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## Conflict of Laws

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# CONFLICT OF LAWS

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## TABLE OF CONTENTS

- I. FORUM CONTESTS
  - A. FORUM CLAUSES
    - 1. *Prorogating Forum Clauses*
    - 2. *Derogating Forum Clauses*
  - B. TEXAS LONG-ARM AND MINIMUM CONTACTS
  - C. FEDERAL LONG-ARM STATUTES AND NATIONWIDE CONTACTS
  - D. INTERNET-BASED JURISDICTION
  - E. FORUM NON CONVENIENS
- II. CHOICE OF LAW
  - A. STATUTORY CHOICE-OF-LAW RULES
  - B. THE MOST SIGNIFICANT RELATIONSHIP TEST
    - 1. *Choice-of-Law Clauses in Contracts*
    - 2. *Contracts Not Designating a Governing Law*
    - 3. *Torts*
  - C. FEDERAL CHOICE-OF-LAW RULES
  - D. OTHER CHOICE-OF-LAW ISSUES
- III. FOREIGN JUDGMENTS
  - A. SISTER-STATE JUDGMENTS
  - B. FOREIGN COUNTY JUDGMENTS
  - C. PRECLUSION
- IV. CONCLUSION

States' and nations' laws collide when foreign factors appear in a lawsuit. Nonresident litigants, incidents outside the forum, and judgments from other jurisdictions can create problems with personal jurisdiction, choice of law, and the recognition of foreign judgments. This Article reviews Texas conflict cases from Texas state and federal courts during the Survey-period from November 1, 2011 through October 31, 2013. The Article excludes cases involving federal-

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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.<sup>1</sup>

Although no data are readily available to confirm this, Texas is no doubt a primary state in the production of conflict-of-laws precedents. This results not only from its size and population, but also from its placement bordering four states and a civil-law nation, and its significant international trade volume. Texas state and federal courts provide a fascinating study of conflicts issues every year, but the volume of case law now greatly exceeds this Survey's ability to report on them, a function both of journal space and authors' time. In addition, the current Survey covers two years and will accordingly limit its review to a few highlight cases and an examination of a couple of trends.

The most notable highlight is a non-Texas case, which is nevertheless important because it comes from the Fifth Circuit Court of Appeals, distinguishing the Circuit's view on stream-of-commerce jurisdiction from the U.S. Supreme Court's recent plurality in 2011.<sup>2</sup> Choice-of-law cases include two interesting trends, one good and one bad. The good trend is Texas courts' increasingly sophisticated use—notably in tort cases—of the variety of subject-specific sections in the Second Restatement of Conflict of Laws.<sup>3</sup> The bad trend, holding over from the 2012 Survey, is the number of courts acquiescing to contractual choice of law clauses without the scrutiny required under Texas law and the Restatement.<sup>4</sup> Along with these cases, the Survey-period produced a number of notable holdings discussed below.

## I. FORUM CONTESTS

Asserting jurisdiction over a nonresident defendant requires amenability to Texas jurisdiction and receipt of proper notice.<sup>5</sup> Amenability may be established by consent (usually based on a contract's forum-selection clause), waiver (failing to make a timely objection), or extraterritorial service of process under a Texas long-arm statute.<sup>6</sup> Because most aspects of notice are purely matters of forum law,<sup>7</sup> this Article will focus primarily on the issues relating to amenability.

Stream-of-commerce once again takes center stage, with nuanced opinions continuing to muddy the waters but not changing the law. The 2012 Survey article highlighted the U.S. Supreme Court's decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, where the Court held New Jersey did not have personal jurisdiction over an English manufacturer in a products liability action brought

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1. For a thorough discussion of the choice-of-law function in federal courts, see RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 722-72 (6th ed. 2010).

2. See *infra* notes 6-14.

3. See *infra* notes 162-78.

4. See *infra* notes 120-30.

5. James P. George et al., *Conflict of Laws*, 65 SMU L. REV. 391, 393 (2012) (discussing *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011)).

6. *Id.*

7. *Id.*

by a man injured in New Jersey while using the manufacturer's sole metal-shearing machine sold in New Jersey through a U.S. distributor.<sup>8</sup> In 2013, the Court of Appeals for the Fifth Circuit had to determine *McIntyre's* impact on the Circuit's stream-of-commerce approach in an action originating in a Mississippi federal court, reported here for its significance throughout the Fifth Circuit.

*Ainsworth v. Moffett Engineering, Ltd.* was a products liability and wrongful death action against an Irish forklift manufacturer, Moffett, which objected to Mississippi jurisdiction for its lack of direct contacts with the forum.<sup>9</sup> The district court rejected Moffett's challenge but before appeal could be heard, the Supreme Court handed down *McIntyre*, requiring the Fifth Circuit to reevaluate its stream-of-commerce approach.<sup>10</sup> The Fifth Circuit's approach had been that minimum contacts are satisfied if the court "finds that the defendant delivered the product into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state."<sup>11</sup> This requires only foreseeability or awareness that the product will reach the forum, but "contacts must be more than 'random, fortuitous, or attenuated, or of the unilateral activity of another party of third person.'"<sup>12</sup>

The crux of whether *McIntyre* would change the Fifth Circuit approach rested on *McIntyre's* plurality status, lacking a majority opinion or binding effect.<sup>13</sup> Although the Supreme Court's careful reasoning was an opportunity for courts to reconsider their analyses, the Fifth Circuit chose instead to look to the narrowest grounds for reaching the conclusion.<sup>14</sup> The plurality opinion, written by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia and Thomas, reasoned that a defendant has to target the forum and not merely predict that its products will reach there.<sup>15</sup> Because the Fifth Circuit's stream-of-commerce approach does not require targeting the forum, the court conceded its approach did not meet the plurality's requirement.<sup>16</sup> Noting, however, that Justice Breyer did not join Justice Kennedy's reasoning and instead concurred merely by applying precedent to the facts, the Fifth Circuit distinguished the *Ainsworth* facts.<sup>17</sup> While *McIntyre's* rejection of New Jersey jurisdiction was based on a single sale in the forum, Moffett's distributor had sold 203 of its forklifts worth \$3,959,000.00 in Mississippi over a nearly ten-year span.<sup>18</sup>

Just as *McIntyre* did not change the law, *Ainsworth* did not change the law in the Fifth Circuit. The *McIntyre* plurality left existing stream-of-commerce

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8. *Id.*

9. *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 175 (5th Cir.), *cert. denied*, 134 S. Ct. 644 (2013).

10. *Id.*; *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

11. *Ainsworth*, 716 F.3d at 177 (quoting *Beary v. Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir. 1987)).

12. *Ainsworth*, 716 F.3d at 177 (quoting *ITL Int'l, Inc. v. Constenla, S.A.*, 669 F.3d 493, 498 (5th Cir. 2012) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985))).

13. *Ainsworth*, 716 F.3d at 176.

14. *Id.* at 178.

15. *McIntyre*, 131 S. Ct. at 2788.

16. *Ainsworth*, 716 F.3d at 178.

17. *Id.* at 178-79.

18. *Id.* at 179.

jurisprudence intact, and the Fifth Circuit took advantage of that, along with a significant fact distinction, to keep its precedent intact.<sup>19</sup> With the Supreme Court denying certiorari to *Ainsworth* in November 2013,<sup>20</sup> defendants who hope for purposeful availment as the singular test for specific jurisdiction are no closer to their wish.

#### A. FORUM CLAUSES

Contracting parties may agree to a forum-selection clause designating either an optional or the exclusive site for litigation or arbitration.<sup>21</sup> 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 contractually-consenting defendant.<sup>22</sup> 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.<sup>23</sup>

##### 1. Prorogating Forum Clauses

Even though prorogation clauses tend to be routine because they establish the forum's jurisdiction,<sup>24</sup> two Survey-period cases raise noteworthy interpretation issues. In *Bob Montgomery Chevrolet v. Dent Zone Cos.*,<sup>25</sup> the court rejected plaintiff's argument for an incorporation-by-reference forum clause. Dent, a Texas business specializing in painless auto dent repairs, contracted with Kentucky-based Bob Montgomery Chevrolet (Montgomery) to be one of Dent's certified repair centers where Dent's technicians would work on cars brought to the Kentucky dealership.<sup>26</sup> When the relationship broke down, Dent sued Montgomery in Texas for breach of contract.<sup>27</sup> The trial court found personal jurisdiction based on Dent's form contract which cross-referenced a Dent website containing a forum selection clause.<sup>28</sup> The court of appeals reversed and granted Montgomery's special appearance, holding that the contract's reference to the website could not be treated as Montgomery's intent to be bound by the external agreement.<sup>29</sup>

*Bancroft Life & Casualty ICC, Ltd. v. FFD Resources III, LLC*<sup>30</sup> was an unusual instance where plaintiff's primary claim was jurisdictionally valid in Texas, but

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19. *Id.* at 177-79.

20. *Moffett Eng'g, Ltd. v. Ainsworth*, 134 S. Ct. 644 (2013).

21. PETER HAY ET AL., *CONFLICT OF LAWS* 534 (5th ed. 2010).

22. *Id.*

23. *Id.*

24. *E.g.*, *Office VP, LLC v. Ideal Health, Inc.*, No. A-11-CV-741 LY, 2012 WL 787041 (W.D. Tex. Mar. 6, 2012) (contract's designation of Texas as exclusive forum subjected New York defendants to Texas jurisdiction in claim by website designer for unpaid service fees).

25. *Bob Montgomery Chevrolet v. Dent Zone Cos.*, 409 S.W.3d 181, 193 (Tex. App.—Dallas 2013, no pet.).

26. *Id.* at 184-85.

27. *Id.* at 184-86.

28. *Id.* at 197.

29. *Id.* at 188-97.

30. *Bancroft Life & Cas. ICC, Ltd. v. FFD Res. III, LLC*, No. H-11-2382, 2012 WL 5032111 (S.D. Tex. Oct. 17, 2012).

defendant's counterclaim was not because it was subject to a mandatory forum clause compelling litigation in St. Lucia, West Indies.<sup>31</sup> Plaintiff's claim was distinguishable from defendant's counterclaim because it was based on distinct loan documents executed in Texas and governed by Texas law.<sup>32</sup>

Although not discussing forum clauses as such, the court in *Adhikari v. Daoud & Partners*<sup>33</sup> held that an indemnity contract subjects the indemnitor to the indemnitee's claim to enforce the agreement anywhere the indemnitee is sued.<sup>34</sup>

## 2. DEROGATING CLAUSES

Courts generally enforce forum clauses naming another jurisdiction as the exclusive site for litigation or arbitration.<sup>35</sup> Two Survey-period cases show why exclusive forum clauses may fail.

*Steakley v. Round One Investments, L.P.*<sup>36</sup> was an action for securities fraud regarding Texas plaintiffs' investment in a California enterprise. The investment agreement included a mandatory California forum clause, but plaintiffs sued for fraud in Texas.<sup>37</sup> The trial court granted defendants' motion to dismiss because of the California clause, but the court of appeals reversed on a finding that the claims did not fall within the forum clause's scope.<sup>38</sup> *Brown v. Mesa Distributors, Inc.*,<sup>39</sup> arose from an equipment lease in which the lessee fell behind in payments. The lease had a forum clause stating that lessee Brown consented to jurisdiction in Pennsylvania, but did not restrict either party to filing there. When the lessor's assignee sued in Texas to collect on overdue payments, the trial court upheld Texas jurisdiction because the forum clause was permissive rather than mandatory, and the court of appeals affirmed.<sup>40</sup>

### B. TEXAS LONG-ARM AND MINIMUM 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.<sup>41</sup> The Texas long-arm statutes also apply in Texas federal courts, except

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31. *Id.* at \*2.

