintains its principal place of business in Kansas. Its design, testing, manufacturing, sales, and warehouse facilities are located in Kansas, Colorado, and Alabama. Beech has never qualified to do business nor maintained an agent for service of process in Texas. It has no telephone listing in Texas; it has no warehouse or manufacturing facility and no bank account in Texas; it has no employees or directors who are permanently assigned to work in Texas; nor has it insured any person in Texas, bought real estate in Texas, or paid taxes in Texas.

Beech did engage in a nationwide marketing campaign from 1980 to 1985. During this period, nearly $250,000,000 of Beech products flowed to seventeen independent Texas dealers from sales negotiated and completed in Kansas.[68] Beech also manufactured airframe assemblies for Bell Helicopter in Fort Worth, Texas, and Beech representatives visited Texas dealers occasionally to assist them with maintenance problems, demonstrate new aircraft, and offer sales incentives, at the dealers' request. Beech also purchased $195,000,000 of goods and services from over 500 Texas vendors under contracts negotiated in Kansas.

The parties agreed that the lawsuit did not relate in any way to Beech's contacts with Texas. Nonetheless, the district court determined that, although specific jurisdiction did not exist, enough continuous and systematic contacts through Beech's creation of a stream of commerce with Texas existed for the assertion of general jurisdiction.[69] The Fifth Circuit disagreed. Before explaining its rationale, the court carefully reviewed the two distinct yet overlapping interests, the two limits on state power, that a court must consider in making its jurisdictional inquiry.[70] The court first emphasized the federalism concerns of state sovereignty.[71] The court observed that although the Supreme Court suggested in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*,[72] that the interstate federalism inquiry is not a separate jurisdictional inquiry, the Supreme Court retreated from that position in *Asahi Metal Industry Co. v. Superior Court*,[73] in which the Court required consideration of "the shared interest of the several states in furthering fundamental substantive social policies."[74] Second *Bearry* emphasized the personal right to due process secured by the fourteenth amendment. The Supreme Court in *Insurance Corp. of Ireland* indicated that the individual

67. The court noted that the statutory and constitutional inquiries collapsed into one because the Texas long-arm reaches as far as constitutionally allowed. *Id.* at 372. See *infra* text accompanying notes 112-30, for discussion of the Louisiana nexus requirement and breadth of the Louisiana long-arm statute.

68. One of the dealers was a subsidiary of Beech, but its contacts could not properly be attributed to Beech because the dealer operated as a distinct corporation. 818 F.2d at 372-73.

69. *Id.* at 373.

70. *Id.*

71. *Id.*

72. 456 U.S. 694, 701-02 (1985).

73. 107 S. Ct. 1026, 1034, 94 L. Ed. 2d 92, 105 (1987).

74. *Bearry*, 818 F.2d at 375.

liberty interest was the only appropriate due process inquiry.[75] The *Bearry* opinion states that the origins of the federalism interests and liberty interests differ, but each limits state power.[76] The court noted that federalism limits states through their membership in the union, and state residents enforce these limits.[77] Liberty is an affirmative right running directly from the due process clause to the populace.[78] Although many readers focus only on the stream of commerce discussion in *Asahi*, the *Bearry* court interpreted *Asahi* to reaffirm the federalism element in the judicial jurisdictional inquiry.[79]

The Fifth Circuit explained the distinction between specific and general jurisdiction, noting that if the contacts with the forum resulted from the defendant's conduct and created a substantial connection with the forum state, even a single act could support jurisdiction.[80] The court further observed that when a foreign defendant's contact stems from the product the defendant sold or manufactured and the product causes harm in the forum state, the court has jurisdiction if it finds that the defendant placed the product into the stream of commerce with the realization that consumers in the forum state would purchase or use the product.[81] Due process requires in-

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75. 456 U.S. at 702. The Supreme Court observed that personal jurisdiction represents a restriction on judicial power as a matter of individual liberty, and not as a matter of sovereignty. The Court remarked:

> It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-á-vis other states. . . . The restriction on state sovereign power . . . , however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

Id. at 702 n.10 (citations omitted).

76. *Bearry*, 818 F.2d at 373.

77. *Id.* at 374.

78. *Id.* The *Bearry* decision suggests that the federalism element is not rooted in the due process clause. Professors Abrams and Dimond have proposed that federalism issues are more appropriately analyzed under the full faith and credit clause than under the due process clause, and that, in fact, due process analysis is an inappropriate means of addressing federalism concerns. *See* Abrams & Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 87 (1984). According to these commentators, the ultimate responsibility for resolving federalism concerns in the exercise of judicial jurisdiction should be Congress's, not the courts'. *See id.* In contrast, Professor Stein believes that the sovereignty inquiry is critical to due process analysis. *See* Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 761 (1987).

79. *Bearry*, 818 F.2d at 375.

80. *Id.* at 374 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)).

81. *Bearry*, 818 F.2d at 374 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980)). If the cause of action in *Bearry* had arisen from or been related to the defendant's stream of commerce, the court would have had to confront directly the Supreme Court's division on the stream of commerce issue. *Bearry* presented a simpler case of general jurisdiction, but the court, in dicta, suggested that had the cause of action arisen from any of Beech's contacts with Texas, it would have found specific jurisdiction. 818 F.2d at 376. The facts in *Bearry*, of course, differ from those in *Asahi* insofar as Beech delivered products directly to Texas. *Cf.* Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 201 (Tex. 1985);

creased contacts when the cause of action does not relate to or arise from the foreign defendant's deliberate actions within the forum state. In these situations, litigants must show continuous and systematic contact between the state and the foreign corporation to support an exercise of general personal jurisdiction. The increased contact is required because the state lacks a direct interest in the cause of action.[82] The Fifth Circuit explained that in a specific jurisdiction case the fact that the defendant placed the instrumentality that harmed the plaintiff into the stream of commerce proves only that the plaintiff's injury resulted from the defendant's conduct and not from the plaintiff's unilateral activities.[83] The defendant's injection of a product into the stream of commerce does not ensure that the defendant's relationship with the forum is continuous and systematic enough to permit suit on unrelated claims.[84]

The *Bearry* court determined that even if Beech's contacts could be characterized as continuous and systematic, in this case the assertion of jurisdiction would be unfair and unreasonable.[85] The court assessed the factors outlined in *Asahi*: (1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining relief; and (4) the interest of the several states.[86] The court emphasized that the cause of action implicated no interest in Texas.[87] The court observed that the interests of Mississippi, the locus of both the injury, and Kansas, the residence of the defendant, were greater than those of Texas.[88] The court confirmed, however, that the burden on the defendant would not be sufficient to overcome an assertion of specific jurisdiction.[89] The court determined that the interest of Texas in the quality and safety of the products introduced into the state is protected because Beech is subject to the specific jurisdiction of Texas courts when Beech products cause injuries or when Beech breaches a contract in Texas.[90]

The opinion in *Ramm v. Rowland*[91] demonstrates that even limited telephone calls to the state may provide sufficient minimum contacts for a con-

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(court found minimum contacts even though foreign corporation delivered products indirectly into forum through independent distributor); Strick Corp. v. Keen, 709 S.W.2d 292, 295 (Tex. App.—Houston [14th Dist.] 1986, *rev'd on other grounds*, 31 Tex. Sup. Ct. J. 209, 211) (Feb. 13, 1987) (minimum contacts found where foreign defendant manufactured defective component part but had no knowledge of where part would go once assembled on trailer).

82. 818 F.2d at 374. Thus, the liberty interest and the federalism interest overlap.

83. *Id.* at 376.

84. *Id.* The stream of commerce may provide some evidence of purposeful availment, but the United States Supreme Court has left open the question of whether it creates a minimum contact when the defendant does not direct the stream of commerce to the forum. *See* Asahi Metal Indus. Co. v. Superior Ct., 107 S. Ct. 1026, 1033, 94 L. Ed. 2d 92, 104 (1987). *See supra* notes 34-63 and accompanying text.

85. *Bearry*, 818 F.2d at 377.

86. *Id.* at 376-77 (citing Asahi Metal Indus. Co., 107 S. Ct. 1026, 94 L. Ed. 2d 92, 105 (1987)).

87. *Bearry*, 818 F.2d at 373.

88. *Id.* at 377.

89. *Id.*

90. *Id.*

91. 658 F. Supp. 705 (S.D. Tex. 1987).

stitutional exercise of specific jurisdiction. In *Ramm* the plaintiff filed an alienation of affection complaint in federal district court. The plaintiff completed service of process pursuant to the Texas long-arm statute,[92] which provides for service of process on a defendant who commits a tort in whole or in part in the state. The defendant filed a motion to dismiss for lack of personal jurisdiction. The defendant's only contacts with the forum were telephone calls and letters directed to the plaintiff's wife in Texas. During March and October of 1984, the defendant contacted the plaintiff's wife in Texas to request that she meet him in California and New Jersey, respectively. The wife joined the defendant in New Jersey and did not return to Texas.

The court determined that the assertion of specific jurisdiction was appropriate. Clearly, the defendant's contacts with the forum were not systematic and continuous enough to support general jurisdiction, but the court noted that the Texas long-arm statute included within its reach defendants who commit a single tort in the State of Texas.[93] Citing *Brown v. Flowers Industry, Inc.*,[94] the court noted that a single long distance telephone call that allegedly constituted a tort committed in whole or in part in the forum state may establish in personam jurisdiction.[95] Here, the defendant's alleged phone call to the plaintiff's wife to encourage her to leave her husband represents the very essence of the tort, the consequences of which harmed the plaintiff in Texas.[96] The court noted that the *Burger King*[97] Court emphasized that as long as the defendant purposefully directs his actions toward an out-of-state resident, absence of actual physical contact with that state would not defeat personal jurisdiction.[98]

Both *Caldwell v. Palmetto State Savings Bank*[99] and *Hayes v. Gulf Oil Corp.*[100] emphasize the difference between subject matter and personal jurisdiction, a difference that the parties in these cases attempted unsuccessfully to blur. In *Caldwell* the Texas plaintiffs brought suit based upon an asset purchase agreement and the corresponding financing. The plaintiffs executed the asset purchase agreement with a South Carolina general partnership, the Georgetown Insurance Company, and arranged the financing through the Palmetto State Savings Bank of South Carolina. The district court granted the defendant's motion to dismiss for lack of personal jurisdiction. The plaintiff's complaint only asserted that the district court had diversity jurisdiction as well as federal question jurisdiction based on the RICO statute.[101] The plaintiffs apparently made no mention of the Texas

92. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986).
93. 658 F. Supp. at 708.
94. 688 F.2d 328, 332-33 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983).
95. 658 F. Supp. at 708.
96. *Id.*
97. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).
98. 658 F. Supp. at 708.
99. 811 F.2d 916 (5th Cir. 1987).
100. 821 F.2d 285 (5th Cir. 1987).
101. *See* 18 U.S.C. § 1965(a)-(d) (1982) (venue & process section of RICO statute).

long-arm statute, asserted no facts connecting the defendants with Texas, and made no attempts to refute the facts stated in the defendants' affidavits.

On appeal, the plaintiffs continued to assert that diversity gave the court a sufficient basis for jurisdiction and in the reply brief asserted, for the first time, that the defendants had some contact with Texas based upon a letter mailed to the plaintiffs in Texas that described the proposed terms of the loan. As a matter of law, the court determined that a single letter sent by the defendant to the plaintiffs in Texas was insufficient for the assertion of personal jurisdiction.[102] The court noted that the undisputed facts in the case established that the defendants did not conduct business in Texas and therefore the RICO statute did not provide a basis for in personam jurisdiction.[103] With regard to the single letter, the court emphasized that the undisputed facts showed that the plaintiff solicited the transaction and that a court does not acquire jurisdiction over a defendant as a result of unilateral activities by another person.[104] Noting the plaintiff's apparent ignorance of the difference between in personam jurisdiction and subject matter jurisdiction and of the fact that both types of jurisdiction are required, the court imposed sanctions for a frivolous appeal.[105]

In *Hayes* the court discussed the settled principle of subject matter jurisdiction that a local action involving real property can only be brought within the territorial boundaries of the state where the land is located.[106] The plaintiff had filed suit in the Eastern District of Texas disputing title to real property located in Colorado. The plaintiff argued that *Shaffer v. Heitner*[107] had rendered the local action rule invalid. The plaintiff suggested that the local action doctrine conflicted with the underlying rationale of *Shaffer*, which indicated that sovereignty and the territoriality of the states no longer controlled the state court's exercise of jurisdiction.[108] The plaintiff apparently concluded that, as long as a court has jurisdiction over the persons, it has jurisdiction to adjudicate the dispute between those persons even if it involves property located in another state. The Supreme Court in *Shaffer* extended the minimum contacts analysis to all assertions of state court jurisdiction, including actions premising jurisdiction solely on the presence of a party's property within the state.[109] The plaintiff argued that after *Shaffer*, the presence of the property in Colorado was not relevant because the defendant, Gulf, had minimum contacts with Texas. Despite the defendant's minimum contacts, the court rejected the plaintiff's argument, noting that

102. 811 F.2d at 917 n.1. The court stated that it could consider that argument even though it was raised for the first time on appeal because it could be decided as a matter of law based on undisputed facts. *Id.*

103. *Id.* at 917.

