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Conflict of Laws (2004)

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CONFLICT OF LAWS

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STATES' and nations' laws collide when foreign factors appear in a lawsuit. Nonresident litigants, incidents outside the forum, parallel lawsuits, and judgments from other jurisdictions can create problems with personal jurisdiction, choice of law, and the recognition of foreign judgments. This article reviews Texas conflicts cases from Texas state and federal courts during the Survey period from October 1, 2002, through November 1, 2003. The article excludes cases involving federal-state conflicts, intrastate issues such as subject matter jurisdiction and venue, and conflicts in time, such as the applicability of prior or subsequent law within a state. State and federal cases are discussed together because conflict of laws is mostly a state law topic, except for a few constitutional limits, resulting in the same rules applying to most issues in state and federal courts.[1]

The Survey period saw an expansive litigation of forum contests, including nine cases based on agency, alter ego, or corporate relationship.[2] In choice of law, the United States Supreme Court issued what may be its most important ruling in fifty years, holding that the forum state may apply its own law without balancing the competing interests of other states, diminishing the constitutional role of interest analysis in choice of law.[3] Texas state and federal courts continued their development of the most significant relationship test, including an unusual application of choice of law to fraudulent joinder in a federal diversity case.[4] Foreign judgments cases followed a similar pattern of routine application of the uniform acts, but with instructive holdings in several areas of commercial litigation, arbitration and family law.

I. FORUM CONTESTS

Asserting jurisdiction over a nonresident defendant requires amenability to Texas jurisdiction and receipt of proper notice. Amenability may be established by consent (usually based on contract's forum selection clause), waiver (failing a timely objection), or extraterritorial service of process under a Texas long arm statute. Because most aspects of notice are purely matters of forum law, this article will focus primarily on the issues relating to amenability.

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1. For a thorough discussion of the role of federal law in choice of law questions, *see* RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 649-95 (4th ed. 2001) [hereinafter WEINTRAUB].

2. *See infra* notes 28-45 & 57-58 and accompanying text.

3. Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488 (2003), discussed *infra* notes 171-174 and accompanying text.

4. Zermeno v. McDonnell Douglas Corp., 246 F. Supp. 2d 646 (S.D. Tex. 2003), discussed *infra* notes 159-161 and accompanying text.

A. Consent and Waiver

Contracting parties may agree to a forum selection clause designating either the optional or exclusive site for litigation or arbitration. When a contracting party sues in the designated forum, the clause is said to be a prorogation clause, that is, one supporting the forum's jurisdiction over the defendant. When a contracting party sues in a non-selected forum in violation of the contract, the clause is said to be a derogation clause, that is, one undermining the forum's jurisdiction. Only valid prorogation clauses establish personal jurisdiction, and they are discussed in this section. Derogation clauses are discussed below as a grounds for the forum to decline otherwise valid jurisdiction.[5]

The Survey period produced two cases using forum clauses to establish Texas jurisdiction. *Von Graffenreid v. Craig*[6] is a very good discussion of several issues regarding forum clauses, their scope, and their susceptibility to venue motions. Swiss bank Pictet & Cie loaned $10 million to Aperian, Inc., a Delaware corporation headquartered in Phoenix, Arizona. Aperian's president, Kevin Craig, persuaded von Graffenreid to guarantee the loan, with the Guaranty Agreement containing Craig's promise to indemnify von Graffenreid. When Aperian (now known as Fourthstage Technologies, Inc.) defaulted, von Graffenreid had to pay Pictet & Cie. Fourthstage then declared bankruptcy and von Graffenreid sued Craig, filing in a Dallas federal court based on the Guaranty Agreement's forum clause designating a state or federal court in Dallas at the guarantor's option.[7] Craig challenged the Dallas federal forum (seeking either dismissal or transfer to Arizona) with the argument that he was not personally bound by the forum clause. In a very instructive analysis of forum clauses, the court found that because Craig was personally obligated only to limited portions of the Guaranty Agreement, and because the forum clause was vague as to its coverage as to the entire Agreement, that the clause was ambiguous and required looking behind the contract's express language. After looking at evidence of the parties' negotiations, the court found that Craig's failure to clarify the ambiguity in drafting the agreement left him susceptible to the entire Agreement.[8] Having found the clause applicable to Craig, the court then examined whether it was effective in general. The court found that the clause's non-exclusive language created a permissive forum clause that permitted a Dallas forum but did not require it.[9] This led to consideration of Craig's venue transfer requests, and the court again distinguished the issues of improper venue (requiring deference to the forum clause) and inconvenient venue (for

5. *See* Eugene F. Scoles & Peter Hay, Conflict of Laws 360-61 (2d ed. 1992) [hereinafter Scoles & Hay]; James P. George, *Parallel Litigation*, 51 Baylor L. Rev. 769, 912-41 (1999) (hereinafter *Parallel Litigation*). For a discussion of forum derogation clauses, *see infra* notes 185-195 and accompanying text.

6. Von Graffenreid v. Craig, 246 F. Supp. 2d 553 (N.D. Tex. 2003).

7. *Id.* at 555-57.

8. *Id.* at 558-59.

9. *Id.* at 560-61.

which the forum clause is merely a non-determinative factor). That deference allowed the forum clause to withstand any improper venue challenge, but not the convenience challenge.[10] Reviewing the various factors for a federal inconvenient forum challenge, the court found that the presence of important witnesses and evidence in Arizona and the loan's strong connections there (in spite of contrary boilerplate language) compelled transfer to Arizona.[11]

Automotive Consultants v. Farls[12] illustrates the pitfalls of agency law and signing capacity. The case arose from a Dallas marketing company's breach of contract action against a Pennsylvania car dealership and its owner. In 2001, Automotive Consultants ("AC") entered a marketing agreement with Northwest Chevrolet, a dba for Northwest Auto, Inc., of Ambridge, Pennsylvania. When AC's promise of a "time proven" system of increasing sales apparently failed, Northwest cancelled the contract and AC sued Northwest's owner, John Farls, in a state court in Dallas. Farls removed the case to federal court, objected to jurisdiction and alternatively sought a venue transfer to Pennsylvania. Farls's motion was undermined by a choice of forum clause in the contract stating that "The agreement shall be governed and controlled under the laws of the State of Texas, and adjudicated in the State of Texas."[13] Farls argued that he had signed the agreement only as an agent for Northwest Auto, but in an instructive review of agency law, the court held that the handwritten subscript "Owner" beneath his signature resulted in individual responsibility and not merely that of an agent. The court thus found the forum clause to be valid and enforceable against Farls individually, and further denied his venue transfer.[14]

B. Nonresident's Forum Contacts

Texas uses "limits-of-due-process" long-arm statutes, meaning that the minimum contacts test is the only necessary foundation for personal jurisdiction in Texas.[15] The Texas long arms also apply in Texas federal courts except where Congress has enacted a federal long arm statute for a very few federal law claims.[16] In spite of due process's dominance, these personal jurisdiction cases are grouped under the long arm categories.

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10. *Id.* at 562.
11. *Id.* at 562-64.
12. Automotive Consultants Div., Progressive Mktg. Group, Inc. v. Farls, No. CIV.A.301CV-171R, 2003 WL 21318320 (N.D. Tex. Mar. 27, 2003).
13. *Id.* at *2.
14. *Id.* at *2-5.
15. *See* U-Anchor Adver., Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977). The primary Texas long arm statutes are found at Tex. Civ. Prac. & Rem. Code Ann. §§ 17.041-.045, and others are scattered throughout Texas statutes, *e.g.*, Tex. Agric. Code Ann. § 161.132 (Vernon 1982) (violation of certain agricultural statutes); Tex. Fam. Code Ann. § 6.305 (Vernon 1998) (nonresident respondents in divorce actions); Tex. Ins. Code Ann. § 823.457 (Vernon Supp. 2003) (violations of duties imposed on insurance holding companies).
16. *See* Fed. R. Civ. P. 4(k)(1)(A) (state long arms in federal court) and Fed. R. Civ. P. 4(k)(1)(D) (federal long arm statutes). Examples of federal long arm statutes include 28

1. *The Texas Long Arm in Commercial Cases*

In *Central Freight Lines, Inc. v. APA Transport Corp.*,[17] the Fifth Circuit Court of Appeals reversed a trial court dismissal and held that Texas was a constitutionally acceptable forum for a dispute over withheld freight shipments in New Jersey. Plaintiff Central Freight Lines is a Waco-based company which ships freight primarily throughout the southwestern United States. Central made an "interline agreement" with New Jersey-based APA Transport and other companies to cooperate in using each others' shipment services. In March, 2001, CFL notified other carriers in its interline agreement that it anticipated a contract to ship Dell computers throughout the United States, and asked if any other carriers would have a problem delivering Dell products under the proposed price structure. No one objected and the Dell contract got underway. APA soon began demanding higher freight charges— allegedly 194% of the agreed price—and withheld delivery until the freight charges were paid.[18] Central sued APA in federal court in the Western District of Texas, alleging breach of contract, tortious interference and other commercial claims. APA objected to Texas jurisdiction for the New Jersey-based services and filed its own action against CFL in a New Jersey federal court. On CFL's motion, the New Jersey federal court stayed its action until the Texas jurisdictional question was resolved. After limited discovery, the Texas federal court dismissed for lack of jurisdiction based on APA's lack of Texas contacts.

The Fifth Circuit reversed. Applying the two-part contacts/fairness test from *Burger King*, the court first found sufficient contacts in APA's trips to Texas to negotiate the interline agreement, coupled with APA's knowledge that it was contracting with a company based primarily in Texas.[19] The court found further contacts in APA's intentionally-tortious conduct aimed at Texas (the allegations of withholding freight were assumed true in considering jurisdiction).[20] The court then turned to the second element—the fair play and substantial justice test looking to (1) the nonresident defendant's burden, (2) the forum state's interests, (3) the plaintiff's interest in a convenient forum, (4) the interstate judicial system's interest in the most efficient resolution of controversies, and (5) the shared interests of the states in furthering fundamental social policies.[21] The court found APA's claim of burden unpersuasive, but did consider the fourth factor—efficient resolution of controversies—in light of the now-resumed New Jersey action. The court observed that New Jersey might be the more convenient forum, but concluded that the convenient forum issue was best considered on remand to the trial court, and held that "APA

U.S.C. § 2361 (2000) for statutory interpleader, and 15 U.S.C. § 78aa (2000) for claims under the Securities Exchange Act of 1934.

17. Central Freight Lines, Inc. v. APA Transp. Corp., 322 F.3d 376 (5th Cir. 2003).
18. *Id.* at 379.
19. *Id.* at 382 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)).
20. *Id.* at 381-83.
21. *Id.* at 384-85.

may not avoid the personal jurisdiction of the Western District of Texas merely because APA did not physically enter the State of Texas to deliver freight."[22]

SITQ E.U., Inc. v. Reata Restaurants, Inc.,[23] found jurisdiction over Canadian and other nonresident defendants regarding actions by tenants for fraud and negligent misrepresentation in the clean-up—or lack of one—of Fort Worth's Bank One Tower following the March, 2000 tornado. In particular, the court of appeals held that the existence of a Texas-resident landlord (Loutex Fort Worth LP) did not protect its nonresident owners from jurisdiction when they allegedly participated in the decision to walk away from the damage rather than repair it. In two similar cases, the Dallas court of appeals held that nonresident members of a Delaware limited liability company were amenable to Texas jurisdiction where they personally committed business torts in Texas, even though their actions were on behalf of their LLC,[24] and the Fourteenth District Court of Appeals in Houston held that the fiduciary shield doctrine did not protect nonresident officers for their own false statements made in Texas.[25]

In *Rynone Manufacturing Corp. v. Republic Industries, Inc.*,[26] the court found Texas jurisdiction over a Pennsylvania-based company for countertops to be shipped to New York and Connecticut. Republic Industries is based in Marshall, Texas, and had ordered the synthetic marble countertops from Rynone after Rynone had soliticited the Texas company's business. The countertops were made in Pennsylvania and destined for New York and Connecticut, with no physical connection to Texas. The court nonetheless found Texas jurisdiction based on the specifications having been drawn in Texas, the order placed from Texas, and the ongoing relationship centered partly in Texas, after Rynone's initial contact with the Texas plaintiff seeking business.[27]

Five cases regarding agency theory defeated and alternatively established jurisdiction over nonresidents. The first two involve jurisdiction based on an agent's forum activities. In *Walker Insurance Services v. Bottle Rock Power Corp.*,[28] a Houston insurance examiner sued a California power company for its commission on a bond obtained in Texas pursuant to the California company's intended acquisition of a Texas power plant. Walker, the Houston party, had dealt with another Texas resident named

22. *Id.* at 385.

23. SITQ E.U., Inc. v. Reata Rest., Inc., 111 S.W.3d 638 (Tex. App.—Fort Worth 2003, no pet.).

24. Boissiere v. Nova Capital, LLC, 106 S.W.3d 897 (Tex. App.—Dallas 2003, pet. filed).

25. D.H. Blair Inv. Banking Corp. v. Reardon, 97 S.W.3d 269 (Tex. App.—Houston [14th Dist.] 2002, pet. dism'd w.o.j.) (reversing the trial court's assertion of jurisdiction over a nonresident investment bank, finding its Texas contacts too sporadic to justify jurisdiction).

26. Rynone Mfg. Corp. v. Republic Indus., Inc., 96 S.W.3d 636 (Tex. App.—Texarkana 2002, no pet.).

27. *Id.* at 638-40.