32. *Id.* at \*3. The opinion did not discuss whether the counterclaim was compulsory or permissive, but it was possibly permissive because it was related to distinct agreements, though not necessarily a distinct transaction.

33. *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2012 WL 718933, at \*6 (S.D. Tex. Mar. 5, 2012).

34. *Id.*

35. *E.g., In re Counsel Fin. Servs., LLC*, No. 13-12-00151-CV, 2013 WL 3895317, at \*12 (Tex. App.—Corpus Christi July 25, 2013, no pet.) (memo op., not designated for publication) (dismissing in deference to New York choice-of-forum clause).

36. *Steakley v. Round One Invs., L.P.*, No. 01-09-00022-CV, 2012 WL 3628800, at \*1 (Tex. App.—Houston [1st Dist.] Aug. 23, 2012, no pet.) (memo op., not designated for publication).

37. *Id.* at \*1.

38. *Id.* at \*3-4. *Accord Sunday Riley Modern Skin Care, LLC v. Maesa*, No. H-12-1650, 2013 WL 5231860, at \*7 (S.D. Tex. Sept. 12, 2013) (finding consumer claims against New York cosmetics company fell outside of New York forum clause).

39. *Brown v. Mesa Distribs., Inc.*, 414 S.W.3d 279, 281 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

40. *Id.* at 283-84.

41. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 2008).

where Congress has enacted a federal long-arm statute for certain federal law claims.<sup>42</sup>

*York v. Tropic Air, Ltd.*,<sup>43</sup> which provides the Survey-period's most interesting analysis, found general jurisdiction over a Belize-based airline for a 2008 air crash in Belize that injured Texas residents. The court found general jurisdiction based on Tropic Air's extensive Texas contacts, all unrelated to the accident which occurred in Belize.<sup>44</sup> The only related Texas contact was that plaintiffs were Texas residents.<sup>45</sup> The court carefully examined the historical bases for general jurisdiction in the Supreme Court's only three opinions on the topic<sup>46</sup> and contrasted Tropic Air's strong Texas presence with the comparatively weaker presence of the Columbia-based defendant (also an air-transport business) in *Helicopteros*.<sup>47</sup> Curiously missing in the court's opinion is any reference to the Supreme Court's recent "at home" standard for general jurisdiction, which requires the defendant's forum contacts be so pervasive that defendant is essentially at home in the forum state.<sup>48</sup> On the other hand, the court pointed out that Tropic Air's chief executive officer had a home in Texas,<sup>49</sup> which may be sufficient to meet the at-home standard.

In other cases, Texas state and federal courts found jurisdiction over a Russian company regarding a trade secrets claim but not over a claim for tortious interference;<sup>50</sup> a Kentucky company which ordered products from a Texas manufacturer and failed to pay after delivery to Kentucky;<sup>51</sup> and a Florida resident who was an officer of a Florida-based venture, in an action for fraud by defendant's co-investor who lived in Texas.<sup>52</sup> Conversely, courts found no jurisdiction over two of three defendants in a Houston-based company's claim for contract payments against Chinese companies with offices in Asia and Europe,<sup>53</sup> a national fraternal organization for a dram shop claim arising from alcohol served at a local affiliate chapter,<sup>54</sup> a Japanese company for failed electronic component that caused automobile accidents based on uncontrolled

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42. FED. R. CIV. P. 4(k)(1)(A).

43. *York v. Tropic Air, Ltd.*, No. V-10-55, 2012 WL 1077198 (S.D. Tex. Mar. 28, 2012).

44. *Id.* at \*3-5.

45. *Id.* at \*4.

46. *Id.* at \*1-3 (discussing *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437 (1952); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011)).

47. *Tropic Air*, 2012 WL 1077198, at \*14.

48. See *Goodyear*, 131 S. Ct. at 2851; see also *Akerblom v. Ezra Holdings, Ltd.*, 848 F. Supp. 2d 673 (S.D. Tex. 2012), *aff'd*, 509 F. App'x 340 (5th Cir. 2013) (no mention in trial court or appellate opinions of the at-home standard in courts' rejection of general jurisdiction over Singapore-based companies for transactions centered there).

49. *Tropic Air*, 2012 WL 1077198, at \*13.

50. *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 147-48 (Tex. 2013).

51. *Betafence USA LLC v. Davis Distrib., Inc.*, No. 3:12-CV-1478-B, 2012 WL 5182909, at \*1, \*7 (N.D. Tex. Oct. 19, 2012).

52. *Fairchild v. Barot*, 946 F. Supp. 2d 573, 575-76 (N.D. Tex. 2013).

53. *Solid Sys. CAD Servs. v. Total Risc Tech., Pty. Ltd.*, No. H-12-03176, 2013 WL 3787495, at \*5-6 (S.D. Tex. July 18, 2013).

54. *Grand Aerie Fraternal Order of Eagles v. Haygood*, 402 S.W.3d 776, 778-82 (Tex. App.—Eastland 2013, no pet.) (also rejecting plaintiff's argument for alter-ego jurisdiction between the national organization and its local affiliate).

acceleration with twenty-four related cases consolidated in Houston,<sup>55</sup> a New York non-profit for tort claims arising in Israel,<sup>56</sup> and a Georgia automotive repair shop for negligence that caused a later accident in Texas.<sup>57</sup>

### C. FEDERAL LONG-ARM STATUTES AND NATIONWIDE CONTACTS

Texas long-arm statutes apply in both state and federal courts in Texas<sup>58</sup> except where Congress has enacted a federal long-arm statute<sup>59</sup> or where a foreign defendant lacks jurisdictional contacts with any state but has sufficient contacts with the United States as a whole.<sup>60</sup> Three notable Survey-period cases were instructive about the reach and function of federal long-arm statutes. *Grynberg v. BP P.L.C.* is the most intricate discussion, analyzing both the federal long-arm and the Foreign Sovereign Immunities Act,<sup>61</sup> in denying jurisdiction for claims related to failed business dealings for oil and gas development in Kazakhstan.<sup>62</sup> *United States ex rel. Tucker v. Christus Health*<sup>63</sup> offers a proper contrast to *Grynberg*'s detailed analysis with a quick-but-proper finding of jurisdiction over Georgia-based medical facilities in a *qui tam* action.<sup>64</sup> The plaintiff had worked only in Georgia. Although the Georgia defendants' alleged fraud was related to actions by Texas defendants, the court pointed out that the only necessary finding was that the Georgia defendants had contacts with the United States and that the lack of Texas contacts was irrelevant.<sup>65</sup>

*SuperMedia, Inc. v. Foy*<sup>66</sup> illustrated a third feature of federal long-arm statutes—their limited scope. This was an employer's declaratory judgment action against retirees, seeking a declaration that its retirement plan amendments complied with federal law under ERISA.<sup>67</sup> Plaintiffs were a group of companies with a common Texas base whose employee benefits plans were governed by Texas law.<sup>68</sup> Several defendants (that is, employees or retirees) who did not live or work in Texas challenged personal jurisdiction. The court held that ERISA's nationwide federal long-arm statute did not apply to the alleged facts and that

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55. *DENSO Corp. v. Hall*, 396 S.W.3d 681, 686 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

56. *Weisskopf v. United Jewish Appeal-Fed'n of Jewish Philanthropies of N.Y., Inc.*, 889 F. Supp. 2d 912, 916 (S.D. Tex. 2012).

57. *Kawaja v. Crawford's Auto Repair*, 413 S.W.3d 194, 196 (Tex. App.—Beaumont 2013, no pet.).

58. See FED. R. CIV. P. 4 (k)(1)(A); TEX. CIV. PRAC. & REM. CODE ANN. § 17.02 (West 2008).

59. See FED. R. CIV. P. 4(k)(1)(D).

60. See FED. R. CIV. P. 4(k)(2).

61. 28 U.S.C. §§ 1330, 1602-11 (2012).

62. *Grynberg v. BP P.L.C.*, 855 F. Supp. 2d 625 (S.D. Tex. 2012).

63. *United States ex rel. Tucker v. Christus Health*, No. 09-1819, 2012 WL 5351212, at \*2 (S.D. Tex. Oct. 23, 2012).

64. See *id.* at \*1 n.1. *Qui tam* is a shortened form of a Latin term of art for false claims for government reimbursement, governed by the False Claims Act, 31 U.S.C. 3732(a).

65. *Tucker*, 2012 WL 535121, at \*2.

66. *SuperMedia, Inc. v. Foy*, No. 3:12-CV-2034-G, 2013 WL 4014453 (N.D. Tex. Aug. 7, 2013).

67. *Id.* at \*1. (ERISA stands for The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461. (2012 & Supp. I. 2013).

68. *Id.* at \*9.



jurisdiction over these non-resident employee-defendants was lacking,<sup>69</sup> which shifted the analysis to traditional minimum contacts, which also did not capture these defendants.<sup>70</sup>

#### D. INTERNET-BASED JURISDICTION

A number of American jurisdictions, including Texas and the Fifth Circuit, apply the *Zippo* sliding scale to assess personal jurisdiction based on Internet contacts.<sup>71</sup> The Survey-period produced several cases in which plaintiffs based their jurisdictional argument significantly on Internet activity.

Although several cases involved routine *Zippo* analysis,<sup>72</sup> two cases indicated the relevance of the websites' related businesses, hotel reservations and higher education to the contacts analysis. In *Diem v. Quinn Hotel Praha, A.S.*, Texas-resident Diem sued the owners of a hotel in Prague, Czech Republic, for injuries suffered during her stay which she booked over the hotel's website.<sup>73</sup> The court found the website to be intermediate under *Zippo* and looked at the extent of the site's interactivity and the nature of the forum contacts.<sup>74</sup> First, the court recognized the uniqueness of hotel reservation websites.<sup>75</sup> The court then found no specific jurisdiction because Diem's mere accessibility to a website did not purposely direct its contact to Texas and Diem's use of the website was not the but-for causation of her injuries.<sup>76</sup>

*American University System, Inc. v. American University* involved educational institutions' websites.<sup>77</sup> Plaintiff sought a declaratory judgment in Texas federal court that it did not infringe on trademarks of a D.C. university and a West Virginia distance learning instruction provider.<sup>78</sup> Under a general jurisdiction

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69. *Id.* at \*2-6 (interpreting the ERISA long arm statute, 29 U.S.C. § 1132(e)(2)).

70. *Id.* at \*6-9.

71. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). The test breaks down Internet use into a spectrum of three areas. *Id.* One end of the spectrum finds the defendant clearly doing business in the forum based on contracts repeatedly entered into with forum residents; the spectrum's other end is passive websites not involving the defendant's intentional contact with the forum and not leading to jurisdiction. *Id.* The spectrum's difficult middle involves the forum resident's exchange of information with the defendant's host computer, and jurisdiction is based on the level of interactivity and the commercial nature of the information exchanged. *Id.* The Fifth Circuit adopted the *Zippo* test in *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999). Texas appellate courts have used it as well. See, e.g., *Townsend v. Univ. Hosp.-Univ. of Colo.*, 83 S.W.3d 913, 922 (Tex. App.—Texarkana 2002, pet. denied); *Experimental Aircraft Ass'n v. Doctor*, 76 S.W.3d 496, 506-07 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

72. See *York v. Tropic Air, Ltd.*, No. V-10-55, 2012 WL 1077198, at \*3-16 (S.D. Tex. Mar. 28, 2012); *Driving Force Techs., Inc. v. Panda Distrib., Inc.*, No. 4:10-cv-24, 2012 WL 1645634, at \*1-8 (E.D. Tex. May 10, 2012); *Kidwai v. St. Matthew's Univ. Sch. of Med.*, No. H-12-455, 2012 WL 2403516, at \*1-2 (S.D. Tex. June 22, 2012); *Ward v. Rhode*, No. 6:11CV531, 2012 WL 4499307, at \*3-8 (E.D. Tex. Sept. 7, 2012); *Knight Corp. v. Knight*, 367 S.W.3d 715, 725-31 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Washington DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 727-28, 731-39 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

73. *Diem v. Quinn Hotel Praha, A.S.*, No. H-10-2848, 2012 WL 524182, at \*1 (S.D. Tex. Feb. 15, 2012).