104. *Id.* at 919.

105. *Id.*

106. Hayes v. Gulf Oil Corp., 821 F.2d 285, 287 (5th Cir. 1987). Although *Hayes* did not involve a dispute over personal jurisdiction, it is included here because of the court's rebuff of the plaintiff's creative application of Shaffer v. Heitner, 433 U.S. 186 (1977).

107. 433 U.S. 186 (1977).

108. *Hayes*, 821 F.2d at 290.

109. 433 U.S. at 195.

Shaffer spoke to personal, not subject matter, jurisdiction, and that subject matter jurisdiction and personal jurisdiction are separate concepts.[110] The court refused to find subject matter jurisdiction because the local action doctrine was viable and required that the property in dispute lie within the forum state.[111]

3. *Louisiana Long-Arm*

This Article includes a discussion of the personal jurisdiction law of the state of Louisiana because of its evolving nature and because Texas lawyers who appear in Louisiana courts must be aware of this change. In 1985, the Fifth Circuit interpreted the Louisiana long-arm statute to require a nexus between the cause of action and the defendant's contacts with the forum.[112] The following case, decided during the Survey period, addressed this nexus requirement.

In *Petroleum Helicopters, Inc. v. Avco Corp.*[113] the Fifth Circuit certified the nexus question to the Louisiana Supreme Court to determine the breadth of the Louisiana long-arm statute.[114] Before considering and certifying the statutory issue, however, the court decided the constitutional issue.[115] It considered the statutory issue only after the constitutional issue because of the uncertainty of the law related to the breadth of the long-arm statute.

Petroleum Helicopters, a Delaware corporation with its principal place of business in Louisiana, purchased a helicopter from Aerospatiale, a Texas manufacturer. When the helicopter sank in the coastal waters off the Louisiana shores, Petroleum Helicopters sued Aerospatiale and, among others, Garrett, the designer, manufacturer, and assembler of the flotation devices. The plaintiff served Garrett pursuant to the Louisiana long-arm statute. Garrett, a California corporation, manufactured flotation devices in New Jersey. Garrett had no employees nor any property or offices in Louisiana.

In 1980, Aerospatiale's sales to Petroleum Helicopters constituted nineteen percent of its volume and in 1981, these sales constituted eight percent of its volume. In 1981, Garrett sold replacement floats costing about $7,000 to Petroleum Helicopters and another $14,000 worth of floats to other Louisiana customers. Garrett made the replacement floats sold directly to Petroleum Helicopters for a different kind of helicopter from the one that sank. Aside from the sale of helicopter floats, Garrett conducted a substantial amount of business in Louisiana. In fact, between 1980 and 1983, its sales in Louisiana averaged $1.75 million.

In its jurisdictional inquiry the court emphasized that Garrett directly served the Louisiana market with its replacement floats, even though the floats sold to Petroleum Helicopters were for a different type of helicop-

110. 821 F.2d at 289.
111. *Id.*
112. *See* Farnham v. Bristow Helicopters, Inc., 776 F.2d 535, 537-38 (5th Cir. 1985).
113. 804 F.2d 1367 (5th Cir. 1986), *rehearing den.*, 808 F.2d 1520 (5th Cir. 1987) (en banc).
114. 804 F.2d at 372-73; *see* LA. REV. STAT. ANN. § 13:3201(1) (West Supp. 1986).
115. 804 F.2d at 1371.

ter.[116] Moreover, Garrett sent representatives to Louisiana for promotion, training, and servicing. As a result, Garrett purposefully availed itself of the benefits of doing business in Louisiana and delivered the floats into the stream of commerce with the expectation that Louisianians would purchase them. The court determined that although Garrett's activities in Louisiana did not rise to the level necessary to establish general jurisdiction, they were sufficient to confer specific jurisdiction over Garrett.[117]

Furthermore, the court stated that Louisiana had a strong interest in adjudicating the dispute.[118] A Louisiana firm used the helicopter and subsequently suffered the economic injury when the helicopter sank. The court emphasized that the stream of commerce analysis does not turn upon whether the accident occurred inside or outside of the forum.[119] The location did not affect the fairness to Garrett of appearing in Louisiana, whereas it might have affected the state's interest in adjudicating the dispute.[120] Since the accident did not occur within the territorial jurisdiction of any other state, however, the injury did not occur in any particular state.

The court in *Petroleum Helicopters, Inc.* held that due process allowed the assertion of specific jurisdiction over the defendant.[121] The court then addressed the statutory question. Noting that although previous courts had held that the Louisiana long-arm extended to the limits of due process, two recent intermediate appellate court opinions interpreted the long-arm statute more narrowly, requiring a direct nexus between the nonresident defendant's business transacted in Louisiana and the plaintiff's cause of action.[122]

Following these state court decisions, the panel in *Farnham v. Bristow Helicopters, Inc.*[123] adopted the restrictive interpretation, requiring a direct nexus between the cause of action and the defendant's activities in the forum. If such a direct nexus were required, the court in *Petroleum Helicopters* would lack jurisdiction. Noting the apparent conflict between these decisions and previous decisions of the Louisiana Supreme Court, the Fifth Circuit in *Petroleum Helicopters* certified the question of the breadth of the Louisiana long-arm statute to the Louisiana Supreme Court.[124] The dissent noted that certification was unnecessary as no post-*Farnham* Louisiana decisions justified departure from its holding.[125]

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116. *Id.* at 1370.
117. *Id.*
118. *Id.* at 1371.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1372; *see* Alba v. Riviere, 457 So. 2d 33, 34 (La. App. 4th Cir.), *cert. denied*, 462 So. 2d 194 (La. 1984); Robinson v. VanGuard Ins. Co., 468 So. 2d 1360, 1369 (La. App. 1st Cir.), *cert. denied*, 472 So. 2d 924 (La. 1985).
123. 776 F.2d 535, 537 (5th Cir. 1985).
124. Certification was completed in Petroleum Helicopters, Inc. v. Avco, 804 F.2d 1367 (5th Cir. 1986). The Supreme Court of Louisiana at 503 So. 2d 1010 (La. 1987) consolidated the case for argument with Superior Supply v. Associated Pipe & Supply, 499 So. 2d 558 (La. App. 2d Cir. 1986), which followed *Farnham*.
125. 776 F.2d at 373 (Garwood, J., dissenting). Since *Petroleum*, some courts have circumvented the statutory inquiry. *See e.g.*, Bayou Steel Corp. v. M/V Amstelvoorn, 809 F.2d 1147,

On October 20, 1987, the Louisiana Supreme Court determined the issue certified to it.[126] The court decided that, although the literal language of the long-arm statute in effect when Petroleum Helicopters filed suit suggested a nexus requirement, the September 1987 amendment to the statute extended the jurisdiction of Louisiana courts to the limits of due process.[127] As a result, the Fifth Circuit's determination that the exercise of jurisdiction over Garrett comported with due process meant that jurisdiction existed under the Louisiana long-arm statute.[128] The Louisiana Supreme Court held that the 1987 amendment applied to all actions pending on the amendment's effective date.[129] Accordingly, the Fifth Circuit reversed and remanded the case.[130]

B. Service of Process

The constitutional notice requirement of service of process 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. The exercise of jurisdiction requires: (1) the defendants' 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 require dismissal, at least not in Texas state courts.

In *Bonewitz v. Bonewitz*,[131] a breach of contract action, the plaintiff served process on the Texas secretary of state,[132] who forwarded the citation to the defendant five days later. The defendant received the citation six days after it was forwarded. After the court entered a default judgment, the defendant appealed.[133] The defendant initially argued that service was improper because the plaintiff served an employee of the secretary of state and not the

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1150 (5th Cir. 1987) (to avoid issue of whether long-arm statute reached defendant, court acknowledged statutory question certified to Louisiana Supreme Court remained unanswered and decided case on constitutional grounds); GAMXX Energy, Inc. v. Frost, 668 F. Supp. 541, 545 (M.D. La. 1987) (court avoided long-arm inquiry by determining defendant lacked requisite contacts with Louisiana to comply with due process requirements); *cf.* Singletary v. B.R.X., Inc., 828 F.2d 1135, 1138 (5th Cir. 1987) (court dismissed case for lack of sufficient contacts without addressing statutory concerns). The court in *GAMXX* noted that the Louisiana legislature proposed an amendment to the Louisiana long-arm that would extend its reach to the limits of due process and no longer require a nexus between the contacts and the cause of action in all cases. 668 F. Supp. at 543.

126. Petroleum Helicopters, Inc. v. Avco Corp., 513 So. 2d 1188, 1191 (La. 1987).

127. *Id.* at 1191, interpreting LA. REV. STAT. ANN. 13:3202 (West 1982), *repealed by* 1987 La. Acts 418 (as amended at LA. REV. STAT. ANN. art. 13:3201(B) (West Supp. 1987)).

128. Petroleum Helicopters, Inc. v. Avco Corp., 834 F.2d 510, 511 (5th Cir. 1987).

129. *Petroleum Helicopters*, 513 So. 2d at 1191.

130. *Petroleum Helicopters*, 834 F.2d at 511.

131. 726 S.W.2d 227 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

132. *See* TEX. CIV. PRAC. & REM. CODE § 17.044 (Vernon 1986) (allows service of process on secretary of state as authorized agent of defendant in certain situations).

133. In the trial court, after the judge signed the default judgment, the defendant filed a special appearance, a motion to quash citation, a motion to withdraw and substitute counsel, and a motion to set aside the default judgment. The trial court sustained the motion to withdraw and substitute counsel. The trial court failed to rule on the other motions before the court's plenary power expired.

secretary of state personally. Citing the Texas Supreme Court's opinion from the last Survey period, *Capitol Brick, Inc. v. Fleming Manufacturing Co.*,[134] the court rejected this argument.[135] The defendant next argued that the secretary of state failed to forward the copy of the process immediately; but the court held that a five-day delay did not violate the secretary's duty.[136] Third, the defendant argued that the time period within which the defendant must answer should begin to run from the date the secretary of state actually forwards the process to the defendant and not from the date the plaintiff serves the secretary of state. Observing that the secretary of state is the defendant's agent, the court held that the time for answer begins to run once the plaintiff serves the secretary of state with process unless the defendant can prove a violation of due process.[137] The defendant did not assert a due process violation in *Bonewitz*. Finally, the defendant argued that the secretary of state failed to comply with statutory requirements[138] because the secretary of state failed to mail the process with delivery restricted to the defendant. The court determined, however, that the long-arm statute which tests the sufficiency of the procedure once service is made on the secretary does not require that the secretary restrict delivery to the defendant.[139] The long-arm statute merely requires that service be sent by registered or certified mail, return receipt requested, and this process was followed in *Bonewitz*.[140] The court noted that under the Texas Rules of Civil Procedure, service would be invalid because receipt of service by one other than the defendant, who is not alleged in the plaintiff's petition to be the authorized agent for service of process, is invalid.[141]

The court emphasized this latter point in *American Universal Insurance Co. v. D.B.&B., Inc.*[142] On appeal, the defendant challenged the entry of a

134. 722 S.W.2d 399 (Tex. 1986).

135. *Bonewitz*, 726 S.W.2d at 229.

