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## Conflict of Laws

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# CONFLICT OF LAWS

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States' and nations' laws collide when foreign factors appear in a lawsuit. Nonresident litigants, incidents outside the forum, 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 December 1, 2015, through November 30, 2016. The article excludes cases involving federal-state conflicts; intrastate issues, such as subject matter jurisdiction and venue; and conflicts in time, such as the applicability of prior or subsequent law within a state. State

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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 one year and will accordingly limit its review to a few highlight cases and an examination of a couple of trends.

## I. FORUM CONTESTS

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

Perhaps sensing a need for some fine-tuning in response to recent U.S. Supreme Court cases, both the U.S. Court of Appeals for the Fifth Circuit and the Texas Supreme Court issued significant personal-jurisdiction decisions in 2016. These new opinions—every one of which has a transnational angle—also reflect the ever-growing impact of globalization on U.S. litigation.

### A. U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

In *International Energy Ventures Management, L.L.C. v. United Energy Group, Ltd.*, a consultant brought an action in Texas state court against a broker, Sean Mueller, and a Chinese oil company, United Energy Group (UEG), seeking fees allegedly owed to it for assisting UEG in its purchase of BP's assets in Pakistan.<sup>2</sup> After removal, the district court denied International Energy Ventures Management's (IEVM) motion to remand, dismissed the claims against Mueller for failure to state a claim, and dismissed the claims against UEG based on lack of personal jurisdiction.<sup>3</sup>

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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. *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 198 (5th Cir. 2016). Although it is not relevant to the jurisdictional discussion, the U.S. Court of Appeals for the Fifth Circuit held that federal, rather than state, pleading standards apply when determining whether a plaintiff has stated a claim against a nondiverse defendant, thereby abrogating a line of cases holding to the contrary.

3. *Id.* at 199.

IEVM alleged a right to recover “under an *unwritten* agreement that UEG would pay IEVM for its consulting services on the BP deal.”<sup>4</sup>

[A]fter that deal closed, IEVM performed services for UEG under a supplemental [*written*] agreement. In that agreement, UEG acknowledged IEVM’s previous services and that UEG had not yet paid IEVM for those services. . . . In consideration for further IEVM services, UEG agreed to pay IEVM . . . . It also agreed to release IEVM from, and indemnify it for, any liability arising out of the BP deal.<sup>5</sup>

The supplemental agreement provided for the application of Texas law and arbitration in Texas. “It included a merger clause, but noted that it ‘does not supersede, but is a supplement to, the agreement with respect to the prior work completed by [IEVM] for UEG.’”<sup>6</sup>

These facts raise two personal jurisdiction questions. First, should the written supplemental agreement extend to the original, unwritten agreement, and, if so, does the arbitration provision constitute implied consent to jurisdiction in Texas for claims under the original agreement? Second, are UEG’s contacts with Texas so substantial that an exercise of personal jurisdiction over it would comport with traditional notions of fair play and substantial justice?

With respect to the first question, the U.S. Court of Appeals for the Fifth Circuit found no need to conduct an ambiguity analysis because—even assuming that the written agreement supplemented the unwritten agreement—there was no consent to Texas jurisdiction.<sup>7</sup> This is so because an arbitration clause confers only *limited* jurisdiction:

“When a party agrees to arbitrate in a particular state, via explicit or implicit consent, the district courts of the agreed-upon state may exercise personal jurisdiction over the parties for the limited purpose of compelling arbitration.” Thus, UEG’s agreement to arbitrate in Texas does not necessarily constitute consent to the personal jurisdiction of Texas courts to adjudicate its claims in the first instance.<sup>8</sup>

The Fifth Circuit made equally short work of IEVM’s “contacts” argument. There was apparently no dispute that UEG had contacts with Texas. In fact, it had hired agents in Texas (including IEVM), sent principals to Texas to close the BP deal, and entered into the supplemental agreement, which contained a Texas choice-of-law clause. But these contacts, in the Fifth Circuit’s view, did not constitute minimum contacts because they bore an insufficient nexus to “‘the relationship among the [UEG], the forum, and the litigation’ over the unwritten, original agreement between UEG and IEVM.”<sup>9</sup> Specifically, the Fifth Circuit found that

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4. *Id.* at 210 (emphasis added).

5. *Id.* at 210–11 (emphasis added).

6. *Id.*

7. *Id.* at 211–12.

8. *Id.* at 212 (citation omitted) (quoting *Armstrong v. Assocs. Int’l Holdings Corp.*, 242 F. App’x 955, 957 (5th Cir. 2007)).

9. *Id.* at 213 (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014)).

UEG had no presence in Texas as a result of the unwritten, original agreement because (1) UEG did not negotiate the agreement in Texas, (2) UEG did not travel to Texas because of that agreement, and (3) the unwritten agreement did not require performance in Texas. Instead, the unwritten, original agreement was between Chinese and Texas entities regarding services performed in Pakistan. That IEVM happened to provide those consulting services from Texas is not sufficient to establish jurisdiction.<sup>10</sup>

This is perhaps the most thinly argued part of the holding: it's no great stretch to frame IEVM's claim not just as a suit on the original agreement but as a suit on the subsequent acknowledgement of the debt. Of course that claim might ultimately fail as a matter of contract law, but that's not a threshold question.

The U.S. Court of Appeals for the Fifth Circuit also decided a general jurisdiction case, *Patterson v. Aker Solutions Inc.*, that effectively shuts the door on that jurisdictional theory unless the target defendant's principal place of business or place of incorporation is a meaningful contact with the forum.<sup>11</sup> In that case, Patterson, a U.S. citizen, was injured while working on a project "aboard the M/V SIMON STEVIN, a Luxembourg-flagged vessel that was located off the coast of Russia."<sup>12</sup> Patterson's employer was Blue Offshore Projects BV (Blue Offshore), but he also sued Aker Solutions, Inc. (Aker Solutions), Aker Subsea, FMC Technologies, Inc., FMC Kongsberg Subsea AS, and FMC Eurasia, LLC. The district court dismissed Aker Subsea for lack of personal jurisdiction.

On appeal from a severed final judgment, Patterson argued that—by virtue of eleven secondment agreements with a U.S. affiliate—Aker Subsea had sufficient contacts with the United States to establish general personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2). In light of recent U.S. Supreme Court pronouncements, the Fifth Circuit noted that for general jurisdiction to attach, "Aker Subsea's contacts with the United States must be so continuous and systematic as to render it essentially at home in the United States."<sup>13</sup> As a general matter, a corporation may be fairly regarded at home only in its principal place of business or place of incorporation, and here, on both counts Aker Subsea's locus was Norway. In the face of these facts, general jurisdiction could be established only in an "exceptional case."<sup>14</sup>

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10. *Id.*

11. *Patterson v. Aker Sols. Inc.*, 826 F.3d 231, 234 (5th Cir. 2016).

12. *Id.* at 233.

13. *Id.* at 234 (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014)). The Fifth Circuit quoted the following language from *Daimler*:

[T]he inquiry under [*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed.2d 796 (2011)] is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."

*Id.* (alteration in original).

14. *Id.*

As a “benchmark,” the Fifth Circuit turned to *Perkins v. Benguet Consolidated Mining Co.*,<sup>15</sup> which it characterized as the only modern case in which the Supreme Court “ha[d] found a sufficient basis for the exercise of general jurisdiction over a non-resident defendant.”<sup>16</sup> In that well-known case, a Philippine corporation, due to World War II, had moved extensive parts of its operation to Ohio, and on that basis was found subject to general jurisdiction. By comparison, the Fifth Circuit held that

Aker Subsea’s contacts fall well short of effectively operating its business within the United States. At most, Aker Subsea sent eleven of its employees to the United States when it entered into the secondment agreements with its affiliate. These contacts are insufficient to make Aker Subsea essentially at home in the United States.<sup>17</sup>

The Fifth Circuit went on to discuss, among other things, two “rare cases where this court has found general jurisdiction over a foreign defendant,” and was at some pains to distinguish them from the case before it.<sup>18</sup> With respect to these cases, which should now be viewed with deep suspicion, the Fifth Circuit more-or-less buried the lede (in a footnote): “Both *System Pipe* and *Adams* predate *Goodyear* and *Daimler AG*. Scholars have viewed the Court’s recent personal jurisdiction decisions as part of an access-restrictive trend.”<sup>19</sup>

#### B. TEXAS SUPREME COURT

In *Searcy v. Parex Resources, Inc.*, the Texas Supreme Court was faced with a “complicated jurisdiction case involv[ing] multiple corporations, countries, and continents.”<sup>20</sup> The supreme court’s own starting place is as good as any:

Here is the SparkNotes summary. A Bermudian entity was the sole shareholder of Class A shares of another Bermudian entity that owns certain Colombian oil and gas operations. The Bermudian shareholder sought to sell these shares and entered into a share purchase agreement, negotiated in Texas, with a Texan entity. The deal fell through, and so the Bermudian shareholder searched for other buyers. After a Canadian entity pursued the shares, the Texan entity sued both the Canadian entity and the Bermudian shareholder in Texas for tortious interference with its share purchase agreement. The Texan entity also sued the Bermudian owner of the Colombian oil and gas operations in Texas for fraud.<sup>21</sup>

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15. 342 U.S. 437 (1952).

16. *Patterson*, 826 F.3d at 235.

17. *Id.*

18. *Id.* at 236.

19. *Id.* at 237 n.7 (citing Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 304 (2013)).