74. *Id.* at \*2.

75. *Id.* at \*3.

76. *Id.* at \*2-4.

77. *Am. Univ. Sys., Inc. v. Am. Univ.*, 858 F. Supp. 2d 705, 708 (N.D. Tex. 2012).

78. *Id.* at 708-09.

inquiry, the court noted that activities typical of national prominent universities are not contacts that subject educational institutions to jurisdiction.<sup>79</sup> The fact that the defendants had intermediate websites that, among other activities typical to universities, sold products to Texas residents did not subject the defendants to general personal jurisdiction.<sup>80</sup>

Perhaps the novelty, as well as the mystery, of the Internet has worn off for the Fifth Circuit. In *Pervasive Software, Inc. v. Lexware GmbH & Co. Kg*, a breach of contract action, the court emphasized the jurisdictional inquiry can still be completed using the traditional personal jurisdiction analysis.<sup>81</sup> Courts should evaluate cases on a case-by-case basis, and the *Zippo* test simply aids the determination of purposeful conduct.<sup>82</sup>

#### E. FORUM NON CONVENIENS

Forum non conveniens, or inconvenient forum, is an old common-law objection to jurisdiction based on significant inconvenience to one or more defendants.<sup>83</sup> It is also available by statute in the federal system and in many states for intra-jurisdictional transfers that do not require dismissal.<sup>84</sup> Where interstate or international case movement is involved, forum non conveniens is truly jurisdictional because it involves the forum's declining of otherwise-valid jurisdiction, as well as the dismissal of the local case, for refile in a distinct forum.<sup>85</sup>

Because intra-federal transfers under § 1404 do not implicate conflicts between states or nations, they are not considered here, even though such transfers may involve significant distances. This Article is limited to inter-jurisdictional forum non conveniens under the common law which is available in state and federal courts in Texas under the same two-part test requiring the movant to show the availability of an adequate alternative forum and that a balancing of private and public interests favors transfer.<sup>86</sup>

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79. *Id.* at 713–14.

80. *Id.* at 712–16.

81. *Pervasive Software, Inc. v. Lexware GmbH & Co. Kg*, 688 F.3d 214, 226–27 (5th Cir. 2012).

82. *Id.*

83. Alexander Reus, *Judicial Discretion: A Comparative View of The Doctrine of Forum Non Conveniens in The United States, The United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L.J., 455, 459–60 (1994).

84. 28 U.S.C. § 1404 (2012) 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) (West 2002).

85. 14 Sonja Larsen, et al., *Tex. Jur. 3d Courts* § 45 (1996 & Supp. 2014).

86. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981); *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 424 (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 attendance of unwilling, and the cost of obtaining attendance of willing, witness[es]; [the] possibility of view of premises, if . . . appropriate . . . ; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* (alterations in original) (quoting *Dickson Marine, Inc. v. Panalpina, Inc.*, 179 F.3d 331, 342 (5th Cir. 1999)). 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 that is at home with the law that must govern the action; the avoidance of unnecessary problems in

While the courts granted the majority of motions to dismiss for forum non conveniens during the Survey-period, the Southern District of Texas denied a dismissal for forum non conveniens, but it granted an alternative motion to stay in one noteworthy case, *MacDermid Offshore Solutions, LLC v. Niche Products, LLC*.<sup>87</sup> This case involved causes of action filed in both the Southern District of Texas and the Patents County Court in England, with both actions having a underlying allegation of fraud by two competing manufacturers and sellers of hydraulic fluid, Niche Products Ltd, a British Company, and MacDermid, a Delaware limited liability company with a place of business in Texas.<sup>88</sup> While the district court found the English court both available and adequate,<sup>89</sup> the court found that the resulting equal balance of relevant private and public interest factors did not favor dismissal.<sup>90</sup> Although the district court acknowledged the English court was an appropriate court to rule on the paramount issue of fact, that is whether MacDermid's two hydraulic fluids were materially different from each other, the court was unwilling to grant dismissal.<sup>91</sup> The court reasoned that if it granted dismissal and the English court found the issue of fact in MacDermid's favor, MacDermid would no longer have access to the American courts to seek recompense although the favorable finding of fact would indicate it would prevail in its claims in the district court.<sup>92</sup> Consequently, the district court granted a stay to allow the English court to rule and leave the American court's door open for relief if the issue of fact favored MacDermid.<sup>93</sup>

In *Liberty Mutual Insurance Co. v. Transit Mix Concrete & Materials Co.*,<sup>94</sup> a construction worker was injured at the Texarkana airport, located in Arkansas, resulting in two lawsuits—Liberty Mutual's subrogation claim for worker's compensation payments, filed in Texas, and the victim's direct action filed in Arkansas. In the Texas case, Transit Mix moved for a forum non conveniens dismissal for refiling in Arkansas, which the trial court granted and Liberty Mutual appealed. The Dallas Court of Appeals affirmed in an interesting discussion of the distinction between statutory and common law forum non conveniens,<sup>95</sup> and a thoroughly-explained choice of law decision that Arkansas

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conflict of laws; and the unfairness of burdening citizens in an unrelated forum with jury duty.” *Id.* Texas forum non conveniens law is multi-faceted. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2008) applies to personal injury and wrongful death claims. Common-law forum non conveniens, in line with *Gulf Oil Corp. 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).

87. *MacDermid Offshore Solutions, LLC v. Niche Prods., LLC*, No. 4:12-CV-2483, 2013 WL 3980870, at \*1 (S.D. Tex. Aug. 2, 2013).

88. *Id.* at \*1-2.

89. *Id.* at \*8.

90. *Id.* at \*9.

91. *Id.* at \*10.

92. *Id.* at \*9-10.

93. *Id.* at \*10-11.

94. *Liberty Mut. Ins. Co. v. Transit Mix Concrete & Materials Co.*, No. 96-12-00117-CV, 2013 WL 3329026, at \*1 (Tex. App.—Texarkana June 28, 2013, pet. denied).

95. In Texas, forum non conveniens issues regarding personal injury are statutory, see TEX. CIV. PRAC. & REM. CODE § 71.051 (West 2008), while generic commercial disputes are covered by common law principles. *Liberty Mut.*, 2013 WL 3329026, at \*1. Transit Mix argued for common

law governed the immediate subrogation issues.<sup>96</sup>

Routine forum-non-conveniens analyses included dismissals in favor of courts in (1) Israel regarding a partnership dispute;<sup>97</sup> (2) Peru for a wrongful death action arising from an oil tanker explosion in Peruvian coastal waters;<sup>98</sup> (3) New Zealand for a breach of warranties action arising from an acquisition agreement;<sup>99</sup> (4) Canada for misappropriation of trade secrets in two related actions;<sup>100</sup> and (5) Australia for a breach of contract action involving a joint development agreement to exploit and sell in North America proprietary software encryption technology owned by an Australian company.<sup>101</sup>

## 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.<sup>102</sup> Second, it is a question of forum 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 then, the forum state remains in control.<sup>103</sup> Third, the forum state has broad power to make choice-of-law decisions, either legislatively or judicially, subject only to limited constitutional requirements.<sup>104</sup>

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 a certain state’s laws, based on events or people important to the operation of each specific law.<sup>105</sup> Second in the choice-of-law hierarchy is

law governance but the court held that the personal injury statute governed because the Texas dispute was derivative of the Arkansas personal injury case. *Id.* at \*1–2.

96. Consistent with the well-done opinions noted in the tort choice of law section below, the court applied the Restatement’s sections 145 (the general tort principle), 146 (personal injury), as well as section 6’s most significant relationship test. *See id.* at \*3–8.

97. *SES Prods., Inc. v. Aroma Classique, LLC*, No. 01-12-00219-CV, 2013 WL 2456797 (Tex. App.—Houston [1st Dist.] June 6, 2013, no pet.).

98. *In re BPZ Res., Inc.*, 359 S.W.3d 866 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding [mand. denied]).

99. *Royal Ten Cate USA, Inc. v. TTAH Trust Co.*, No. A-11-CA-1057 LY, 2013 WL 56151 (W.D. Tex. Jan. 3, 2013).

100. *Logan Int’l, Inc. v. 1556311 Alberta Ltd.*, 929 F. Supp. 2d 625 (S.D. Tex. 2012); *Logan Int’l Inc. v. SureTech Completions (USA), Inc.*, No. H-13-0492, 2013 WL 3005592 (S.D. Tex. June 10, 2013).

101. *K2M3, LLC v. Cocoon Data Holding Pty. Ltd.*, No. 13-11-00194-CV, 2012 WL 2469705 (Tex. App.—Corpus Christi June 28, 2012, pet. denied).

102. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941).

103. The Restatement (Second) creates a presumption against *renvoi* except for limited circumstances. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971). Although commentators defend the limited use of *renvoi*, 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* HAY ET AL., *supra* note 21, at 162–68; WEINTRAUB, *supra* note 1, at 102–09. Texas law provides for *renvoi* in specified sections of the Uniform Commercial Code. *See* TEX. BUS. & COM. CODE ANN. § 1.301(b) (West 2009) (identifying nine sections in which Texas courts must look to the choice of law rule of another state). For federal courts, *Klaxon* reiterates the forum state’s control of choice of law. *Klaxon*, 313 U.S. at 496–97.

104. *See infra* note 130 and accompanying text.

105. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1), cmt. a (1971); *see, e.g.*, Owens

party-controlled choice of law, that is, choice-of-law clauses in contracts that control unless public policy dictates otherwise.<sup>106</sup> 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.<sup>107</sup> 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. This grouping of cases 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 to the extent choice of law is a state issue (that is, except for constitutional issues), the only binding opinions are those of the Texas Supreme Court.<sup>108</sup>

#### A. STATUTORY CHOICE-OF-LAW RULES

Statutory choice-of-law rules express a public policy interest that overrides the multi-factor considerations in typical choice-of-law analyses or the party autonomy principal in contract disputes. Some choice-of-law statutes compel the application of Texas law and some the application of another state's or nation's law. In each case, the application of law is based on a designated event or relationship deemed paramount.

A common example of a statute designating forum law is the Texas Insurance Code, which directs the application of Texas law to any insurance contract payable to "any citizen or inhabitant of this state by any insurance company or corporation doing business within this State."<sup>109</sup> *Preferred Contractors Insurance Co. Risk Retention Group, LLC v. Oyoque Masonry, Inc.*,<sup>110</sup> an insurer's declaratory judgment action for non-coverage of a truck driver's injury, is a good example of Texas law displacing the contract's chosen law on an issue of interpretation. Finnels was a truck driver who worked as an independent contractor for Gulf Coast Express, a company owned by Jose Oyoque, who also owned Oyoque Masonry, Inc. (OMI).<sup>111</sup> Finnels was injured while unloading a concrete wall, built by OMI, which Finnels was delivering to the installation site. The opinion provides no geographic information, but the setting is apparently Texas where

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*Corning v. Carter*, 997 S.W.2d 560, 564 (Tex. 1999) (applying an earlier version of the Texas wrongful death statute requiring the court to "apply the rules of substantive law that are appropriate under the facts of the case") (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (West 2008) (as amended in 1997 with the same wording as this provision)).

106. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1988) (Law of the State Chosen by the Parties) (allowing contracting parties to choose a governing law, within defined limits). Texas has adopted § 187. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-78 (Tex. 1990).

107. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (listing the seven balancing factors for the most significant relationship test).

108. The exception is when a court rules on a constitutional issue, such as legislative jurisdiction or full faith and credit. See, e.g., *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657, 680 (Tex. 2004) (legislative jurisdiction); *Certain Underwriters at Lloyd's, London v. Chi. Bridge & Iron Co.*, 406 S.W.3d 326 (Tex. App.—Beaumont 2013, pet. denied) (full faith and credit).

109. TEX. INS. CODE ANN. art. 21.42 (West 2009).

110. *Preferred Contractors Ins. Co. Risk Retention Grp., LLC v. Oyoque Masonry, Inc.*, No. 4:12-CV-1406, 2013 WL 3899332 (S.D. Tex. July 26, 2013).

111. *Id.* at \*1.

OMI is based<sup>112</sup> and where two lawsuits were filed related to Finnells's injury. Finnells filed the first action in a Texas state court in Galveston, suing Gulf Coast and OMI.<sup>113</sup> When OMI's insurer, Preferred Contractors, refused to defend or indemnify OMI in the Galveston suit, OMI filed this action in a federal court in Houston.<sup>114</sup> Preferred Contractors had declined coverage based on the insurance contract's exclusion of employment-based claims, including those of independent contractors like Finnells.<sup>115</sup> OMI argued that the insurance contract was governed by its designated Montana law, under which Finnells's employment relationship was limited to Gulf Coast, making him a covered third-party in relation to OMI.<sup>116</sup> The federal court found this to be a straightforward application of the Texas Insurance Code's directive (further indicating a Texas setting for the injury) and used Texas law to interpret coverage in Preferred's favor.<sup>117</sup>

In contrast to forum-directed statutes, the internal affairs doctrine is an example of a statute designating what is often non-forum law for claims based on a corporation's internal affairs.<sup>118</sup> *U.S. Bank National Ass'n v. Verizon Communications, Inc.*<sup>119</sup> involved claims against Verizon and others for breach of fiduciary duty and promoter liability. In 2006 Verizon spun off its domestic directories business to create Idearc, Inc. When Idearc failed and filed for bankruptcy, the bankruptcy court appointed U.S. Bank as litigation trustee to pursue claims against Verizon and others involved in Idearc's founding and alleged wrongs afterward.<sup>120</sup> On the claims of breach of fiduciary duty and promoter liability, the litigation trustee argued that the most-significant-relationship test dictated the application of New York or Texas law which supported the trustee's claims.<sup>121</sup> Verizon successfully countered that the Texas choice-of-law rule was trumped by the Texas statute codifying the internal affairs doctrine which invalidated trustee's argument on these claims.<sup>122</sup>

*Barrash v. American Ass'n of Neurological Surgeons, Inc.*<sup>123</sup> illustrates that not every internal dealing falls under the internal affairs doctrine. Plaintiff Barrash is a medical doctor in Illinois who was cited for professional misconduct by

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112. *Id.*

113. *Id.* at \*1 n.2.

114. *Id.* at \*1.

115. *Id.* at \*1-2.

116. *Id.* at \*2.

117. *Id.* Without analyzing Montana law, the court also speculated that the result would not differ under Montana law. *Id.*

118. TEX. BUS. ORGS. CODE ANN. § 1.102 (West 2012).

119. *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 892 F. Supp. 2d 805 (N.D. Tex. 2012).

120. *Id.* at 807.

121. *Id.*

122. *Id.* at 827-28; *see also* *Collins v. Sydow (In re NC12, Inc.)*, 478 B.R. 820 (Bankr. S.D. Tex. 2012) (applying Nevada law as the incorporating state to determine whether the shareholders' claims were theirs to raise in a collateral action or were direct injuries assertable only by the debtor company); *ExxonMobil Global Servs. Co. v. Gensym Corp.*, No. 1:12-CV-442-JDR, 2013 WL1314461 (W.D. Tex. Mar. 28, 2013) (applying Delaware law to determine the alter ego issue between defendant Gensym and its parent corporation which plaintiff sought to add as defendant).

123. *Barrash v. Am. Ass'n of Neurological Surgeons, Inc.*, No. 4:13-cv-1054, 2013 WL 4401429 (S.D. Tex. Aug. 13, 2013).

defendant American Association of Neurological Surgeons (AANS).<sup>124</sup> When Barrash lost an internal appeal within AANS, he sued AANS for breach of contract and related tort claims.<sup>125</sup> Responding to AANS's motion to dismiss for failure to state a claim, Barrash argued that his contract claim under AANS's bylaws should be governed by Illinois law as the state of AANS's incorporation.<sup>126</sup> The court rejected this, explaining that in this instance the bylaws operated as a contract with plaintiff, a non-board member.<sup>127</sup> This shifted the analysis from the internal affairs doctrine to the Restatement's section 301 which called for the application of the law with the most significant relationship to the dispute, which the court found to be Texas as the place where the pertinent facts and possible injury occurred.<sup>128</sup>

Some areas of law have both forum-directed and foreign-directed choice-of-law statutes. One example is child support, which falls under both state and federal statutes governing several issues. This can result in contrasting policies where the controlling state may be the one issuing the original child support order or the state currently enforcing that order. *In re Lamar*<sup>129</sup> was a claim by the Texas attorney general in bankruptcy court, seeking to exempt from discharge the interest the debtor allegedly owed on back child support. The child support was originally ordered in Florida in 1979. When debtor Lamar moved from Florida to Texas, he fell behind in child support payments which in 1996 resulted in a Texas judgment under the Uniform Interstate Family Support Act (UIFSA).<sup>130</sup> The court noted that since his earlier arrearage, Lamar had paid the back support and kept it current—the dispute was over interest allegedly accrued, which varied according to which state's law controlled.<sup>131</sup> In managing the UIFSA judgment over the years, the State of Texas calculated interest at the twelve percent rate under Texas law.<sup>132</sup> The bankruptcy court deemed this error because of the Texas Family Code's choice-of-law rule requiring that interest on foreign child support judgments be calculated under Florida law as the state issuing the original judgment. Under the proper Florida calculation, Lamar's payments exceeded his obligation, and the court thus denied the claim by the State of Texas.<sup>133</sup>

*Norman v. Experian Information Solutions, Inc.*<sup>134</sup> offers a different choice-of-law result on a child support issue. Norman's complaint was that Experian was reporting delinquent child support obligations that were more than seven years old and thus exempt from credit reports under federal law.<sup>135</sup> According to

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124. *Id.* at \*1.

125. *Id.* at \*1-2.

126. *Id.* at \*1.

127. *Id.* at \*6.

128. *Id.* at \*5-6.

129. *In re Lamar*, No. 1234034, 2012 WL 5985324 (Bankr. S.D. Tex. Nov. 29, 2012).

130. *Id.* at \*1-2, \*3 n.1 (citing the Texas UIFSA, TEX. FAM. CODE ANN. §§ 159.001-.901 (West 2008)).

131. *Id.* at \*3-4.

132. *Id.* at \*4.

133. *Id.* at \*5.

134. *Norman v. Experian Info. Solutions, Inc.*, No. 3:12-CV-128-B, 2013 WL 1774625 (N.D. Tex. Apr. 25, 2013).

135. See Fair Credit Reporting Act, 15 U.S.C.A. 1681c(a)(4) (West 2009).

Norman, the original support orders were from Shelby County, Tennessee and were later domesticated in Illinois when Norman moved there.<sup>136</sup> After several complaints to Experian starting in 2008, Norman eventually sued Experian for false credit reporting under the Fair Credit Reporting Act.<sup>137</sup> The issue was whether subsequently-issued child support judgments were new judgments and thus reportable, or judgments that became unreportable after seven years.<sup>138</sup> Norman argued that Tennessee law controlled as the original issuing state and that under Tennessee law the judgments were not new.<sup>139</sup> Illinois law, on the other hand, treated each successive judgment as new and thus still reportable.<sup>140</sup> Applying a federal choice-of-law rule under the full-faith-and-credit statute governing child support, the court ruled that Illinois law governed because it was the state of Norman's residence and thus the enforcing state.<sup>141</sup>

Texas family law also offers an example of a forum-directed statute. *Tener v. Short Carter Morris, LLP* was a legal malpractice claim arising from a Texas divorce involving a Colorado husband.<sup>142</sup> Tener's wife had moved to Houston where she filed for divorce.<sup>143</sup> Tener hired the defendant law firm to represent him in the Texas case and afterward sued for malpractice. Among other claims, Tener argued that his lawyers failed to offer the court adequate proof of Colorado law regarding Tener's claim to marital property.<sup>144</sup> In making this argument, Tener relied on a line of Texas cases that were superseded in 2003 when the Texas legislature amended the Family Code to provide that Texas law governs the characterization of property acquired by a spouse in another state.<sup>145</sup> The trial court ruled for defendant law firm on this issue and the court of appeals affirmed.<sup>146</sup>

Logic suggests that statutes based on uniform laws would not require choice-of-law provisions, and as is often true, logic fails in legal reasoning. In *BMW Financial Services, N.A., LLC v. Rio Grande Valley Motors, Inc.*,<sup>147</sup> BMW sued to foreclose on secured property held by two car dealerships in McAllen, Texas. The court applied a Texas UCC choice-of-law statute subjecting the perfection of security interests to the law of the state of the debtor's location,<sup>148</sup> which in turn is defined as the state where the debtor is organized.<sup>149</sup> Because the dealer

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136. *Norman*, 2013 WL 1774625, at \*4. The facts are vague because Norman, a *pro se* plaintiff, argued several choice-of-law points without supporting evidence, including arguing for Tennessee as the originating forum. *Id.* at \*4 n.2. The court assumed the validity of Norman's assertions as a basis of ruling against him.

137. *Id.* at \*3. Norman also sued the Illinois official in charge of child support collections.

138. *Id.* at \*5.

139. *Id.* at \*4.

140. *Id.* at \*4-5.

141. *Id.* (citing 28 U.S.C.A. § 1738(b)(1) (West 2005)).

142. *Tener v. Short Carter Morris, LLP*, No. 01-12-00676-CV, 2013 WL 4007802 (Tex. App.—Houston [1st Dist.] Aug. 6, 2013, no pet.).

143. *Id.* at \*1.

144. *Id.*

145. *Id.* at \*1.

146. *Id.* at \*9 (citing TEX. FAM. CODE ANN. § 7.002(b) (West 2006)).

147. *BMW Fin. Servs., N.A., LLC v. Rio Grande Valley Motors, Inc.*, No. M-11-292, 2012 WL 4623198 (S.D. Tex. Oct. 1, 2012).