136. *Id.*; *see* Roberts v. Niekerk, 730 S.W.2d 341, 343 (Tex. App.—Dallas 1987, writ ref'd) (demonstrated that record must show service was forwarded). Upon reviewing the record in *Roberts*, the appellate court found no evidence that the Texas secretary of state forwarded process to the nonresident defendant by registered or certified mail, return receipt requested, as required by TEX. CIV. PRAC. & REM. CODE ANN. § 17.045(b) (Vernon 1986); 730 S.W.2d at 343. Since the record did not affirmatively show strict compliance with the long-arm statute, the trial court lacked in personam jurisdiction over the defendant and erred in entering default judgment. *Id.* The appellate court refused to presume that the secretary of state mailed notice to the defendant based on an argument that the law presumes public officials perform their duties diligently. *Id.* The court noted that a petition for writ of error constitutes a direct attack on the judgment and prevents the court from indulging in presumptions in supporting the judgment. *Id.* (citing McKanna v. Edgar, 388 S.W.2d 927, 929-30 (Tex. 1965), *rev'd on other grounds*, 675 S.W.2d 729 (Tex. 1984)). The court concluded that the defendant, having appeared to attack the default judgment, submitted himself to the trial court's jurisdiction and new service was not necessary. 730 S.W.2d at 343.

137. 726 S.W.2d at 230.

138. TEX. CIV. PRAC. & REM. CODE ANN. § 17.045 (Vernon 1986).

139. 726 S.W.2d at 230.

140. *Id.* at 230-31.

141. *Id.*

142. 725 S.W.2d 764 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); *see also* Pharmakinetics Laboratories, Inc. v. Katz, 717 S.W.2d 704, 706 (Tex. App.—San Antonio 1986, no writ) (court held that trial court does not have personal jurisdiction over a defendant if return receipt reveals service was addressed to agent but signed by someone else; service

default judgment because of an improper service of process. Although the plaintiff's petition alleged the specific name of the defendant's registered agent, and the receipt for certified mail was addressed to the registered agent, the addressee himself did not sign the receipt. After entry of default, the defendant filed a motion for new trial in which he raised points directed to the merits but did not raise the defective service of process issue. At the hearing on the motion for a new trial, the defendant's attorney acknowledged valid service. The motion for a new trial was denied; thus, the default judgment remained.

On the defendant's appeal, the plaintiff argued that the failure to acquire jurisdiction over the person made the judgment voidable, not void. The majority, however, concluded that the judgment was void for lack of personal jurisdiction,[143] citing *Browning v. Placke*.[144] The majority concluded that the failure to raise the point in the motion for new trial did not waive the voidness of the judgment. The court held that the rules of procedure do not require a point in a motion for a new trial as a prerequisite to an appeal from a void default judgment based on invalide service.[145] According to the majority, a void judgment cannot be waived by admitting proper service, and the defendant was entitled to a new trial.[146]

The dissent, in contrast, relying on *Tidwell v. Tidwell*,[147] concluded that the judgment was merely voidable, because only lack of subject matter jurisdiction makes a judgment void, and, thus, the defendant's admission of service at the hearing on the motion for new trial validated the judgment.[148] The holding in *American Universal* should be compared to the holding of the Texas Supreme Court in *Liberty Enterprises, Inc. v. Moore Transportation Co.*,[149] which was not mentioned in *American Universal*. In *Liberty* the court held that the defendant submitted to the court's jurisdiction by announcing ready for trial in its motion for new trial and by agreeing to the court's order reinstating the action.[150] Based on *Liberty*, the defendant in *American Universal* also, arguably, made a general appearance and should have lacked grounds to contest jurisdiction on appeal.

In *UNL, Inc. v. Oak Hills Photo Finishing, Inc.*[151] the plaintiff served UNL, a foreign corporation, by serving the secretary of state in accordance with the Texas long-arm statute.[152] UNL failed to appear or answer, and

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invalid unless return receipt signed by appointed agent). The Texas Rules of Civil Procedure are relevant only in determining whether the secretary of state was properly served in the first instance.

143. 725 S.W.2d at 766.
144. 698 S.W.2d 362, 363 (Tex. 1985).
145. 725 S.W.2d at 767; *see* TEX. R. CIV. P. 324(a).
146. 725 S.W.2d at 767.
147. 604 S.W.2d 540, 542 (Tex. Civ. App.—Texarkana 1980, no writ).
148. 725 S.W.2d at 768 (Seerden, J., dissenting).
149. 690 S.W.2d 570 (Tex. 1985).
150. *Id.* at 571-72.
151. 733 S.W.2d 402 (Tex. App.—San Antonio 1987, no writ).
152. TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (Vernon 1986).

the trial court rendered a default judgment. On appeal, UNL attacked the judgment for lack of personal jurisdiction.

The record included a copy of the citation directed to UNL with a sheriff's return indicating service on the secretary of state as agent for service on January 6, 1986. The parties did not dispute that this document was filed with the district court clerk on January 14, 1986. A question arose with regard to the secretary of state's sworn statement, which recited that the petition was served upon him on January 6, 1986, that the secretary in turn forwarded, by certified mail, return receipt requested, a true and correct copy of the petition to UNL on January 8, 1986, and that the green card was returned to the secretary on January 21, 1986. The plaintiff offered the secretary's sworn statement into evidence, but the record did not reflect its admission. The sworn statement was, however, attached to the statement of facts that was part of the record on appeal, and the court reporter marked the sworn statement with her initials, the date, February 3, 1986, and "PX-1."

The defendant argued that the plaintiff did not properly admit the exhibit into evidence because the trial judge was not present during the default hearing; therefore, there was no indication in the record that the secretary of state forwarded process and, thus, no jurisdiction existed over the defendant. The appellate court rejected this argument, even though the court reporter signed an affidavit stating that the trial judge was not present when the testimony was taken at the default hearing and that the plaintiff's attorney took Exhibit No. 1 with him at the conclusion of the hearing instead of leaving it in the possession of the court.[153]

The court noted that the reporter had indicated on the statement of facts that the judge was present during the hearing, that the transcription of the record of the proceedings truly and correctly reflected the exhibits offered by the respective parties, and, further, that the court reporter had marked the sworn statement of service with the date of the default hearing, the exhibit number, and her initials. These acts, according to the court, sufficiently showed that the statement was before the trial court and that the trial court obtained jurisdiction.[154] Significantly, the court concluded that the allegations that the trial judge was absent when the appellees proved up the allegations in the petition did not support the conclusion that the plaintiff's failed to present the statement of service to the trial court either prior to the recorded default hearing or later when the judge signed the judgment.[155]

C. Inconvenient Forum

Forum non conveniens, a conflict of laws doctrine, provides 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

153. 733 S.W.2d at 405.
154. *Id.*
155. *Id.*

the plaintiff. *Houston International Televideo, Inc. v. Technicolor, Inc.*[156] involved a contract action regarding a manufacturing and marketing agreement between two plaintiffs and a defendant. The court upheld the parties' choice of forum clauses, which stated that Tulsa County, Oklahoma, was the proper venue for any action arising on the agreements.[157] The plaintiffs argued that they might be barred from suit in Oklahoma because the defendant might not be subject to the Oklahoma long-arm statute, and the Oklahoma Business Corporation Act limited unregistered corporations' use of Oklahoma courts. The court disallowed both arguments. First, the plaintiffs did not prove the defendant's nonamenability to the Oklahoma long-arm statute.[158] Second, as to the Oklahoma Corporation Act's barring the plaintiffs, the court held that the only issue under the federal venue statute was the defendant's capacity to be sued.[159] The plaintiffs' capacity to sue in Oklahoma was irrelevant, the court continued, and if the plaintiffs were barred, then they would not be excused from utilizing the proper forum because of their mistake in entering into a contract that directed suits to be brought in a state in which they failed to comply with corporation laws.[160]

In *United Sonics, Inc. v. Shock*,[161] however, a federal district court held a choice of forum clause did not bind the parties since the chosen forum, Texas, lost its contacts with the dispute during the litigation. The plaintiff originally filed the action in New York; the action moved to Texas after the defendant's successful forum non conveniens motion,[162] based on a choice of forum agreement. After the case moved to Texas, the defendant moved from San Antonio to Arkansas and again filed a section 1404(a) motion[163] to transfer to Arkansas. The plaintiff opposed the transfer, seeking to go forward with the action in Texas or to return the case to New York. The court chose the latter, holding that the transfer back to New York was proper because the defendant no longer lived in Texas and because the action had no other reasonable connection to Texas.[164]

Boller v. National Mediation Board[165] involved a labor dispute in the Southern District of Texas. The defendant union moved to transfer the case under section 1404(a) to consolidate it with a similar case in the District of Columbia. The court considered transfer and consolidation separately and held that consolidation was justified because the parties and issues were substantially similar.[166] The Texas plaintiffs were not parties to the District of Columbia action, and one Texas defendant was a plaintiff in the District of Columbia action, otherwise all parties were the same and the same contested

156. 647 F. Supp. 554 (S.D. Tex. 1986).
157. *Id.* at 555-56.
158. *Id.* at 556.
159. *Id.*
160. *Id.*
161. 661 F. Supp. 681, 683 (W.D. Tex. 1986).
162. *See* 28 U.S.C. § 1404(a) (1982).
163. *Id.*
164. 661 F. Supp. at 683.
165. 647 F. Supp. 1060 (S.D. Tex. 1986).
166. 647 F. Supp. at 1061.

union election comprised the issue in both cases. As for transfer, the court noted that while the plaintiff's choice of forum is entitled to deference, the standard was reduced since the lawsuit had no connection to the forum.[167] Plaintiff's residence in Texas constituted the only connection between the *Boller* lawsuit and Texas.[168]

The Fifth Circuit denied an identical request for transfer and consolidation to the District of Columbia in *Mobile Oil Exploration v. Federal Energy Regulatory Commission*.[169] *Mobil Oil* dealt with an action by a group of energy companies against the Federal Energy Regulatory Commission (FERC) regarding the FERC's pricing regulations. The FERC statute governing gas pricing review provides for venue of multiple cases in the forum of the first action instituted.[170] Earlier in the same case, the Fifth Circuit had decided an initial venue question regarding whether the Fifth Circuit or the D.C. Circuit had venue to decide venue. The court held that both Circuits had equal status to rule on venue and that it would toss a coin to choose which circuit decided venue.[171] The Fifth Circuit won the coin toss and the right to decide venue. Upon full consideration of the venue issue, the court decided that the convenience of the parties and the interests of justice did not warrant transfer to the D.C. Circuit for consolidation with similar FERC cases.[172] The court held that the two sets of FERC orders before the Fifth and D.C. Circuits sufficiently differed and did not require review by the same circuit.[173]

Exxon Corp. v. Chick Kam Choo[174] held that when a federal court dismissed a plaintiff's wrongful death action, based on a shipping accident in Singapore, on forum non conveniens grounds, a Texas state court could not reconsider those claims. The ruling turned on the fact that this was a maritime claim, for which federal law pre-empted the Texas wrongful death statute.[175] The court noted that when a plaintiff has distinct causes of action in state and federal courts, a forum non conveniens dismissal in federal court would probably not bar a wrongful death claim in state court.[176]

In *Lands v. St. Louis Southwestern Railroad*[177] defendant moved for reconsideration of a section 1404(a) transfer to the federal district where the

167. *Id.* at 1062-63.

168. The court listed five factors to consider: (1) convenience to witnesses, (2) convenience to the parties, (3) location of books and records, (4) availability of judicial process to compel witness attendance, and (5) the possibilities of delay or prejudice if transfer is granted. *Id.* at 1062. The important factors in *Boller* were convenience to the parties and the delay or prejudice caused by transfer. *Id.* Transferring to the District of Columbia would cause neither of these problems because the parties had District of Columbia counsel, except for Trans World Airlines with New York counsel, and because of the D.C. judge's familiarity with the companion case. *Id.*

169. 814 F.2d 1001 (5th Cir. 1987).

170. *Id.* at 1003. The opinion does not cite the FERC statute.

171. *Id.*

172. *Id.* at 1003-04.

173. *Id.*

174. 817 F.2d 307, 314 (5th Cir.), *cert. granted*, 108 S. Ct. 343, 98 L. Ed. 2d 369 (1987).

175. *Id.* at 317-23.

176. *Id.* at 316.