28. Walker Ins. Servs. v. Bottle Rock Power Corp., 108 S.W.3d 538 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

Beane who purported to represent the California company Bottle Rock. The negotiations then shifted from Beane to Bottle Rock's California attorney, Hagan, who saw through the bond acquisition (with Walker's help), but later pleaded ignorance as to Walker's commission. Walker sued in Texas, basing his jurisdictional argument on his dealings with Beane. Hagan and Bottle Rock denied Beane's agency status, and the trial court dismissed the suit for lack of jurisdiction. The court of appeals reversed, finding first that Beane had apparent authority and second that Bottle Rock had ratified Beane's actions in any event.[29] The opposite holding resulted in *Wichita Falls Builders Wholesale, Inc. v. Jancor Co., Inc.*,[30] where the court rejected plaintiff's argument that Texas had personal jurisdiction over a Kentucky defendant based on the Texas activities of its subsidiary.

The third, fourth, and fifth cases involve attempts to assert jurisdiction over the agent. In *Kennedy Ship & Repair, L.P. v. Loc Tran*,[31] the court rejected a California defendant's argument that he was merely the agent for Texas residents and thus not acting in his own capacity when negotiating shipbuilding contracts in Texas. The opposite result obtained in *Lang v. Capital Resource Investments, I & II, LLC*,[32] where the Dallas court of appeals affirmed the trial court's jurisdictional dismissal of an Illinois corporate director sued by a Texas investor when the Illinois venture failed, and again in *Hone v. Hanafin*, where the court sustained a nonresident's objection to jurisdiction based on his acts as defendant corporation president who negotiated with Texas lawyers for out of state legal services.[33]

In a similar case, not based on agency theory but discussing jurisdiction based on a corporate relationship, the Dallas Court of Appeals held that foreign directors of a company partly located in Texas were not amenable to Texas jurisdiction. *Rittenmeyer v. Grauer*[34] arose from the bankruptcy of Ameriserve Food Distributors, Inc., a Delaware corporation with management offices in Wisconsin and Connecticut, and operational offices in Texas. A planned merger with Pro Source, a larger food distributor based in Miami, caused Ameriserve to file for bankruptcy. Attempting to gain funds to pay creditors, the plan administrator sued Ameriserve's parent companies and various directors, including defendants Grauer and Jamar, both of Connecticut, and Onarheim from Norway. The trial court sustained the three nonresidents' objections to Texas jurisdiction. The court of appeals affirmed, finding that Texas was not the company's headquarters at the time of the Pro Serve merger vote, and that the directors' mere act of voting (in a Florida meeting) for the merger was not the

29. *Id.* at 544-55.

30. Wichita falls Builders Wholesale, Inc. v. Jancor Co., Inc., No. CIV.A.7:01CV196R, 2003 WL 292141 (N.D. Tex. Feb. 7, 2003).

31. Kennedy Ship & Repair, L.P. v. Loc Tran, 256 F. Supp. 2d 678 (S.D. Tex. 2003).

32. Lang v. Capital Resource Inves. I & II, LLC, 102 S.W.3d 861 (Tex. App.—Dallas 2003, no pet.).

33. Hone v. Hanafin, No. 05-01-00897-CV, 2003 WL 22020778 (Tex. App.—Dallas Aug. 28, 2003, no pet. h.) (mem. opinion).

34. Rittenmeyer v. Graver, 104 S.W.3d 725 (Tex. App.—Dallas 2003, no pet.).

transacting of business within Texas that could lead the defendants to anticipate being sued here.[35]

The Survey period also offered two variations on the vicarious jurisdiction theme using alter ego or veil piercing. In *Magic House, A.B. v. Shelton Beverage, L.P.*,[36] the Dallas court of appeals found no Texas jurisdiction over a Swedish energy drink manufacturer for its alleged out-of-state manipulation of assets. Magic House A.B. manufactures the energy drinks Nice and Nexcite, and made an agreement with Michigan-based Michigan Trading Post, Inc., (MPTI) to be the exclusive American distributor. MPTI in turn contracted with Shelton Beverage, L.P., for the Texas distributions, but Shelton soon learned that Texas was already saturated with unauthorized distributions of the drinks through another regional distributor, RLW Marketing, Inc. Pursuant to their agreement, Shelton arbitrated its claim with MPTI but the resulting award was apparently frustrated because of MPTI's lack of assets. Shelton then sued Magic House, MPTI and others in a Texas court, alleging that Magic House controlled MPTI and had fraudulently transferred its assets to defeat Shelton's arbitration award. The trial court agreed and denied Magic House's special appearance, but the Dallas court of appeals reversed, finding that Magic House had no alter ego relationship with MPTI, and that Magic House's actions in shipping products into the United States and arranging for their distribution through MPTI created neither general nor specific jurisdiction in Texas.[37] In the second case, Houston's Fourteenth Court of Appeals found jurisdiction over an Ecuadoran oil company for claims of unpaid freight charges, but refused to find jurisdiction over the defendant company's majority stockholder under a veil-piercing theory.[38]

In one of this year's Enron-related opinions, a Houston federal court held that Enron Canada was subject to Texas jurisdiction for claims regarding its corporate affiliates' debts, but further held that the action was an improper attempt to circumvent the protection of the bankruptcy stay.[39]

In other cases, Texas courts found jurisdiction over two foreign insurers,[40] and found no jurisdiction in (1) a Texas plaintiff's claim of trade secret misappropriation against a Swedish company related to work per-

35. *Id.* at 730-36.

36. Magic House, A.B. v. Shelton Beverage, L.P., 99 S.W.3d 903 (Tex. App.—Dallas 2003, no pet.).

37. *Id.* at 907-12.

38. Intercarga, S.A., v. Fritz Cos., Inc., No. 14-02-00297-CV, 2003 WL 21402583 (Tex. App.—Houston [14th Dist.] June 19, 2003, no pet.) (mem. opinion).

39. Reliant Energy Servs., Inc., v. Enron Canada Corp., 291 B.R. 687 (S.D. Tex. 2003).

40. Walker v. Loiseau, No. 03-02-00328-CV, 2003 WL 21705253 (Tex. App.—Austin July 24, 2003, no pet.) (mem. opinion) (Mississippi-based insurance company sued by a Texas receiver following Texas Attorney General's action for unauthorized insurance.); Allianz Risk Transfer (Bermuda), Ltd., v. S. J. Camp & Co., 117 S.W.3d 92 (Tex. App.—Tyler 2003, no pet.) (Canadian reinsurer regarding Texas health care insurance).

formed in Sweden;[41] (2) an Oklahoma plaintiff's claim against an Oklahoma defendant for breach of contract in steel fabrication work for delivery to Qatar;[42] (3) a claim against an Argentine oil company for fraud in a stock purchase agreement relating to drilling rights in Argentina;[43] (4) a Texas employer's claim against a Michigan-based employee for breach of a confidentiality agreement and misappropriation of trade secrets;[44] and (5) a Texas lender's constructive trust claim against a Nevada-based inventor for loan proceeds received from Texas investors.[45]

2. *The Texas Long Arm in Non-Commercial Tort Cases*

Religious Technology Center v. Liebreich[46] is the attempted Texas enforcement of a Florida contract partially settling a tort claim. The case began in 1997 as a Florida wrongful death claim against several corporate and individual defendants affiliated with the Church of Scientology, arising out of Lisa McPherson's death. Early in the Florida action, McPherson's estate entered an agreement with Florida defendant Flag Service Organization ("Flag") to limit the number of Scientology-related defendants in return for Flag's agreement not to encumber its assets. In 1999, McPherson's estate apparently violated the agreement in attempting to add Scientologist leader David Miscavige as a Florida defendant. After the Miscavige claim's dismissal in Florida, the Religious Technology Center ("RTC")—a Scientology-affiliated company chaired by Miscavige—brought this action in the Eastern District of Texas against McPherson's estate and its personal representative, Dell Liebrich. The Texas action alleged breach of contract against the estate and tortious interference with contract against Liebrich, in her personal capacity. RTC claimed third-party standing to enforce the estate's agreement with Flag not to add additional parties. The district court dismissed the tortious interference claim against Liebrich personally, but the case went to trial against the estate on the theory that Liebrich's Texas residency subjected the estate to general jurisdiction here. The jury found for RTC on the contract claim and awarded $258,697.10, to which the court added $327,654.00 in attorney fees. The Fifth Circuit reversed, finding that the district court had impermissibly imputed Liebrich's general jurisdiction (on the personal claim against her) to the estate, a Florida-based entity. The Fifth Circuit also rejected RTC's argument of specific jurisdiction because Liebrich's related activities either occurred in Florida or were di-

41. Delta Brands, Inc. v. Danieli Corp., No. CIV.A.3:02-CV-0081-N, 2002 WL 31875560 (N.D. Tex. Dec. 20, 2002) (not designated for publication).

42. Budgget [sic] Indus., Inc. v. Faber Eng'g, L.L.C., No. 14-02-01076-CV, 2003 WL 21087138 (Tex. App.—Houston [14th Dist.] May 15, 2003, no pet.) (mem. opinion).

43. PET Ja, S.A. v. Shell Compañia Argentina de Petroleo, S.A., No. 01-02-00661-CV, 2003 WL 854163 (Tex. App.—Houston [1st Dist.] Mar. 6, 2003, pet. denied) (mem. opinion).

44. Gustafson v. Provider Healthnet Services, Inc., 118 S.W.3d 479 (Tex. App.—Dallas 2003), *reh'g overruled* (Nov. 6, 2003).

45. Yfantis v. Balloun, 115 S.W.3d 175 (Tex. App.—Fort Worth 2003, no pet.).

46. Religious Tech. Ctr. v. Liebreich, 339 F.3d 369 (5th Cir. 2003).

rected to the Florida lawsuit.[47]

In rejecting Texas jurisdiction for claims of sexual assault in Missouri, the Dallas court of appeals skipped the contacts analysis and went directly to the fair play and substantial justice test.[48]

Doe v. Roman Catholic Archdiocese of St. Louis[49] involves the claims of several Missouri residents for sexual assault by a priest in St. Louis who had been reassigned there from Dallas. Plaintiffs named the priest and both the St. Louis and Dallas archdioceses as defendants. The trial court dismissed for lack of jurisdiction, and the court of appeals affirmed, noting that even if the St. Louis diocese had contacts in Texas, the fair play and substantial justice balancing tests weighed heavily against the Texas forum. Specifically, the assaults occurred in Missouri, the victims were all from Missouri, the witnesses where there, and Texas had a relatively lower interest in resolving the dispute than did a Missouri court.[50]

In an attorney malpractice case, the San Antonio court of appeals appears to have ruled on the merits, without the need of a jury, in its finding of no jurisdiction over a Louisiana attorney.[51] Texas resident Karen French was shot and rendered quadriplegic in a robbery attempt outside a parking garage in New Orleans. She hired Austin attorney Dicky Grigg, who in turn hired Louisiana attorney Vincent Glorioso to represent her in a Louisiana lawsuit, which settled in mediation. French was covered by her employee group plan at the time of the injury, but sought Medicaid benefits when the employee coverage ended. She then learned that she had waived her Medicaid claim by depositing the settlement proceeds in Glorioso's client trust account instead of immediately placing them in a special needs trust. French then sued Grigg and Glorioso, whose objection to Texas jurisdiction was sustained. In affirming the trial court's dismissal, the court of appeals made what it characterized as jurisdictional fact findings, which included a finding that Glorioso had not misadvised French about her benefits. The court explained that "ultimate liability in tort is not a jurisdictional fact, although in some cases it may be."[52] With that "jurisdictional fact" decided against her, plaintiff had failed to establish the basis for Texas jurisdiction.

In re El Paso Apparel Group, Inc.[53] held a New York accounting firm amenable to Texas jurisdiction for its alleged negligence in facilitating an El Paso firm executive's asset depletion. El Paso Apparel Group's ("EPAG") 2001 bankruptcy included an adversary proceeding against Mark Lederman, EPAG's president, chief executive officer and control-

47. *Id.* at 375-76.

48. *Id.*

49. Doe v. Roman Catholic Archdiocese of St. Louis ex rel Rigali, 109 S.W.3d 928 (Tex. App.—Dallas 2003, no pet.).

50. *Id.* at 931.

51. French v. Glorioso, 94 S.W.3d 739 (Tex. App.—San Antonio 2002, no pet.).

52. *Id.* at 746 (citing Arterbury v. Am. Bank & Trust Co., 553 S.W.2d 943, 948 (Tex. Civ. App.—Texarkana 1977, no writ)).