148. See TEX. BUS. & COM. CODE ANN. § 9.301(1) (West 2011).

149. See TEX. BUS. & COM. CODE ANN. § 9.307(e) (West Supp. 2013).



was a Delaware corporation, that state's law governed issues regarding perfection.<sup>150</sup>

## B. THE MOST SIGNIFICANT RELATIONSHIP TEST

In the absence of a statutory choice-of-law rule, Texas courts apply the most significant relationship test, a seven-factor balancing test from the Restatement.<sup>151</sup>

### 1. Choice-of-Law Clauses in Contracts

Texas law and the Restatement permit contracting parties to choose a governing law,<sup>152</sup> which is reflected in forty-eight Survey-period cases. Thirty-five of those cases involve the courts' summary acquiescence to the parties' choice of law with little or no analysis, a judicial practice also noted in the 2012 Conflicts Survey.<sup>153</sup> It may be tempting to accept this practice with the idea that the parties' choice should be presumed valid, especially in the absence of a party's objection and adequate opposing argument. The Restatement, however, makes it clear that parties' contractual choices of law do not control unless (1) the choice bears a reasonable relationship to the dispute, and (2) the result does not contravene a fundamental interest of a jurisdiction with a materially greater interest. Case law in both Texas<sup>154</sup> and federal<sup>155</sup> courts adopt the Restatement's structured view.

One of the acquiescing opinions offers insight into a source for the error, which not surprisingly is an earlier opinion misstating the law. *Yesh Music v. Lakewood Church*<sup>156</sup> was a copyright infringement action alleging that a Houston-based religious broadcaster exceeded the parties' licensing agreement on certain songs. The license designated British Columbia law as controlling.<sup>157</sup> The court appropriately noted that as a copyright claim, this was a federal question that

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150. *BMW Fin. Servs.*, 2012 WL 4623198, at \*8.

151. The embodiment of the most significant relationship test are within the seven factors to be balanced according to the needs of the particular case. They are: "(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) (1971). 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.

152. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

153. See George, et al., *supra* note 5, at 409-10. The thirty-five cases, on file with the authors, comprise twenty-seven cases from federal district courts in Texas and eight cases from Texas intermediate state appellate courts.

154. See *DeSantis*, 793 S.W.2d at 677-81.

155. *Provident Fin., Inc. v. Strategic Energy L.L.C.*, 404 Fed. App'x 835, 839 (5th Cir. 2010) (per curiam) (citing *Int'l Interests, L.P. v. Hardy*, 448 F.3d 303, 306-07 (5th Cir. 2006); *Griffin v. BAC Home Loans Servicing, LP*, No. H-09-03842, 2011 WL 675285, at \*1 (S.D. Tex. Feb. 16, 2011) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971)).

156. *Yesh Music v. Lakewood Church*, No. 4:11-CV-03095, 2012 WL 524187 (S.D. Tex. Feb. 14, 2012).

157. *Id.* at \*4.

invoked a choice-of-law rule from federal common law rather than the local state's rule, and federal common law used the Restatement.<sup>158</sup> The court then drew from a 1997 Fifth Circuit opinion—*Mitsui & Co. (USA) Inc. v. Mira M/V*—that “choice-of-law clauses are presumatively valid.”<sup>159</sup> The *Mitsui* opinion took the error further, stating that “[t]he Supreme Court has consistently held forum-selection and choice-of-law clauses presumptively valid,” citing four cases in support, all dealing with forum-selection clauses and none dealing with choice-of-law clauses.<sup>160</sup> Further analysis requires more space than the Survey affords, but the correct view is stated in both Fifth Circuit and Texas Supreme Court opinions cited above.<sup>161</sup> The *Yesh* opinion did attempt a Restatement analysis, finding that the transaction had a reasonable relationship to British Columbia.<sup>162</sup> But in doing so, the opinion confused Restatement sections 187(1) and 187(2). Section 187(1) allows contracting parties to designate a controlling law for any issues that could have been resolved explicitly in the contract and does not require a reasonable relationship between the chosen law and the facts underlying the contract.<sup>163</sup> Section 187(2), on the other hand, sets the guidelines for contracting parties designating a law for issues that could not have been explicitly resolved in the contract and imposes the reasonable relationship test, along with not contravening the fundamental interests of a state with a greater relationship.<sup>164</sup> In basing its analysis on section 187(1), the opinion also failed to identify the issue that the parties could have resolved in the contract.<sup>165</sup>

Two of the Survey-period's best examples of contract-clause analysis are in personal injury cases with collateral contract issues. *Williams-Smith v. Designers Edge, Inc.*<sup>166</sup> offers a textbook application of Restatement sections 187 and 188, negating the parties' chosen law for violating Washington law. The underlying case was an action to recover damages for burns from the explosion of a halogen work lamp at a work site in Texas.<sup>167</sup> The accident killed one worker and

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158. *Id.* at \*3.

159. *Id.* (citing *Mitsui & Co. (USA) Inc. v. Mira M/V*, 111 F.3d 33, 35 (5th Cir 1997)).

160. *Mitsui*, 111 F.3d at 35 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995)); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Kevlin Servs., Inc. v. Lexington State Bank*, 46 F.3d 13 (5th Cir. 1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

161. See *supra* notes 121–22 and accompanying text.

162. *Yesh Music v. Lakewood Church*, No. 4:11-CV-03095, 2012 WL 524187, at \*3 (S.D. Tex. Feb. 14, 2012).

163. See *DCS Sanitation Mgmt., Inc. v. Castillo*, 475 F.3d 892, 896–97 (8th Cir. 2006) (discussing the difference between RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 187(1), 187(2)).

164. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677–81 (Tex. 1990) (discussing RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2)).

165. *Yesh Music*, 2012 WL 524187, at \*3. Two Survey-period cases did a partly correct law-clause analysis, in each case requiring the adequate relationship between the dispute and the chosen law, but failing to require a showing that the chosen law did not contravene a fundamental interest of a state with a greater interest. *Gernsbacher v. Campbell (In re Equip. Equity Holdings, Inc.)*, 491 B.R. 792 (Bankr. N.D. Tex. 2013); *In re Texas Rangers Baseball Partners*, No. 1043400-DML, 2012 WL 4464550 (Bankr. N.D. Tex. Sept. 25, 2012).

166. *Williams-Smith v. Designers Edge, Inc.*, No. G-10-590, 2012 WL 1201926 (S.D. Tex. Apr. 10, 2012).

167. *Id.* at \*1.

severely burned two others.<sup>168</sup> After the accident, the lamp's manufacturer—Designers Edge—sold its assets to Coleman Cable, Inc. (Coleman) with an asset purchase agreement designating Illinois law as controlling. Ordinarily that contract's impact would rest only on Designers Edge and Coleman.<sup>169</sup> But in this case, the plaintiffs—third parties to the contract—sought successor liability from purchaser Coleman, and the acquisition agreement controlled that issue.<sup>170</sup> Coleman moved for summary judgment on the grounds that both Texas forum law and the contract's designated Illinois law made them immune.<sup>171</sup> Washington law did not, under the “product line exception” apply to asset transfers, which Washington recognized and the other states did not.<sup>172</sup> Plaintiffs argued that Washington law controlled as the home state of Designers Edge and the locale of the sale to Coleman.<sup>173</sup> In an excellent analysis of Restatement sections 187 and 188, the court ruled that Washington had greater interest than either Texas (the forum state and accident situs) or Illinois (the contract's designated law), thus rejecting Coleman's motion for summary judgment.<sup>174</sup>

*CMA-CGM (America), Inc. v. Empire Truck Lines, Inc.*<sup>175</sup> was an action for personal injury and indemnity regarding a truck driver's injury when a new chassis was being attached to his truck. Acquire, the driver, sued Empire (his employer) and CMA (the chassis owner). CMA filed a cross-claim against Empire under the Uniform Intermodal Interchange and Facilities Access Agreement, which CMA argued required Empire to defend and indemnify CMA.<sup>176</sup> The Intermodal Agreement had a Maryland choice-of-law clause. After Acquire settled with CMA and Empire, the trial court granted summary judgment to Empire, finding that CMA's defense/indemnity claim was not enforceable.<sup>177</sup> CMA won reversal on appeal, arguing that the trial court failed to apply Maryland law as chosen by the parties.<sup>178</sup> As part of the appeal, Empire raised the point (not argued below) that Maryland law violated the Texas Transportation Code's limitations on indemnity provisions, which it argued was a fundamental Texas policy.<sup>179</sup> The court of appeals declined to rule on that argument but directed that it be considered on retrial. On remand, the trial court again ruled for Empire on a finding that Maryland law contravened Texas

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168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at \*1-2.

173. *Id.* at \*2.

174. *Id.* at \*3-4. In a subsequent ruling on Coleman's claim of indemnity against Designers Edge, the court found false conflict among Washington, Texas, and Illinois because this indemnity claim would be recognized in all three states. See *Williams-Smith v. Designers Edge, Inc.*, No. G-10-00590, 2012 WL 6554372 (S.D. Tex. Dec. 14, 2012).

175. *CMA-CGM (Am.), Inc. v. Empire Truck Lines, Inc.*, No. 01-12-00354-CV, 2013 WL 3422666 (Tex. App.—Houston [1st Dist.] July 9, 2013, no pet.).

176. *Id.* at \*1.

177. *Id.*

178. *Id.*

179. *Id.* at \*2 (referring to TEX. TRANS. CODE ANN. § 623.0155 (West 2011)).

policy as codified in the Transportation Code.<sup>180</sup> In a careful application of *DeSantis*, the court of appeals affirmed, finding that Maryland law contravened a fundamental Texas policy and that Texas had a materially greater interest than Maryland.<sup>181</sup>

*Solotko v. LegalZoom.com, Inc.*<sup>182</sup> is a good example of a choice-of-law clause affecting class action formation. It further shows the importance of a Restatement section 187 analysis that a contractually-designated law cannot be applied without considering the possibly greater interests of other affected jurisdictions. This was an attempted class action for overcharged filing fees on a trademark application website. During the pertinent time period it was possible to file under two federal trademark laws, one with a \$275 fee and the other a \$325 fee. Legalzoom's website stated that the government filing fee was \$325 for both.<sup>183</sup> Solotko filed a nationwide class action in a Texas state court, alleging violations under California law which Legalzoom's contract with its users (the putative class) identified as controlling.<sup>184</sup> In denying class formation, the court explained the burden on the party proposing the class to furnish information on the laws of all affected states where members live.<sup>185</sup> Even though there was a contractual choice-of-law clause arguably governing defendant's conduct, the court explained that the potential governing law does not do away with the requirement of conducting a fifty-state analysis to see if the chosen law violates other states' fundamental policies.<sup>186</sup>

*Giner v. Estate of Higgins*<sup>187</sup> was a claim by an attorney and an accountant for their contractual fees for the title transfer of a manufacturing site in Juarez, Mexico. The transfer was from one corporation to another, both owned by Higgins. Plaintiffs, an accountant and a lawyer and both Mexican citizens, sued to collect fees for their participation in a series of title transfers.<sup>188</sup> The series of transactions (allegedly fraudulent, which is irrelevant here), began in 2004.<sup>189</sup> Higgins died in 2009 without paying plaintiffs, who sued his estate and another defendant in 2011.<sup>190</sup> The disputed agreement on which plaintiffs claimed fees designated the "Laws of the United Mexican States" as controlling. Ruling on summary judgment motions from all parties, the court noted the distinction between Mexican federal law and the law of the State of Chihuahua, and further noted that in Mexico, commercial matters such as this one are governed by federal law.<sup>191</sup> Applying the Restatement, the court found that Mexican law had

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180. *Id.* at \*3.

181. *Id.* at \*9-17 (applying *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990)).

182. *Solotko v. LegalZoom.com, Inc.*, No. 03-10-00755-CV, 2013 WL 3724770 (Tex. App.—Austin July 11, 2013, pet. denied).