177. 648 F. Sup. 322 (E.D. Tex. 1986).

accident occurred. The court upheld its earlier decision to transfer, but noted that reconsideration was probably unnecessary because the case had already been transferred.[178] The court explained that the transferee court lacked jurisdiction to review a section 1404(a) transfer, and the transferor court lost jurisdiction to reconsider the transfer after shipping all the case records to the other court.[179] The court held the only remedy at that point would be a mandamus action in the Fifth Circuit.[180]

Perez y Compania (Cataluna) S.A. v. Triton Pacific Maritime Corp.[181] dealt with a breach of contract action against a ship owner for failure to reimburse a Spanish shipping agent for fuel. The plaintiff was a Spanish corporation acting as shipping agent for a U.S. corporation. The defendant was a Philippine corporation and owner of a ship registered in the Philippines. In April 1984, while the ship was at Pasajes, Spain, the plaintiff ordered and paid for a resupply of bunker fuel, for which the defendant shipowner never reimbursed the plaintiff. The parties' agreement provided that Spanish law would control. The plaintiff filed the in rem action in the Southern District of Texas while the ship was docked there. The court found that controlling Spanish law did not provide an in rem action, but the court gave the plaintiff leave to amend for an in personam action.[182] The court held that the plaintiff had a valid personal claim against the ship owner based on their agreement, and the ship owner moved for a forum non conveniens dismissal.[183] The court granted the forum non conveniens dismissal provided that the defendant agreed to submit to the jurisdiction of the Spanish courts.[184]

In *Conklin & Garrett v. M/V Finnrose*[185] the Fifth Circuit reversed a federal district court's dismissal of a lawsuit to recover damages to a merry-go-round shipped from England to Florida. The district court's dismissal resulted from the enforcement of a forum selection clause pointing to Finnish jurisdiction. The defendant ship owner was a Finnish corporation, and the bill of lading provided that a Finnish court would resolve any disputes under Finnish law.[186] Another clause in the bill of lading provided, however, that notwithstanding the Finnish choice of forum, that United States law applied to disputes relating to performance within United States territorial limits.[187] The district court relied on the seminal forum selection case, *Bremen v. Zapata Offshore Co.*,[188] to favor the forum selection clause over the alternative choice of United States law. The Fifth Circuit disagreed, holding that

178. *Id.* at 325.
179. *Id.* at 326.
180. *Id.*
181. 647 F. Supp. 556 (S.D. Tex. 1986), *aff'd in part, rev'd in part*, 826 F.2d 1449 (5th Cir. 1987).
182. 647 F. Supp. at 559-60.
183. *Id.* at 559.
184. *Id.* at 560.
185. 826 F.2d 1441, 1441-44 (5th Cir. 1987).
186. *Id.*
187. *Id.*
188. *Id.*

Bremen did not involve an alternative choice of law and thus did not factually apply to *Conklin*.[189] In distinguishing *Bremen*, the Fifth Circuit provided an instructive discussion of the narrow issues of forum selection clause enforceability.

The most significant forum non conveniens decision of the Survey period is a Fifth Circuit opinion in a non-Texas case. In *In Re: Air Crash Disaster Near New Orleans, Louisiana*,[190] the Fifth Circuit upheld the federal district court's denial of forum non conveniens dismissal of an action by survivors of Uruguayans killed in an air crash in New Orleans. The defendant, Pan American Airlines, wanted the case transferred to Uruguay, apparently because of a perceived difference in potential damages.[191] The Fifth Circuit held that the Warsaw Convention's[192] provision for actions in any one of four designated forums did not mean that a plaintiff could choose the forum without being subject to a forum non conveniens challenge.[193] The court, however, could not grant a forum non conveniens dismissal unless it determined that all the plaintiffs could have their claims resolved fairly.[194] The court decided that the plaintiffs could not have their claims resolved fairly in this case because the United States was a party defendant and could not be sued in a Uruguayan court.[195] The court noted, however, that the fact that Uruguayan damages were less was not an unfairness issue and was not a sufficient reason for denying a forum non conveniens dismissal if the defendant was otherwise entitled to move the case to Uruguay.[196]

D. Sovereign Immunity

This year's only sovereign immunity case, *Falcoal, Inc. v. Turkiye Komur Isletmeleri Kurumu*,[197] raised numerous conflicts issues. *Falcoal* encompasses personal jurisdiction, venue, sovereign immunity, and choice of law. Turkiye Komur Isletmeleri Kurumu (TKI) is a Turkish government agency that furnishes energy. In 1984, TKI decided to import some of its coal, and therefore advertised for bids in Turkish publications. Houston-based Falcoal submitted its bid, which TKI ultimately accepted, through its Turkish agent, Zihni Dis Ticaret Ve Pazarlama A.S., a Turkish company. Falcoal employees travelled to Ankara for the negotiations, which were conducted entirely in Turkish, with Falcoal's agent Zihni translating for Falcoal. At the negotiation's conclusion, Zihni prepared two copies of the agreement, one in English and one in Turkish. The two versions were supposedly identical, but in fact they contained contrary forum selection

189. *Id.* at 1442-44.
190. 821 F.2d 1147, 1169 (5th Cir. 1987).
191. In trying the case on its merits, the district court conducted a choice of law analysis under Louisiana law, deciding that Louisiana law governed most of the issues, and Uruguayan law at least one issue. *See id.* at 1169 n.38; *id.* at 1173-78 (Gee, J., dissenting).
192. 49 U.S.C. § 1502 (1982).
193. 821 F.2d at 1161-62.
194. *Id.* at 1165.
195. *Id.* at 1168-69.
196. *Id.* at 1164.
197. 660 F. Supp. 1536 (S.D. Tex. 1987).

clauses. The English version called for exclusive venue in Houston, while the Turkish version called for venue in Houston only if TKI chose to sue there, and otherwise provided for Turkish venue.

Under the contract, Falcoal agreed to post a performance bond of ten percent of the contract price. In turn, TKI agreed to open a letter of credit in New York to secure payment forty-five days prior to Falcoal's shipment of coal. Falcoal posted its performance bond, but TKI failed to open the letter of credit. Consequently, Falcoal refused to ship the coal. TKI then drew on the Falcoal performance bond. Falcoal sued in federal district court in Houston, alleging breach of contract for failing to open the letter of credit, and fraud and conversion for drawing on the performance bond. TKI moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and improper venue.

Based on its status as a foreign governmental agency TKI asserted sovereign immunity in its challenge of subject matter jurisdiction. Falcoal agreed that TKI was a Turkish governmental entity, but argued that the Foreign Sovereign Immunities Act (FSIA)[198] provided for jurisdiction over TKI under two exceptions to sovereign immunity. Falcoal first argued that TKI waived its immunity by agreeing to the Houston forum selection clause; and, second, Falcoal argued that TKI engaged in a commercial activity. The court disagreed with Falcoal's first argument, holding that the Turkish language forum selection clause controlled.[199] The court concluded that with two contrary choice of forum clauses, TKI could not be viewed as having waived its sovereign immunity.[200]

Turning to the second exception of commercial activity, the court rejected Falcoal's first two examples. It was clear, the court held, that TKI was not engaged in an activity that represented a commercial venture conducted in the United States,[201] nor one based on activity carried out in the United States in conjunction with a commercial enterprise of TKI being carried out elsewhere.[202] The court favored Falcoal's third argument of commercial activity: the direct effect in the United States example. In a thorough case law analysis, the court noted contrary holdings that the direct effect is satisfied merely by having an American corporation suffer financial injury, and the direct effects test is not met unless the effects in the United States are sufficient to establish minimum contacts for personal jurisdiction.[203]

The court resolved the contrary precedents by opting for a third precedent. These cases hold that direct effects causing financial injury to American corporations waive sovereign immunity under the FSIA, but in doing so merely establish statutory subject matter jurisdiction and not necessarily personal jurisdiction.[204] The court thus held that TKI waived its sovereign

198. 28 U.S.C. §§ 1602-1611 (1982).
199. 660 F. Supp. at 1539.
200. *Id.*
201. *Id.* at 1540 (quoting from 28 U.S.C. § 1603(e) (1977)).
202. *Id.* (quoting from 28 U.S.C. § 1605(a)(2) (1977)).
203. *Id.* at 1540-41.
204. *See* Texas Trading & Milling Corp. v. Federal Rep. of Nigeria, 647 F.2d 300, 308 (2d

immunity by its actions injuring Falcoal, but that in waiving sovereign immunity, TKI had not necessarily established minimum contacts with the United States.[205]

As to TKI's personal jurisdiction, Falcoal argued again that TKI's forum selection clause permitted United States jurisdiction. Falcoal further argued that the court should reject the Turkish language version because of TKI's fraudulent concealment of the difference between the two versions. The court disagreed, holding that if anyone concealed information it was Falcoal's agent, Zihni, whom Falcoal had not sued.[206]

Faced with contradictory forum selection clauses, the court conducted a *Duncan v. Cessna* choice of law analysis,[207] and determined that Turkish law would apply because Falcoal solicited and bargained the agreement for the contract in Turkey.[208] The court cited Turkish law Number 805, providing that all transactions with Turkish companies must be in Turkish, and that if a second language is used, the Turkish version controls.[209] The court found that under the Turkish version, TKI had not consented to United States jurisdiction and absent TKI's consent, no other basis for minimum contact existed.[210] The court concluded it lacked personal jurisdiction.[211] The lack of personal jurisdiction mooted the venue question, and the court dismissed the case.[212]

II. CHOICE OF LAW

A. Contracts

Readers should note the recently enacted Texas law,[213] effective September 1, 1987, which requires boldfaced print for certain contractual choice of law clauses.[214] The new law applies only to contracts having both an element of execution within Texas and a party to the contract who is an individual Texas resident or an association or corporation created under Texas law or that has its principal place of business in Texas.[215]

A second legislative development affecting Texas is the United States' rati-

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Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); Crimson Semiconductor, Inc. v. Electronium, 629 F. Supp. 903, 906 (S.D.N.Y. 1986).

205. 660 F. Supp. at 1541.

206. *Id.* at 1542.

207. *Id.* (citing Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 420-21 (Tex. 1984)).

208. 660 F. Supp. at 1542.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 1542-43.

213. TEX. BUS. & COM. CODE ANN. § 35.53 (Vernon 1987).

214. The new law states:

> If a contract to which this section applies contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation. . . , or to arbitration in another state, the provision must be set out in boldface print. If the provision is not set out in boldface print, the provision is voidable by a party against whom it is sought to be enforced.

Id. § 1(b).

215. *Id.*

fication of the United Nations Convention on Contracts for the International Sale of Goods.[216] The convention is the international version of Article Two of the Uniform Commercial Code. Like the UCC, the Convention has choice of law provisions. Most notable is the implication that transactions falling within the Convention's purview will automatically be governed by the Convention unless the contracting parties specifically opt out with a choice of law clause. The effective date is January 1, 1988.

The Fifth Circuit raised two interesting choice of law questions in *Kucel v. Walter E. Heller & Co.*[217] Kucel owned an airplane financed by Heller Company. After making sixty-two monthly payments, Kucel was unable to continue payments. Kucel sought to sell the plane and pay off Heller, but Kucel and Heller could not agree on the remaining balance. Kucel paid the balance Heller requested so as not to lose the sale, but demanded an accounting. Heller accepted payment and released the lien, but retained its right of action against Kucel for any matters occurring before the release.

Kucel waited two months for the accounting on his note, then sued Heller to recover the alleged overpayment on the loan. After a bench trial, the court awarded Kucel $42,892.40 in overpayments and reduced the award by $1,114.90 in late fees Kucel owed Heller. The court also awarded prejudgment interest under Illinois law and post-judgment interest under federal law. Kucel then requested attorneys' fees under Texas law, and the court complied. Heller asked for reconsideration, arguing that Illinois law governed attorneys' fees and did not allow them in this case. The district court disagreed and imposed sanctions of $500.00 on Heller's attorney. Heller appealed to the Fifth Circuit, and Kucel cross appealed on the district court's failure to apply Illinois law on the question of calculating interest on the promissory note.[218]

The Fifth Circuit made several adjustments to the district court's opinion. The Fifth Circuit held that attorneys' fees related to the substantive law of the case, thus making Texas law applicable only if Texas law governed the substantive issues.[219] Noting that the parties' loan agreement called for the application of Illinois law, the court held that under Texas choice of law rules the parties' agreement controlled, and Illinois law governed the substantive issues in the case.[220] The court concluded that the trial court applied Illinois law to construe the note and to award prejudgment interest, but reimbursed Kucel for interest overpayment and awarded attorneys' fees under Texas law.[221] The Fifth Circuit disagreed with the application of laws and held that the note's choice of Illinois law governed all of Kucel's claims,

216. U.N. Doc. A/Conf. 97/19 (1980); U.S. SENATE TREATY DOC. NO. 98-9, 98th Cong., 1st Sess. 22-43 (1983); *see* Winship, *A Bibliography of Commentaries on the United Nations International Sales Convention*, 21 INT'L LAW. 585 (1987).

217. 813 F.2d 67 (5th Cir. 1987).

218. *Id.* at 69-70.

219. *Id.* at 73.