53. *In re* El Paso Apparel Group, Inc., 288 B.R. 757 (W.D. Tex. 2003).

ling shareholder, also naming New York accounting firm Konigsberg Wolf & Company. Konigsberg's objection that it performed its work in New York persuaded the bankruptcy judge to dismiss for lack of jurisdiction, but the district court reversed, noting the well-settled precedent that "non-resident professionals who purposefully avail themselves of the laws of business opportunities of another state" may be subject to jurisdiction there.[54]

Hitachi Shin Din Cable, Ltd. v. Cain[55] involved problems that can occur when the defendants' identities are unclear. It was a products liability claim for a defective clock radio that caught fire and damaged plaintiffs' home. Plaintiffs sued Wal-Mart and various manufacturers, including Hitachi Shin Din, a Hong Kong plug manufacturer unrelated to the large Japanese manufacturer Hitachi. Because the fire destroyed the radio, it was impossible to identify the radio's origin; thus when plaintiffs could not establish with any certainty where they bought the radio, Wal-Mart had to be dropped and plaintiffs had to argue extraterritorial jurisdiction against a few parts manufacturers, but not against the radio's manufacturer or seller, both of whom would no doubt be amenable in Texas.[56] Those arguments—based on products shipments and internet presence—succeeded in the trial court but failed on appeal.[57]

Agency theory can establish personal jurisdiction in tort cases as well, and did over a Missouri company in *Long v. Grafton Executive Search, L.L.C.*[58] Terry Ann Long had been employed as a vice president and salesperson for two years with Grafton Executive Search, LLC, and Grafton, Inc., both Missouri entities with offices there and in Kansas. When Long moved to Texas, she used Grafton as a reference, but sued for defamation when Grafton president Richard Carroll sent email and telephone communications to Texas stating that Long intended to steal the new employers' customer lists, had honesty and integrity problems, and other disparaging comments. Although this assertion of specific jurisdiction is unremarkable, its detailing of contacts and supporting precedents provide a good model for defamation jurisdiction.[59]

Exito Electronics Co., Ltd. v. Trejo[60] is a reminder of the need to heed detail when entering a special appearance for a nonresident defendant. Exito is the Taiwanese manufacturer of an allegedly defective cord that caused a fire leading to three deaths. When Exito was added to the lawsuit, it filed a Rule 11 agreement extending time to answer before con-

54. *Id.* at 764.

55. Hitachi Shin Din Cable, Ltd. v. Cain, 106 S.W.3d 776 (Tex. App.—Texarkana 2003, no pet.).

56. Telephone conversation with Hitachi Shin Din's attorney, Susan Hays, November 26, 2003.

57. *Id.* at 781-88.

58. Long v. Grafton Executive Search, L.L.C., 263 F. Supp. 2d 1085 (N.D. Tex. 2003).

59. *Id.* at 1087-90.

60. Exite Elecs. Co. Ltd. v. Trejo, 99 S.W.3d 360 (Tex. App.—Corpus Christi 2003, pet. filed).

testing jurisdiction, and thereby waived it objection.[61]

Two unreported cases this year demonstrate the extremes to which jurisdictional facts can reach, and the resulting inconsistent decisions. The first case holds that advertising in the local yellow pages does not necessarily subject a nonresident business to Texas jurisdiction, at least according to the Austin Court of Appeals. In *Malik v. A Briggs Passport & Visa Expeditors,*[62] Austin-resident Malik sought visas for a Christmas holiday trip to Pakistan. Thinking that special help would be needed for the holiday rush, Malik looked in the Austin yellow pages and chose the listing for Briggs Passport & Visa Expeditors and called the 800 number listed there. Malik alleged that because of Briggs's inaction and misrepresentations their visas arrived too late, causing the Malik family to miss part of the vacation and incur additional expenses. When Malik sued in Austin, Briggs entered a special appearance and denied doing business in Texas. The trial court granted the jurisdictional objections and the court of appeals affirmed, finding that Malik's jurisdictional allegations were too meager to support Texas jurisdiction. The court's discussion emphasizes that Malik needed more definitive allegations as to the substance of defendant's wrongful acts in Texas, and that mere allegations of (1) plaintiff responding to a local yellow pages advertisement, (2) ordering a product by phone, and (3) thereafter suffering from defendant's breach and related misinformation, are insufficient.[63]

Charles R. Weber Co., Inc. v. Back-Haul Bulk Carriers, Inc. is the opposite extreme, with Houston's Fourteenth Court of Appeals finding Texas jurisdiction—both specific and general—over a Connecticut-based cargo broker for breach of contract and deceptive-trade-practice claims relating to the delivering of crude oil from Oman to Singapore.[64] For specific jurisdiction, defendant's Texas contacts were telephone calls and telefaxes, for which the court noted: "This court has consistently held that even a single telephone call, during which a misrepresentation was directed into Texas and relied on in Texas, satisfies the 'minimum contacts' prong of the jurisdictional analysis under specific jurisdiction."[65] Although jurisdictional analyses necessarily turn on facts and vary from case to case, these two holdings seem at odds. *Malik* involved a service to be rendered to consumers in Austin, while *Weber* arose from a contract to be performed half a world away.

In other decisions, Texas courts found general jurisdiction over a New Jersey manufacturer for an employee's asbestosis claim, based on the company's Texas activities since the 1950s, including sales and product

61. *Id.* at 368-70.

62. Malik v. A Briggs Passport & Visa Expeditors, No. 03-02-00511-CV, 2003 WL 549258 (Tex. App.—Austin Feb. 27, 2003, no pet.) (mem. opinion).

63. *Id.* at *1–5.

64. Charles R. Weber Co., Inc. v. Back-Haul Bulk Carriers, Inc., No. 14-02-00240-CV, 2002 WL 31769418 (Tex. App.—Houston [14th Dist.] Dec. 12, 2002, no pet.) (not designated for publication).

65. *Id.* at *3.

testing unrelated to plaintiff's claim;[66] found specific jurisdiction over a Mexican recording company for a car crash in Mexico killing several Texas residents, where the defendant had sent a car from Mexico to pick up the decedents in Texas and transport them to Mexico;[67] found specific jurisdiction over a Wyoming communications corporation for failure to pay a Texas company for brokerage services;[68] and found specific jurisdiction over three residents of Mexico who transported their eighty-eight year-old father (a Texas resident) to Mexico against his wife's wishes for the alleged purpose of controlling inheritance issues.[69] Texas courts found no jurisdiction for (1) a defendant's contribution impleader against a Missouri physician who had treated the plaintiff (also a Missouri resident);[70] (2) three Texas harvesters' claims against nonresident growers for work to be performed in Colorado and Kansas;[71] (3) a claim against a Kentucky accident investigation company regarding an automobile accident there;[72] and a slip and fall claim arising in Las Vegas and argued under general jurisdiction and internet presence, explained below in the internet section.[73]

3. *Long Arms in Federal Question Cases*

Federal courts ordinarily use the long arm statute of the state in which they're located, but in a few instances use a federal long arm statute.

a. Texas contacts—federal question cases applying the Texas long arm

Most claims arising under federal law lack an accompanying federal long arm statute and are limited to the forum state's jurisdictional reach. Because Texas extends its long arm to the full reach of due process, federal question defendants are amenable if they satisfy any of the Texas long arms. The most interesting example this year is *Flores v. A.C., Inc.*, an action by Texas residents under federal migrant and labor laws and related state laws.[74] Plaintiffs allege they were recruited from west Texas

66. Hoffman-La Roche, Inc. v. Kwasnik, 109 S.W.3d 21 (Tex. App.—El Paso 2003, no pet.).

67. EMI Music Mexico, S.A. de C.V. v. Rodriguez, 97 S.W.3d 847 (Tex. App.—Corpus Christi 2003, no pet.).

68. Mountain States Radio, Inc. v. Star Media Group, Inc., No. 05-02-00844-CV, 2002 WL 31411065 (Tex. App.—Dallas Oct. 28, 2002, no pet.) (not designated for publication).

69. Quintanilla v. Verges, No. 04-03-00099-CV, 2003 WL 21216487 (Tex. App.—San Antonio May 28, 2003, no pet.) (mem. opinion).

70. Sealift, Inc. v. Satterly, No. 14-03-00051-CV, 2003 WL 21664672 (Tex. App.—Houston [14th Dist.] July 17, 2003, no pet.) (mem. opinion).

71. Ramon v. Jensen, No. 04-02-00682-CV, 2003 WL 1232996 (Tex. App.—San Antonio Mar. 19, 2003, no pet.) (mem. opinion).

72. Coleman v. Cecil, No. 05-02-01129-CV, 2003 WL 187434 (Tex. App.—Dallas Jan. 29, 2003, no pet.) (mem. opinion).

73. Arriaga v. Imperial Palace, Inc., 252 F. Supp. 2d 380 (S.D. Tex. 2003).

74. Flores v. A.C., Inc., No. EP-02-CA-0200-DB, 2003 WL 1566507 (W.D. Tex. Mar. 5, 2003) (mem. opinion). Plaintiffs sued under the Agricultural Workers Protection Act, 29 U.S.C. §§ 1801 et seq. and the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., and under the Maine state wage payment laws. *Id.* at *1.

to work in Maine processing sea cucumbers, with promises that (1) they could choose between piece rate and hourly rate pay, (2) if they wished, they could instead work clearing pine trees, and (3) they would have a certain quality of food and housing. Plaintiffs claimed that these promises were ignored when they arrived in Maine and that they had to work at substantially lower wages than promised, ride in substandard transportation and live in substandard housing. Defendants included two Maine companies, A.C., Inc., and Country Concrete and Construction Company, Inc., who both used Francisco Velez to recruit the Texas workers. This allowed the Maine defendants to object to personal jurisdiction based on their own lack of contact with Texas. The court sustained their objections and found that Velez did not qualify as an agent whose Texas contacts could be imputed to defendants, and accordingly dismissed the claims against them. The ruling here stands in sharp contrast to one from last year's Survey—*Gonsalez Moreno v. Milk Train, Inc.*[75]—in which the same federal district found specific jurisdiction over a New York company for similar violations, committed against similar plaintiffs recruited in a similar fashion from the El Paso area.

Federal courts found personal jurisdiction over an Oklahoma sole proprietor dealing in used school buses who allegedly infringed on an Illinois manufacturer's trademark by marketing under the name "International" in certain Texas markets,[76] and no jurisdiction in a trademark infringement claim by Texas-based MADD against New York-based DAMMADD.[77]

b. Nationwide contacts—federal question cases applying a federal long arm

Rule 4(k)(1) allows for a nationwide contacts analysis for enumerated cases, and 4(k)(2) for foreign defendants not otherwise subject to the jurisdictional reach of any one state. In these cases sufficient contacts are assessed with the United States as a whole rather than any one state.[78] In *Quick Technologies, Inc. v. Sage Group, PLC*,[79] the Fifth Circuit affirmed the district court's determination that English-based Sage Group was not subject to 4(k)(2) jurisdiction for trademark infringement. In 1995, plaintiff Quick Technologies (of indeterminate origin in the opinion) sought to register the mark "Sage Information System" with the United States Patent and Trademark Office. Quick's application met opposition from Sage Group, an English company with two American subsidiaries, Sage U.S. Holdings, Inc., and Sage Software, Inc. When negotiations broke down between the two claimants in 1999, each sued the other and the actions

75. Gonsalez Moreno v. Milk Train, 182 F. Supp. 2d 590 (W.D. Tex. 2002).
76. International Truck & Engine Corp. v. Quintana, 259 F. Supp. 2d 553 (N.D. Tex. 2003).
77. Mothers Against Drunk Driving v. DAMMADD, Inc., No. CIV.A.302CV1712G, 2003 WL 292162 (N.D. Tex. Feb. 7, 2003) (mem. opinion).
78. Fed. R. Civ. P. 4(k)(2), 28 U.S.C. at 32 (2000).
79. Quick Technologies, Inc. v. Sage Group, PLC, 313 F.3d 338 (5th Cir. 2003).

were consolidated. The district court dismissed the English parent, and the Fifth Circuit affirmed, rejecting plaintiff's arguments of U.S. contacts related to its trademark applications and its maintenance of a passive website.[80]

4. Internet Jurisdiction

Three Survey period cases rejected internet arguments as a basis for personal jurisdiction in Texas. One of the most newsworthy jurisdiction cases involves a defamation claim arising from the Pan Am Flight 103 crash over Lockerbie, Scotland in 1988.[81] Harvard pathologist Hart G.W. Lidov wrote an article on the terrorist attack in which he alleged the Reagan administration's willful ignoring of repeated early warnings of the terrorist attack, all done for political purposes. The allegations included a cover-up by the FBI's then-Associate Deputy Director, Oliver "Buck" Revell, and included an accusation that Revell knew of the attack in advance and made certain that his son, originally booked on the flight, changed planes. Lidov posted his article on Columbia University's journalism web site where it was available for anyone to read. At the time Lidov posted the article, he was unaware that Revell had moved to Texas. Revell filed his defamation suit against Lidov and Columbia University in a Dallas federal court and defendants challenged personal jurisdiction. The district court sustained the jurisdictional objections and the Fifth Circuit Court of Appeals affirmed in an opinion exploring both the old and new boundaries of defamation jurisdiction. In particular, the court found that "one cannot purposefully avail oneself of 'some forum someplace;' rather, as the Supreme Court has stated, due process requires that 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'"[82] Because Lidov and Columbia published the article unaware of Revell's Texas residence, and because the article did not refer to any events in Texas, there was no basis for general or specific jurisdiction.[83]

In *Arriaga v. Imperial Palace, Inc.*,[84] a Texas resident slipped and fell in a Las Vegas hotel, returned to Texas for medical treatment and sued the hotel here. The court dismissed for lack of jurisdiction—specific jurisdiction was not at issue because the accident occurred in Nevada, and plaintiff's general jurisdiction argument, based on the hotel's use of the internet for advertising and guest registration, was insufficient. In particular, plaintiff failed to allege that she made an online reservation, and the hotel established that she had checked in under another guest's reservation. The court nonetheless applied the Fifth Circuit's sliding scale test for internet presence, noting that no Fifth Circuit court had yet analyzed

80. *Id.*
81. Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002).
82. *Id.* at 475 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)).
83. *Id.* at 468-76.
84. Arriaga v. Imperial Palace, Inc., 252 F. Supp. 2d 380 (S.D. Tex. 2003).

an internet hotel reservation system for jurisdictional purposes, and emphasizing the test's ill-suitedness for measuring general jurisdiction.[85] The court found that Imperial's web site was not targeted to Texas and accounted for too few Texas registrations to establish jurisdiction, following a federal decision from Missouri involving the same defendant and the same facts.[86]

Quick Technologies, discussed immediately above, also rejected plaintiff's argument that the English defendant's website was a sufficient contact for personal jurisdiction in a trademark claim.[87]

5. *Status Jurisdiction*

Status jurisdiction is a special category recognizing a state's authority to adjudicate issues such as marital status, parental custody and mental competence. It is often characterized as subject matter jurisdiction but turns on amenability factors such as contacts with the forum state. Competence determinations do not often implicate interstate issues, and marital status litigation still tends to tolerate parallel suits in different states and countries. The pervasive problem exists with child custody determinations—both original and modifications—where conflicting judgments and parental abduction create problems. The solution has been legislation in the form of uniform acts or treaties designed to choose a single custody forum that other states will respect. Domestically, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[88] and the federal Parental Kidnapping Prevention Act[89] seek to establish unitary child custody jurisdiction and apply full faith and credit to those decisions. Internationally, the UCCJEA governs both jurisdictional disputes and decree enforcement,[90] and is joined by the International Child Abduction Remedies Act[91] ("ICARA," the United States version of the Hague Convention on Child Abduction[92]), which seeks the return of children taken both within the United States and across international borders in violation of valid custody orders. These Acts often involve judgment enforcement and preclusion, but are discussed here because they also involve questions of status jurisdiction.