20. *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 62 (Tex. 2016).

21. *Id.*

The facts are so convoluted that it makes sense to work backwards from the supreme court's holdings. First, when the Canadian entity, Parex Canada, "sought to purchase shares of a Bermudian entity that owns Colombian assets from a Bermudian shareholder and did not intend to develop a Texas business, it did not purposefully avail itself of Texas's jurisdiction."<sup>22</sup> The supreme court deemed Parex Canada's contacts with Texas "too fortuitous and attenuated for the exercise of specific jurisdiction."<sup>23</sup> "[E]ven considering the extent of the communications between [it] and the Bermudian shareholder's executives in Texas—communications that were certainly voluminous, and, as is usual these days, electronic—the Canadian entity had no control over where the employees of the Bermudian shareholder happened to be located."<sup>24</sup> We'll return to this holding in a minute, but the supreme court's conception of "fortuity" is in some sense novel. Second, the supreme court held "that Texas courts have specific—although not general—jurisdiction over the Bermudian owner of the Colombian oil and gas operations [(Ramshorn)]. The claims against [Ramshorn] turn on its Texas-based executives' alleged misrepresentations in Texas to a Texas entity."<sup>25</sup>

With respect to its analysis of Parex Canada's Texas contacts, the supreme court had already set up the framework in a discussion of specific jurisdiction. In that discussion, the supreme court observed that it must focus on the defendant's relationship, not the plaintiff's, to the forum and that a defendant may structure transactions to "purposely avoid" a particular forum and its laws. With these principles in mind, the supreme court interpreted cases like *Calder v. Jones*<sup>26</sup> and *Keeton v. Hustler Magazine, Inc.*<sup>27</sup> to mean that a defendant is at risk only if it "continuously and deliberately exploited the [forum state's] market."<sup>28</sup> Thus, "[e]ven if a nonresident defendant *knows* that the effects of its actions will be felt by a resident plaintiff, that knowledge alone is insufficient to confer personal jurisdiction over the nonresident."<sup>29</sup> Something more is required and that "something" is a "*substantial* connection" to the forum.<sup>30</sup>

Once this backdrop was stitched into place, the supreme court moved to a discussion of what it saw as the controlling facts. Although Parex Canada seems to have known that the Bermudian seller of Colombian assets had operations in Texas and had many communications with the seller's Houston-based employees, it never sought out a Texas seller or Texas assets. From the supreme court's perspective, the communications

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22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 62.

26. 465 U.S. 783 (1984).

27. 465 U.S. 770 (1984).

28. *Searcy*, 496 S.W.3d at 68 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984)).

29. *Id.* at 69.

30. *Id.* at 70 (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014)).

in Texas, though voluminous, were not “purposeful” in a jurisdictionally meaningful sense:

Discussions that focused on acquiring some non-Texan assets are a far cry from purposeful availment of Texas’s jurisdiction—the [seller’s] employees involved could, quite literally, have been based anywhere in the world, and Parex Canada would presumably have interacted with it in the same way as they did with its employees here. Parex Canada did not purposefully avail itself of the benefits, privileges, or profits of engaging with Texas.<sup>31</sup>

To the contrary, Parex Canada—by inserting New York forum and choice-of-law clauses in transaction documents and by arranging for its Bermudian subsidiary to own the shares relating to the Columbian assets—“appears to have purposefully avoided Texas.”<sup>32</sup> And the fact that the plaintiff felt harm in Texas changes nothing because “the alleged direction of a tort into Texas is not a valid basis for specific jurisdiction.”<sup>33</sup>

With respect to Ramshorn, the supreme court easily found adequate contacts to support specific personal jurisdiction. Although Ramshorn argued that an executive of the seller was not its agent, the supreme court agreed that the trial court had ample evidence to conclude that this executive “had actual and apparent authority to sell the Ramshorn shares and . . . actively negotiated their sale in Texas.”<sup>34</sup> Indeed,

entanglement between Ramshorn and Nabors supports the trial court’s holding that it had specific jurisdiction over claims alleging misrepresentation by the Nabors executive who had the actual power to control whether Nabors sells the Ramshorn shares—claims which arise out of the exercise of that power. This sort of close connection between Ramshorn and Nabors is not random, fortuitous, or attenuated—rather it was all part of a general plan to sell the Ramshorn shares via talks in Texas, and thus use the Texas forum to make money.<sup>35</sup>

In dissent, Justice Guzman sharply disagreed with the majority’s holding concerning Parex Canada. The gist of the argument is that “Parex Canada’s contacts with Texas were anything but fortuitous.”<sup>36</sup> Particularly troublesome for the dissent was the majority’s disregard of the “repeated contacts with Texas to negotiate a share purchase agreement, and [the fact that] the fallout from those negotiations was directly tied to this forum.”<sup>37</sup> So, at bottom, there remains some theoretical disagreement at the supreme court as to what kind of Texas contacts are purposeful rather than fortuitous.

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31. *Id.* at 74–75.

32. *Id.* at 75.

33. *Id.* at 76. Without breaking any new ground, the supreme court also rejected assertions of general jurisdiction over either Parex Canada or Ramshorn.

34. *Id.* at 77.

35. *Id.*

36. *Id.* at 79 (Guzman, J., dissenting).

37. *Id.*



*TV Azteca v. Ruiz* presented the Texas Supreme Court with a first-impression opportunity to examine personal jurisdiction in the context of alleged defamation originating in a foreign jurisdiction.<sup>38</sup> As the supreme court set forth the background facts,

Mexican recording artist Gloria de Los Angeles Trevino Ruiz, popularly known as Gloria Trevi (and sometimes referred to as “Mexico’s Madonna”), now lives in Texas. Near the height of Trevino’s fame in the late 1990s, she was accused of luring underage girls into sexual relationships with her manager. Authorities arrested Trevino and her manager in Brazil on charges of sexual assault and kidnapping. Trevino spent nearly five years in prisons in Brazil and Mexico, but a Mexican judge ultimately found her not guilty and dismissed all charges in 2004. After her acquittal, Trevino moved to McAllen, Texas . . . .<sup>39</sup>

Trevino sued two Mexican television broadcasting companies, TV Azteca and Publimax, and a Mexican citizen, Patricia Chapoy, a news anchor and producer for TV Azteca, alleging that TV Azteca, Publimax, and Chapoy (referred to in the opinion as Petitioners) “defamed her on several occasions, primarily in stories [about aspects of her past] on a television program called *Ventaneando*, a Spanish-language entertainment news program that TV Azteca produced, Chapoy hosted, and Publimax aired on television stations affiliated with TV Azteca.”<sup>40</sup>

The supreme court began its jurisdictional analysis with a review of, most importantly, *Calder* and *Keeton*, each of which permitted an exercise of jurisdiction in a media defamation case despite fairly limited physical contacts to the forum. Trevino advanced four jurisdictional theories, namely that Petitioners “‘directed a tort’ at Trevino in Texas; broadcast allegedly defamatory statements in Texas; knew the statements would be broadcast in Texas; and intentionally targeted Texas through those broadcasts.”<sup>41</sup> The supreme court ultimately held that the first three of these theories do not establish purposeful availment, but the fourth does.<sup>42</sup> We take each of these in turn.

There was no dispute that Trevino resides in Texas and suffered her injuries in Texas. But the supreme court had previously, in *Michiana Easy Livin’ Country, Inc. v. Holten*,<sup>43</sup> rejected the direct-a-tort test for specific jurisdiction. As the supreme court observed, “[t]here is a subtle yet crucial difference between directing a tort at an individual who happens to live in a particular state and directing a tort at that state.”<sup>44</sup> Here, “the fact that the plaintiff lives and was injured in the forum state is not irrele-

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38. *TV Azteca v. Ruiz*, 490 S.W.3d 29, 36 (Tex. 2016), *petition for cert. filed*, 85 U.S.L.W. 3182 (U.S. Oct. 7, 2016) (No. 16-481).

39. *Id.* at 35.

40. *Id.*

41. *Id.* at 43.

42. *See id.* at 43–56.

43. 168 S.W.3d 777, 791–92 (Tex. 2005).

44. *Ruiz*, 490 S.W.3d at 43.

vant to the jurisdictional inquiry, but it is relevant only to the extent that it shows that *the forum state* was ‘the focus of the activities of the defendant.’”<sup>45</sup> Thus, “the mere fact that Petitioners directed defamatory statements at a plaintiff who lives in and allegedly suffered injuries in Texas, without more, does not establish specific jurisdiction over Petitioners.”<sup>46</sup>

There was also no dispute that Petitioners’ broadcasts, which originated in Mexico, traveled into Texas via the phenomenon known as “signal spill-over.”<sup>47</sup> As a policy matter, the Petitioners urged the supreme court to draw a line between broadcast and print publication (the latter being at issue in *Calder and Keeton*): “If the ‘over-the-air transmission of television signals’ constitutes ‘business in Texas,’ they contend, then every television and radio broadcaster ‘deep in Mexico’ whose signal reaches over the border is ‘doing business in Texas,’ as is ‘virtually every out-of-state Internet service provider which operates a website accessible in Texas.’”<sup>48</sup> The supreme court accepted this argument, holding that broadcast signals straying into Texas are not “purposeful” contacts.<sup>49</sup>

Trevino next posited that Petitioners knew that their broadcasts would reach a Texas audience, a fact that they appear to have conceded. Here, too, the supreme court noted that knowledge and foreseeability—though not irrelevant to a jurisdictional analysis—are not enough to demonstrate purposeful availment.<sup>50</sup> For authority-by-analogy, the supreme court turned to its stream-of-commerce precedents, under which mere knowledge that a product may arrive in the forum is insufficient to establish personal jurisdiction.<sup>51</sup> Accordingly, “a broadcaster’s mere knowledge that its programs will be received in another jurisdiction is insufficient to establish that the broadcaster purposefully availed itself of the benefits of conducting activities in that jurisdiction.”<sup>52</sup> More is required: “[E]vidence of ‘additional conduct’ must establish that the broadcaster had ‘an intent or purpose to serve the market in the forum State.’”<sup>53</sup>

Despite rejection of these three theories, the supreme court acknowledged that Trevino had presented evidence of “additional conduct” that could demonstrate Petitioners intent to serve the Texas market.<sup>54</sup> One way to establish this intent would be to show that Petitioners “aimed” their conduct at Texas.<sup>55</sup> But to make this showing courts typically require the subject matter and sources to be in the forum state, a showing

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45. *Id.* (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984)).