220. *Id.*

221. *Id.*

which the court described as "inextricably intertwined."[222] Because Illinois law governed all of Kucel's substantive claims, and because Illinois law did not permit recovery of attorneys' fees, the court reversed Kucel's attorneys' fee award.[223]

Kucel argued on appeal that Heller had waived any claim that Illinois law governed attorneys' fees. The court disagreed, first observing that under federal law, Heller did not have to plead the application of Illinois law to preserve the question, nor did Heller need to prove the content of Illinois law because the court must take judicial notice of all states' laws.[224] The court indicated that Heller was only required to call the question to the court's attention in time for judicial consideration.[225] The court held that Heller

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222. *Id.* While the *Kucel* court correctly applied the promissory note's choice of law clause to all of Kucel's claims, readers should note the practice of *depecage*. This is the practice of splitting issues in a case, applying one state's law to one issue and another state's law to a second issue. The Texas Supreme Court mandated this practice for Texas courts in Duncan v. Cessna, 665 S.W.2d 414, 421 (Tex. 1984), stating that "in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law cause, the law of the state with the most significant relationship *to the particular substantive issue will be applied to resolve that issue.*" 665 S.W.2d at 421 (emphasis added).

223. 813 F.2d at 73-74.

224. *Id.* at 74.

225. *Id.* The court's ruling on pleading the applicability and content of Illinois law was correct, but the court's citations do not fully support it. The court cited two authorities, a case and a treatise, for the proposition that Heller need not plead the applicability of Illinois law in order to preserve the claim. The case, Lumbermen's Mut. Casualty Co. v. Norris Grain Co., 343 F.2d 670, 685 (8th Cir. 1965), does not address this issue. Instead, *Lumbermen's* held that when a party pursues a claim under a particular state's law, the party need not plead that law in order to preserve the claim. *Id.* In pertinent part, *Lumbermen's* held that if a party alleged a contract was "an Illinois contract, the party relying on the provision of Illinois law need not expressly plead that Illinois law." *Id.* In context, *Lumbermen's* states only that a party need not plead the content of Illinois law. *Lumbermen's* made no statement as to the need to plead the applicability of Illinois law.

The *Kucel* opinion also cites C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1253 (1969) for the same proposition: the non-necessity of pleading applicability of another state's law. Wright and Miller state that "it is not necessary to plead state law, whether it be the forum state's law, or the law of another state." *Id.* Read in context, this states only that a party need not plead the content of the applicable state's law, and does not address the need to plead applicability. Wright and Miller continue:

> [H]owever, in cases having multi-state contacts, the pleader may be well advised to include an allegation as to which state's law he intends to rely on when he can do so at the pleading stage, even though he need not plead its content, since he does not have the obligation to call the applicability of another state's law to the court's attention.

Id. (footnotes omitted).

In reading the cases cited in C. WRIGHT & A. MILLER, *supra*, and other cases on point, the following synthesis emerges: in federal court, one need not plead the applicability of any state's law; however, one must raise the argument of governing law, if other than forum law, by some means at a reasonable time before the trial court renders judgment on the merits. *See* Jannenga v. Nationwide Life Ins. Co., 288 F.2d 169, 171 (D.C. Cir. 1961); Prudential Ins. v. Carlson, 126 F.2d 607, 611 (10th Cir. 1942). Even though the federal appellate court may refuse to consider applying a different state's law if that law was not raised at trial, it is not required to. The court may remand such cases for consideration under the applicable law. Pecheur Lozenge Co. v. National Candy Co., 315 U.S. 666 (1942); Nagoya Assoc., Inc. v. Esquire, Inc., 191 F. Supp. 379, 383 (S.D.N.Y. 1961). At no time in federal practice must one plead and prove the content of any state's law, because federal courts must take judicial notice of all states' laws. Lamar v. Micou, 114 U.S. 218, 223 (1885); Lumbermen's Mut. Casualty Co. v. Norris Grain Co., 343 F.2d 670, 685 (8th Cir. 1965); Jaeger v. Raymark Indus., 610 F.

had done so by the fact that the choice of law provision was in the note drafted by Heller, and by including Illinois law in its motion to dismiss at the time the pretrial order was filed.[226] Heller's failure to mention Illinois law in the pretrial order did not waive the argument on appeal because the pretrial order mentioned the outstanding motion to dismiss, and there was no agreement as to the application of Texas or Illinois law, leaving choice of law unresolved.[227]

The Fifth Circuit also applied a false conflicts analysis to Kucel's cross-appeal.[228] Kucel argued that the trial court erred in not calculating the promissory note's interest rate at nine percent as required by Illinois law for loans lacking an interest agreement. The applicable Illinois law provided for interest at the judgment rate at the place of payment from the date of the contract unless the parties specified otherwise in their agreement.[229] The court observed that the UCC provisions were identical under both Texas and Illinois law; thus, it did not matter which state's law applied.[230] Under either state's law, the interest would be assessed from the judgment interest rate at the place of payment, in this case Illinois. There was no conflict. Moreover, there was no trial error because section 3-118 did not apply.[231] The Fifth Circuit held that although the loan did not specify an interest rate or an annual percentage rate, it did not provide for interest, thus precluding application of section 3-118.[232]

Singer v. Lexington Insurance Co.[233] concerned unpaid insurance claims on thoroughbred horses located throughout North America and western Europe. The conflict of laws arose between the Massachusetts insurance law of good faith and fair dealing and the absence of that doctrine in Texas at the time of the *Singer* decision.[234] *Singer* first discussed several presumptions as to the parties' imputed intent for the policy's governing law, along with the

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Supp. 784, 787-88 (E.D. Wis. 1985). Nevertheless, although a federal court may not refuse to apply the law of another state merely because it was not affirmatively plead and proved, *Pecheur*, 315 U.S. at 667, a court may decline to apply such law where the offering party fails to inform the court of the law's content. *Jannenga*, 285 F.2d at 170; *Prudential*, 126 F.2d at 611.

Thus, applicability need not be plead, but should be raised by some means at a reasonable time before the judgment on the merits. If it is not reasonably raised, the appellate court may ignore the argument that another law should govern, or it may remand for reconsideration under the newly argued law. Content, the substance of the governing law, need not be plead or proved, but the party should make an informal proof of content to the court (e.g. by offering a photocopy); failure to do so entitles the trial court to ignore the remedies under the unknown law, although the appellate court has the discretion to remand.

226. 813 F.2d at 74.

227. *Id.*

228. *Id.* at 70.

229. ILL. ANN. STAT. ch. 26, § 3-118(d) (Smith-Hurd 1963).

230. 813 F.2d at 70, *comparing* ILL. STAT. ANN. ch. 26, § 3-118 (Smith-Hurd 1963) *with* TEX. BUS. & COMM. CODE ANN. § 3.118(4) (Tex. UCC) (Vernon 1968).

231. 813 F.2d at 70-71.

232. *Id.*

233. 658 F. Supp. 341 (N.D. Tex. 1986).

234. After *Singer*'s holding in late 1986, the Texas Supreme Court recognized the common law action for an insurer's breach of the duty of good faith and fair dealing. *See* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987). Had the *Singer* decision been a few months later, it would have been a false conflict.

rules for determining where the contract was made for choice of law purposes.[235] The *Singer* court also considered the Texas Insurance Code,[236] which imposes a choice of Texas law on certain insurance contracts made with Texas residents, but held that it was inapplicable in the case at hand because the policy was not issued in the course of Lexington's Texas business, even though Lexington did Texas business.[237] The court then held that the difference between Texas and Massachusetts laws did not, in this case, make the enforcement of the Massachusetts law contrary to Texas public policy.[238] Finally, the court considered a paragraph in the insurance policy stating that in the event of an unpaid claim, Lexington would submit to "the jurisdiction of any Court of competent jurisdiction within the United States" for an adjudication under the law of that forum.[239] The court disagreed with Lexington that this represented a contractual choice of forum agreement.[240] The court pointed out that forum law included the forum's choice of law rules, and the paragraph thus did not point to the forum's substantive law alone.[241] The court added that if the parties intended the clause as a choice of law, they should have been more explicit than simply indicating a willingness to submit to forum law.[242]

DeSantis v. Wackenhut Corp.[243] dealt with the enforcement of a noncompetition clause under Florida law in Texas. Wackenhut Corporation had hired DeSantis to manage its Houston area office that provided private security services to a forty-county area. As a condition of employment DeSantis signed a noncompetition contract in which he agreed to refrain from participating in any business or other endeavor in competition with Wackenhut within a prescribed geographical area for two years after termination of his employment with Wackenhut. Additionally, DeSantis agreed not to disclose the company's client list or any other confidential or proprietary information. The agreement specifically called for Florida law to govern questions of interpretation and enforcement.

DeSantis resigned on March 15, 1984, in a disagreement with Wackenhut.[244] In April 1984, one month after leaving Wackenhut, DeSantis mailed announcements of his new business ventures, which included marketing security devices and providing guard services. Wackenhut sued to enforce the noncompetition agreement, and DeSantis counterclaimed for interference with his business. Applying Florida law, the Texas jury found various issues

235. 658 F. Supp. at 342-43.

236. TEX. REV. CIV. STAT. ANN. art. 21.42 (Vernon 1981).

237. 658 F. Supp. at 343-44, (citing Howell v. American Livestock Ins. Co., 483 F.2d 1354, 1361 (5th Cir. 1973); Austin Bldg. v. National Union Fire Ins. Co., 432 S.W.2d 697, 701 (Tex. 1968)).

238. *Id.* at 344.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. 732 S.W.2d 29 (Tex. App.—Houston [14th Dist.] 1987, writ granted).

244. DeSantis claimed he was forced out in a disagreement about the Houston office's profitability. Wackenhut claimed that DeSantis made an unethical business solicitation.

for each party.[245] Pertinent to this discussion, the jury found that DeSantis had not caused Wackenhut irreparable harm, an element necessary for recovery under Florida law.[246] The trial court disregarded this jury finding and entered judgment for Wackenhut on the grounds that Florida law presumed irreparable harm for the mere breach of a noncompetition agreement.[247]

The appellate court addressed two choice of law questions. One was routine, while one was unusual. The routine question addressed whether the contract's choice of Florida law would control. The court of appeals held did, citing Texas case law that contractual choice of law agreements controlled as long as the agreement was reasonably related to the chosen state and did not contravene the public policy of the forum state.[248] The court held that Florida had a reasonable relation[249] to the noncompetition agreement because Wackenhut's headquarters were in Florida, Wackenhut interviewed and hired DeSantis in Florida, and the Florida headquarters closely supervised the Houston office.[250] The court also found, in a questionable analysis, that Texas had no strong public policy against the application Florida law.[251]

Having decided that Florida law controlled, the court turned to the second question of the extent of its control. DeSantis argued that the Florida presumption of irreparable harm from any violation of a noncompetition clause was a procedural norm and thus inapplicable anywhere but in Florida courts. The appellate court agreed not to use the Florida procedure in the Texas case, but added that it was often difficult to characterize a law as procedural or substantive.[252] According to the court, procedural rules regu-

245. 732 S.W.2d at 31.

246. *Id.*

247. *Id.* at 35 (citing Capraro v. Lanier Bus. Prod., Inc., 466 So. 2d 212, 213 (Fla. 1985)).

248. 732 S.W.2d at 32 (citing Woods Tucker Leasing Corp. v. Hutcheson Ingram Dev. Co., 642 F.2d 744, 746, 750 (5th Cir. 1981); First Commerce Realty Investors v. K-F Land Co., 617 S.W.2d 806, 808-09 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); TEX. BUS. & COM. CODE ANN. § 1.105 (Vernon Supp. 1987)).

249. The requirement of a reasonable relation between the contract and the chosen state is an aspect of legislative jurisdiction. *See* George, *Choice of Law Outline for Texas Courts*, 18 TEX. TECH L. REV. 785 (1987).

250. 732 S.W.2d at 32.

251. *Id.* The court of appeals noted that Florida law was permitted both by Texas case law and the Texas Free Enterprise and Antitrust Act of 1983, TEX. BUS. & COM. CODE ANN. §§ 15.01-.40 (Vernon Supp. 1988). The court noted in particular the 1987 Texas Supreme Court case of Hill v. Mobil Auto Trim, Inc., 725 S.W.2d 168, 171 (Tex. 1987), which adopted a stricter standard for recognition of noncompetition clauses. 732 S.W.2d at 33. The *DeSantis* court held that *Hill* "does not vitiate such reasonable agreements. In that case the supreme court specified four criteria that a covenant not to compete must meet in order to be deemed reasonable and then found that the particular covenant at issue . . . did not meet several of those criteria." *Id.* (citations omitted). In dismissing *Hill*, the *DeSantis* court failed to apply *Hill*'s criteria to the *DeSantis* facts and ignored *Hill*'s seminal language adopting a new standard for noncompetition clauses in Texas. In particular, *Hill* quoted a Connecticut case stating "[t]he changing conditions of life modify from time to time the reasons for determining whether the public interest requires that a restrictive stipulation should be deemed void as against public policy." 725 S.W.2d at 172 (quoting Samuel Stores, Inc. v. Abrams, 94 Conn. 248, 252, 108 A.2d 541, 543 (1919)).