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85. *Id.* at 385 & n.4. The sliding scale test is commonly known as the *Zippo* test from Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997), incorporated in Fifth Circuit precedent by Mink v. AAAA Dev. LLC, 190 F.3d 333 (5th Cir. 1999).

86. *Id.* at 384-87 (citing Bell v. Imperial Palace Hotel/Casino, Inc., 200 F. Supp. 2d 1082 (E.D. Mo. 2001)); *see also*, Reiff v. Roy, 115 S.W.3d 700 (Tex. App.—Dallas 2003, pet. denied) (reaching the same conclusion in a similar claim against a Colorado hotel).

87. *See supra* notes 79-80 and accompanying text.

88. TEX. FAM. COD. ANN. §§ 152.101-152.317 (Vernon Supp. 2002).

89. 28 U.S.C. § 1738A (2000).

90. TEX. FAM. CODE ANN. § 152.105 (Vernon Supp. 2002). The PKPA does not apply to child custody conflicts with foreign countries.

91. 42 U.S.C. §§ 11601-11610 (1995 & Supp. 2002).

92. Hague Convention on the Civil Aspects of International Child Abduction, opened for signature Oct. 25, 1980, 1343 U.N.T.S. 89 (1980) (entered into force Dec. 1, 1983).

a. Interstate custody disputes

Two Survey period cases involved interstate custody and related disputes. *In re Oates*[93] denied custody jurisdiction for grandparent access after the mother's move to New York. Janet and Sammy Oates met and married in Odessa, Texas, and filed for divorce there in July, 2000. The court appointed both parents joint managing conservator of their three children, but gave Sammy primary possession while Janet relocated to New York. When Sammy died in January, 2001, Janet agreed to leave the children in Texas with both sets of grandparents until she found a suitable residence in New York. The children then moved to New York to live with her in April, 2001. In August, 2001, Sammy's parents sued for his insurance benefits (on a policy naming Janet as beneficiary), and three weeks later amended to ask for grandparent access. Janet contested the trial court's custody jurisdiction under the UCCJEA, and filed this mandamus action when the court rejected her argument. The court of appeals granted mandamus, finding that Texas lacked home state jurisdiction (because the children had already located to New York four months before the grandparents filed their suit), and further lacked significant connection jurisdiction because the children now lived with a parent in another state.[94] Janet had also challenged the Texas UCCJEA's constitutionality in light of the Supreme Court's opinion in *Troxel v. Granville*,[95] but the argument was unnecessary in light of the court's granting her request on nonconstitutional grounds.

Texas courts also (1) approved the ceding of child custody jurisdiction to a Colorado court based on the children's having lived there with the mother for almost three years;[96] and (2) held that although the UCCJEA barred the biological parents' Texas bill of review to set aside adoption proceedings that placed their child in a Virginia home, that the UCCJEA did not affect Texas litigation of the parents' fraud action against the adoption agency's attorney.[97]

b. International custody disputes

In re Vernor[98] highlights the special difficulties inherent in an international custody dispute. The mother, Jude Vernor, is an Australian who was living in Round Rock, Texas, in 1994 when she became romantically involved with the father, Texas resident Larry Carden. The parties had a child in July, 1995, but never married, and Ms. Vernor was the child's only

93. *In re* Oates, 104 S.W.3d 571 (Tex. App.—El Paso 2003, no pet.).
94. *Id.* at 574-78.
95. *Id.* at 574 (citing Troxel v. Granville, 530 U.S. 57 (2000)).
96. *In re* C.C.B. & M.J.B., No. 08-01-00353-CV, 2002 WL 31727247 (Tex. App.—El Paso Dec. 5, 2002, no pet.) (not designated for publication). Deference to the Colorado court was authorized by Tex. Fam. Code Ann. § 152.202 (Vernon 2000).
97. *In re* B.G.A., No. 04-02-00315-CV, 2003 WL 1712517 (Tex. App.—San Antonio Apr. 2, 2003, no pet.) (mem. opinion).
98. *In re* Vernor, 94 S.W.3d 201 (Tex. App.—Austin 2003), *reh'g overruled*, (Feb. 13, 2003).

caregiver. The opinion recites that Mr. Carden visited the child "informally" during the parties' "sporadic and stormy relationship." Mr. Carden filed a paternity action in November, 1995, resulting in temporary orders naming Vernor and Carden joint managing conservators and restricting the child's residence to Texas. But Carden abandoned that case and it was dismissed in 1998 for want of prosecution.[99]

The stormy relationship is reflected in the parties' reciprocal allegations. Carden was apparently violent and attended anger-management counseling, and Carden in turn reported Vernor to Child Protective Services several times. Vernor alleges that these were false reports that never resulted in state action, and the court of appeals apparently agreed.[100] A particularly violent episode occurred in April, 2001, when Carden struck Vernor in front of the then-six-year-old child, who attempted to protect his mother as Carden dragged her to his car. Vernor moved into a women's shelter and applied for a protective order in Williamson County, which was denied. Carden then tried to take the child from his school, and in response, Vernor first moved him to another school and then fled to a shelter in New Mexico. Carden learned of her new residence and sought help from the New Mexico police, and Vernor then left with the child to return to her parents in Australia.[101] In the meantime, Carden had filed a second paternity action in Williamson County, obtaining a default judgment on the same day Vernor left for Australia without legal or actual knowledge of the new lawsuit. Now aware of her move to Australia, Carden sought the child's return under the Hague Convention with false allegations of custody rights under the dismissed 1995 joint custody order. Unaware of this fraud, the Australian court ordered an investigation, further ordered Vernor not to relocate the child pending further Hague Convention proceedings, and later stayed its action in deference to Carden's action in Williamson County.[102]

With the legal proceedings now returned to Texas, Vernor appeared at two evidentiary hearings. She lost and was ordered to return the child to Texas, in spite of proof that (1) her move to Australia did not violate any valid custody orders; (2) Carden had lied in his Hague Convention application; (3) her immigration status was now compromised; and (4) perhaps most pointedly, her fears of Carden's violence.[103] The Austin Court of Appeals, with due deference to the inherent difficulty for trial courts faced with these issues, nonetheless found little good to say about the trial court's conclusions. In particular, the court of appeals noted repeatedly Carden's having based this entire action on a dismissed 1995 temporary custody order and an invalid 2001 action. In a classic instance of bootstrap logic, the dispute's only facially valid custody order was the one currently under review, issued more than a year after Vernor and the

99. *Id.* at 203.
100. *Id.* at 203-04.
101. *Id.* at 204.
102. *Id.* at 204-06.
103. *Id.* at 206-07.

child moved to Australia. The court of appeals found further fault in the trial court's failure to take other factors into account, such as the child's current well-being in Australia and Vernor's financial burden in returning to Texas, not to mention her immigration status. The court granted the writ of mandamus with instructions to reconsider based on the concerns addressed.[104]

C. Reasons for Declining Otherwise Valid Jurisdiction

Even where all jurisdictional elements exist, courts may refrain from litigating cases involving a sovereign foreign government, cases contractually directed at other forums, cases in which convenience dictates another forum, and cases parallel for other litigation.

1. Sovereign Immunity

The Survey period's only action involving a foreign sovereign is *Elixir Shipping, Ltd. v. Perushahann Pertambangan Minyak Dan Gas Bumi Negara*,[105] a Maltese plaintiff's suit against an Indonesian-owned corporation for a ship collision in Indonesian waters. The Southern District of Texas found that the defendant was in fact a government instrumentality, but that its commercial activity lacked a sufficient nexus to the United States to invoke personal jurisdiction (or the subject matter jurisdiction of United States courts) under the Foreign Sovereign Immunities Act.[106]

2. Derogating Forum Selection Clauses

The Consent section above discusses forum selection clauses that *establish* local jurisdiction.[107] Somewhat different considerations arise when the plaintiff sues in a forum contrary to the parties' earlier choice in a forum selection clause. These are known as derogation clauses (in regard to that forum), and instead of justifying the court's retention of the case, require the court to consider declining its otherwise valid jurisdiction over the parties.

In *My Café–CCC, Ltd. v. Lunchstop, Inc.*,[108] the Dallas Court of Appeals enforced a franchise clause designating California for litigation, relying on a UCC provision governing choice of law clauses and arguably irrelevant to choice of forum clauses. My Café is a Texas limited partnership with its principal place of business here. It entered four franchise agreements with California-based Lunchstop, each of which was accom-

104. *Id.* at 207-12. In an attached Supplemental Opinion, the court of appeals overruled the trial judge's motion for rehearing, finding that the judge's arguments "pertain more to the permanent custody decision to be reached in this cause than to the appropriateness of the temporary orders . . . ." *Id.* at 212-13.

105. Elixir Shipping, Ltd. v. Pertambangan Minyak Dan Gas Bumi Negara, 267 F. Supp. 2d 659 (S.D. Tex. 2003).

106. 28 U.S.C. §§ 1330, 1602-11 (2000); *see Elixir Shipping*, 267 F. Supp. 2d at 662-67.

107. *See supra* notes 20-29, especially the sources cited in note 20.

108. My Café-CCC, Ltd. v. Lunchstop, Inc., 107 S.W.3d 860 (Tex. App.—Dallas 2003, no pet.).

panied by a "Franchise Offering Circular" designating in capital letters that resulting lawsuits had to be filed in San Francisco, California, and each of which restated that in the contract. My Café objected to the clause with arguments of noncompliance with Texas Business and Commerce Code Section 35.53 (requiring bold print for forum clauses in certain contracts),[109] and fraudulent inducement which would negate the forum clause.[110] My Café's two fraud arguments also failed. The first—based on the fact that the various clauses were not identical—failed for not alleging the elements of fraud. The second— allegations that Lunchstop misrepresented profitability—went to the merits of the case, not to the forum issue. The court accordingly affirmed the trial court's dismissal.[111]

In a simpler application of derogation clause principles, the federal court in Galveston enforced a forum clause in plaintiff's employment contract and transferred his personal injury claim to the Western District of Louisiana, finding the clause to be mandatory and thus creating an exclusive forum there.[112]

3. *Forum Non Conveniens Dismissals*

Forum non conveniens, or inconvenient forum, is an old common law objection to jurisdiction that now is also available by statutes such as 28 U.S.C. § 1404 for intra-jurisdictional transfers based on convenience.[113] Because intra-federal transfers under § 1404 do not implicate conflicts between states or nations, they are not considered here. This article is lim-

109. *Id.* at 864-65.

110. The court of appeals held that My Café's argument failed because Section 35.53 expressly excludes contracts governed by Texas Business and Commerce Code Section 1.105, as was this franchise contract. Although the court's reasoning logically flows through Section 35.53 and Section 1.105, the court's statement that Section 1.105 "confers upon parties to a multistate transaction the right to choose their own law" goes too far to the extent that it includes non-UCC contracts. *Id.* at 865 (citing 1.105 cmt. 1 (Vernon 1994)). That is, Section 1.105 does not apply in any way to non-UCC transactions, and more importantly, does not apply to choice of forum clauses. The United States Supreme Court has clarified that choice of law and choice of forum are two different functions, neither determinative of the other. *See e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481-82 (1985). The contract at issue here was a franchise agreement, ordinarily not governed by the UCC. The contract clause at issue here was a choice of forum clause, which is not addressed by Section 1.105. Nevertheless, because of Section 35.53's odd invocation of Section 1.105, and in cases in which a non-UCC contract involves some transaction in goods (as franchise agreements often do, and apparently was argued here), a choice of forum clause can be governed by a UCC provision never intended to be applied. The result in this case is not all that untenable because the parties' choice of a California forum (defendant Lunchstop's homestate) is reasonable. Further problems with these statutes may be moot because Texas has just repealed the former Section 1.105 on September 1, 2003, although the current Section 35.53 does not reflect that repeal and still refers to Section 1.105.

111. *Id.* at 862-67.