46. *Id.*

47. *Id.* at 44 (describing “signal spill-over” as the “results from the over-the-air signals ‘following the law of physics’”).

48. *Id.*

49. *Id.* at 45.

50. *Id.* at 46.

51. *Id.*

52. *Id.*

53. *Id.* at 46–47 (quoting *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 577 (Tex. 2007)).

54. *Id.* at 47.

55. *Id.*

that Trevino could not make as a factual matter. Nonetheless, the subject-and-sources test is only one way of demonstrating intent, and Trevino presented three types of intent evidence:

- “Petitioners actually physically ‘entered into’ Texas to produce and promote their broadcasts”;<sup>56</sup>
- “Petitioners derived substantial revenue and other benefits by selling advertising time to Texas businesses”;<sup>57</sup> and
- “Petitioners made substantial and successful efforts to distribute their programs and increase their popularity in Texas, including the programs in which they allegedly defamed Trevino.”<sup>58</sup>

The collective weight of this evidence was sufficient to convince the supreme court that Petitioners purposely availed themselves of the Texas market and that their conduct was sufficiently related to Trevino’s claims to support personal jurisdiction.<sup>59</sup>

Petitioners final thrust was against the “fair play” of a U.S. suit against them. This argument consisted of two strands. First, “Texas has no interest” in suits between Mexican citizens. The supreme court quickly snapped this thread: “Fundamentally, [a] state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory,” and we have never conditioned that interest on the plaintiff’s status as a Texas ‘citizen,’ as opposed to a Texas ‘resident.’”<sup>60</sup> Second, the Petitioners postulated a border war with Mexico over straying broadcast signals that might lead to chilled speech in this country. The supreme court acknowledged these concerns as an abstract matter but didn’t accept their contextual relevance:

We hold that Texas courts have jurisdiction over Petitioners not because their broadcast signals “strayed” and “crossed national boundaries,” but because some evidence establishes that Petitioners intentionally targeted Texas with those broadcasts and thereby purposefully availed themselves of the benefits of Texas laws. Requiring nonresidents to comply with the laws of the jurisdictions in which they choose to do business is not unreasonable, burdensome, or unique.<sup>61</sup>

### C. OTHER COURTS

A number of other courts confirmed or clarified some finer points of personal jurisdiction:

- A preponderance standard applies when a court holds an evidentiary hearing.<sup>62</sup>

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56. *Id.* at 49–50.

57. *Id.* at 50.

58. *Id.*

59. *Id.* at 52.

60. *Id.* at 55 (alteration in original) (citation omitted) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984)).

61. *Id.* at 56.

62. *Bonner v. Triple-S Mgmt. Corp.*, 661 F. App’x 820, 821 (5th Cir. 2016).

- Discovery is unwarranted when the plaintiff has no credible documents demonstrating contacts with the forum.<sup>63</sup>
- An email exchange initiated by the plaintiff is insufficient to establish minimum contacts.<sup>64</sup>
- A forum selection clause is irrelevant where the plaintiff has no credible evidence of a contract.<sup>65</sup>
- Actions taken to cloud title in Texas are sufficient to confer personal jurisdiction.<sup>66</sup>
- Voluntary travel to Texas for the purpose of soliciting business is sufficient to confer personal jurisdiction.<sup>67</sup>
- The fiduciary shield doctrine does not insulate individuals from jurisdiction over intentional torts.<sup>68</sup>
- Substitute service on the Secretary of State is insufficient when the Secretary is provided with the address of the nonresident's registered agent rather than the address of the nonresident's home office.<sup>69</sup>
- Contacts that are no more than the effects of an alleged conspiracy are insufficient to confer jurisdiction.<sup>70</sup>
- Exercise of personal jurisdiction in a proceeding to establish parent-child relationship is proper where the child is present in Texas other than through unilateral acts of the mother.<sup>71</sup>
- Solicitation of a purchase of a retail installment sales contract is sufficient to support jurisdiction when a breach of the purchase agreement is the basis of the claim asserted.<sup>72</sup>
- Mere existence of an attorney-client relationship with a nonresident lawyer is insufficient to establish jurisdiction.<sup>73</sup>
- "Abnormal" control over a subsidiary is required to establish jurisdiction over a parent under an alter-ego theory.<sup>74</sup>

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63. *Id.* at 822.

64. *Id.* at 822–23.

65. *Id.* at 823.

66. *Hoskins v. Ricco Family Partners, Ltd.*, Nos. 02-15-00249-CV, 02-15-00253-CV, 2016 WL 2772164, at \*8 (Tex. App.—Fort Worth May 12, 2016, no pet.) (mem. op.).

67. *Richardson v. MH Outdoor Media, LLC*, No. 14-16-00041-CV, 2016 WL 4921104, at \*6 (Tex. App.—Houston [14th Dist.] Sept. 15, 2016, no pet.) (mem. op.).

68. *Id.* at \*8; *Ren v. ANU Res., LLC*, 502 S.W.3d 840, 849 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *see also* *U.S. Bank Nat'l Ass'n v. TFHSP LLC* Series 6481, 487 S.W.3d 715, 719–21 (Tex. App.—Fort Worth 2016, no pet.) (failure to comply with statutory methods of service on fiduciary coupled with insufficient pleading to establish jurisdiction).

69. *Air Voice Wireless, LLC v. M&E Endeavours LLC*, No. 14-15-00548-CV, 2016 WL 5342707, at \*4–5 (Tex. App.—Houston [14th Dist.] Sept. 22, 2016, no pet.) (mem. op.).

70. *Predator Downhole Inc. v. Flotek Indus., Inc.*, 504 S.W.3d 394, 409 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

71. *In re E.H.G.*, No. 05-15-00439-CV, 2016 WL 4443544, at \*3 (Tex. App.—Dallas Aug. 23, 2016, no pet.) (mem. op.).

72. *DJRD, LLC v. SKOPOS Fin., LLC*, No. 05-16-00072-CV, 2016 WL 3912769, at \*4 (Tex. App.—Dallas July 14, 2016, no pet.) (mem. op.).

73. *Mitchell v. Freese & Goss, PLLC*, No. 05-15-00868-CV, 2016 WL 3923924, at \*5–6 (Tex. App.—Dallas July 15, 2016, pet. filed) (mem. op.).

74. *TMX Fin. Holdings, Inc. v. Wellshire Fin. Servs., LLC*, No. 01-16-00044-CV, 2016 WL 5920776, at \*5–6 (Tex. App.—Houston [1st Dist.] Oct. 11, 2016, no pet.). *But cf.* *Cornerstone Healthcare Grp. Holding, Inc. v. Nautic Mgmt. VI, L.P.*, 493 S.W.3d 65, 73 (Tex.

- Execution of a disputed guarantee is sufficient to establish jurisdiction, even if its existence is later effectively challenged.<sup>75</sup>
- Evidentiary issues may be waived by omission in an opening brief.<sup>76</sup>
- Seeking affirmative relief in the trial court may waive a special appearance.<sup>77</sup>
- An actual product need not have been sold in Texas to support jurisdiction under a stream-of-commerce theory.<sup>78</sup>
- Defendant should anticipate a Texas forum where its arbitration clause selects the federal district of defendant's residence as the forum and defendant never establishes another U.S. residence.<sup>79</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>80</sup> Second, it is a question of forum law.<sup>81</sup> Third, the forum state has broad power to make choice-of-law rules, either legislatively or judicially, subject only to limited constitutional requirements.<sup>82</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,

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2016) (“[K]eeping legal entities distinct does not mean they can escape jurisdiction by splitting an integrated transaction into bits.”).

75. *Rubinstein v. Lucchese, Inc.*, 497 S.W.3d 615, 632 (Tex. App.—Fort Worth 2016, no pet.).

76. *Phillips Dev. & Realty, LLC v. LJA Eng'g, Inc.*, 499 S.W.3d 78, 89 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *ERC Midstream LLC v. Am. Midstream Partners, LP*, 497 S.W.3d 99, 107 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

77. *Nationwide Distribution Servs., Inc. v. Jones*, 496 S.W.3d 221, 225 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

78. *See Semperit Technische Produkte Gesellschaft M.B.H. v. Hennessy*, 508 S.W.3d 569, 576–77 (Tex. App.—El Paso 2016, no pet.).

79. *Am. Express Centurion Bank v. Haryanto*, 491 S.W.3d 337, 346–47 (Tex. App.—Beaumont 2016, no pet.).