252. 732 S.W.2d at 35.

late the conduct of a trial and substantive rules affect the outcome of the issue.[253] The court explained that a departure from the general rule occurs when a foreign state's rule concerning a presumption or a burden of proof actually affects the parties' substantive rights rather than merely regulates procedure.[254] When the enforcement of such a rule will not violate the public policy of the forum state, that rule, rather than the law of the forum, will control.[255] The Texas appellate court examined the Florida noncompetition statute and concluded that the presumption of irreparable harm was a substantive rule, and thus controlled.[256] This conclusion entitled Wackenhut to the trial court's award of damages.

Readers should note that the court of appeals did not use the Restatement (Second) in the initial choice of law analysis; it was unnecessary since a valid choice of law agreement existed. Texas law calls for the Restatement (Second)'s most significant relationship test only when no valid contractual choice of law exists.[257] Readers should further note the court's reliance on the Restatement (Second) in the more difficult problem of characterizing the Florida presumption as substantive or procedural. This represents yet another extension of the Restatement (Second)'s application in Texas courts, although the entire Restatement (Second) has yet to be endorsed by the Texas Supreme Court.[258]

Davidson v. Great National Life Insurance Co.[259] involved an action to recover on the life insurance coverage on the plaintiff's ex-husband Dauod Alquassab. Alquassab applied for the insurance in May 1980. Alquassab first named his business partner as beneficiary, but he later changed the beneficiary to his ex-wife, Phyllis Davidson. In February 1981, six months after designating Phyllis as beneficiary, Alquassab went to Tel Aviv. Before leaving, Alquassab allegedly defrauded First City Bank in Houston of $1.5 million and committed other fraudulent acts on other banks. On February 11, 1981, a body was discovered about one hundred yards from the hotel where Alquassab was registered. The body had been struck by a car and dragged faced down. Ms. Davidson notified Great National on February 12, 1981, and the body was buried in Israel on February 13, 1981.

Phyllis Davidson made a formal claim to Great National on June 1, 1981. Great National rescinded the policy and refused to pay the claim. Davidson sued, and Great National defended with allegations of fraud insofar as Alquassab faked his own death. Davidson won at trial, with the jury finding that Alquassab was dead, that Alquassab did not misrepresent anything material to the insurance policy, and that while some of Alquassab's representa-

253. *Id.*
254. *Id.*
255. *Id.* (citing RESTATEMENT (SECOND), *supra* note 2, §§ 133, 134, comments).
256. 732 S.W.2d at 35-36.
257. *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984).
258. In Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984), the Texas Supreme Court adopted only the "most significant relationship test" of the Restatement (Second), which is delineated at RESTATEMENT (SECOND), *supra* note 2, § 6 and qualified by numerous other sections in the Restatement.
259. 737 S.W.2d 312 (Tex. 1987).

tions to Great National were false, they were not made with the intent to deceive.[260]

A major point in Great National's appeal focused on the choice of law controversy surrounding the testimony of Schmuel Carmelli, a high ranking Tel Aviv police officer, who testified about Alquassab's death. Great National attempted to discredit Carmelli by asking about discrepancies in the investigation and Carmelli's knowledge of Alquassab's background. Carmelli refused to answer these questions at trial and claimed police privilege under Israeli law. Under the basic choice of law rule, the forum law controls most evidentiary matters, but privilege is controlled by the law where the privileged conduct occurred.[261] Carmelli's claimed privilege, thus, should be honored if recognized under Israeli law.

Great National objected to Carmelli's use of the privilege and moved to strike his testimony, as well as, for a mistrial, but the trial court refused.[262] The court of appeals reversed and remanded, holding that the privilege denied Great National an opportunity to cross-examine Carmelli.[263] As reported in last year's Survey,[264] the court of appeals recognized that Israeli law governed the claimed privilege, but held that the plaintiff did not prove the privilege's existence under Israeli law.[265] The court of appeals denied the privilege and remanded to the trial court so that Great National could cross-examine Carmelli on these issues. Prior to remand, plaintiff appealed to the Texas Supreme Court.

The Texas Supreme Court affirmed the court of appeal's holding that the plaintiff failed to prove the privilege under Israeli law, and it was thus waived.[266] The supreme court reversed the court of appeals on the remand for a new cross-examination of Carmelli, however, reasoning that Carmelli's testimony was harmless error because of other substantial testimony proving Alquassab's death.[267] The supreme court noted that Great National had several other trial objections on appeal and remanded the case to the court of appeals to consider Great National's other objections.[268]

B. Torts

Tennimon v. Bell Helicopter Textron, Inc.[269] involved a wrongful death claim brought eleven years after the helicopter crash at Fort Campbell, Kentucky, which killed Thomas Tennimon. Tennimon's widow learned immediately of the crash and four days later asked her husband's commanding

260. *Id.* at 313.
261. *Id.* at 314.
262. *Id.*
263. *Id.*
264. *See* George & Pederson, *Conflict of Laws, Annual Survey of Texas Law*, 41 Sw. L.J. 383, 421 (1987).
265. Great Nat'l Life Ins. Co. v. Davidson, 708 S.W.2d 476, 478 (Tex. App.—Dallas 1986, *aff'd in part, rev'd in part*, 737 S.W.2d 312 (Tex. 1987).
266. 737 S.W.2d at 315.
267. *Id.*
268. *Id.*
269. 823 F.2d 68 (5th Cir. 1987).

officer what had happened. He told her that pilot error caused the crash. Mrs. Tennimon did not inquire further until her mother referred her to a 1984 newspaper article regarding problems with Bell's mechanical rotors. Mrs. Tennimon and her sons sued Texas-based Bell in a Texas federal court in 1984 for Thomas's death.

Bell argued that the statutes of limitations of Texas, Kentucky, and Florida barred the claim. Plaintiffs responded that the sons' minority and the defect discovery rule tolled some or all of the three states' limitations periods. The district court agreed with Bell and dismissed.[270] Plaintiffs appealed.

The Fifth Circuit first inquired as to the governing substantive law. The court noted that because the death occurred in 1973, plaintiffs had no claim under Texas law because the 1973 Texas wrongful death statute[271] did not apply to deaths outside of Texas.[272] For deaths outside of the state, Texas law called for the application of the substantive law of the place where the harm occurred: the lex locus delicti.[273] The court, thus, held that Texas law directed the application of Kentucky's substantive law.[274] In so holding, the court applied a choice of law rule repealed in 1975.[275] This may seem unwarranted because of the general perception that choice of law rules are procedural and not subject to retroactive application. The court was, nonetheless, correct, at least according to precedent. Prior to 1975, article 4678[276] was a statutory choice of law rule; it was part of the Texas Wrongful Death Act and thereby deemed substantive law. The court might have ruled that choice of law rules, even statutory ones, constitute procedural rules that remain viable only until repealed.[277]

The court did not use current choice of law rules because of its reliance on a *Gutierrez v. Collins*[278] footnote stating that the 1975 amendment to article 4678 was not retroactive.[279] The *Gutierrez* footnote, and the *Tennimon* court's use of it to apply a lex locus delicti rule repealed in 1975, are arguably correct. The justification is that article 4678 was an integral part of the substantive wrongful death act in 1973, and that if the court applies any part of the 1973 law, the court must apply all of the law.[280]

Having chosen Kentucky law, the court turned to the statute of limita-

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270. *Id.* at 69-70.

271. TEX. REV. CIV. STAT. ANN. arts. 4671-4678 (Vernon 1952), *repealed by* Act of June 19, 1975, ch. 530, § 3 1975 Tex. Gen. & Spec. Laws, 1382, (now codified at TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986)).

272. 823 F.2d at 69.

273. TEX. REV. CIV. STAT. ANN. art. 4678 (repealed 1975).

274. 823 F.2d at 70-71.

275. *Id.* at 70-71 n.1.

276. TEX. REV. CIV. STAT. ANN. art. 4678 (repealed 1975).

277. Under this view, the court still would have decided that the 1973 Texas wrongful death law applied only to deaths in Texas and that plaintiffs' claim would be governed by some other law. Instead of using the repealed article 4678 that invoked lex locus delicti, the court could have applied current choice of law rules. If it had, the result would have been the same.

278. 583 S.W.2d 312, 317-18 n.3 (Tex. 1979).

279. 823 F.2d at 70-71 n.1.

280. *Id.* at 71 n.2.

tions arguments. The trial court applied only the Texas statute of limitations to all limitations issues, reasoning that the Kentucky statute of limitations was procedural rather than substantive and, thus, not applicable in Texas courts. Plaintiffs did not dispute the application of the Texas limitations periods, but argued that Kentucky law additionally favored tolling the limitations period on the issue of the sons' minority. The Fifth Circuit upheld the trial court, finding first that the Texas law on the defect discovery rule was, by legislative mandate, not available to toll the limitations period for wrongful death cases.[281] As to minority tolling, the court found that, although Texas does toll for minors, the Texas rule did not apply because the controlling Kentucky wrongful death law did not allow minors to bring actions if a personal representative such as Mrs. Tennimon existed.[282]

Some may see the court's reasoning as vacillating here, by applying the Texas limitations rules when it hurts the plaintiffs and then switching to the Kentucky law on the minority tolling issue to further undercut the plaintiffs' claims. Nonetheless, the court's analysis appears proper. The court properly applied the Kentucky wrongful death statute to all appropriate issues: the Kentucky statute has no built-in limitations period, so the court used the forum's limitation period; the Kentucky statute did not recognize actions for minors, thus, rendering the minority tolling issue irrelevant. This represents a proper analysis of the application of another state's substantive law.

On the other hand, it is not the only analysis. The Restatement (Second) recommends ignoring the substantive and procedural labels for limitations issues and the application of the statute of limitation of the state having the most significant relationship to the issue in question.[283] Under this analysis, the proper statute of limitation might be Kentucky's as the site of the crash and the state whose wrongful death law controlled. Similarly, Florida's limitation might be appropriate, especially on minority tolling, as the plaintiffs' domicile. Finally, the Texas limitation period might apply as furthering the forum's interest and in meeting the Texas defendant's expectations of how long it might be subject to suit in Texas courts.

Johansen v. E.I. Du Pont De Nemours & Co.[284] arose from the plaintiff's personal injury in Libya in 1980 due to an oil well casing gun explosion. Three years later Johansen sued Du Pont and eight other defendants; the court dismissed all but Du Pont for forum non conveniens. Johansen asserted claims for negligence and strict liability in his original complaint, then two years later and almost five years after the accident he amended his original complaint to add a breach of implied warranty of merchantability and fitness claim. Du Pont argued that the two-year statute of limitations for personal injury should disallow all claims.[285]

The federal district court held for Du Pont on all points. The court ruled

281. *Id.* at 72 (interpreting TEX. REV. CIV. STAT. ANN. art. 5526(5) (Vernon Supp. 1980-81)).
282. *Id.* at 73-74.
283. *See* RESTATEMENT (SECOND), *supra* note 2, § 142 comment e (1986 Revision).
284. 810 F.2d 1377 (5th Cir.), *cert. denied*, 108 S. Ct. 148, 98 L. Ed. 2d 104 (1987).
285. Now codified as TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 1986).

that Johansen's original claims for negligence and strict liability were time barred under the Texas two-year limitation period, and that the original complaint did not sufficiently state a claim for implied warranty.[286] The court further held that the Texas relation back statute[287] did not save the implied warranty claim because the original claim was time barred.[288] The court held that if the federal relation back rule[289] applied, instead of the Texas rule, the plaintiff's claims were still proscribed.[290] Finally, the court denied Johansen's late move to amend to add express warranty claims, ruling that such claims would also be barred by the statute of limitations.[291]

Johansen appealed. He did not dispute the dismissal of negligence and strict liability claims, but argued that his original complaint had stated a claim for implied warranty and that the claim fell within the four-year UCC limitation period[292] instead of the two-year tort period applied by the trial court. Alternatively, Johansen argued that even if the original complaint did not state an implied warranty claim, the federal relation back rule[293] brought the warranty claim within the original filing, placing it within the UCC's four-year limitation period. Johansen also argued that his amended express warranty claim related back to the original filing and therefore should be allowed.