112. Speed v. Omega Protein, Inc., 246 F. Supp. 2d 668 (S.D. Tex. 2003).

113. 28 U.S.C. § 1404 (2000) is the federal statutory provision for inconvenient forum objections seeking transfer to another federal court. Texas law provides for in-state venue transfers based on convenience under TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (Vernon 2002).

ited to inter-jurisdictional forum non conveniens under the common law, available in state and federal courts in Texas under the same two-part test requiring movant to show the availability of an adequate alternative forum, and that a balancing of private and public interests favors transfer.[114] It also includes one noteworthy Texas statutory forum non conveniens case.

The Survey period produced four noteworthy forum non conveniens decisions. *Vasquez v. Bridgestone/Firestone, Inc.*[115] was a wrongful death action (or series of actions) for a single-vehicle crash in the state of Nuevo Leon, Mexico, that killed six passengers. The victims' family members sued Bridgestone, General Motors and other defendants for alleged product defects, while defendants alleged improper maintenance and driver negligence. Plaintiffs' first lawsuit in federal court in Brownsville, Texas ("*Vasquez I*"), was dismissed for lack of diversity, and plaintiffs refiled in state court in Orange County ("*Vasquez II*"). Defendants removed *Vasquez II* to federal court in Beaumont, which granted a forum non conveniens dismissal for re-filing in Mexico, which included a determination that Mexico's law should govern. The federal court then dismissed with prejudice to prevent re-filing and did not impose a "return jurisdiction clause" that would allow plaintiffs the Beaumont forum if defendants did not consent to litigation in Mexico. Plaintiffs did not accept this and filed *Vasquez III* in Cameron County, Texas, which was removed to federal court and dismissed by stipulation. Plaintiffs then filed *Vasquez IV* in Webb County, Texas, naming five new defendants (including the vehicle's driver) and two new plaintiffs. Defendants removed *Vasquez IV* to federal court, whereupon the federal court in *Vasquez II* issued a sua sponte temporary restraining order barring plaintiffs and their attorneys from arguing their pending remand motion or from filing new suits; this later became a permanent injunction, meant to protect the finality of *Vasquez II*'s forum non conveniens dismissal. Plaintiffs appealed

114. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Piper Aircraft v. Reyno, 454 U.S. 235 (1981); McLennan v. American Eurocopter Corp., Inc., 245 F.3d 403, 423-24 (5th Cir. 2001). The private factors look to the parties' convenience and include the relative ease of access to sources of proof; the availability of compulsory process for the attendance of unwilling witnesses; the cost of obtaining their attendance; the possibility of viewing the premises (if appropriate); and all other practical problems that make the trial easy, expeditious and inexpensive. The public factors look to the courts' concerns and the forum state's interests, and include the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum familiar with the law that must govern the action; the avoidance of unnecessary conflict of laws problems; and the unfairness of burdening citizens in an unrelated forum with jury duty. *See McLennan*, 245 F.3d at 423. Texas forum non conveniens law is multi-faceted. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon Supp. 2003) applies to personal injury and wrongful death claims. TEX. CIV. PRAC. & REM. CODE ANN. § 71.052 (Vernon Supp. 2003) applies to asbestosis claims filed by persons not residing in Texas at the time their claims arose. Common law forum non conveniens, in line with *Gulf Oil v. Gilbert*, governs all other interstate and international forum convenience issues in Texas state courts. *See* In re Smith Barney, Inc., 975 S.W.2d 593, 596 (Tex. 1998).

115. Vasques v. Bridgestone/Firestone, Inc., 325 F.3d 665 (5th Cir. 2003).

the dismissal of *Vasquez II* and the permanent injunction.[116]

The Fifth Circuit agreed that Mexico was the proper forum. Plaintiffs' multifaceted argument included the International Covenant of Civil and Political Rights, which, plaintiffs argued, gave Mexico's citizens the same position before Texas courts as American citizens.[117] The Fifth Circuit rejected this, citing precedent allowing for forum non conveniens dismissals in the face of treaty obligations.[118] The Fifth Circuit also found that in spite of the tire manufacturing's evidence being located in the United States, that far more of the pertinent evidence was in Mexico.[119] In its final point favoring the dismissal, the Fifth Circuit found that Mexico's law indeed was the better choice under Restatement (Second) of the Conflict of Laws Sections 6 and 145, specifically noting the best possible accommodation of both nations' policies and the need for uniformity and predictability. Although the court upheld the forum non conveniens dismissal, it reversed on two other points. First, the district court's dismissal lacked the important return-jurisdiction clause, and second, a forum non conveniens dismissal is not on the merits and did not justify a permanent injunction against further suits.[120]

In re DuPont[121] is an important Texas Supreme Court ruling interpreting Texas's statutory forum non conveniens law for asbestosis claims filed by foreign plaintiffs. Specifically, it determined when the statute applies to trigger the election to file elsewhere or to take a lower remedy in Texas courts. The action involved more than 8,000 plaintiffs from five related cases in Orange and Jefferson counties, pending against eighty defendants. DuPont moved to dismiss under the Texas statutory requirement that certain asbestosis claims filed by non-Texas residents on or after August 1, 1995 but before January 1, 1997, include an election to abate pending re-filing in another state, or an acceptance of lower damages.[122] DuPont argued that the statute applied here, based on some plaintiffs' prior filings against other defendants, but not against DuPont. The court disagreed, making a first-impression decision that the triggering date is when DuPont was first named as a party, not when the claim was initially filed against other defendants. The supreme court further held that statute did apply to these facts, but that plaintiffs should now have a chance to make election and remanded for that purpose.[123]

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116. *Id.* at 670-71.

117. *Id.* at 672, n.6 (citing Int'l Covenant on Civil and Politial Rights, Dec. 16, 1966, art. 14(1), 999 U.N.T.S. 171).

118. *Id.* at 672.

119. *Id.* at 672-74.

120. *Id.* at 675-81.

121. In re E. I. DuPont de Nemours and Co., 92 S.W.3d 517 (Tex. 2002).

122. *Id.* at 520 n.3 (citing Act of May 29, 1997, 75th Leg., ch. 424, § 2, 1997 Tex. Gen. Laws 1680, 1682-83 *repealed by* Act of June 11, 2003, 78th Leg., ch. 204, § 3.09, 2003 Tex. Gen. Laws 847, 855 (formerly codified as TEX. CIV. PRAC. & REM. CODE ANN. § 71.052)).

123. *Id.* at 525-26.

In *Delta Brands, Inc. v. Danieli Corporation*,[124] the Texas plaintiff competed with Danieli to become contractor on a project to supply steel processing equipment to a Swedish company, SSAB Tunnplat, A.B. A confidentiality agreement accompanied Delta's bid submission, covering confidential and proprietary information relating to Delta's equipment. When Danieli got the bid, Delta brought claims in a Dallas federal court that SSAB and Danieli had conspired to acquire and use Delta's trade secrets. Defendants filed forum objections, and when the court found no personal jurisdiction over the Swedish defendant, it was a logical follow up to dismiss the claim against Danieli on forum non conveniens grounds, based not only on the Swedish location of the underlying incident, but on the Swedish defendant's unavailability in Texas.[125]

Zermeno v. McDonnell Douglas Corp., discussed at length in the choice of law section, is a routine forum non conveniens analysis regarding an air crash in Mexico, with novel twists in the intersection of choice of law with fraudulent joinder and federal subject matter jurisdiction.[126] Plaintiff's attorneys should also note the court's delaying dismissal to allow extra time for service on additional defendants so as to bind them to the terms of the forum non conveniens dismissal.[127]

Cases published late in the Survey period include *Acadian Geophysical Services, Inc. v. Cameron*, an employee action for unpaid merger proceeds in which the Waco Court of Appeals upheld the trial court's denial of forum non conveniens, even though the action arose in Louisiana, was governed by its law, all defendants were amenable to Louisiana process and all witnesses were from Louisiana;[128] and *Jones v. Raytheon Aircraft Services, Inc.*, a case resembling *Zermeno* in which the court of appeals affirmed a forum non conveniens dismissal in a New Zealand air crash case.[129]

4. *Parallel Litigation*

Parallel litigation is difficult to define, sometimes meaning identical lawsuits with exactly the same parties bringing the same claims, and sometimes meaning two or more lawsuits that may result in claim preclusion for some or all parties. It occurs both intra- and inter-jurisdictionally, and involves remedies of transfer and consolidation (intra-jurisdictional only), stay, dismissal, and anti-suit injunction, or in many

124. Delta Brands, Inc. v. Danieli Corp., No. CIV.A.3:02-CV-0081-N, 2002 WL 31875560 (N.D. Tex. Dec. 20, 2002).

125. *Id.* at *6-10.

126. Zermeno v. McDonnell Douglas Corp., 246 F. Supp. 2d 646 (S.D. Tex. 2003). *See infra* notes 159-161 and accompanying text.

127. *Zermeno*, 246 F. Supp. 2d at 665-68. This typically includes defendants' agreement to submit themselves to the foreign jurisdiction.

128. Acadian Geophysical Serves., Inc. v. Cameron, 119 S.W.3d 290 (Tex. App.—Waco 2003, no pet.). The court based its decision on the Texas residence of some plaintiffs and the fact of the defendant corporation's registration to do business in Texas. *Id.* at 305.

129. Jones v. Raytheon Aircraft Servs., 120 S.W.3d 40 (Tex. App.—San Antonio 2003, pet. denied).

cases, allowing both cases to proceed and using the first-to-judgment to preclude the other.[130] This article will discuss only parallel litigation involving at least one case outside of Texas; that is, it will not consider multiple related actions involving courts all located in Texas.

The Survey period produced two parallel litigation matters, one resulting in a stay of the Texas action, the other in an anti-suit injunction against the foreign litigation. *Crown Leasing Corp. v. Sims*[131] involved parallel actions in Florida and Texas over possession of Billy Sims's 1978 Heisman trophy. In 1995, Sims used his Heisman trophy and other sports memorabilia as security for a $50,000 loan from Crown Leasing Corporation, which periodically allowed Sims to have temporary possession of the trophy for signature shows. Sometime in 2000, Sims failed to return it and instead sold an interest in the trophy to Scott Goodman, who soon advertised his intention to sell the trophy in a telephone auction in Florida. The litigation began with Crown's lawsuit against Goodman and Sims in Florida on December 4, 2000, seeking a temporary injunction against the sale, which the court denied. Crown then filed a related claim in Texas on December 7, 2000, seeking an ex parte sequestration order, which the Texas court granted. Goodman then asked the Texas court to abate its action pending the Florida outcome, and before the Texas court could rule, Goodman filed a counterclaim in the Florida action. The Texas court then abated its action. Crown's appeal of the Texas abatement failed, based on the appellate court's findings that (1) Crown had filed both lawsuits, Florida being first, (2) although the pertinent transactions occurred in Texas, by the time of suit both Goodman and the trophy were in Florida; and (3) Crown had pursued discovery in Florida.[132] The court of appeals did correct one aspect of the trial court's order by replacing the abatement with a stay as the appropriate remedy.[133]

London Market Insurers v. American Home Assurance Company[134] upheld the issuance of an anti-suit injunction in an insurance coverage dispute. The case began when Asarco, Inc. and related companies filed a Texas declaratory judgment action regarding insurance coverage for asbestos claims at its industrial facilities in Texas. They sought coverage from London Market Insurers, which followed up with a reactive declaratory judgment action in a New York state court. Asarco responded with a motion for an anti-suit injunction from the Texas court, which it granted, enjoining London Market Insurers from pursuing the New York action or any other related action. The court of appeals affirmed, finding that the New York action was a threat to the Texas court's jurisdiction and could

130. *See generally Parallel Litigation*, *supra* note 20; James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 TEX. INT'L L. J. 499 (2002).

131. Crown Leasing Corp. v. Sims, 92 S.W.3d 924 (Tex. App.—Texarkana 2002, no pet.).

132. *Id.* at 926-28.

133. *Id.* at 928.

134. London Market Insurers v. Am. Home Assurance Co., 95 S.W.3d 702 (Tex. App.—Corpus Christi 2003, no pet.).

lead to an irreparable miscarriage of justice, two of the four grounds for issuing anti-suit injunctions in Texas.[135] A well-reasoned dissent argued that the standard had not been met and pointed out that the Texas Supreme Court had denied all three of its latest three considerations of anti-suit injunctions.[136]

II. CHOICE OF LAW

Choosing the applicable substantive law is a question, like personal jurisdiction and judgment enforcement, involving both forum law and constitutional issues. Understanding these issues requires a clear focus on basic principles. First, choice of law is a question of *state* law, both in state and federal courts.[137] Second, it is a question of *forum state* law. *Renvoi*—the practice of using another state's choice of law rule—is almost never employed unless the forum state directs it, and even there, the forum state remains in control.[138] Third, the forum state has broad power to make choice of law decisions, either legislatively or judicially, subject only to limited constitutional requirements.[139]

Within the forum state's control of choice of law is a hierarchy of choice of law rules. At the top are legislative choice of law rules, that is, statutes directing the application of certain state's laws, based on events or people important to the operation of that specific law.[140] Second in the

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135. *Id.* at 705-10. The four grounds are (1) threat to the court's jurisdiction; (2) to prevent the evasion of important public policy; (3) to prevent a multiplicity of lawsuits; and (4) to protect from vexatious or harassing lawsuits. *Id.* at 705-06; *see* Gannon v. Payne, 706 S.W.2d 304, 307 (Tex. 1986); Golden Rule Ins. Co. v. Harper, 925 S.W.2d 649, 651 (Tex. 1996) (per curiam).