183. *Id.* at \*1 (referring to the Trademark Electronic Application Service (TEAS, a \$275 fee) and the TEAS Plus (a \$325 fee)).

184. *Id.* at \*1 n.1.

185. *Id.*

186. *Id.* at \*4-7.

187. *Giner v. Estate of Higgins*, No. EP-11-CV-126-KC, 2012 WL 123973 (W.D. Tex. Jan. 13, 2012).

188. *Id.* at \*1.

189. *Id.*

190. *Id.* at \*3.

191. *Id.* at \*5.

a reasonable relationship to the dispute, that the applicable law was not contrary to a fundamental policy of Texas, and that Mexican law favored plaintiffs' recovery.<sup>192</sup>

Justice Hecht's opinion in *DeSantis* is the model for law-clause analyses in Texas. *DeSantis* rejected a Florida law clause that validated a non-compete agreement for services performed in Houston.<sup>193</sup> Two non-compete cases during the Survey-period also provide choice-of-law clause analysis, each case choosing Texas law over the chosen laws of New York<sup>194</sup> and Delaware.<sup>195</sup>

Two cases gave examples of the interaction of choice-of-law clauses with federal law. *Dyna Torque Technologies, Inc. v. Helix Energy Solutions Group, Inc.*, an action for breach of contract and related tort claims regarding an offshore pipeline construction project, held that a choice of law agreement could not create a federal question.<sup>196</sup> *Diamond Offshore Co. v. Survival Systems International, Inc.*, an action for injuries in an oil rig accident attributed to defendant's faulty equipment, held that a choice-of-law clause cannot divest federal preemption.<sup>197</sup> Considered together, *Diamond Offshore* and *Dyna Torque* provide bookend rules that choice-of-law clauses neither create nor destroy federal questions.<sup>198</sup>

Other valuable points raised during the Survey-period include that in addition to preemption by another state's fundamental interests, choice-of-law clauses may be preempted by federal law,<sup>199</sup> and that disclaimers in employee handbooks stating that the handbooks are not contracts may invalidate the handbooks' designation of law.<sup>200</sup>

192. *Id.* at \*5-13. As to the reasonable relation, the court recited that the agreement was entered in Mexico for a sale of property in Mexico, several of the parties were Mexican citizens, and contained confidentiality obligations to non-contracting entities in Mexico. As to Mexican law not contradicting a more-interested state's fundamental interests, the court simply noted that none of the parties had argued that. *Id.* at \*4.

193. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990).

194. *Drennan v. Exxon Mobil Corp.*, 367 S.W.3d 288 (Tex. App.—Houston [14th Dist.] 2013) (employment contract's "detrimental activity" clause was impermissible non-compete agreement under Texas law), *rev'd*, No. 12-0621, 2014 WL 4782974 (Tex. Aug. 29, 3014) (finding uniformity a worthy goal under the Restatement (Second) of Conflict of Laws and a logical rationale for choosing New York law, and such choice did not contravene fundamental policy in Texas). Reversal came after Survey period.

195. *Heritage Operating, L.P. v. Rhine Bros., LLC*, No. 02-10-00474-CV, 2012 WL 2344864 (Tex. App.—Fort Worth June 21, 2012, no pet.) (court of appeals reversed the trial court's application of the contract-designated Delaware law regarding a non-compete agreement because Texas had a materially greater interest).

196. *Dyna Torque Techs., Inc. v. Helix Energy Solutions Grp., Inc.*, No. 4:12-CV-1529, 2013 WL 1204927 (S.D. Tex. Mar. 20, 2013). The court added the point that until the court had subject matter jurisdiction, it lacked authority to determine which law governed the claims, and that the parties obviously could not confer that jurisdiction on their own. *Id.* at \*4.

197. *Diamond Offshore Co. v. Survival Sys. Int'l, Inc.*, 902 F. Supp. 2d 912, 935-40 (S.D. Tex. 2012).

198. See *Dyna Torque*, 2013 WL 1204927; *Diamond Offshore*, 902 F. Supp. 2d 912.

199. *Shamrock Foods Co. v. Munn & Assocs., Ltd.*, 392 S.W.3d 839, 843 n.2 (Tex. App.—Texarkana 2013, no pet.) (choice of law clause preempted by the contract's arbitration clause and the Federal Arbitration Act, 9 U.S.C. §§ 1-14(2012)).

200. *Little v. Technical Specialty Prods., LLC*, No. 4:11-CV-717, 2012 WL 695719, at \*3 n.2 (E.D. Tex. Feb. 8, 2012). The court further found that even though the handbook's choice of law clause was invalid as such, that Louisiana law might nonetheless govern the employer's claim to force arbitration. *Id.* at \*4.

## 2. *Contracts Not Designating a Governing Law*

The Survey-period produced only two contract cases not involving a choice-of-law clause, compared with forty-eight involving law clauses. Two reasons for the disparity come to mind, one good, one bad, neither provable. The good reason is that more contracts now include law clauses. The bad reason is that parties litigating multi-jurisdictional claims on contracts lacking law clauses do not routinely consider raising a choice-of-law issue.

Both cases involved inadequate responses to motions to dismiss, one at the law level and the second at the factual level. The two cases were well-analyzed by the respective courts and bear mentioning here only because of the lessons in various parties' inadequate advocacy.

*Murthy v. Abbott Laboratories*<sup>201</sup> was a pharmaceutical products liability action raising both contract and tort claims. Abbott moved to dismiss for failure to state a claim and made its argument under Texas law.<sup>202</sup> Although all the pertinent facts were centered in Texas—plaintiff's residence from first dosage through follow-up treatment—plaintiff's response was that she would assume arguendo that Texas law applied, and she raised no other choice-of-law arguments.<sup>203</sup> In spite of plaintiff's weak response, the court thoroughly listed the Restatement factors governing tort and contract claims, then in one paragraph listed the Texas contacts that supported applying Texas law under which plaintiff's contract action survived but her tort claim did not.<sup>204</sup> The one paragraph was adequate in light of the absence of contrary argument or facts, but was unnecessary in light of the presumption that forum law governs absent any showing to the contrary.<sup>205</sup>

*National Oilwell Varco, L.P. v. Elite Coil Tubing Solutions, LLC*<sup>206</sup> was a contract action for failure to pay for pipe, but the issue at bar was defendant's counterclaim for faulty pipe. National Oilwell, the pipe seller, is headquartered in Louisiana and Elite Tubing is based in Texas where the damage occurred.<sup>207</sup> Elite Tubing alleged its claims under Louisiana contract and tort law, and National Oilwell moved to dismiss with the argument that Texas law controlled and did not support Elite Tubing's claims.<sup>208</sup> Unlike Murthy's acquiescence on Abbott Labs' choice of law argument, Elite argued for Louisiana law under Restatement section 188, that is, supporting the contract but not the tort claims.<sup>209</sup> The court noted that Elite's counterclaims sounded in tort and then

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201. *Murthy v. Abbott Labs.*, 847 F. Supp. 2d 958 (S.D. Tex. 2012).

202. *Id.* at 965-67.

203. *Id.* at 967. Plaintiff apparently now lives in Massachusetts. *See id.* at 964 n.2.

204. *Id.* at 966-67.

205. 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, but parties must supply "sufficient information" for the court to comply. *See, e.g., Ogletree v. Crates*, 363 S.W.2d 431, 435 (Tex. 1963) (applying TEX. R. CIV. P. 184a, the predecessor to TEX. R. EVID. 202).

206. *Nat'l Oilwell Varco, L.P. v. Elite Coil Tubing Solutions, LLC*, No. 4:13-cv-00374, 2013 WL 4735574 (S.D. Tex. Sept. 3, 2013).

207. *Id.* at \*3.

208. *Id.* at \*2.

209. *Id.*

examined the pertinent Restatement sections for both tort and contract.<sup>210</sup> None of the court's work mattered, though, because neither party had argued sufficient supporting facts to enable the court to apply the Restatement often place-centered factors.<sup>211</sup> Because of the factual inadequacies, the court denied National Oilwell's motion without prejudice.<sup>212</sup>

### 3. Torts

Choice-of-law in tort cases is directed by Restatement section 145, a four-factor test prioritizing (1) the injury situs, (2) the conduct situs, (3) the parties' "domicile residence, nationality, place of incorporation and place of business," and (4) the situs of the parties' relationship, if any.<sup>213</sup> Section 145 is augmented by forty additional tort sections addressing specific claims such as fraud,<sup>214</sup> or issues common to torts such as standard of care.<sup>215</sup> As noted in the introduction, Texas case law is showing a better application of these Restatement sections.<sup>216</sup> This is not to say that opinions failing to use those sections reach an incorrect result or that the use of those sections is necessary for the correct results. It is to say that the Restatement is structured with presumptions keyed to specific claims or issues, and the use of those presumptions adds a good measure of the predictability inherent in the First Restatement and its *lex loci* rules. Application of these presumptions could dispel criticisms of the most-significant relationship test's reputation for unpredictability.

*Sulak v. American Europcoter Corp.*<sup>217</sup> offers the most thorough analysis in the Survey-period and shows the proper analytical sequence for Restatement analysis. Sulak died in a helicopter crash in Hawaii and his survivors sued the helicopter's French manufacturer and Texas owner.<sup>218</sup> The court first rejected arguments for Hawaii law as governing subsequent remedial measures and defendants' wish to implead a third party; both were procedural issues governed by forum law, in this case federal.<sup>219</sup> As to the case's substantive issues, the court noted the presumption in Restatement sections 175 and 178 favoring the accident's situs law for wrongful death unless another law has a more significant relationship.<sup>220</sup> Applying Restatement sections 145 and then 6, the court considered Texas law (argued by defendants) and French law (which the parties neither argued nor presented evidence for), and chose Hawaii law as the accident's situs.<sup>221</sup>

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210. *Id.* at \*3 n.2. The court discussed Restatement section 188 for contracts, and sections 6, 145, and 147 (injury to land) for the tort claims. *Id.* at \*2-3.

211. *Id.* at \*3.

212. *Id.* at \*3-5.

213. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

214. *Id.* § 148.

215. *Id.* § 157.

216. See *supra* text accompanying note 3.

217. *Sulak v. Am. Europcoter Corp.*, 901 F. Supp. 2d 834 (N.D. Tex. 2012).

218. *Id.* at 837.

219. *Id.* at 838-41.

220. *Id.* at 842.

221. *Id.* at 842-46.