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

81. *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. The Restatement (Second) creates a presumption against *renvoi* except for limited circumstances. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (AM. LAW INST. 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* PETER HAY ET AL., CONFLICT OF LAWS 162–68 (5th ed. 2010); 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 Co.*, 313 U.S. at 496–97.

82. The Due Process Clause is the primary limit on state choice-of-law rules, requiring a reasonable or at least minimal connection between the dispute and the applied law. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799 (1985); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930); *Compaq Comput. Corp. v. Lapray*, 135 S.W.3d 657, 680 (Tex. 2004); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 & cmts. a–f (AM. LAW INST. 1971).

statutes directing the application of a certain state's laws, based on events or people important to the operation of each specific law.<sup>83</sup> Second in the choice-of-law hierarchy is party-controlled choice of law, that is, choice-of-law clauses in contracts that control unless public policy dictates otherwise.<sup>84</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>85</sup> This Survey article is organized according to this hierarchy, that is, constitutional, statutory, contractual, and finally common law under the balancing factors of the most significant relationship test. In spite of the mix of state and federal cases, readers should 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>86</sup>

#### A. CONSTITUTIONAL ISSUES

The concept of legislative jurisdiction imposes two territorial limits on the application of any given law. First is the limit within the law itself, that is, what territorial range this law was intended to have. Historically, common law did not have a built-in territorial limit other than the older concept of *lex locus* at a time when laws were deemed territorial. However, statutes often have an intended range, and that is the first limit of legislative jurisdiction—the range imposed by the lawmaker. Within the United States, the second limit on a law's range is imposed by the U.S. Constitution. Similar to the due-process limitation on state long-arm statutes, the Constitution imposes limits on a state's ability to choose the governing law in its courts. Unlike the limits on state long-arm statutes (which arise only under the due process clause), the choice-of-law limits arise under several doctrines—due process (requiring a reasonable connection between the dispute and the governing law); full faith and credit (requiring the choice-of-law analysis to consider the interests of other affected states); and to a lesser extent, equal protection, privileges and immunities, the Commerce Clause, and the Contract Clause.<sup>87</sup> Constitutional

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83. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) cmt. a (AM. LAW INST. 1971); *See, e.g.*, *Owens Corning v. Carter*, 997 S.W.2d 560, 564 (Tex. 1999) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (West 2008) (applying an earlier version of the Texas wrongful death statute, requiring that the court “apply the rules of substantive law that are appropriate under the facts of the case”)).

84. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971) (Law of the State Chosen by the Parties—allowing contracting parties to choose a governing law, within defined limits). Texas has adopted section 187. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677–78 (Tex. 1990).

85. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971) (listing the seven balancing factors for the most significant relationship test).

86. The exception is when a court rules on a constitutional issue, such as legislative jurisdiction or full faith and credit. *See, e.g.*, *Compaq Comput. Corp.*, 135 S.W.3d at 680 (legislative jurisdiction); *Certain Underwriters at Lloyd's, London v. Chi. Bridge & Iron Co.*, 406 S.W.3d 326, 331–32 (Tex. App.—Beaumont 2013, pet. denied) (full faith and credit).

87. The Due Process Clause is the primary limit on state choice-of-law rules, requiring a reasonable or at least minimal connection between the dispute and the law being applied.

problems most often occur when a state court chooses its own law in questionable circumstances.

Although due process is the more common doctrine, full faith and credit figured into two Survey period cases, one from the U.S. Supreme Court and the other from a Texas court of appeals. In *Franchise Tax Board of California v. Hyatt*,<sup>88</sup> the Supreme Court held that full faith and credit requires Nevada to give California some aspect of immunity when sued in a Nevada state court. In the early 1990s Gilbert Hyatt moved from California to Nevada to avoid California income tax. His move led to a dispute with the California tax agency—the Franchise Tax Board—about the effective date of his Nevada residency, which he claimed occurred in September 1991, but which the Tax Board argued was in April 1992. The difference was \$10 million in taxes.<sup>89</sup> Agents for the Tax Board gathered evidence on Hyatt, much of it from investigations in Nevada.<sup>90</sup> In addition to the Tax Board's administrative action in California, Hyatt sued the Tax Board in a Nevada state court, asserting only claims under Nevada law.<sup>91</sup> The Tax Board objected on sovereign immunity grounds. California law provided full immunity for its own state tax collection efforts while Nevada law merely barred negligence claims against its own state agents, capped intentional tort damages at \$50,000, and barred punitive damages.<sup>92</sup> On interlocutory appeal, the Nevada Supreme Court granted immunity as to the negligence claims but not for the intentional torts, and the U.S. Supreme Court affirmed.<sup>93</sup>

On remand, the jury awarded Hyatt \$490 million, including \$250 million in punitive damages. The Nevada Supreme Court reduced that to \$1 million (the fraud judgment) but negated the privacy claim as a matter of law, granted a new trial on emotional distress, and, pertinent to sovereign immunity, struck the \$250 million punitive damages award because Nevada state agencies have such immunity.<sup>94</sup> In spite of this Nevada-immunity allowance, the Nevada Supreme Court rejected Tax Board's argument that Nevada's \$50,000 damage cap applied. That is (as high-

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*See Phillips Petroleum Co.*, 472 U.S. at 799; *Home Ins. Co.*, 281 U.S. at 407; *Compaq Comput. Corp.*, 135 S.W.3d at 680; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 and comments following; HAY ET AL., *supra* note 81, at 175–203; WEINTRAUB, *supra* note 1, at 585–648; James P. George, *Choice of Law: A Guide for Texas Attorneys*, 25 TEX. TECH. L. REV. 833, 844–46 (1994). In addition to these two limits, international law also imposes a reasonable connection limit on choice of law. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–04 (AM. LAW INST. 1987).

88. *See* 136 S. Ct. 1277, 1279 (2016).

89. *Id.* at 1279–80.

90. *See id.* at 1284 (Roberts, C.J., dissenting).

91. The claims were invasion of privacy, intentional infliction of emotional distress, fraud, breach of confidence, and abuse of process. These claims were based on Tax Board's Nevada investigation, which Hyatt alleged included the Tax Board auditor having "peered through Hyatt's windows, rummaged around in his garbage, contacted his estranged family members, and shared his personal information not only with newspapers but also with his business contacts and even his place of worship." *Id.*

92. *See id.* at 1280.

93. *See id.* (citing *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003)).

94. *Id.* at 1285 (Roberts, C.J., dissenting).

lighted in Chief Justice Roberts's dissent), the Nevada Supreme Court applied none of California's immunity law, and part but not all of Nevada's immunity law.<sup>95</sup> The Nevada Supreme Court justified the bifurcation of its immunity law as public policy—the \$50,000 cap was for Nevada agencies that were under appropriate restraints that California did not impose on its agents, at least not in investigations done outside California.<sup>96</sup>

The U.S. Supreme Court granted the case's second certiorari and agreed to decide two issues: (1) should California be granted full immunity from suits in another state's court?<sup>97</sup> and (2) did full faith and credit require some aspect of Nevada immunity?<sup>98</sup> On the first issue, the Supreme Court split 4-4 and thus upheld Nevada's denial of California having intrinsic immunity.<sup>99</sup> That is, because a state's immunity from suits in another state is not addressed in the Eleventh Amendment or otherwise in the Constitution, the only ground for immunity was that it's intrinsic to statehood.<sup>100</sup> On the second issue—full faith and credit for sister-states' sovereign immunity laws—by a 6-2 vote the Supreme Court reversed the Nevada decision on a finding that Nevada's application of a "special law" embodied a policy of hostility to California's public acts (California's statutory declaration of its own absolute immunity on tax investigations) without a sufficient policy justification.<sup>101</sup> The special law was Nevada's crafting of a partial immunity rule that applied Nevada immunity law to negate (1) Hyatt's negligence claims; and (2) Hyatt's punitive damages, but allowed unlimited actual damages on the intentional torts. Nevada's policy justification was California's failure to police its tax auditors' activities in Nevada, something the dissent found to be adequate but the majority did not.<sup>102</sup>

Back home in Texas, the Fort Worth Court of Appeals addressed full faith and credit in *Richardson v. State*,<sup>103</sup> which is a rare example of the Restatement (Second)'s application in a criminal case. Richardson was intoxicated when his elevated truck ran over and crushed a car, resulting in injuries and one death.<sup>104</sup> Following his conviction, the trial court considered Richardson's misdemeanor convictions in Iowa for sentencing-enhancement purposes. In that consideration the trial court applied Texas law to characterize the Iowa misdemeanor convictions as felonies.<sup>105</sup>

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95. *Id.* at 1282 (majority op.); see also *id.* at 1287-88 (Roberts, C.J., dissenting).

96. *Id.* at 1280.

97. *Id.* at 1279-80 (this was a reconsideration of *Nevada v. Hall*, 440 U.S. 410 (1979), in which the Supreme Court held that a Nevada agency could be sued in a California state court).

98. *Id.* at 1280.

99. *Id.* at 1279.

100. See *Hall*, 440 U.S. at 418-21.

101. See *Hyatt*, 136 S. Ct. at 1281-83.

102. See *id.* at 1282, 1287.

103. See Nos. 02-15-00271-CR, 02-15-00272-CR, 2016 WL 6900901 (Tex. App.—Fort Worth Nov. 23, 2016, no pet.) (mem. op.).

104. *Id.* at \*1.

105. *Id.* at \*7.