136. *London Market Insurers*, 95 S.W.3d at 710-12 n.1 (referring to *Gannon* and *Golden Rule*, *supra* note 134, and to Christensen v. Integrity Ins. Co., 719 S.W.2d 161 (Tex. 1986)).

137. *See* Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941).

138. The Restatement (Second) of Conflict of Laws creates a presumption against *renvoi* except for limited circumstances. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8. Although commentators defend *renvoi*'s limited use, they acknowledge its general lack of acceptance in the United States except in limited circumstances, usually found in statutes directing the use of *renvoi*. *See* SCOLES & HAY, *supra* note 5, at 67-72 (especially 68 n.4); WEINTRAUB, *supra* note 1, at 88-94. Texas law provides for *renvoi* in TEX. BUS. & COM. CODE ANN. §§ 1.105(b), 2.402(b), 4.509(a), 4.102(b), 8.106 & 9.103. For federal courts, *Klaxon* reiterates the forum state's control of choice of law. *Kiaxon*, 313 U.S. at 497.

139. Similar to the due-process limitation on state long arm statutes, the United States Constitution imposes limits on a state's ability to choose the governing law in its courts. Unlike the limits on state long arm statutes (which arise only under the due process clause), the choice of law limits arise under several doctrines—due process (requiring a reasonable connection between the dispute and the governing law), full faith and credit equal protection, privileges and immunities, the commerce clause, and the contract clause. Constitutional problems most often occur when a state court chooses its own law in questionable circumstances. But the inappropriate choice of forum law is not the only conceivable constitutional issue, and even when choosing foreign law, courts must apply choice of law rules with an eye toward constitutional limitations.

140. RESTATEMENT (SECOND) § 6(1) and cmt. a. *See, e.g.*, Owens Corning v. Carter, 997 S.W.2d 560 (Tex. 1999) (applying an earlier version of the Texas wrongful death statute, requiring that the court "apply the rules of substantive law that are appropriate to the case." TEX. CIV. PRAC. & REM. CODE § 71.031 (Vernon Supp. 2003) (as amended in 1997, with the same wording as this provision).

choice-of-law hierarchy is party-controlled choice of law, that is, choice of law clauses in contracts that control unless public policy dictates otherwise.[141] Third in the hierarchy is the common law, now controlled in Texas by the most significant relationship test of the Restatement (Second) of Conflict of Laws.[142] This Survey article is organized according to this hierarchy, that is, statutory choice of law, followed by choice of law clauses, and concluding with choice of law under the most significant relationship test. Special issues, such as constitutional limitations are discussed in the following section. This grouping results in a discussion that mixes Texas Supreme Court opinions with those of Texas intermediate appellate courts, federal district courts, and the Fifth Circuit. In spite of this mix, readers should of course note that because choice of law is a state law issue, that the only binding opinions are those of the Texas Supreme Court.[143]

A. Statutory Choice of Law Rules

The Survey period offered one noteworthy case involving Texas choice of law statutes. *Citizens Insurance Company of America v. Hakim Daccach*[144] was an interlocutory appeal of the certification of a class of defendant Citizens Insurance's investors. In particular, Citizens Insurance complained that the district court failed to engage in an adequate choice of law analysis in finding that the application of Texas law created sufficient commonality to justify class formation.[145] Citizens Insurance argued that the lower court's finding of commonality rested upon the erroneous conclusion that Texas law applies to the sale of foreign life

141. Restatement (Second) of Conflict of Laws § 187 ("Law of the State Chosen by the Parties") allows contracting parties to choose a governing law, within defined limits. The Texas Supreme Court has adopted Restatement (Second) Section 187's provision that (1) parties may choose any state's law to govern any issue which the parties could have explicitly agreed to in the contract, and (2) for issues not capable of explicit agreement, the parties may choose any law bearing a substantial relationship to the parties or the transaction, unless it would violate a fundamental policy of a state having a materially greater interest than the chosen state, and which would be the state selected under the contract choice of law principles in Section 188. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677-78 (Tex. 1990).

142. The embodiment of the most significant relationship test are seven factors to be balanced according to the needs of the particular case. They are as follows: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states, and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws § 6(2). This listing is not by priority, which varies from case to case. *Id.* at cmt. c. In a larger sense, the most significant relationship test includes the other choice of law sections throughout the Restatement (Second) of Conflict of Laws.

143. The exception is when a federal court rules on a constitutional issue such as discussed in National Western Life Ins. Co. v. Rowe, 86 S.W.3d 285 (Tex. App.—Austin 2002, pet. filed), discussed *infra* at notes 345-56.

144. Citizens Ins. Co. of Am. v. Hakim Daccach, 105 S.W.3d 712 (Tex. App.—Austin 2003, pet. filed).

145. *See* Tex. R. Civ. P. 42(b)(4).

insurance policies occurring in jurisdictions across the globe. Citizens Insurance argued that a most-significant-relationship analysis under the Restatement (Second) of Conflict of Laws Section 6 pointed away from Texas law because of the interests of other states dictated by the class members' residences—an argument quickly refuted by the Texas statute directing the application of Texas law to this category of securities claims.[146]

B. Choice of Law Clauses in Contracts

Texas law and the Restatement (Second) of Conflict of Laws permit contracting parties to choose a governing law,[147] as reflected in two Survey period cases. *Benchmark Electronics, Inc. v. J.M. Huber Corp.*,[148] is a reversal of a summary judgment on a choice of law issue. The trial court applied New York law to Texas-based Benchmark's action for breach of contract and fraud regarding its acquisition of defendant's New Jersey-based subsidiary and granted defendant's summary judgment motion. The Fifth Circuit found that, although the parties' contractual choice of New York law controlled on the contract issues, that plaintiff's fraud claims required application of the fraud and general tort provisions of Restatement (Second) of Conflict of Laws which pointed to Texas law[149] and the necessary remand.

In re Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara[150] was an action to enforce a Swiss arbitration award regarding the construction of a geothermal electricity generating plant in Indonesia. After plaintiff KBC won the arbitration, the two Indonesian government-owned defendants obtained an Indonesian judgment setting aside the award, and defendants sought to interpose that nullifying judgment in KBC's action in a Texas federal court to enforce the arbitration. The key issue was which law controlled the agreement to arbitrate. The parties had agreed to the Swiss arbitration but their agreement was ambiguous as to which law controlled. The court noted the presumption that situs law governs arbitral proceedings, but further noted the parties' autonomy to vary from that presumption.[151] After an extensive review of the agreement and the parties' conduct, the Houston federal court held that Swiss law governed and the Indonesian judgment was ineffective to

146. *See* Tex. Rev. Civ. Stat. Ann. arts. 581-12, 33A(1) (Vernon Supp. 2003) (cited in *Citizens Ins. Co.*, 105 S.W.3d at 724); *see generally Citizens Ins. Co.*, 105 S.W.3d at 723-26; *see also* Restatement (Second) of Conflict of Laws § 6(1) (approving of the forum's statutory preemption of the most significant relationship test).

147. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990); *see also* Restatement (Second) of Conflict of Laws § 187.

148. Benchmark Elecs., Inc. v. J.M. Huber Corp., 343 F.3d 719 (5th Cir. 2003).

149. *Id.* at 726-28 (citing Restatement (Second) of Conflict of Laws § 145 (general tort provisions) and § 148 (fraud)). The court further noted the Texas requirement of issue-by-issue choice of law analysis (known as depecage). *Id.* at 727.

150. *In re* Karaha Bodas Co. v. Perushaan Pertambangan Minyak Dan Gas Bumi Negra, 264 F. Supp. 2d 490 (S.D. Tex. 2003).

151. *Id.* at 494-95.

nullify the award.[152]

C. The Most Significant Relationship Test

If there is no statutory choice of law rule, and if contracting parties have not made an effective choice of law, then Texas courts apply the most significant relationship test from the Restatement (Second) of Conflict of Laws.[153] The Survey period produced four noteworthy cases applying the test.

In *Zermeno v. McDonnell Douglas Corp.*,[154] a federal court addressed an unusual choice of law question—hypothetically—tied to fraudulent joinder and removal. Zermeno is a surviving family member of a mother and three children killed when an AeroMexico flight erratically landed, left the runway, and struck their house. Zermeno settled with AeroMexico but later claimed duress and sued AeroMexico, along with several other defendants, in a Texas state court. Defendants removed the case to federal court in Houston, and Zermeno moved to remand for lack of complete diversity based on AeroMexico's presence as defendant. Before Zermeno's remand motion could be heard, defendants moved for a forum non conveniens dismissal. The court was faced with two motions, one difficult and one routine. The difficult motion went to diversity jurisdiction and whether Zermeno had fraudulently joined AeroMexico to prevent removal; the determining factor would be the legitimacy of the release signed in Mexico that would bar any action against AeroMexico and make removal possible. The more straightforward issue was whether Mexico was a significantly preferable forum. Citing the United States Supreme Court's recent *Ruhrgas*[155] decision, which now allows the flexibility to dispose of the case on forum non conveniens grounds without addressing the more complex question of jurisdiction, the court granted defendants forum non conveniens motion. Before getting to that issue, however, the court took care to demonstrate the choice of law difficulties in addressing AeroMexico's release. The court listed both the seven factors of the most significant relationship test under Restatement (Second) of Conflict of Laws Section 6 as well as the five contacts specifically governing contracts under Section 188. The court then recited the complex evidence surrounding this issue, including its negotiation and signing in

152. *Id.* at 501.

153. The embodiment of the most significant relationship test are seven factors to be balanced according to the needs of the particular case. They are as follows: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states; and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws § 6(2). This listing is not by priority, which varies from case to case. *Id.* at cmt. c. In a larger sense, the most significant relationship test includes the other choice of law sections throughout the Restatement (Second) of Conflict of Laws.

154. Zermoro v. McDonnell Douglas Corp., 246 F. Supp. 2d 646, 646 (S.D. Tex. 2003).

155. *Id.* (citing Ruhrgas v. Marathon Oil Co., 526 U.S. 574 (1999)).

Mexico and Zermeno's claim of duress. The court then raised a second choice of law question—the likelihood that Restatement (Second) of Conflict of Laws Section 145 would point to the application of Mexico's law to the tort issues in the case's merits, and speculated as to difficulties in that application as well. The court concluded that the better route was to follow *Ruhrgas* and first address the forum non conveniens motion.[156]

Perkins v. Dynasty Group Auto[157] is a wrongful death action in a one-vehicle accident in Texas. The court of appeals affirmed the trial court's summary judgment and its decision to apply Texas law, perhaps a predictable conclusion at first glance, but made more complicated by the underlying facts. None of the passengers was from Texas, and the apparent driver's negligence possibly included an employment relationship and vicarious liability issues. The trip originated in Florida as part of a "drive-away" program in which people agree to drive cars to other locations for resale there, with the drivers receiving no compensation but also not paying for the car's use. In this case, the vehicle was a 1994 Toyota minivan and the multiple drivers were from Australia, Switzerland, England, Sweden and California. After stopping in San Antonio, the group left without spending the night and had an accident early the next morning near Sierra Blanca, Texas. All passengers were thrown from the car and one later died. The decedent's estate and several passengers sued Florida-based Dynasty Group Auto for alleged driver negligence. The court applied Restatement (Second) of Conflict of Laws Sections 6 and 145 (torts) to conclude that Texas had the most significant relationship, in spite of the parties being nonresidents, having formed their relationship in Florida, and more importantly, having formed the relationship with defendant in Florida. The application of Texas law avoided Florida's "dangerous instrumentality" doctrine which would have imposed a higher standard on Dynasty. Although the opinion did not merit official reporting, it is noted in this year's annual survey of American conflicts law, compared to a number of cases involving claims against vehicle owners who lease or loan them to others.[158]

In *Tracker Marine, L.P. v. Ogle*,[159] the court of appeals applied Restatement (Second) of Conflict of Laws Section 148 in its reversal of the trial court's certification of a consumer class of boat owners allegedly victimized by rotting plywood. The court first noted the Supreme Court's due process mandate barring states from applying their laws to claims too weakly connected to the forum[160] and then, analyzing the defendant's Missouri home base and the plaintiff class's multi-state residences con-

156. *Id.* at 654-56.

157. Perkins v. Dynasty Group Auto, No. 08-01-00493-CV, 2003 WL 22810452 (Tex. App.—El Paso Nov. 25, 2003, no pet. h.) (mem. opinion).

158. Symeon C. Symeonides, *Choice of Law in the American Courts in 2003: Seventeenth Annual Survey*, 52 AM. J. COMP. L. 1, 34-35 (2004).

159. Tracker Marine, L.P. v. Ogle, 108 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

160. *Id.* at 355 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985)).

cluded that no one state's law could control all the claims, thus undermining class formation.[161] Although the opinion is grounded in the due process mandate, it is an excellent survey of American states' consumer product law, illustrating the difficulty of applying one state's law to multistate consumer claims.