The Fifth Circuit agreed that Johansen should have another chance, at least on the implied and express warranty claims.[294] The Fifth Circuit first held that the federal relation back rule applied and that it allowed filing of the express and implied warranty claims.[295] Nonetheless, those claims would still have to fall within the appropriate statute of limitation.[296] If the two-year personal injury limitation applied, Johansen had no claim; on the other hand, if the four-year UCC period applied, he did.[297]

The district court applied the two-year period because it believed the Texas UCC's four-year period was substantive and therefore inapplicable under article 4678,[298] calling for the application of Texas procedure to foreign personal injury claims. The Fifth Circuit disagreed, holding that section 2.275 was procedural in spite of its attachment to the substantive UCC law.[299] The Fifth Circuit analyzed the distinction between the procedural and substantive status of the limitation, noting that limitations are presumed

286. 810 F.2d at 1379.
287. TEX. REV. CIV. STAT. ANN. art. 5539B (now codified as TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (Vernon 1986)).
288. 810 F.2d at 1379.
289. FED. R. CIV. P. 15(c).
290. 810 F.2d at 1379.
291. *Id.*
292. TEX. BUS. & COM. CODE ANN. § 2.725 (Tex. UCC) (Vernon 1968).
293. FED. R. CIV. PROC. 15(c).
294. 810 F.2d at 1380.
295. *Id.* at 1379.
296. *Id.* at 1381.
297. *Id.* at 1380.
298. TEX. REV. CIV. STAT. ANN. art. 4678 (repealed 1975) (now codified as TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986)).
299. 810 F.2d at 1381.

procedural: when attached to substantive law, they do not lose their procedural characterization unless the substantive law modifies the common law.[300] Because the UCC's actions for breach of warranty merely restate a common law action, section 2.275 remained procedural.[301] Section 2.275 of the UCC, thus, qualified for application under article 4678, supplementing the personal injury period of two years. Johansen's warranty claims, deemed to relate back to the filing three years after the accident, were timely.[302]

The court then charted the course for the district court on remand. The district court would have to decide which substantive law governed this claim and whether that law had causes of action for breach of express and implied warranty.[303] If the state's substantive law did, the court would next have to determine whether the governing law had a substantive statute of limitation that displaced Texas's procedural limitation period, and if so, whether the other state's law barred Johansen's warranty claims.[304] If Johansen could clear all these hurdles, then his claim would be heard on the merits. The Fifth Circuit also affirmed the trial court's dismissal of the negligence and strict liability claims as time barred.[305]

This year's most interesting application of foreign law, *Texaco, Inc. v. Pennzoil Co.*,[306] contains no choice of law analysis. The parties agreed in the trial court that New York law applied to the major issue, tortious interference with a contract, under Texas's most significant relationship test.[307] Consequently, the court of appeals opinion merely notes the parties' stipulation to New York law.[308] While some have criticized the Texas trial court's accuracy in applying New York law,[309] at least one source has criticized the parties' failure to argue choice of law.[310] Of course, Texaco might want only New York law applied to preserve its argument that New York law required a written contract as a predicate for tortious interference.[311] Nevertheless, Pennzoil arguably should have pleaded alternatively for application of Texas

300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). Most readers are familiar with the *Texaco Inc. v. Pennzoil Co.* background. For those who are not, Pennzoil sued Texaco in a Texas district court for allegedly interfering with Pennzoil's offer to buy Getty Oil. For additional details, *see* Baron & Baron, *The Pennzoil-Texaco Dispute: An Independent Analysis*, 38 BAYLOR L. REV. 253 (1986).
307. *See* Baron & Baron, *supra* note 306, at 260-61. Delaware law and federal law also applied to certain issues in the case.
308. 729 S.W.2d at 787.
309. *See* Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250, 254 (S.D.N.Y. 1986), *injunction aff'd on appeal*, 784 F.2d 1133 (2d Cir. 1986). *See also* Baron & Baron, *supra* note 306, at 260-61.
310. *See* Baron & Baron, *supra* note 306, *passim*.
311. The Texas trial court and court of appeals did not interpret New York law as requiring a written contract, but critics believe New York law does require a writing in this instance. *See* Texaco, Inc. v. Pennzoil Co., 626 F. Supp. at 254; Baron & Baron, *supra* note 306, at 260-61.

law, under which Pennzoil may have had a stronger claim.[312]

According to one commentary, Texas law arguably applied under three factors of the most significant relationship test: the relevant policies of the forum, the protection of justified expectations, and the basic policies underlying the particular field of law.[313] The authors chose not to analyze these factors, but they are correct in stating that the adversary system did not function to expose fully the policy arguments deemed so crucial by recent Texas case law and by Restatement (Second) section 6.[314] On the other hand, the authors also correctly state that even if the court had conducted a full choice of law analysis, nothing indicated that the outcome would have been different.[315]

The United States Supreme Court issued a ruling corollary to the Texas dispute, concerning Texaco's New York federal court challenge to Pennzoil's enforcement of the judgment pending the Texas appeal. After the Houston trial court awarded Pennzoil an $11 billion verdict, Texaco claimed it could not post the supersedeas bond for the judgment, which exposed Texaco to immediate collection. To prevent this, Texas sought injunctive relief from a New York federal district court, alleging that the Texas supersedeas law violated its civil rights.[316] Texaco won injunctive relief in the federal district court and from the Second Circuit.[317] During this Survey period, however, the United States Supreme Court reversed, ruling 8-1 that the Texas supersedeas law did not violate Texaco's civil rights merely because judgment enforcement would arguably bankrupt Texaco.[318]

C. *Other Cases*

Kneeland v. NCAA[319] involved an action by journalists to force the defendants, the NCAA and the Southwest Conference, to allow the journalists to inspect information the NCAA gathered in its investigation of certain universities in the Southwest Conference. The plaintiffs sought the information under the Texas Open Records Act.[320] The NCAA argued that the Act

312. Texas law allows for the enforcement of an oral agreement if the parties intend to be bound. *See* Vick v. McPherson, 360 S.W.2d 866, 868 (Tex. Civ. App.—Amarillo 1962, writ ref'd n.r.e.); Baron & Baron, *supra* note 306, at 262.

313. *See* Baron & Baron, *supra* note 306, at 265-68.

314. *Id.* at 261.

315. *Id.*

316. Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250, 251-52 (S.D.N.Y. 1986), *injunction affirmed on appeal*, 784 F.2d 1133 (2d Cir. 1986).

317. Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1157 (2d Cir. 1986).

318. Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519, 1529, 95 L. Ed. 2d 1, 20 (1987). Justice Powell wrote the majority opinion, holding that the federal courts should have abstained and that the federal district court should not have addressed the constitutional grounds of the Texas supersedeas law because the Texas courts had not reviewed that question. 107 S. Ct. at 1529, 95 L. Ed. 2d at 20. Justices Rehnquist, White, O'Connor, and Scalia joined Justice Powell. In separate concurring opinions, Justices Brennan, Marshall, and Stevens all agreed that the Texas supersedeas law did not violate due process. *Id.* Justice Blackmun concurred in the result, but argued that Texaco's due process claim was litigable in federal court, except that a *Pullman* abstention was required. *See* 107 S. Ct. at 1535, 95 L. Ed. 2d at 27.

319. 650 F. Supp. 1047 (W.D. Tex. 1988).

320. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1988).

had no extra-territorial application, and that even if it did, Texas law did not control the case. The district court disagreed on both points, holding that the Act's purpose, ensuring public access to information, could not be realized unless the Act applied to foreign entities meeting the Act's definition of governmental bodies.[321] As to choice of law, the court held that Texas had the most significant relationship to the case because the journalists resided in Texas, eight of the nine members of the defendant Southwest Conference were in Texas, and the NCAA conducted a number of investigations in Texas.[322] The court resolved several other challenges to the Act's application, not relevant to this discussion, and ordered the defendants to produce the information for in camera inspection.[323]

Hilsher v. Merrill Lynch Pierce Fenner & Smith, Inc.[324] considered the question of an expert witness's disqualification based on his alleged ignorance of the New York law underpinning his testimony. The lawsuit concerned a commodity broker's action to recover deficits on commodities accounts Hilsher had allegedly mismanaged. Merrill Lynch won at trial, and Hilsher appealed.[325] One point of alleged appellate error concerned the testimony of Paul Goree, an operating manager for Merrill Lynch in New York. Goree testified on the computation of interest charged on the investors' accounts with Merrill Lynch. Hilsher argued that Goree was not qualified as an expert and, further, that Goree lacked knowledge of New York law, the basis of his testimony on interest rates. The court of appeals denied Hilsher's challenge, holding that Goree's knowledge or lack of knowledge of New York law did not affect admissibility, but only affected the weight and sufficiency of his testimony.[326]

Williams v. Home Indemnity Co.[327] represented an attempt to establish a common law marriage so that the plaintiff could collect widow's workers' compensation benefits. The plaintiff, Robin Williams, began living with her purported husband while the two attended college in Virginia in 1980. The two conducted a private ceremony that consisted of placing their hands on a Bible and vowing that they were married. They lived together from that point on. They moved to New York where they continued to cohabit and had a child. They decided to move the Texas, but prior to moving the family, the putative husband (unnamed throughout the opinion) came to Texas to find a job and rent an apartment. Before Robin and the child could join him, the man was murdered during a convenience store robbery.

The trial court applied the older Texas choice of law rule, which directed that the law of the site of the marriage determined the validity of a marriage.[328] The trial court took judicial notice of the laws of Virginia and New

321. 650 F. Supp. at 1058.
322. *Id.* at 1059.
323. *Id.* at 1063.
324. 717 S.W.2d 435 (Tex. App.—Houston [14th Dist.] 1986, no writ).
325. *Id.* at 437.
326. *Id.* at 442.
327. 722 S.W.2d 786 (Tex. App.—Houston [14th Dist.] 1987, no writ).
328. *Id.* at 787.

York, found them both to deny common law marriages, and held against Robin.[329] Robin appealed, arguing that the court should apply the newer Texas choice of law rule, the most significant relationship test,[330] and under that test choose Texas substantive law, which recognizes common law marriages.[331]

The court of appeals observed that the most significant relationship test might control, but found no need to proceed since there was no conflict in the results.[332] The court noted that Texas recognized only those common law marriages in which the parties openly cohabitated in Texas as husband and wife and represented to others that they were married.[333] Because Robin had not lived in Texas prior to the murder, Texas law did not apply to her marriage.[334] Either Virginia or New York law, both of which denied her claim, governed the validity of the marriage.[335] Readers should note that *Williams* represents a false conflict in that even though Texas law differed from New York's and Virginia's, the outcome was the same.

III. FOREIGN JUDGMENTS

Foreign judgments create Texas conflicts of laws in two ways: the local enforcement of non-Texas judgments, both of sister states and foreign countries, and the preclusion effect of foreign lawsuits on local lawsuits. Foreign judgments include sister state and foreign country judgments, but not federal court judgments from other states, because courts summarily enforce those judgments as local federal court judgments.[336] Texas recognizes two methods of enforcing foreign judgments: the common law method of using the foreign judgment as the basis of a local lawsuit, and the more direct procedure under the Uniform Foreign Judgments Acts.[337]

A. Enforcement

1. The Foreign Judgments Acts

Since 1981, Texas has used two uniform acts to recognize and enforce foreign judgments, although their adoption did not displace the common law enforcement method.[338] The Uniform Enforcement of Foreign Judgments Act (UEFJA)[339] provides for Texas enforcement of non-Texas judgments

329. *Id.*
330. *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984).
331. 722 S.W.2d at 787-88; *see* Seth v. Seth, 694 S.W.2d 459, 462-63 (Tex. App.—Fort Worth 1985, no writ); TEX. FAM. CODE ANN. § 1.91(a)(2) (Vernon 1975).
332. 722 S.W.2d at 788; *see* Seth v. Seth, 694 S.W.2d at 462-63.
333. 722 S.W.2d 788 (citing TEX. FAM. CODE ANN. § 1.91(a)(2) (Vernon 1975)).
334. *Id.*
335. *Id.*
336. *See* 28 U.S.C. § 1963 (1982).
337. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-.008 (Vernon 1986).
338. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon 1986) (formerly TEX. REV. CIV. STAT. ANN. art. 2328b-5).
339. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-.008 (Vernon 1986) (formerly TEX. REV. CIV. STAT. ANN. art. 2328b-5).

entitled to full faith and credit. This includes sister state judgments[340] as well as foreign country judgments that Texas recognizes under the second uniform act, the Uniform Foreign Country Money Judgment Recognition Act (UFCMJRA).[341] The legislature recodified both acts in 1985 and incorporated them into the new Civil Practice and Remedies Code[342] with no significant changes.[343]

The most significant case for the Survey period is *Detamore v. Sullivan*.[344] *Detamore* involved a mandamus action brought by the relator-debtor Detamore to require the trial court to vacate an order for the turnover of stock and to nullify the recognition of a foreign country money judgment. The creditor, Continental Bank of Canada, obtained a default judgment in Canada against Detamore. Continental filed the default judgment in Harris County and sought a writ of execution after abstracting the judgment. Thereafter, Continental applied for a turnover order and the trial judge signed an order for the turnover of Detamore's stock to the constable for sale under the writ of execution.