Richardson argued on appeal that the Full Faith and Credit Clause required the court to define those convictions under Iowa law which would disqualify them as felony enhancements in Texas.<sup>106</sup> The court of appeals rejected this argument, based on a Texas statute that directed the application of Texas law to define convictions from other states.<sup>107</sup>

In applying the Texas choice of law statute, the court of appeals cited several authorities for the point that full faith and credit has less applicability to criminal cases than it would if asked to recognize a civil judgment.<sup>108</sup> That lesser applicability did not, however, negate Richardson's choice of law argument, so the court of appeals went on to consider whether Texas or Iowa law should control the effect of an Iowa conviction in enhancing a Texas conviction.<sup>109</sup> The court of appeals relied here on Restatement (Second) Section 6 for the point that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."<sup>110</sup> This of course pointed to the primacy of the Texas criminal statute designating Texas law for assessing sentencing enhancement.<sup>111</sup> The court of appeals further noted that the issue here was procedural and quoted Restatement (Second) Section 122 for the point that forum law controls procedural issues such as this one.<sup>112</sup>

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

Statutory choice-of-law rules express a public policy interest that overrides both the common law analysis in the Restatement (Second), and the party autonomy principle in contract disputes involving a choice-of-law clause. 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.

*Oubre v. Schlumberger Limited*<sup>113</sup> provides a common example under the Texas wrongful death statute applying to deaths or injuries occurring out of state. The case involved a refinery accident in Louisiana that injured Oubre, who sued in Texas a year and a day after the accident.<sup>114</sup> Defendants moved to dismiss based on Louisiana's one-year statute of limitations for personal injury actions.<sup>115</sup> Oubre argued that Texas law controlled under a Restatement (Second) Section 145 analysis, based on defendants' Texas activities including policy determination and a failure

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106. *Id.*

107. *Id.* at \*7–8 (citing TEX. PENAL CODE ANN. § 12.41 (West 2011)).

108. *Id.* at \*7.

109. *Id.* at \*8.

110. *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (AM. LAW INST. 1971)).

111. *Id.*

112. *Id.*

113. No. 3:15-CV-111, 2016 WL 5334627 (S.D. Tex. Sept. 23, 2016).

114. *Id.* at \*1.

115. *Id.*

to train employees.<sup>116</sup> The U.S. District Court for the Southern District of Texas bypassed Oubre's Restatement (Second) argument and noted that Texas statutorily controls choice of law in wrongful death and personal injury actions occurring out of state.<sup>117</sup> The Texas statute provides that personal injury claims from other jurisdictions may be filed here if filed before time barred under Texas law, and, if plaintiff is not a Texas resident, the law of the state where the accident occurred.<sup>118</sup> The evidence was conclusive that Oubre's filing exceeded the time limit under Louisiana law, and the district court issued summary judgment for defendants.<sup>119</sup>

In *Petrobras America, Inc. v. Vicinay Cadenas, S.A.*,<sup>120</sup> the U.S. Court of Appeals for the Fifth Circuit considered the timing for raising a choice of law issue. The case arose from defendant Vicinay's negligent manufacture of underwater tether chains that eventually broke, resulting in the shutdown of oil and gas production and losses of \$400 million.<sup>121</sup> Petrobras brought the claim in federal court alleging federal maritime jurisdiction over various common law claims without arguing for any other source of law. Vicinay won by summary judgment under maritime law's economic loss doctrine,<sup>122</sup> and Petrobras then moved to amend to assert a claim under Louisiana law, which it argued was mandated by the Outer Continental Shelf Lands Act (OCSLA),<sup>123</sup> a federal choice of law statute with a test that may point to federal common law or in some cases to the adjacent state. The district court rejected the choice of law argument as having been waived by not being raised before summary judgment.<sup>124</sup> The Fifth Circuit reversed, holding that Congress mandated OCSLA's application, that it was not waivable either by contract or failure to raise at trial,<sup>125</sup> and that in this case OCSLA pointed to Louisiana law.<sup>126</sup> In a subsequent clarification, the Fifth Circuit noted that this ruling of non-waivability applied only to OCSLA and not to other choice of law rules.<sup>127</sup>

### C. 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

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116. *Id.* at \*2.

117. *Id.* at \*4–5.

118. *Id.* (citing TEXAS CIV. PRAC. & REM. CODE § 71.031(a) (West 2008)); *see also* Burdett v. Remington Arms Co., LLC, No. 3:15-CV-4038-B, 2016 WL 3745682, at \*5 (N.D. Tex. July 13, 2016) (holding that TEX. CIV. PRAC. & REM. CODE § 71.031 applies to pertinent choice-of-law issues in Texas federal courts).

119. *Oubre*, 2016 WL 5334627, at \*7.

120. 815 F.3d 211 (5th Cir. 2016).

121. *See id.* at 213.

122. *Id.* at 214.

123. *See id.* at 213 (citing 43 U.S.C. § 1333(a)(2) (2012)).

124. *Id.* at 214.

125. *Id.* at 214–15.

126. *Id.* at 215–18.

127. *See Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, 829 F.3d 770, 771 (5th Cir. 2016).

Restatement. The embodiment of the most significant relationship test is 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.<sup>128</sup>

This listing is not by priority, which varies from case to case.<sup>129</sup>

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

Texas law and the Restatement permit contracting parties to choose a governing law.<sup>130</sup> It may be tempting to accept this practice with the idea that the parties' choice should be conclusive, especially in the absence of a party's objection and 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.<sup>131</sup> Case law in both Texas<sup>132</sup> and federal<sup>133</sup> courts adopt the Restatement's structured view.

*Merritt, Hawkins & Associates, LLC v. Caporicci*<sup>134</sup> is a good example of the proper Restatement analysis where the parties' contract designates one state's law but another state has a greater interest—that is, the court's rejection of an otherwise valid choice-of-law clause. *Merritt* was a second-filed case in a dispute with simultaneous litigation in California.<sup>135</sup> Interestingly, it is also a somewhat rare example of an interlocutory appeal of the trial court's choice-of-law decision, with the merits left to be decided.<sup>136</sup>

*Merritt* is a California limited liability company engaged in employee recruiting for health care firms, with its primary location in Texas. Two of its California-based employees left the company in 2013 to start a rival business in California, leading *Merritt* to send warning letters to both regarding non-compete clauses in their employment contracts.<sup>137</sup> The employees filed suit in California state court seeking various employment-

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128. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (AM. LAW INST. 1971).

129. *Id.* at cmt. c.

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

131. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971).

132. *See DeSantis*, 793 S.W.2d at 677–81.

133. *See Int'l Interests, L.P. v. Hardy*, 448 F.3d 303, 306–07 (5th Cir. 2006).

134. *See generally* No. 05-15-00851-CV, 2016 WL 1757251 (Tex. App.—Dallas May 2, 2016, no pet.) (mem. op.).

135. *Id.* at \*1

136. *See id.*

137. *Id.*

related damages and a declaration that the non-compete clauses violated California law.<sup>138</sup> Merritt then filed a parallel action in Texas to which the employees filed counterclaims.<sup>139</sup> The Texas trial court granted the employees' request to designate California law as controlling (accomplished with a motion to take judicial notice), in spite of the Texas choice of law clause in the employment contracts. Merritt obtained the court's approval for the interlocutory appeal.<sup>140</sup>

The Dallas Court of Appeals affirmed. Starting the analysis with Restatement (Second) Section 187(1), the court of appeals found that Texas had a substantial connection to the dispute and was an appropriate choice unless another state had a greater connection under Section 187(2).<sup>141</sup> California, however, had a greater connection, and the non-compete agreement clearly violated California public policy.<sup>142</sup> This conclusion applied to the contract claims only, and the court of appeals did a separate analysis for both sides' tort claims. California law prevailed again under Restatement (Second) Sections 6 and 145 with the greater quality of contacts in California.<sup>143</sup>

*Western-Southern Life Assurance Co. v. Kaleh*<sup>144</sup> was a collection action against defendant-guarantor Kaleh when he failed to repay a loan for the development of an apartment complex in Houston. The issue was which of two choice-of-law clauses controlled. The loan guarantees had an Ohio choice of law clause while the amended loan documents had a Texas choice of law clause.<sup>145</sup> The U.S. District Court for the Southern District of Texas found that the earlier contract's clause (choosing Ohio) applied because the action was on the guarantees and "the Amended Loan Documents did not alter the Guarantees' terms."<sup>146</sup> Having determined that Ohio law governed the merits, there remained an issue of which law governed defendant Kaleh's limitations defense. Kaleh had argued that Texas had an applicable two-year period,<sup>147</sup> and plaintiff countered that the Ohio choice of law clause applied both to substance and procedure.<sup>148</sup> The district court readily rejected this, noting the phenomenon that statutes of limitations can be procedural or substantive, but that they're presumed to be procedural (and thus controlled by forum law) unless the limitations period is built into the controlling substantive law.<sup>149</sup> In this case, Ohio law did not include a limitations period in the law controlling the guarantees claim and accordingly the Texas limitations

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at \*2.

142. *Id.* at \*3-4 (the court of appeals relied in part on *DeSantis*, the bellwether Texas opinion on choice-of-law clause analysis and coincidentally a non-compete case).

143. *Id.* at \*5.

144. 193 F. Supp. 3d 756 (S.D. Tex. 2016).

145. *Id.* at 762.

146. *Id.* at 770.

147. *Id.* at 773.