Snow v. WRS Group, Inc.[162] is an invasion of privacy action for the unauthorized publication of a mother's child birth photographs on the internet. The court concluded that Oregon law, as plaintiff's residence and situs of her injury, should apply. Although the court was required to follow Texas state law—meaning Restatement (Second) of Conflict of Laws Sections 6 and 145—the application was short-circuited by clear Fifth Circuit precedent applying those sections to a significantly similar claim.[163] In *Vasquez v. Bridgestone/Firestone, Inc.,* the Fifth Circuit upheld the trial court's selection of Mexico's law, under Restatement (Second) of Conflict of Laws Sections 6 and 145, to govern a single-vehicle accident in Mexico allegedly caused by American product defects.[164] In *Benchmark Electronics*, the Fifth Circuit injected a Restatement (Second) discussion regarding fraud to reverse a district court's *sua sponte* summary judgment in which it applied the parties' choice of New York law to all contract and tort issues.[165]

D. Other Choice of Law Issues

1. *Legislative Jurisdiction and Constitutional Limits on State Choice of Law Rules*

In a year when the Texas judicial focus was on personal jurisdiction, the United States Supreme Court rendered the most important choice of law decision in decades. In *Franchise Tax Board of California v. Hyatt*,[166] the Court ruled that it would "abandon the balancing-of-interests approach to conflicts [sic] of law under the Full Faith and Credit Clause."[167] The ruling affirmed a Nevada supreme court opinion that allowed a Nevada resident to sue a California state tax agency under Nevada's relaxed immunity standards rather than California's complete immunity.

Under the former precedent, states faced with choice of law questions were constitutionally required to assess the interests of the competing states and, at the very least, weigh those interests in deciding which law to apply. California urged the Court to retain interest-balancing at least where "core sovereignty" interests were at stake. The Court declined,

161. *Id.* at 359-63.

162. Snow v. WRS Group, Inc., No. 02-50118, 02-50812, 2003 WL 21672844 (5th Cir. July 17, 2003).

163. *Id.* at *2-3 (citing Wood v. Hustler Magazine, 736 F.2d 1084, 1087 (5th Cir. 1984)).

164. Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 665 (5th Cir. 2003), discussed *supra* at notes 115-120 and accompanying text.

165. Benchmark Elecs., Inc. v. J.M. Huber Corp., 343 F.3d 719 (5th Cir. 2003), discussed *supra* at notes 148-149 and accompanying text.

166. Franchise Tax Bd. of Ca. v. Hyatt, 538 U.S. 488 (2003).

167. *Id.* at 488-89 (referring to Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.10).

pointing to the inherent difficulties in interest balancing: "Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause."[168] To the extent the Court follows *Franchise Tax Board* in the future, the only significant limit on state court choice of law analysis will be due process, which requires a reasonable relationship between the parties, the dispute, and the state whose law is applied.[169]

Tracker Marine, discussed immediately above, noted the constitutional limitation on states applying laws lacking a real connection to the dispute.[170]

2. *False Conflicts*

A false conflict exists when other potentially applicable laws are the same as the forum's laws, or at least reach the same result.[171] Defining a clear, outcome-changing difference between the forum's and the foreign law is the first step in conducting a choice of law analysis, and the absence of a clear conflict should result in the application of forum law.[172] The Survey period produced only one false conflict case. *Vandeventer v. All American Life & Casualty Company*[173] was an action by insureds for breach of contract, illusory contract, and good faith and fair dealing breach relating to the defendant's sale of policies to a Texas insurer, American Insurance Company of Texas ("AICT"), who then cancelled them. The trial judge granted summary judgment to defendant and plaintiffs appealed, including a challenge to the governing law. Plaintiffs were from Indiana and South Carolina and purchased the policies there. The

168. *Id.* at 488. The Court left considerable room in its analysis for refining this radical statement later, observing that: "States sovereign interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* (quoting Carroll v. Lanza, 349 U.S. 408, 413 (1955)).

169. *See e.g.*, Mayo v. Hartford Life Ins. Co., 220 F. Supp. 2d 714 (S.D. Tex. 2002), discussed in James P. George & Anna K. Teller, *Conflict of Laws*, 56 SMU L. REV. 1283, 1324-26 (2003). The Supreme Court has also applied equal protection, privileges and immunities, the commerce clause, and the contract clause as a limit on choice of law decisions. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 and comments following. *See also* SCOLES & HAY, *supra* note 5, at 78-109; WEINTRAUB, *supra* note 1, at 585-648; James P. George, *Choice of Law: A Guide for Texas Attorneys*, 25 TEX. TECH. L. REV. 833, 844-46 (1994).

170. Tracker Marine, L.P. v. Ogle, 108 S.W.3d 349, 349 (Tex. App.—Houston [14th Dist.] 2003, no pet.), *see supra* notes 159-161 and accompanying text.

171. This is the Restatement's definition of false conflict. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, cmt. i; *id.* at § 186, cmt. c. A very different concept of false conflicts came from Professor Brainerd Currie's government interest analysis, which defines a false conflict as one in which only one state has a real interest. *See* SCOLES & HAY, *supra* note 5, at 16-19. Unfortunately, Texas courts have used both definitions, as discussed in George & Teller, *supra* note 169, 1335 n.396.

172. Phillips Petroleum Co. v. Shotts, 472 U.S. 797, 823-45 (1985) (Stevens, J., concurring in part and dissenting in part).

173. Vandeventer v. All Am. Life & Cas. Co., 101 S.W.3d 703 (Tex. App.—Fort Worth 2003, no pet.).

dispute's only Texas connection was AICT, which was not a party to the summary judgment or to the appeal. Plaintiffs argued on appeal for the application of Indiana, and alternatively South Carolina law, but failed to identify any distinction with Texas law. The court accordingly found no conflict and no need for a choice of law analysis.[174] Having found no conflict, this left the court free to pick and choose precedents as persuasive authority from Indiana, South Carolina, and other states.[175]

3. *Proof of Foreign Law*

Litigants seeking the application of another state's or nation's law must comply with the forum's rules for pleading and proving foreign law. In both Texas and federal courts, judicial notice is sufficient for the application of sister-states' laws.[176] Foreign country law, on the other hand, must be adequately pleaded and proven.[177] During the Survey period, the Fifth Circuit upheld a trial court's refusal to apply Mexico's attorney-client privilege in a breach of contract action,[178] and the Fort Worth Court of Appeals ignored a choice of law clause designating Florida law,[179] both for the proponents' failure to demonstrate a difference with otherwise applicable Texas law.

4. *Use of the Forum's Procedural Rules*

In *Robin v. Entergy Gulf States, Inc.*,[180] plaintiffs appealed a take-nothing judgment on their claim for job-related injuries while working for an electric company in Louisiana. The trial court, after extensive argument, ruled that Louisiana law applied under the Texas foreign personal injury

174. *Id.* at 711-12.

175. *Id.* at 712-24.

176. TEX. R. EVID. 202 allows a Texas court to take judicial notice of sister states' laws on its own motion and requires it to do so upon a party's motion. Parties must supply "sufficient information" for the court to comply. *Id.* Federal practice is the same under federal common law; neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure address judicial notice of American states' laws. *See* Lamar v. Micou, 114 U.S. 218, 223 (1885); Kucel v. Walter E. Heller & Co., 813 F.2d 67, 74 (5th Cir. 1987). Even though FED. R. EVID. 201 (the sole federal evidence rule dealing with judicial notice) does not apply to states' laws, we should assume that *Lamar*'s judicial notice mandate for American states' laws is subject to FED. R. EVID. 201(b)'s provision for proof of matters "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." That is, federal courts may take judicial notice of American states' laws from (1) official statutory and case reports, (2) widely-used unofficial versions, or (3) copies, all subject to evidentiary rules on authentication and best evidence.

177. TEX. R. EVID. 203 requires written notice of foreign law by pleading or other reasonable notice at least thirty days before trial, including all written materials or sources offered as proof. For non-English originals, parties must provide copies of both the original and the English translation. Sources include affidavits, testimony, briefs, treatises, and any other material source, whether or not submitted by a party, and whether or not otherwise admissible under the Texas Rules of Evidence. Federal practice is similar. *See* FED. R. CIV. P. 44.1.

178. *In re* Avantel, S.A., 343 F.3d 311, 321-22 (5th Cir. 2003).

179. Fraud-Tech, Inc. v. Choicepoint, Inc., 102 S.W.3d 366 (Tex. App.—Fort Worth 2003, pet. denied).

180. Robin v. Entergy Gulf States, Inc., 91 S.W.3d 883 (Tex. App.—Beaumont 2002, no pet.).

statute. This issue was not appealed, but another choice of law issue arose on appeal when plaintiffs challenged the trial court's instructions of the duty of care and its assessment of the weight of the evidence supporting the verdict. Both parties cited Louisiana law on these issues, and the court of appeals took care to point out that on procedural issues such as standard of review and assessment of trial court discretion, Texas law governed rather than Louisiana law.[181]

III. FOREIGN JUDGMENTS

Foreign judgments from other states and countries create Texas conflict of laws issues in two ways: (1) their local enforcement, and (2) their preclusive effect on local lawsuits. Foreign judgments include those from sister states and foreign country judgments, but do not include federal court judgments from districts outside Texas because those judgments are enforced as local federal court judgments.[182]

A. ENFORCEMENT

Texas recognizes two methods of enforcing foreign judgments: the common-law method using the foreign judgment as the basis for a local lawsuit,[183] and, since 1981, the more direct procedure under the two uniform judgment acts, along with similar acts for arbitration awards, child custody and child support. There were no instances of common-law enforcement during the Survey period.[184]

1. The Uniform Enforcement of Foreign Judgments Act

The Uniform Enforcement of Foreign Judgments Act (UEFJA) provides for summary enforcement of non-Texas judgments that are entitled to full faith and credit.[185] This includes sister-state judgments as well as foreign country money judgments that Texas recognizes under the Uni-

181. *Id.* at 885.

182. *See* 28 U.S.C. § 1963 (West Supp. 2002).

183. The underlying mandate for the common law enforcement is the full faith and credit clause of the United States Constitution, U.S. CONST. art. IV, § 1, and its statutory counterpart, 28 U.S.C. § 1738. The Uniform Enforcement of Foreign Judgments Act specifically reserves the common law method as an alternative. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon 1997).

184. Examples of common law enforcement after the UEFJA's enactment include McFadden v. Farmers and Merchants Bank, 689 S.W.2d 330 (Tex. App.—Fort Worth 1985, no writ); Cal Growers, Inc. v. Palmer Warehouse & Transfer Co., 687 S.W.2d 384 (Tex. App.—Houston [14th Dist.] 1985, no writ); First Nat'l Bank v. Rector, 710 S.W.2d 100 (Tex. App.—Austin 1986, writ ref'd n.r.e.); Escalona v. Combs, 712 S.W.2d 822 (Tex. App.—Houston [1st Dist.] 1986, no writ); Keller v. Nevel, 699 S.W.2d 211 (Tex. 1985).

185. TEX. CIV. PRAC. & REM. CODE ANN. § 35.001-.007 (Vernon 1997). The Act requires (1) the judgment creditor to file a copy of the judgment authenticated under federal or Texas law, *id.* at § 35.003; (2) notice to the judgment debtor from the clerk, *id.* at § 35.004, or the judgment creditor, *id.* at § 35.005. The judgment debtor may (1) move to stay enforcement if grounds exist under the law of Texas or the rendering state, *id.* at 35.006; and (2) challenge enforcement along traditional full faith and credit grounds such as the rendering state's lack of personal or subject matter jurisdiction. *Id.* at § 35.003.

form Foreign Country Money-Judgment Recognition Act (UFCMJRA).[186] The Survey period produced two UEFJA cases and no foreign money judgment cases. *Russo v. Dear*[187] clarified the impropriety of challenging the merits of a valid and final sister-state judgment. Barbara Russo hired private investigator, Dear, to investigate her friend's death, which required Dear to travel to Ohio. Russo later sued Dear in Texas for overcharges and fraud. Dear counterclaimed for defamation, but his insurance carrier settled with Russo without Dear's permission. When Dear then sued Russo in Ohio, Russo moved to dismiss on the grounds that Dear's claims were raised or should have been raised in his Texas counterclaim. The Ohio court ruled against Russo and issued a judgment in Dear's favor. Dear attempted enforcement in Texas but failed because of the Ohio judgment's non-finality. Dear then obtained a *nunc pro tunc* judgment in Ohio that cured the finality problem and again sought enforcement in Texas. The Texas trial court again refused enforcement on non-finality grounds, but the Dallas Court of Appeals reversed after finding that the *nunc pro tunc* judgment had achieved finality. On remand, Russo again raised her objections to the Ohio court's errors but lost. The court of appeals affirmed, noting that Russo's collateral attacks on the Ohio judgment were not permitted under the Constitution's full faith and credit clause.[188]

The same issue—attacks on the foreign judgment's merits—arose in *Adriano v. Finova Capital Corporation*[189] and had the same outcome. The claim originated as Finova's action in an Arizona federal court to collect on the Adrianos' guaranties on a defaulted loan to their restaurant. The federal court in Arizona entered judgment against the Adrianos as a sanction for discovery abuse and other wrongs in the case, and the Ninth Circuit Court of Appeals affirmed. When Finova domesticated the Ninth Circuit judgment in a Texas state court, the Adrianos filed a

186. TEX. CIV. PRAC. & REM. CODE ANN. § 36.001-.008 (Vernon 1997). Like the UEFJA, the UFCMJRA requires the judgment creditor to file a copy of the foreign country judgment that has been authenticated under federal or Texas law, *id.* at § 36.0041, with notice to the debtor provided either by the clerk, *id.* at § 36.0042, or the creditor, *id.* at § 36.0043. The judgment debtor has thirty days to challenge enforcement, or sixty if domiciled in a foreign country, with a twenty-day extension available for good cause. *Id.* at § 36.0044. Unlike the UEFJA, the UFCMJRA explicitly states ten grounds for non-recognition—three mandatory and seven discretionary. Briefly stated, the mandatory grounds are (1) lack of an impartial tribunal, (2) lack of personal jurisdiction, and (3) lack of subject matter jurisdiction. *Id.* at § 36.005(a). The discretionary grounds for non-recognition are that the foreign action (1) involved inadequate notice, (2) was obtained by fraud, (3) violates Texas public policy, (4) is contrary to another final judgment, (5) is contrary to the parties' agreement (e.g., a contrary forum selection clause), (6) was in an inconvenient forum, and (7) is not from a country granting reciprocal enforcement rights. *Id.* at § 36.005(b). The UFCMJRA also provides for stays, id. at § 36.007, and expressly reserves the right of enforcement of non-money judgments under traditional, non-statutory standards, id. at § 36.008. *See* Hilton v. Guyot, 159 U.S. 113 (1895) (comity as discretionary grounds for recognizing and enforcing foreign country judgments).