Detamore sought the mandamus on two grounds. First, he contended that the UFCMJRA required a plenary suit and a plenary hearing. Second, Detamore contended that the UFCMJRA was unconstitutional. The court held that the Act did not require a suit or hearing as a condition precedent to the recognition of a foreign country money judgment.[345] This court based its reasoning on the plain import of the statute, which requires no hearing or suit.[346] The court did, however, hold that the Act was unconstitutional.[347] In so holding, the court stated that the Act, by its own measure, recognizes that there are grounds for determining that a foreign country money judgment is not entitled to recognition; the court noted, however, that the Act does not create a procedure whereby a judgment debtor can assert grounds for nonrecognition.[348]

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

341. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-.008 (Vernon 1986) (formerly TEX. REV. CIV. STAT. ANN. art. 2328b-6).

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

343. The only substantive change in the text of the UEFJA 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.

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).

344. 731 S.W.2d 122 (Tex. App.—Houston [14th Dist.] 1987, no writ).

345. *Id.* at 123.

346. *Id.*

347. *Id.* at 124.

348. *Id.*

As reported in the 1985 Survey, the court in *Hennessy v. Marshall*[349] held that a plenary hearing was necessary for the enforcement of foreign country judgments. *Detamore* goes one step further in stating that the absence of a procedure for hearing is per se unconstitutional.[350] The 1985 Survey's question on *Hennessey* also applies to *Detamore*: Does the absence of a plenary hearing for enforcement of a sister state judgment render the UEFJA unconstitutional? One might respond that the full faith and credit requirement outweighs the hearing requirement since to mandate a hearing undermines the concept of full faith and credit. The full faith and credit doctrine does not, however, override due process.[351] The literal language of the Act does not mandate a hearing, but merely authorizes a hearing if the judgment debtor requests a stay.[352]

In *Grynberg v. Christiansen*[353] Grynberg obtained a Colorado default judgment against Eric Christiansen, a resident of Belgium. Grynberg then sought to enforce the judgment by filing a notice to take the deposition of a nonparty witness, Jorgen Christiansen, the son of the defendant. Jorgen filed a motion to modify the subpoena duces tecum, alleging that Grynberg had never served Eric Christiansen with a summons in the Colorado action. The trial court agreed and held the Colorado judgment void.[354] The court of appeals reversed, holding that Jorgen did not qualify as a party in interest who could collaterally attack the judgment.[355] The court found that Jorgen's only asserted interest was to avoid the inconvenience of attending an oral deposition and producing documents.[356]

Farley v. Farley[357] is instructive on the requirements for the admissibility of a foreign judgment. Constance Farley brought suit in Texas seeking to modify a California judgment which ordered James Farley to pay $175.00 per month in child support. The trial court rendered a default judgment ordering James Farley to pay $1,150.00 per month.[358] James Farley appealed by writ of error contending, in part, that the copy of the California judgment introduced at the trial was hearsay and did not conform to the requirements of either federal law[359] or the Texas UEFJA.[360] The court of appeals held that the California judgment failed to satisfy the requirements of the federal statute in that it did not contain a certificate from the judge that the attestation of the court clerk was in proper form.[361] The court,

349. 682 S.W.2d 340, 345 (Tex. App.—Dallas 1984, no writ).
350. 731 S.W.2d at 124.
351. *See* RESTATEMENT (SECOND), *supra* note 2, § 104.
352. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 35.003 (Vernon 1986) (section (c) indicates a foreign judgment, when filed, is subject to the same procedures, etc. as a judgment of the court in which it is filed).
353. 727 S.W.2d 665 (Tex. App.—Dallas 1987, no writ).
354. *Id.* at 666.
355. *Id.* at 667.
356. *Id.*
357. 731 S.W.2d 733 (Tex. App.—Dallas 1987, no writ).
358. *Id.* at 734.
359. *See* 28 U.S.C. § 1738 (1982).
360. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-.008 (Vernon 1986).
361. 731 S.W.2d at 735.

however, went on to hold that failure to satisfy the requirements of the federal law does not automatically render the judgment inadmissible.[362] Conformity with the Texas Rules of Evidence suffices.[363] In the instant case, the court noted that the California judgment was properly authenticated.[364] The court noted that once properly authenticated, it was properly admitted as some evidence and sufficient evidence that a valid subsisting final judgment existed.[365] Even though the underlying obligation might violate the public policy of the state, Texas must still give full faith and credit to a valid foreign state judgment.[366]

In *GNLV Corporation v. Jackson*[367] GNLV filed an authenticated judgment with the Johnson County clerk. The judgment covered a Nevada gambling debt. The trial court enjoined enforcement of the judgment on grounds that it violated Texas public policy. The court of appeals held that Texas could not deny full faith and credit to the Nevada judgment merely because it offended Texas public policy.[368]

2. *Common Law Enforcement*

In *Reeves v. F.S.L.I.C.*[369] the court of appeals affirmed the trial court's order directing Reeves to turn over any evidence of ownership of property he held in Portugal to a court appointed receiver. The Federal Savings and Loan Insurance Corporation sued Reeves in Texas to enforce a Maryland judgment against Reeves. Reeves contended that the court's order constituted an in rem action and that the court had no jurisdiction to adjudicate title to the Portuguese property. The court determined that the trial court's order did not adjudicate title.[370] The trial court merely directed Reeves to surrender any indicia of title he possessed rather than ordering him to make a conveyance.[371]

3. *Child Custody Enforcement*

Texas statutorily enforces sister state child custody awards under the Uniform Child Custody Jurisdiction Act (UCCJA).[372] In addition, federal law mandates full faith and credit for sister state custody orders under the Parental Kidnapping Prevention Act of 1980 (PKPA),[373] a corollary to the statutory full faith and credit imperative for general state court judgments.[374] The UCCJA and the PKPA provide both jurisdictional and en-

362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. 736 S.W.2d 892 (Tex. App.—Waco 1987, writ denied).
368. *Id.* at 894.
369. 732 S.W.2d 380, 382 (Tex. App.—Dallas 1987, no writ).
370. *Id.*
371. *Id.*
372. TEX. FAM. CODE ANN. §§ 11.63-.64(a) (Vernon 1986).
373. 28 U.S.C. § 1738A (1982); 42 U.S.C. §§ 654, 655, 663 (1982).
374. 28 U.S.C. § 1738 (1982).

forcement standards for interstate child custody disputes.

The Survey period produced one significant case in the area. In *Garza v. Harney*,[375] a mandamus action, Garza and Taylor were husband and wife residing in Mexico at the time that the divorce action was filed. The Mexican court granted the divorce and ordered the parties to abide by various mutual agreements concerning their property and their two children. Taylor received temporary custody of the children, with the stipulation that he could not remove the children from the Monterrey area. The court gave Garza liberal visitation rights. Final custodial orders would be entered after psychological testing was conducted.

In June 1985, before the Monterrey court granted final custody, Taylor removed the children to Randall County, Texas. Garza filed a petition in Randall County seeking enforcement of the Mexican court's orders and to force Taylor to return the children to Mexico. Taylor counterclaimed, seeking both a temporary injunction and a change of the Mexican orders.

Judge Harney granted the temporary injunction pending final orders, and allowed the children to remain with Taylor in the United States, limiting Garza's access to the children. Garza alleged the district court in Randall County lacked both the jurisdiction and the power to enter a temporary order or to modify the Mexican decree. Garza sought relief under the UCCJA.[376] This statute mandates that a decree of a similar court in another nation where basic due process was observed, should be recognized and enforced by Texas courts.[377]

Garza contended that the UCCJA prohibited the district court's action. The jurisdictional section of the UCCJA permits a Texas court with general jurisdiction over custody matters to make a custody determination by initial decree or modification decree if one of four possible jurisdictional bases exists.[378] Those four bases are commonly referred to as the (1) home state, (2) significant connection, (3) emergency and, (4) default bases.[379] Even if a jurisdictional base exists, however, the Texas court may not be able to determine or modify custody. For instance, the Act prohibits a Texas court from asserting jurisdiction absent specific circumstances, if a proceeding concerning the custody of the child was pending in a court of another state at the time the petition was filed.[380] Additionally, a Texas court may not modify the decree of a court of a sister state unless two criteria are met.[381]

The trial court's temporary order only mentioned the emergency jurisdic-

375. 726 S.W.2d 199 (Tex. App.—Amarillo 1987, no writ).
376. TEX. FAM. CODE ANN. §§ 11.51-.75 (Vernon 1986).
377. *Id.* § 11.73.
378. *Id.*
379. *Id.*
380. *Id.* § 1156. The Act would allow a Texas court to exercise jurisdiction if the foreign court had stayed the proceeding because Texas presented a more appropriate forum or for other (unnamed) reasons. *Id.*
381. *Id.* § 11.64(a). "(1) it appears to the court of this State that the court that rendered the decree [lacks] jurisdictional prerequisites substantially in accordance with this subchapter or has declined to assume jurisdiction to modify the decree; and (2) the court of this State has jurisdiction." *Id.*

tional ground. That ground is satisfied if the child is physically present in Texas, and has either been abandoned, or "it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment of abuse or is otherwise neglected or there is a serious and immediate question concerning the welfare of the child. . . ."[382]

The court concluded that Taylor had established both elements of the emergency base and that the evidence supported the district court's finding concerning the daughter.[383] The court, however, did not reach the same conclusion about the son. It found no evidence of any emergency concerning him and no indication or contention that he needed emergency protection.[384] The Family Code provides that a Texas court may have jurisdiction of a custody dispute and still not have the power to act if a court of a sister state or nation has jurisdiction of the matter.[385] The court of appeals concluded that the district court was empowered to act, but only on a short-term, temporary, or emergency basis.[386] The court relied upon *Hache v. Riley*,[387] in which a New Jersey court pointed out that a court could exercise emergency jurisdiction under the UCCJA whenever there was a potential for immediate harm. The court ruled that the emergency involving the daughter permitted the district court to enter a temporary order for the daughter's protection until the original forum state took proper steps to adequately protect the daughter.[388] The court of appeals concluded that the district court could not take any other action to change the orders of the Mexican court.[389]

B. Preclusion

The Survey period produced no significant preclusion cases arising from foreign judgments. Readers should note *A.L.T. Corporation v. Small Business Administration*[390] for the preclusive effect of a Texas state court judgment in Texas federal court and *Exxon Corporation v. Chick Kam Choo*[391] for the preclusive effect of a Texas federal judgment in a Texas state court.

382. Garza v. Harney, 726 S.W.2d 198, 201 (Tex. App.—Amarillo 1987, no writ) (quoting TEX. FAM. CODE ANN. § 11.53(a)(3)(B) (Vernon 1986)).
383. *Id.* at 202.
384. *Id.*
385. TEX. FAM. CODE ANN. §§ 11.56, 11.64 and 11.73 (Vernon 1986); *see* McElreath v. Stewart, 545 S.W.2d 955, 958 (Tex. 1977); Milner v. Kilgore, 718 S.W.2d 759, 762 (Tex. App.—Corpus Christi 1986, no writ).
386. 726 S.W.2d at 203.
387. 186 N.J. Super. 119, 451 A.2d 971, 975 (Super. Ct., Ch. Div. 1982).
388. 726 S.W.2d at 203.
389. *Id.*
390. 801 F.2d 1451 (5th Cir. 1986).
391. 817 F.2d 307, 324-25 (5th Cir.), *cert. granted*, 108 S. Ct. 343, 98 L.Ed. 2d 39 (1987). *See* discussion in Inconvenient Forum section, *supra* notes 174-76 and accompanying text.