148. *Id.*

149. *Id.* at 771.

period applied.<sup>150</sup> That result did not help defendant's limitations objection because the district court further found that the appropriate Texas limitations period was four years, thus validating plaintiff's timely filing.<sup>151</sup>

*Connell v. Wells Fargo & Co.*<sup>152</sup> is an attempted class action to set aside defendant's non-compete clauses in employment contracts with its financial advisors. Plaintiffs argued that the employment contracts' designation of North Carolina law should be rejected because it violated Texas public policy.<sup>153</sup> In applying North Carolina law to dismiss the claims, Judge Rosenthal provided a concise-but-thorough analysis under Restatement (Second) Section 187 that recognized the contracts' valid choice of North Carolina law (based on the reasonable basis for selecting that law) and the governing law's non-violation of a fundamental Texas policy.<sup>154</sup>

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

This Survey period produced one notable contract case not involving a choice-of-law clause, contrasted with the seven cases discussed in the Survey ten years ago.<sup>155</sup> Two reasons for the disparity come to mind, one good, one bad, neither provable. The good reason is that more contracts now include choice-of-law clauses. The bad reason is that parties litigating multi-jurisdictional claims on contracts lacking law clauses often do not consider raising a choice-of-law issue. The lone case this Survey period is an example of the latter, and the court went out of its way to justify Texas law's application. *Glycobiosciences, Inc. v. Woodfield Pharmaceutical, LLC*<sup>156</sup> was an action for breach of a confidentiality agreement regarding the manufacture of pain relievers. The parties' contract lacked a choice-of-law clause, the parties did not raise the issue in their pleadings, and the parties cited only Texas law in their briefs.<sup>157</sup> This is enough to waive the argument for any other governing law,<sup>158</sup> but instead the U.S. District

150. *Id.* at 774–75.

151. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (West 2002)). In *Exco Res., Inc. v. Cudd Pressure Control Inc.*, No. 05-14-01364-CV, 2016 WL 2726539, at \*5–7 (Tex. App.—Dallas May 9, 2016, no pet.), the court of appeals dealt with the same issue—conflicting choice of law clauses—this time in an indemnity claim. The parties' relationship was centered on two agreements—a master services agreement for oilfield operations (choosing Texas law) and a separate indemnity agreement choosing Louisiana law. The court of appeals affirmed the trial court's decision that the more specific indemnity agreement controlled over the larger agreement, and then confirmed that holding under a Restatement (Second) analysis. *Id.*

152. No. H-15-2841, 2016 WL 4733448 (S.D. Tex. Nov. 12, 2016).

153. *Id.* at \*2.

154. *Id.* at \*3–4.

155. See James P. George & Anna K. Teller, *Conflict of Laws*, 60 SMU L. REV. 817, 826–27 (2007).

156. No. 4:15-CV-02109, 2016 WL 1702674 (S.D. Tex. April 27, 2016).

157. *Id.* at \*3.

158. In addition to the permissibility of following the parties' briefed law, the court could have added that forum law applies unless a party meets the burden of pleading and proving the applicability of another. See *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 53 (Tex. 2008); see also George, *supra* note 87, at 848.

Court for the Southern District of Texas first noted the presumption of following the parties' sole references to Texas law,<sup>159</sup> then turned to a proper Restatement (Second) analysis under Section 188 and found that Texas law would govern based on the facts known.<sup>160</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>161</sup> Section 145 is augmented by forty additional tort sections addressing specific claims such as fraud,<sup>162</sup> or issues common to torts such as standard of care.<sup>163</sup>

*EH National Bank v. Tran*<sup>164</sup> was an action for legal malpractice regarding a land purchase in Montana. Plaintiff was a California bank that agreed to finance the purchase of the Montana land by Blue Vault, LLC, a Wyoming company. Defendants were Texas attorney Tran and his Texas-based law firm, hired by plaintiff to prepare the transaction documents.<sup>165</sup> Blue Vault tendered a bad check for the \$750,000 down payment and when it defaulted, the bank sued Tran and his firm in a Montana state court for failing to verify the check's validity.<sup>166</sup> Defendants removed to federal court in Montana and then objected to personal jurisdiction there. The Montana district court found in defendants' favor but rather than dismiss, it transferred the action to the U.S. District Court for the Northern District of Texas.<sup>167</sup> In Texas, defendants moved to designate Erika Rae Brown (who'd been sentenced to prison in regard to the transaction) as a responsible third party. Plaintiff bank objected on the grounds that Montana law, which did not allow such joinder, should control.<sup>168</sup> The district court applied Restatement (Second) Sections 6 and 145 to find that Texas law controlled the procedural issue of party joinder.<sup>169</sup>

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159. *Glycobiosciences, Inc.*, 2016 WL 1702674, at \*3.

160. *Id.*

161. RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (AM. LAW INST. 1971).

162. *Id.* § 148.

163. *Id.* § 157.

164. No. 3:16-CV-00083-M, 2016 WL 4138634 (N.D. Tex. Aug. 4, 2016).

165. *Id.* at \*1.

166. *Id.*

167. *Id.*

168. *Id.* at \*2.

169. *Id.* at \*4. Plaintiff also argued that Montana law applied because it was designated in the pertinent loan agreement, but the district court rejected this because defendant attorneys were not parties to the loan agreement. *Id.* at \*5. Plaintiff also argued that Montana choice-of-law rules governed because Texas was a transferee court. The district court rejected this as well, pointing that that the transferee rule applied only for inconvenient forum transfers under 28 U.S.C. § 1404, and this was a jurisdictional transfer under 28 U.S.C. § 1631. *Id.* On that point, see *Sims v. Kia Motors of Am., Inc.*, 839 F.3d 393, 399–400 (5th Cir. 2016) (court applied California choice-of-law rule in wrongful death case because

In other tort actions, federal district courts in Texas (1) held that Vietnamese law applied to a business fraud claim for activities in Vietnam in spite of the district court's denial of motions to dismiss on jurisdictional and inconvenient forum grounds;<sup>170</sup> (2) noted that in multi-district litigation procedures, the district court must apply the choice of law rules of each state of origin;<sup>171</sup> and (3) denied dispositive motions in a trade secrets case involving Canadian parties because both sides failed to articulate the necessary elements under Restatement (Second) Section 145 for tort claims.<sup>172</sup>

#### 4. *Family Law*

Three Survey period cases raise choice of law in family-related cases, which is somewhat unusual. *Bauer v. White*<sup>173</sup> was an interpleader case filed by Etoco to resolve conflicting inheritance claims to oil and gas royalties in Texas. W.A. Gillam was born in Nebraska in 1913 and apparently lived there his entire life. After his first wife's death, he married Mae Gillan in Nebraska in 1937. In 1950, while still living in Nebraska, W.A. acquired an undivided half interest in a 271.5-acre tract in Texas. He later sold a one-eighth interest and retained three-eighths of the property. When W.A. died in Nebraska in 1963, his will allotted a one-third interest to wife Mae and two-thirds to his three children by his first wife.<sup>174</sup> In spite of the Nebraska probate following W.A.'s death, the Texas royalty issue did not reach litigation for several decades when Etoco filed the Texas interpleader in 2009, seeking resolution as to which groups of heirs—the first wife's or the second wife's—had which interest.<sup>175</sup> The answer rested on which state's law governed marital property.<sup>176</sup> The first wife's heirs claimed that the mineral interests were separate property at the time W.A. married Mae, while Mae's heirs argued that the Texas mineral interests were her community property. If community property, the first wife's heirs would lose half their share.

The trial court rendered a summary judgment for the first wife's heirs, finding that the Texas property was decedent's separate property under Nebraska law.<sup>177</sup> Mae's heirs appealed, arguing that Texas law controlled

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it was an inconvenient forum transfer under 28 U.S.C. § 1404, based on location of evidence and witnesses).

170. *Viet. Land v. Tran*, No. H-14-957, 2016 WL 1085101, at \*1–3 (S.D. Tex. Feb. 18, 2016) (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 145, 156 (AM. LAW INST. 1971)).

171. *In re Whole Foods Mkt., Inc., Greek Yogurt Mktg. and Sales Practices Litig.*, 163 F. Supp. 3d 385, 388–89 (W.D. Tex. 2016).

172. *PCM Sales, Inc. v. Quadbridge, Inc.*, No. 3:14-CV-2806-L, 2016 WL 407300, at \*5–6 (N.D. Tex. Feb. 3, 2016).

173. No. 13-16-00054-CV, 2016 WL 3136608 (Tex. App.—Corpus Christi June 2, 2016, pet. denied) (mem. op.).

174. *Id.* at \*1.