187. Russo v. Dear, 105 S.W.3d 43 (Tex. App.—Dallas 2003, pet. denied).

188. *Id.* at 46-47.

189. Adrano v. Finova Capital Corp., No. 04-02-00796-CV, 2003 WL 21696300 (Tex. App.—San Antonio Aug. 22, 2003, pet. denied) (mem. opinion).

motion for new trial, arguing that their Arizona attorney had withdrawn without telling them and that they had no notice of that case. The Texas trial court denied their motion for new trial, and the San Antonio Court of Appeals affirmed, emphasizing that any wrongs occurring in a sister-state court having jurisdiction were immune from attack now because of the full faith and credit required for that judgment.[190] There were no UFCMJRA cases during the Survey period.

2. *Arbitration Enforcement*

Foreign arbitration awards may be enforced in Texas under federal and state law.[191] The only case this period, *Bridas S.A.P.I.C. v. Government of Turkmenistan*,[192] was an action by an Argentine corporation to enforce an arbitration award issued against the government of Turkmenistan. The dispute arose from a joint venture agreement between Bridas and a production association called Turkmenneft, created and owned by the Turkmenistan government, whose purpose was to exploit minerals in an area of southwestern Turkmenistan known as Keimir. In November 1995, the Turkmenistan government ordered Bridas to cease operations and prohibited further imports or exports.[193] Bridas submitted the dispute to arbitration with the International Chamber of Commerce in Paris, pursuant to an arbitration clause in the joint venture agreement. The ICC tribunal awarded Bridas $495 million in January 2001, against both Turkmenneft and the Turkmenistan government.[194] When they refused to pay, Bridas sued in the Southern District of Texas, seeking to confirm and enforce the award under the Federal Arbitration Act. Defendants objected on grounds including Turkmenistan's immunity and its not having been a party to the joint venture. The district court held in Bridas's favor on all points and defendants appealed. The Fifth Circuit upheld the award as to the private company Turkmenneft, but vacated it as to the government, rejecting Bridas's arguments that tied the government to its private company, including agency, alter ego, estoppel, and third party beneficiary.[195]

3. *Family Law Judgments*

Texas laws also provide for recognition and enforcement of sister-state and foreign-country child custody under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)[196] and child support under the Uniform Interstate Family Support Act (UIFSA).[197] This past year pro-

190. *Id.* at *2-3.
191. *See* Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (2000); Texas International Arbitration Act, TEX. CIV. PRAC. & REM. CODE § 172.082(f) (Vernon 1997 & Supp. 2003).
192. Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347 (5th Cir. 2003).
193. *Id.* at 351-52.
194. *Id.* at 352.
195. *Id.* at 353-63.
196. *See* TEX. FAM. CODE ANN. §§ 152.001-.317 (Vernon 2002 & Supp. 2004).
197. *See* TEX. FAM. CODE ANN. §§ 159. 001-.902 (Vernon 2002 & Supp. 2004).

duced one of each. *In the Interest of K.L.V. and K.J.V.*[198] points out the need to respond quickly to notices of foreign judgments, or in this case, foreign custody orders. The parents were married in Utah and had children in 1991 and 1995. They divorced in Nevada in 1998, and pursuant to the parties' agreement, the mother took the children to her home in Norway. In February 2000, the father filed again in Nevada seeking the children's return and change of custody, and the court granted his motion in March 2000. Then in May, the father and his girlfriend met the mother and the children in a hotel in Norway to celebrate one of the children's birthdays, and it is not difficult to guess what followed. The father persuaded the mother to allow him to take the children back to his room for a surprise, and when the mother later went to the room, the surprise was that father, girlfriend and the children had left for the father's new residence in Texas.[199]

In October 2000, the Nevada court entered further orders exercising child custody jurisdiction until another court assumed that role, ordering the surrender of the children's passports and that they remain in Texas pending further custody orders. The father followed up with a custody modification action in Texas, but before that could be adjudicated, the mother returned to Nevada and was able to persuade the Nevada Supreme Court to vacate everything and find that Nevada lacked child custody jurisdiction and that any further determinations should occur under Hague Convention guidelines. The mother then filed the Nevada opinion in Texas where the custody action was still pending. The Texas court took judicial notice of the Nevada opinion. After all this litigation, which also included forums in England and Norway, the father failed to perfect a timely appeal from the court's entry of the Nevada order, and the Fort Worth Court of Appeals declined review.[200]

Harris v. Harris,[201] the Survey period's only interstate child support enforcement case, highlights the need for uniform laws in this area. The parties married in 1984 and divorced in 1994, living all that time in Jackson, Mississippi. The mother was granted full custody of their only child and the father was granted visitation and ordered to pay child support and alimony. The father soon moved to Baton Rouge, Louisiana and apparently paid support only sporadically. In January 2000, the Mississippi court ordered the father to pay $30,659.70 to the mother in arrearages. The court's second order reduced the amount with a $6,000 offset as a credit for payments, and in its third order directed withholding from the father's wages (presumably in Louisiana). The mother and child moved

198. *In re* K.L.V. & K.J.V. 109 S.W.3d 61 (Tex. App.—Fort Worth 2003, pet. denied).

199. *Id.* at 63.

200. *Id.* at 64-67. The applicable statute is Texas Family Code Ann. § 152.314 (Vernon 2002), part of the Uniform Child Custody Jurisdiction and Enforcement Act. *See also In re* Y.M.A., 111 S.W.3d 790 (Tex. App.—Fort Worth 2003, no pet.), a straightforward and expedited enforcement of an Egyptian custody decree over the father's objections.

201. Harris v. Harris, No. 03-02-00404-CV, 2003 WL 742362 (Tex. App.—Austin Mar. 6, 2003, no pet.) (mem. opinion).

to Austin in March 2000, leading the father to complain to the Mississippi court that he lacked access to his son and to move for custody modification. Meanwhile, the mother filed two new lawsuits, one in Travis County, Texas, seeking to modify the Mississippi orders, and a second in Louisiana to enforce the Mississippi arrearages orders.[202]

At this point there were actions in three states and no party lived in Mississippi, but the Mississippi court nonetheless found mother in contempt and suspended its prior arrearages orders. Father registered this new Mississippi ruling in the Louisiana action, which the Louisiana court recognized as controlling, thus ordering suspension of prior support awards. Mother then asked the Texas court to "recognize" the earlier Mississippi orders as controlling and to "reinstate" them, but she failed to register any foreign orders as required under UIFSA.[203] Father also registered in the Texas court the foreign orders favoring him (both as to custody and child support), and mother cured her misfiling with proper copies of the earlier Mississippi orders.

The Texas trial court assumed jurisdiction over the custody issue and named mother the sole managing conservator and father possessory conservator, but declined jurisdiction as to child support, finding that the Louisiana court now had jurisdiction over support issues. The Austin Court of Appeals affirmed, finding that Louisiana had assumed jurisdiction and that in any event, Texas could not determine child support because it lacked personal jurisdiction over the father.

B. Preclusion

Both sister-state and foreign country judgments are entitled to preclusive effect in Texas courts. The full faith and credit clause compels full faith and credit for valid and final sister-state judgments involving the same parties and claims, as well as collateral estoppel if the required elements are satisfied.[204] Under the doctrine of comity, foreign country judgments may also be given res judicata and preclusive effect, subject to discretion based on the nature of the foreign proceeding and the satisfaction of traditional preclusion requirements.[205]

1. Interstate Preclusion

Acridge v. Evangelical Lutheran Good Samaritan Society[206] demonstrates how a prior state court decision could determine federal subject matter jurisdiction. This was an action for nursing home negligence relating to an Alzheimer's patient's murder by his roommate. The victim,

202. *Id.* at *1.

203. *See id.* at *2 (discussing the filing and notice requirements under Tex. Fam. Code Ann. §§ 159.602, .605.608 (Vernon Supp. 2004)).

204. U.S. Const. art. IV, § 1; *see also* 28 U.S.C. § 1738; *see* Weintraub, *supra* note 1, at 701-02.

205. Scoles & Hay, *supra* note 5, at 999-1001.

206. Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444 (5th Cir. 2003).

Louis Acridge, had been a sheriff in New Mexico since 1968. In 1996, suffering from Alzheimer's dementia, he was placed in a nursing home in New Mexico. His wife moved him to a nursing home in Texas in 1997, where Louis was assigned to a room with a resident having violent history and who murdered Louis in June 1999. His family sued the nursing home and individual defendants for negligence, and plaintiffs' choice of a federal court led defendants to challenge diversity jurisdiction, arguing that both Louis and some defendants were from Texas.[207]

Federal diversity jurisdiction turns on the fiction of state citizenship, which in turn rests on domicile.[208] Although federal jurisdiction is statutory, its domicile component is federal common law, and the issue here was whether Mary, as Louis's guardian, had the authority to change his domicile from New Mexico to Texas when she moved him here. The question was one of first impression in the Fifth Circuit, and one on which other circuits were split.[209] After examining the reasons underlying the split, the court opted for the rule applied in the Tenth and Seventh Circuits, giving guardians the power to change an incompetent's domicile if acting in his best interest.[210]

Defendants argued that Mary had in fact changed Louis's domicile to Texas when she moved him here and obtained Texas Medicaid benefits starting in 1997. The court found this persuasive except for one possibly preclusive roadblock—a New Mexico probate court had already accepted jurisdiction over Louis's estate. Plaintiffs argued that this probate determination was binding on the federal court, and the court of appeals noted that it could be under the full faith and credit clause, that it was required to give the New Mexico decision. The court further noted that full faith and credit required the federal court to give the New Mexico ruling the same effect it would have in New Mexico. Preclusion failed here on several grounds, including the court's finding that Louis's domicile was not fully litigated as part of that process, was not necessary to a New Mexico probate (which also allows non-domiciliary probates), and was being used here against defendants who were not parties to the New Mexico case. With that issue resolved, the court held that Louis was a Texas domiciliary and dismissed for lack of diversity.[211] In spite of issue preclusion's failure here, it is noteworthy that a properly litigated state court issue may be determinative of jurisdiction in later state and federal cases.

2. *International Preclusion*

Both international preclusion cases this Survey period involved judgments from Mexico's courts. *International Transactions, Ltd. v. Embotel-*

207. *Id.* at 446-47.
208. *See* Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974); *see also* JAMES P. GEORGE, THE FEDERAL COURTHOUSE DOOR (2002) at 73-75.
209. *Acridge*, 334 F.3d at 449.
210. *Id.* at 450.
211. *Id.* at 452-53.

ladora Agral Regiomontana, S.A. de C.V.,[212] involved the recognition, and rejection on appeal, of a Mexican bankruptcy decision invalidating an arbitration award. International Transactions, Ltd ("ITL") sued in a state district court in Dallas to confirm the award. Defendant Embotelladora removed to federal court, which then disallowed ITL's claim because of a Mexican bankruptcy court ruling. The federal court based its decision on federal common law and comity as established in *Hilton v. Guyot.*[213] The Fifth Circuit reversed on the grounds that the Mexican bankruptcy court's ruling had been ex parte and without notice to ITL, and then remanded the case to the district court for further consideration.[214]

In *Fidalgo v. Galan*,[215] a Mexican divorce decree invalidated a later Texas decree. The parties married in 1985 in Brownsville, Texas, lived in Texas until 1990, moved back to Mexico and separated in 1997. Wife Mercedes Fidalgo was granted a divorce in Mexico in 1998 and then returned to live in Texas, where in 1999 she filed another divorce action from which she obtained a no-answer default judgment. Husband Galan filed this bill of review seeking to set aside the Texas divorce decree, which the trial court granted. The court of appeals affirmed on grounds including the finality of the Mexican divorce rendered the original Texas court without jurisdiction.[216]

212. Int'l Transactions. Ltd. v. Embotelladora Agral Regiomontana, S.A. de C.V., 347 F.3d 589 (5th Cir. 2003).

213. *Id.* at 593 (citing Hilton v. Guyot, 159 U.S. 113 U.S. 113, 164-65 (1895)).

214. *Id.* at 596. Judge Smith dissented on the grounds that ITL had actual knowledge of the bankruptcy and did not take sufficient action, thus waiving any objection to not receiving notice of a specific ruling later. *Id.* at 596-98. This case is not discussed in the arbitration section because that was not the issue, and is not discussed in the enforcement of foreign judgments section because the issue here was issue preclusion with the Mexican's bankruptcy court's finding.

215. Fidalgo v. Galan, No. 13-02-469-CV, 2003 WL 21982186 (Tex. App.—Corpus Christi Aug. 21, 2003, no pet.) (mem. opinion).

216. *Id.* at *2-3.