In spite of *Sulak's* accurate disposition of its procedural issues as governed by forum law, there are times when party joinder and indemnity are governed by another state's law.<sup>222</sup> *Insurance Co. of State of Pennsylvania v. Neese*<sup>223</sup> is a good example how intervention can have a greater mix of underlying substantive law. The case was a wrongful death claim from a pipeline explosion in Texas, where the decedent and his employer were from Oklahoma but several other defendants were from Texas.<sup>224</sup> The Dallas Court of Appeals applied Restatement sections 145 and 185 to decide that Oklahoma law governed intervention because of the insurer's relation with the decedent's employer.<sup>225</sup>

*Engine Components, Inc. v. A.E.R.O. Aviation Co.*<sup>226</sup> did the same with indemnity. This was the crash of a Cessna aircraft in Wisconsin which killed three Wisconsin residents.<sup>227</sup> As a corollary to a wrongful death claim in Ohio, defendant A.E.R.O. sued ECI in Texas seeking indemnity.<sup>228</sup> After the Texas trial court rejected ECI's summary judgment motion under Wisconsin law, A.E.R.O. later won a judgment for costs in the Wisconsin suit.<sup>229</sup> The Texas court of appeals reversed and rendered in ECI's favor, holding that under Restatement sections 6, 145, and 173, Wisconsin law governed indemnity for the Wisconsin lawsuit.<sup>230</sup>

*Janvey v. Suarez*<sup>231</sup> illustrates a different Restatement presumption—that unproven foreign law is the same as forum law. *Janvey* was an action by the receiver for the Stanford Financial Group (Stanford) to recoup money transferred to defendant Suarez, who was Stanford's chief of staff.<sup>232</sup> On state law claims for fraudulent transfer, Suarez argued for Florida law and plaintiffs for Texas law.<sup>233</sup> Suarez failed to supply the court with any evidence that Florida law differed from Texas, and the court thus applied the presumption that unproven foreign law is the same as that of the forum state.<sup>234</sup>

Three other Survey-period cases applied Restatement presumptions favoring the situs law of the tort after analyzing whether another state had a more significant relationship: (1) Indiana products liability law compelled denial of defendant's summary judgment motion in a claim for a child's fall from an infant seat;<sup>235</sup> (2) Ohio law governed a slip-and-fall claim arising in Ohio but

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<sup>222</sup>. *Id.*

<sup>223</sup>. *Ins. Co. of State of Pa. v. Neese*, 407 S.W.3d 850 (Tex. App.—Dallas 2013, no pet.).

<sup>224</sup>. *Id.* at 852.

<sup>225</sup>. *Id.* at 853–54.

<sup>226</sup>. *Engine Components, Inc. v. A.E.R.O. Aviation Co.*, No. 04-10-00812-CV, 2012 WL 666648 (Tex. App.—San Antonio Feb. 29, 2012, pet. denied).

<sup>227</sup>. *Id.* at \*1.

<sup>228</sup>. *Id.*

<sup>229</sup>. *Id.*

<sup>230</sup>. *Id.* at \*1–5.

<sup>231</sup>. *Janvey v. Suarez*, No. 3:10-CV-02581-N, 2013 WL 5663107 (N.D. Tex. Oct. 17, 2013).

<sup>232</sup>. *Id.* at \*1–2.

<sup>233</sup>. *Id.* at \*2–3.

<sup>234</sup>. *Id.* at \*3–4.

<sup>235</sup>. *O'Neal v. Bumbo Int'l Trust*, No. 6:11-CV-72, 2013 WL 4083281, at \*2 (S.D. Tex., Aug. 1, 2013) (applying RESTATEMENT sections 6, 145, & 156 (presumption favoring situs law for personal injury claims)).



where the victim had treatment and ongoing injury at his home in Texas;<sup>236</sup> and (3) Texas defamation law governed a Houston doctor's claim based on a disparaging email sent from Missouri to recipients in Missouri, Wisconsin, and Texas.<sup>237</sup>

### C. FEDERAL CHOICE-OF-LAW RULES

Federal common law has various choice-of-law rules for use in federal question cases having a gap that requires using non-federal law. Bankruptcy law has the "independent judgment rule" which provides that when bankruptcy obligations involve claims arising under multiple states' laws, the choice of governing law "requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states."<sup>238</sup> This rule, however, is subject to circuit splits. The Fifth Circuit, for example, has not decided in bankruptcy cases whether to use the independent judgment rule or the forum state's choice-of-law rule.<sup>239</sup> This conflict between these choice-of-law rules was at issue in three cases during the Survey-period, all of which found it to be a false conflict. That is, federal common law uses factors similar to and sometimes interchangeable with those in the Restatement. The lack of a conflict in these cases does not mean, however, that the differing circuit views will always produce the same result.

*In re Mirant Corp.*<sup>240</sup> was an action by the debtor to avoid guaranties made in a failed venture. The basis for the guaranty avoidance was fraudulent transfer.<sup>241</sup> The debtor company was based in Georgia but the lenders were not.<sup>242</sup> The bankruptcy court concluded that New York law governed, but the federal district court reversed under an independent-judgment-rule analysis (using Restatement sections 6 and 145) that Georgia law had the stronger interest.<sup>243</sup> Georgia law favored the lenders and the trial court dismissed the debtor's claims.<sup>244</sup> The Fifth Circuit reversed, noting that the intangible nature of the injury minimized the relevance of the section 145 factors which are (1) the injury situs, (2) the injury-causing conduct situs, (3) the parties' domicile, residence, nationality, place of incorporation, and place of business, and (4) the place where the parties' relationship is centered.<sup>245</sup> The court held instead that the injury's

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236. *Hooper v. Marriott Int'l, Inc.*, No. 3:12-CV-5078-G, 2013 WL 5786294, at \*2-6 (N.D. Tex. Oct. 28, 2013) (applying RESTATEMENT sections 6, 145, & 156 (presumption favoring situs law for personal injury claims)).

237. *Tyson v. Austin Eating Disorders Partners, LLC*, No. A-13-CA-180-SS, 2013 WL 3197641, at \*1, \*5-6 (W.D. Tex. June 21, 2013).

238. *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161-62 (1946).

239. See *MC Asset Recovery LLC v. Commerzbank A.G. (In Re Mirant Corp.)*, 675 F.3d 530, 537 (5th Cir. 2012).

240. *Id.*

241. *Id.* at 532.

242. *Id.* at 532, 538

243. *MC Asset Recovery LLC v. Commerzbank A.G.*, 441 B.R. 791, 810-12 (Bankr. N.D. Tex. 2010).

244. *Id.* at 804-12.

245. *In re Mirant*, 675 F.3d at 537-38 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971)).

intangible nature made the section 145 factors difficult to assess and should yield to the policy of helping injured parties rather than deterring conduct.<sup>246</sup> The court accordingly turned to the broader balancing factors in Restatement section 6 which pointed to New York law.<sup>247</sup> Two other Survey opinions noted the similarity of the two bankruptcy conflicts rules in choosing North Carolina law over those of Delaware, Texas, and Georgia in a wrongful distribution claim,<sup>248</sup> and Texas rather than Colorado law in a fraudulent transfer claim.<sup>249</sup>

Another federal-common-law rule arose to defeat a third-party claim in a criminal forfeiture action. *United States v. 2004 Ferrari 360 Modena*<sup>250</sup> was the forfeiture of a car seized in a conspiracy to pass counterfeit money. Evens Claude came from Pennsylvania to Houston and bought the car that was later seized after his arrest for possession of counterfeit money.<sup>251</sup> When the government filed an *in rem* action to seize the car, Claude's mother, Josette Claude, intervened to claim an ownership interest even though her name was not on the title.<sup>252</sup> She argued that Texas law controlled as the site of the seizure, and under Texas law she was an innocent bailee because the money used for the car was hers.<sup>253</sup> The court noted that Texas no longer recognized a joint-venture corporate form that could establish bailment.<sup>254</sup> Pennsylvania law, however, did recognize that form.<sup>255</sup> On the issue of ownership interest, the court held that Pennsylvania law governed under a federal-common-law choice-of-law rule that the law of the jurisdiction creating the property right determines a claimant's legal interest<sup>256</sup> and that Claude's claim failed because her son was the car's only legal owner.<sup>257</sup> On Claude's second claim based on bailment, the court found a false conflict between Texas and Pennsylvania law, both defeating Claude's claim.<sup>258</sup>

*W & T Offshore, Inc. v. Apache Corp.*<sup>259</sup> is a well-done analysis of the complex federal choice-of-law rule for non-federal claims arising under the Outer Continental Shelf Land Act (OCSLA).<sup>260</sup> W & T alleged that Apache breached a production handling agreement by misallocating oil from W & T's Gulf platforms, including instances of fraud and related state-law torts by misrepresenting those allocations.<sup>261</sup> For the state law claims, the OCSLA directs

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246. *Id.* at 537.

247. *Id.* at 537-38 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. c (1971) and remanding to the district court for application of New York law).

248. *Crescent Res. Litig. Trust v. Duke Energy Corp.*, 500 B.R. 464, 483 (Bankr. W.D. Tex. 2013).

249. *Feuerbacher v. Moser*, No. 4:11-CV-272, 2012 WL 1070138, at \*9-10 (E.D. Tex. Mar. 29, 2012).

250. *United States v. 2004 Ferrari 360 Modena*, 902 F. Supp. 2d 944 (S.D. Tex. 2012).

251. *Id.* at 948.

252. *Id.* at 947-48.

253. *Id.* at 948-49.

254. *Id.* at 953.

255. *Id.*

256. *Id.*

257. *Id.* at 953-54.

258. *Id.* at 955-57.

259. *W & T Offshore, Inc. v. Apache Corp.*, 918 F. Supp. 2d 601 (S.D. Tex. 2013).

260. 43 U.S.C. § 1349(b)(1) (2012).

261. *W & T Offshore*, 918 F. Supp. 2d at 604.

that such claims be controlled by the law of the adjacent state, which are incorporated into federal common law for the purposes of that case.<sup>262</sup> To fall under this rule, the torts must be committed on a fixed platform anchored to the seabed.<sup>263</sup> The court did a lengthy analysis of the function of the OCSLA choice-of-law rule and the case law confusion surrounding the concept of where the events occurred, giving rise to the claims.<sup>264</sup> The court found that in spite of the lack of clear direction from precedent, the events giving rise to the claims occurred sufficiently on the fixed platform to point to the application of Louisiana law as surrogate federal law.<sup>265</sup>

#### D. OTHER CHOICE-OF-LAW ISSUES

*Taylor v. Tesco Corp. (US)*<sup>266</sup> offered an informative example of the need to apply another state's choice-of-law methodology. The action was for a worker's injuries on an oil rig off the coast of Mexico, originally filed in federal court in Louisiana and transferred on an inconvenient forum motion to the Southern District of Texas.<sup>267</sup> Such intra-federal transfers of diversity cases require the transferee court to apply the transferor court's choice-of-law rule.<sup>268</sup> The issue here was a motion to sever by various insurers which was opposed by the primary defendants.<sup>269</sup> The opinion is a good application of Louisiana's comparative impairment choice-of-law test, and also illustrates the function of a choice-of-law analysis in a motion to sever.<sup>270</sup>

The choice-of-law function generally applies to substantive legal matters and not procedure, which is generally governed by forum law. Two Survey-period cases reach opposite but correct results in the substance/procedure dichotomy, both considering attorney fees. *Man Industries (India) Ltd. v. Midcontinent Express Pipeline, LLC*<sup>271</sup> was a series of claims, counterclaims, and crossclaims among parties to a pipeline purchase agreement, along with the bank which financed the agreement. One issue was the bank's request for attorney fees and expenses after prevailing on its declaratory judgment action that it had not wrongfully dishonored a letter of credit.<sup>272</sup> Plaintiff Man Industries argued that New York law, which governed the letter of credit, did not provide for attorney fees.<sup>273</sup> Both the trial and appellate courts disagreed, holding that the bank's

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262. *Id.* at 609-10.

263. *Id.*

264. *Id.* at 609-14.

265. *Id.* at 613-14. For a more straightforward application based on simpler facts, see *In re Seahawk Drilling, Inc.*, No. 11-20089, 2012 WL 1123864, at \*2-4 (Bankr. S.D. Tex. Mar. 30, 2012); *SM Energy Co. v. Smackco, Ltd.*, No. 11-cv-3028, 2012 WL 4760841, at \*4 (S.D. Tex. Oct. 5, 2012).

266. *Taylor v. Tesco Corp. (US)*, No. H-11-00517, 2012 WL 4470461 (S.D. Tex. Sept. 26, 2012).