175. *Id.*

176. *See id.*

177. *Id.*

and it was community property.<sup>178</sup> Texas law controlled because the character of Texas land is governed by Texas law.<sup>179</sup> Texas law is that the community-property nature of land is determined by the source of the funds used to purchase the land—if the property was purchased with W.A.’s non-community funds, then it remained separate property.<sup>180</sup> Further, there is a presumption about acquiring Texas property: where there is any indication that community funds could have been used to purchase the Texas property, then the Texas property is presumptively community.<sup>181</sup> That presumption has exceptions, though, and this case raises one because W.A. lived in Nebraska his entire life.<sup>182</sup> This defeated the presumption of Texas community property but did not compel the conclusion as to the property’s character.<sup>183</sup> The first wife’s heirs won at trial on summary judgment, which the Corpus Christi Court of Appeals held was inappropriate because the first wife’s heirs failed to negate the possibility that the purchase funds came from Nebraska separate property (in spite of the presumption favoring that).<sup>184</sup> Thus, there was a fact issue for trial on remand.<sup>185</sup>

*Cutler v. Cutler*<sup>186</sup> is the application of the Restatement to determine which state’s law governs the validity of a marriage ceremony. Ernest Cutler and Teresita Martell began living together in Florida and married there in 2002, although at the time of the Florida ceremony the husband was married to another woman. Martell left him at that point, but Cutler obtained a divorce from the prior wife and Martell resumed the relationship with him.<sup>187</sup> They moved to Texas and held themselves out as married, but the relationship eventually failed and Martell filed for divorce. Cutler counterclaimed to seek division of what he claimed was marital property, and Martell amended her petition to seek a declaration that the marriage was void. The trial court ruled for Cutler, finding that under Texas law the parties’ relationship ripened into a common law marriage after Cutler’s divorce.<sup>188</sup> The trial court apparently applied a Texas choice-of-law statute which directs that Texas “law applies to persons married elsewhere who are domiciled in this state.”<sup>189</sup> The San Antonio Court of Appeals reversed in Martell’s favor, finding that (1) the Texas statute did not apply to the parties at the time they lived outside Texas; (2) under Restatement (Second) Sections 6 and 283, Florida law gov-

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178. *Id.*

179. *Id.* at \*2 (citing *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 341 (Tex. 2009)).

180. *Id.* at \*2–3.

181. *See id.* at \*2.

182. *Id.* at \*3–4.

183. *Id.* at \*4.

184. *Id.*

185. *Id.* at \*4–5.

186. No. 04-15-00693-CV, 2016 WL 4444418 (Tex. App.—San Antonio Aug. 24, 2016, no pet.) (mem. op.).

187. *Id.* at \*1.

188. *Id.* at \*1–2.

189. *Id.* at \*2 (quoting TEX. FAM. CODE ANN. § 1.103 (West 2006)).



erned that period; and (3) Florida law did not recognize common law marriage and the parties thus were never married in Florida.<sup>190</sup> The trial court had not considered the parties' marital status based on later events in Texas, and because there was some evidence to support a finding of common law marriage in Texas, the court of appeals remanded the case to determine if the parties assumed a common law relationship in Texas.<sup>191</sup>

*Di Angelo v. Wells Fargo Bank, N.A.*<sup>192</sup> illustrates the importance of considering choice of law at the case's outset. Although the action was for negligence against a bank, the underlying case was probate, which raised the unusual instance of federal trial and appellate courts applying probate laws. Di Angelo sued Wells Fargo for wrongfully disbursing her deceased father's bank account to her stepmother. Her father and brother died while attempting to climb K2 on the China-Pakistan border. Her father's New Zealand will left Di Angelo the money in the Wells Fargo bank account.<sup>193</sup> Di Angelo notified the bank's Houston branch and asked them to place a hold on the account but the bank declined because of the deposit's large size. Instead, the bank assured her that no one could withdraw the funds without proof of the depositor's death. When Di Angelo returned later with the death certificate, the bank had given the money to her stepmother.<sup>194</sup> Di Angelo sued in a Texas state court and the bank removed to federal court, which granted summary judgment for the bank based on the California probate code.<sup>195</sup> On appeal, Di Angelo argued that Texas law applied instead of California law, but the U.S. Court of Appeals for the Fifth Circuit held that she'd waived her argument by conceding the application of California law at the summary judgment stage.<sup>196</sup>

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

##### 1. *The Role of Choice of Law in Forum Challenges*

During the Survey period, the U.S. Court of Appeals for the Fifth Circuit rendered three decisions applying choice of law analyses to forum clauses and forum non conveniens. *Weber v. Pact GSPP Technologies, AG*<sup>197</sup> is the most notable of the three for its resolution of a question of first impression flowing from the U.S. Supreme Court's decision in *Atlantic Marine Construction Co. v. U.S. District Court*.<sup>198</sup> PACT is an intellectual property licensing and enforcement company formed in Germany but with its early operations mostly in the United States. Weber joined

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190. *Id.* at \*2–3.

191. *Id.* at \*3–4.

192. 820 F.3d 806 (5th Cir. 2016).

193. *Id.* at 807–08.

194. *Id.* at 808.

195. *Id.* (citing CAL. PROB. CODE § 13106(a) (West 1991)).

196. *Id.* at 808.

197. 811 F.3d 758 (5th Cir. 2016).

198. 134 S. Ct. 568 (2013).

the board in 2002, was elected chairman in 2003, and became chief executive officer in 2004. He did so without pay under an agreement that he'd be paid when the company became profitable.<sup>199</sup> Weber claimed that he directed a successful patent infringement suit in the U.S. District Court for the Eastern District of Texas, and that soon after the 2012 verdict but before the 2013 judgment, the PACT board voted him out. When PACT refused his compensation demand, Weber sued PACT in a federal court in Texas. Two days later PACT sued in Germany, seeking a declaration that Weber's compensation agreement was invalid because it lacked shareholder approval required under German law.<sup>200</sup> PACT moved to dismiss the Texas case based on Weber's employment contract's designation of a German forum.<sup>201</sup> The contract was in German and the translation was disputed. It had been negotiated in both California (where Weber signed) and in Germany (where the company agent signed).<sup>202</sup> PACT's expert witness testified that the clause was mandatory, and further that applicable German choice of law principles (not the contract itself) dictated the application of German law.<sup>203</sup>

In deciding PACT's motion to dismiss, the Fifth Circuit had to address unanswered questions from *Atlantic Marine's* clarification (and resolution of a circuit split) on the proper procedure when faced with a derogating-forum clause, that is, where plaintiff sues in a forum contrary to a contractually-agreed forum. The resulting *Atlantic Marine* procedure is for the court to (1) determine if the forum clause is mandatory; and if so (2) conduct a forum non conveniens analysis with an eye toward the parties having conceded the acceptability of the contractually-chosen forum.<sup>204</sup>

*Atlantic Marine* left open at least two questions. First, what is the standard of review on appeal? Prior to *Atlantic Marine*, the Fifth Circuit used de novo review for dismissals or transfers based on forum clauses.<sup>205</sup> The court noted that although *Atlantic Marine* changed the analytical struc-

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199. *Weber*, 811 F.3d at 763.

200. *Id.* at 763–64.

201. *Id.* at 764 (the agreement lacked a choice-of-law clause, but PACT's expert on German law testified that under German law, a forum clause was an implicit choice of the chosen forum's law).

202. *Id.* at 763 (the forum clause read: "Soweit gesetzlich zulässig, ist Gerichtsstand und Erfüllungsort der Sitz der PACT AG." The dispute was on the word "sitz," which Weber argued meant residence (arguably the United States at the contract's formation), while PACT argued it meant "corporate seat" (which was Germany).

203. *See id.* at 764 (citing Regulation 864/2007, 2007 O.J. (L 199) 40(EC); Regulation 593/2008, 2008 O.J. (L 177) 6(EC)) (the expert's testimony was based on European Union law and various treaty-based regulations).

204. *Id.* at 766–67 (citing *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 581 n.6 (2013); *Piper Aircraft Co. v. Reno*, 454 U.S. 235, 241 n.6 (1981)). In routine forum non conveniens analyses (those lacking forum clauses), a district court applies the public and private balancing factors outlined in *Piper Aircraft Co.* But in cases involving mandatory forum clauses, because the parties have chosen an exclusive forum, *Atlantic Marine* holds that the parties have conceded the acceptability of the chosen forum, and as a result, the private-interest factors do not apply.

205. *Id.* at 767 (citing *Piper Aircraft*, 454 U.S. at 257) (noting that ordinary forum non conveniens dismissals (those lacking mandatory forum clauses) were reviewed for abuse of discretion).

ture, it had not identified the standard of review.<sup>206</sup> The Fifth Circuit answered that question with a two-fold standard: “We review the district court’s interpretation of the FSC and its assessment of that clause’s enforceability *de novo*, then we review for abuse of discretion the court’s balancing of the private- and public-interest factors.”<sup>207</sup>

The second question from *Atlantic Marine* was what laws govern various stages of the analysis. The Fifth Circuit noted the disparity in federal opinions, with many applying federal common law as the choice-of-law rule to determine if the contract’s chosen law (if any) should govern, or some other state’s law.<sup>208</sup> The Fifth Circuit noted the same two issues as with the standard of appellate review: (1) which law governs interpretation; and (2) which law governs enforceability. The Fifth Circuit held that instead of federal common law, the forum state’s choice-of-law rules applied to interpret the forum clause.<sup>209</sup>

Applying that to the case, Texas choice-of-law rules confirmed that the contract’s designated German law controlled the forum clause’s interpretation.<sup>210</sup> Once the clause is interpreted, its enforceability is a matter of federal common law,<sup>211</sup> which brings the analysis back to *Atlantic Marine*. Under that analysis, PACT won, and the Fifth Circuit affirmed the district court’s dismissal for litigation in Germany.<sup>212</sup>

*Barnett v. DynCorp. International, L.L.C.*<sup>213</sup> considered what law governs limitations periods in employment contracts with forum clauses, where the chosen forum would dismiss the claim. Plaintiff worked in Kuwait and later sued in a Texas federal court for unpaid wages in a putative class action. The employment contract had choice-of-forum and choice-

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206. *Id.*

207. *Id.* at 768.

208. *Id.* at 770–71.

209. *Id.*

210. *Id.* at 771–73 (applying RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 188 (AM. LAW INST. 1971)).