267. *Id.* at \*1.

268. *Id.* at \*3 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 243 n.8 (1981)).

269. *Id.* at \*1.

270. *Id.* at \*3 (applying LA. CIV. CODE ANN. art. 3537 (2011)).

271. *Man Indus. (India) Ltd. v. Midcontinent Express Pipeline, LLC*, 407 S.W.3d 342 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

272. *Id.* at 345-46.

273. *Id.* at 354-55.

entitlement to fees was based on the Texas Uniform Declaratory Judgment Act, that is, the issue was a matter of forum procedure and not based on substantive law.<sup>274</sup>

*HealthTronics Inc. v. Lisa Laser USA, Inc.*<sup>275</sup> held in contrast that California law governed the issue of admissibility of evidence to prove attorney fees in a contract dispute. The court explained that although forum law ordinarily governs procedure, another state's law is appropriate if "the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of the trial."<sup>276</sup>

### III. FOREIGN JUDGMENTS

Foreign judgments from other states and countries create Texas conflict-of-laws issues in two ways: (1) their local enforcement,<sup>277</sup> and (2) their preclusive effect on local lawsuits. Page limits preclude any detailed discussion beyond brief statements of holdings of the more notable foreign judgment cases in the twenty-four month Survey-period.

#### A. SISTER-STATE JUDGMENTS

*Liberty Bank, F.S.B. v. Etter*<sup>278</sup> is an interesting example of rejecting enforcement of an earlier judgment based on subsequent collateral judgment. Etter leased telecommunications equipment from NonVergence who then assigned the lease to Liberty Bank.<sup>279</sup> The equipment was faulty and Etter ceased payments, leading to Liberty Bank obtaining an Iowa judgment against Etter for

274. *Id.* at. 352–55; see also *Thygesen v. Strange*, Nos. 14-09-00866-CV:4-10-0324-CV, 2013 WL 2247381, at \*2 (Tex. App.—Houston [14th Dist.] May 21, 2013, pet. denied) (holding entitlement to jury trial controlled by forum law and not Delaware law) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 129 (1971)).

275. *HealthTronics Inc. v. Lisa Laser USA, Inc.*, 382 S.W.3d 567 (Tex. App.—Austin 2012, no pet.).

276. *Id.* at 579 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 133 (1971)).

277. Texas recognizes two methods of enforcing foreign judgments: the common-law method using the foreign judgment as the basis for a local lawsuit, and since 1981, the more direct procedure under the two uniform judgments acts. The underlying mandate for the common-law enforcement is the full faith and credit clause of the U.S. Constitution, U.S. CONST. art. IV, § 1, and its statutory counterpart, 28 U.S.C. § 1738 (2012). 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 (West 2008). Under the two uniform acts, sister-state judgments are enforced under the Uniform Enforcement of Foreign Judgments Act (UEFJA). TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001–.003 (West 2008), 35.004 (West Supp. 2013), 35.005–.008 (West 2008). Foreign-country judgments for money are enforced under the Uniform Foreign Country Money-Judgments Recognition Act (UFCMJRA). TEX. CIV. PRAC. & REM. CODE ANN. § 36.001–.008 (West 2008). Texas laws also provide for enforcement of (1) arbitration awards (Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2012)); Texas International Arbitration Act (TEX. CIV. PRAC. & REM. CODE ANN. § 172.082(f) (West 2011)); (2) child custody decisions (TEX. FAM. CODE ANN. § 152.303 (West 2008)); and (3) child support awards (TEX. FAM. CODE ANN. § 159.601 (West 2008)). Federal judgments may be enforced in any other federal district as local judgments. See 28 U.S.C. § 1963 (2012). Federal judgments may also be enforced as sister-state judgments in Texas state courts. See *id.* § 1963.

278. *Liberty Bank, F.S.B. v. Etter*, No. 02-12-00337-CV, 2013 WL 5302719 (Tex. App.—Fort Worth, Sept. 19, 2013, pet. filed).

279. *Id.* at \*1.

the defaulted lease.<sup>280</sup> In the meantime, the Texas Attorney General brought a consumer action against NonVergence and obtained a judgment nullifying Etter's and other consumers' leases.<sup>281</sup> When Liberty Bank sought to enforce the Iowa judgment in Texas, the appellate court affirmed the trial court's rejection of the Iowa judgment based on the Attorney General's intervening judgment.<sup>282</sup>

Two Survey-period cases involved judgment debtors' attempted relitigation of personal jurisdiction in the judgment-rendering state. In *Peters v. Top Gun Executive Group*,<sup>283</sup> Houston-based Top Gun had contracted with New Jersey resident Peters to assist in job searches in New York and New Jersey. Peters eventually sued Top Gun in a New Jersey court for breach of contract, fraud, and related claims, and Top Gun defaulted.<sup>284</sup> When Peters attempted enforcement in Texas, the Texas trial court rejected the New Jersey judgment, finding that Top Gun was not subject to New Jersey jurisdiction in its contract to assist a New Jersey resident in finding employment in New Jersey or New York.<sup>285</sup> The Texas court of appeals reversed and rendered after conducting a detailed review of the trial record's recitation of Top Gun's contacts and the resulting jurisdiction under the New Jersey long-arm statute and due process.<sup>286</sup> The court conducted a similar analysis in *Chaseekhalili v. Cinemacar Leasing, Inc.* to affirm the trial court's finding that New York had personal jurisdiction over judgment debtor, based on proper service of process leading to default judgment.<sup>287</sup>

In other cases, Texas courts of appeal refused a North Carolina probate court's determination of a will's validity, based on Texas's exclusive jurisdiction over the decedent's real property in Texas;<sup>288</sup> and affirmed the enforcement of an Indiana judgment, rejecting the judgment debtor's challenge that proper authentication required certification on every page.<sup>289</sup>

## B. FOREIGN COUNTY JUDGMENTS

*New Hampshire Insurance Co. v. Magellan Reinsurance Co.*<sup>290</sup> was a judgment from the Turks and Caicos Islands for reimbursement of fees and costs in New Hampshire. Pursuant to Magellan's business wind up in the Turks and Caicos Islands, New Hampshire Insurance Company (NHIC) filed a claim.<sup>291</sup> After

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280. *Id.* at \*2.

281. *Id.*

282. *Id.* at \*2-5.

283. *Peters v. Top Gun Exec. Grp.*, 396 S.W.3d 57 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

284. *Id.* at 60.

285. *Id.* at 60-61.

286. *Id.* at 60-61, 72.

287. *Chaseekhalili v. Cinemacar Leasing, Inc.*, No. 02-11-00454-CV, 2012 WL 3207247, at \*1-3 (Tex. App.—Fort Worth Aug. 9, 2012, pet. denied).

288. *Haga v. Thomas*, 409 S.W.3d 731, 732-33, 738 (Tex. App.—Houston [1st Dist.] 2013, pet. filed).

289. *Whitehead v. Bulldog Battery Corp.*, 400 S.W.3d 115, 116-19 (Tex. App.—Dallas 2013, pet. denied).

290. *N.H. Ins. Co. v. Magellan Reinsurance Co.*, No. 02-11-00334-CV, 2013 WL 105654 (Tex. App.—Fort Worth Jan. 10, 2013, pet. denied).

291. *Id.* at \*1.

several stages of litigation, NHIC lost and was assessed fees and costs for the litigation.<sup>292</sup> Magellan filed its Turks and Caicos Islands judgment in a state court in Fort Worth where the trial court approved enforcement over NHIC's objection that the foreign judgment was for a penalty and thus improper.<sup>293</sup> The trial court disagreed and found instead that it was a proper money judgment enforceable in Texas, and the court of appeals affirmed.<sup>294</sup> In *Presley v. N.V. Masureel Veredeling*, the court enforced a Belgian judgment, rejecting the judgment debtor's argument that the Belgian court improperly ignored an arbitration clause.<sup>295</sup>

### C. PRECLUSION

*Certain Underwriters at Lloyd's, London v. Chicago Bridge & Iron Co.*<sup>296</sup> is an interesting and well-reasoned application of full faith and credit to a Massachusetts court's application of Illinois law to interpret an insurance policy. The Massachusetts case was for asbestos liability, with subsequent litigation in Texas for reimbursement of Chicago Bridge's litigation expenses.<sup>297</sup> The Texas trial court granted Chicago Bridge's motion for partial summary judgment based on issue preclusion of coverage issues litigated in Massachusetts.<sup>298</sup> The insurer appealed, arguing that the issues in the Texas reimbursement case differed on several points.<sup>299</sup> In a meticulous analysis of the identity of the issues and other preclusion elements, the court of appeals rejected this argument and affirmed the trial court's ruling.<sup>300</sup>

In other Survey-period cases, a Texas court of appeals applied claim preclusion to find that plaintiff's prior arbitration in Kentucky was dispositive of her claim in Texas for breach of fiduciary duty regarding estate distributions,<sup>301</sup> and two federal district courts held that (1) prior Colorado litigation of the accounting for the insurance policy deductible precluded relitigation between insurer and insured in a subsequent Texas action for reimbursement of litigation costs;<sup>302</sup> and the fraud issue decided in Colorado litigation did not preclude relitigation in Texas because the Colorado default judgment did not meet the actually-litigated requirement.<sup>303</sup>

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292. *Id.* at \*1-2.

293. *Id.* at \*2, \*11.

294. *Id.* at \*3-11.

295. *Presley v. N.V. Masureel Veredeling*, 370 S.W.3d 425, 431, 434 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

296. *Certain Underwriters at Lloyd's, London v. Chi. Bridge & Iron Co.*, 406 S.W.3d 326 (Tex. App.—Beaumont 2013, pet. denied).

297. *Id.* at 329-30.

298. *Id.* at 330.

299. *Id.* at 332.

300. *Id.*

301. *Wall v. Orr*, No. 05-12-00369-CV, 2013 WL 3956664, at \*2-3 (Tex. App.—Dallas July 30, 2013, pet. denied).

302. *Trammell Crow Residential Co. v. Am. Prot. Ins. Co.*, No. 3:10-CV-2163-B, 2012 WL 4174898, at \*7-8 (N.D. Tex. Sept. 20, 2012).

303. *Alan Bau Invs. V. Horne (In re Horne)*, No. 10-42625, 2012 WL 1205796, at \*4 (Bankr. E.D. Tex. Apr. 11, 2012).

## IV. CONCLUSION

The 2012 Survey's conclusion noted that Texas courts would need to reassess their calculation for stream-of-commerce and general jurisdiction.<sup>304</sup> In this Survey-period, the Fifth Circuit Court of Appeals reaffirmed its pro-jurisdiction application of stream-of-commerce jurisdiction with a convincing distinction of the volume-sale facts in *Ainsworth* from the far narrower facts in *McIntyre*.<sup>305</sup> In choice of law, the Survey-period showed an ongoing tendency toward two trends—the unfortunate acceptance of choice-of-law clauses without the required scrutiny,<sup>306</sup> and a healthy trend toward an ever-increasing sophistication in applying the many aspects of Restatement analysis, particularly in tort law, a practice which adds stability and predictability to the otherwise seemingly open-ended balancing factors of the most significant relationship test.<sup>307</sup> Overall, the two-year Survey-period showed the ongoing breadth and depth, much of it omitted from this report, of conflict of laws as a pervasive feature of Texas adjudication.

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304. See George et al., *supra* note 5 at 421.

305. See *supra* notes 5–20 and accompanying text.

306. See *supra* notes 153–65 and accompanying text.

307. See *supra* notes 213–37 and accompanying text.