211. *Id.* at 770 (citing *Haynsworth v. The Corp.*, 121 F.3d 956, 962 (5th Cir. 1997)).

212. *Id.* at 773–76. Two federal district courts in Texas applied *Weber* during the Survey period. *Sabal Ltd. LP v. Deutsche Bank AG* was an investor’s action against a bank for breach of contract and conversion. The underlying agreements had inconsistent forum clauses, both choosing New York as the forum, but the first mandatory and the second permissive. The mandatory clause would trigger an *Atlantic Marine* analysis favoring transfer, but the permissive clause would warrant transfer only under a stricter forum non conveniens analysis. Citing *Weber*, the U.S. District Court for the Western District of Texas used Texas choice-of-law rules to determine that the contract’s chosen New York law governed interpretation, used New York law to determine the primacy of the mandatory clause, then used federal common law under *Atlantic Marine* to validate the forum clause’s enforceability, resulting in the action’s transfer to the Southern District of New York. *Sabal Ltd. LP v. Deutsche Bank AG*, 209 F. Supp. 3d 907, 919–25 (W.D. Tex. 2016). The second case is *DBS Solutions LLC v. Infovista Corp.*, No. 3:15-CV-03875-M, 2016 WL 3926505, at \*1 (N.D. Tex. July 21, 2016), an action on a contract designating French law as controlling and pointing to litigation in the Paris Commercial Court. Citing *Weber*, the U.S. District Court for the Northern District of Texas used Texas choice-of-law rules to determine that the contract’s choice of French law was valid, interpreted the clause under French law, and found it enforceable under federal common law as detailed in *Atlantic Marine*’s forum non conveniens formula. *DBS Solutions*, 2016 WL 3926505, at \*2–4.

213. 831 F.3d 296 (5th Cir. 2016).

of-law clauses designating Kuwait, and the trial court dismissed based on that forum clause.<sup>214</sup> On appeal, plaintiff argued that the Kuwait forum clause was statutorily void under Texas law.<sup>215</sup> In spite of this, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's dismissal based on Kuwait law, noting that the parties' chosen law governs unless it violates a "'strong' or 'fundamental' public policy of Texas."<sup>216</sup> The Fifth Circuit found that it did not.<sup>217</sup>

*Nabors Completion & Production Services Co. v. Chesapeake Operating, Inc.*,<sup>218</sup> is the application of judicial estoppel where a party failed to argue choice of law in the lower court. Nabors filed an indemnity claim for a fire that resulted from two blown tires on a tank it was hauling in Oklahoma for Chesapeake. Nabors also had a claim for contribution related to claims against Nabors by a landowner whose property was damaged by the fire.<sup>219</sup> The district court granted a summary judgment to defendants on both the indemnity and the contribution claims, and Nabors appealed. As to the contribution claim, Nabors argued that Oklahoma law controlled as the accident situs.<sup>220</sup> Nabors lost on two grounds. First, when defendant had earlier moved for an inconvenient forum transfer to the Western District of Oklahoma, Nabors had argued that the case should stay in Texas to be tried by a court familiar with Texas law, which, Nabors argued, governed this case.<sup>221</sup> Second, Nabors failed to brief the forum state's choice-of-law rules that would lay the predicate for applying Oklahoma law.<sup>222</sup>

## 2. *The Use of Another State's Choice-of-Law Rule*

*ADP, LLC v. Capote*<sup>223</sup> was a suit to enforce non-compete and non-disclosure agreements, filed in New Jersey but, on defendant's motion, transferred to the U.S. District Court for the Western District of Texas. The employment contract designated New Jersey law and the district court found it enforceable under a proper 187 analysis—the chosen state had a relationship with the dispute and no other state had a materially greater interest and public policy that would be impacted if the chosen law applied.<sup>224</sup> Applying New Jersey law to the merits, there were two pertinent claims: (1) non-disclosure, which the chosen New Jersey law

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214. *Id.* at 299–300.

215. *Id.* at 300–01 (citing TEX. CIV. PRAC. & REM. CODE § 16.070 (West 2015)) (voiding “any stipulation, contract, or agreement that establishes a limitations period that is shorter than two years”).

216. *Id.* at 303.

217. *See id.* at 303–09.

218. *See* 648 F. App'x 393 (5th Cir. 2016).

219. *Id.* at 394–95.

220. *Id.* at 397.

221. *Id.*

222. *Id.* at 397–98.

223. No. A-15-CA-714-SS, 2016 WL 3742319 (W.D. Tex. July 7, 2016).

224. *Id.* at \*2 (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 678 (Tex. 1990) (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187(2) (AM. LAW INST. 1971))).

governed because applying that law did not violate a fundamental Texas interest;<sup>225</sup> and (2) the non-compete agreement, which Texas law governed because New Jersey law violated a fundamental Texas policy.<sup>226</sup> This analysis is proper on its face except that Texas choice-of-law rules may not apply. The opinion recites a transfer from the District of New Jersey to the Western District of Texas but does not identify the transferring statute. According to the case's Docket Item No. 14, the transfer was based on 28 U.S.C. § 1404,<sup>227</sup> which requires the transferee court in Texas to apply the transferring court's choice-of-law rule,<sup>228</sup> which is the New Jersey rule.<sup>229</sup>

### III. FOREIGN JUDGMENTS

Final judgments from other states, territories, and countries create Texas conflict-of-laws issues in two ways: (1) their local enforcement; and (2) their preclusive effect on local lawsuits.

#### A. SISTER-STATE JUDGMENTS

The Survey period offered several routine-but-instructive judgment enforcements from sister states or territories under the Uniform Enforcement of Foreign Judgments Act (UEFJA).<sup>230</sup> *Liberty Sport Aviation, L.P. v. Texas Hill Country Bank*<sup>231</sup> is an example of a non-party intervening to contest possession of property awarded by a sister-state judgment. Liberty Sport Aviation obtained a Pennsylvania judgment for the foreclosure on an aircraft that had been used as security for a loan. Liberty Sport Aviation filed that judgment in Texas to obtain possession, along with a fraudulent transfer action because the debtor had sold the aircraft to PFM Group LLC. Texas Hill Country Bank intervened, seeking a declaration that its security interest in the aircraft (for a line of credit to PFM) was superior to that created by the loan in Pennsylvania or the resulting Pennsylvania judgment.<sup>232</sup> The bank won, based on the San Antonio Court of Appeals' conclusion that the original debtor's fraudulent creation of the bank's security interest did not defeat its superiority under

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225. *Id.* at \*2–4.

226. *Id.* at \*4–6.

227. ADP, LLC v. Capote, No. 15–1355 (JLL) (JAD), at 5, 13 (D.N.J. July 28, 2015) (letter order of United States Magistrate Judge Joseph A. Dickson transferring venue to the U.S. District Court for the Western District of Texas) (on file with SMU Law Review Association).

228. *See* Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).

229. The New Jersey choice-of-law rules draw heavily from the Restatement (Second) but use more emphasis on government-interest analysis. *See, e.g.,* Pfizer, Inc. v. Emp'rs Ins. of Wausau, 712 A.2d 634, 642 (N.J. 1998); *see also* HAY ET AL., *supra* note 81, at 115 n.10 and accompanying text. New Jersey's rule is likely to have led to the same result, but that can't be known without making a supporting record and doing the analysis.

230. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001–.008 (West 2015).

231. No. 04-15-00480-CV, 2016 WL 4626238 (Tex. App.—San Antonio, Sept. 7, 2016, pet. filed) (mem. op.).

232. *Id.* at \*1.

Texas law.<sup>233</sup>

*Sargeant v. Al Saleh*<sup>234</sup> is a similar fact setting where judgment-related assets were transferred to avoid collection on a Florida judgment. Al Saleh obtained a \$28.8 million judgment in Florida against Sargeant and others for breaching an agreement regarding shipment of fuel to American troops in Iraq. Two days before the Florida judgment, Sargeant transferred assets to BTB Refining, LLC (BTB), a Texas entity. Al Saleh filed the Florida judgment for domestication in Texas, along with a fraudulent-transfer action against BTB under the Texas Uniform Fraudulent Transfer Act.<sup>235</sup> Pending the final decision, the district court issued a temporary asset-freezing injunction to prevent BTB's disposal of the assets.<sup>236</sup> On appeal, the court of appeals affirmed that the trial court was not only authorized to issue the injunction but did not abuse its discretion in doing so.<sup>237</sup>

*Thompson v. Florida Wood Treaters, Inc.*<sup>238</sup> involved a judgment from the U.S. Virgin Islands raising questions of the territorial court's authority to enter a final judgment under the UEFJA. Florida Wood Treaters (Wood Treaters) foreclosed on liens against the Thompsons' property which led to a money judgment for post-foreclosure indebtedness. When Wood Treaters domesticated the Virgin Islands judgment in Texas, the Thompsons objected that the rendering court in the Virgin Islands lacked authority as a non-Article III federal court, and that the judgment wasn't final because of the additional parties and claims.<sup>239</sup> The Texas trial court held in favor of Wood Treaters, and the Dallas Court of Appeals affirmed, finding that the territorial court had authority<sup>240</sup> and that the Virgin Islands judgment was final and properly rendered.<sup>241</sup>

Other Survey period cases discussed (1) enforcing a Massachusetts default judgment where the appellant Collins failed to file a motion to set aside the default even though default judgments are inherently suspect;<sup>242</sup> (2) authenticating foreign judgments in light of current e-filing technology in Texas;<sup>243</sup> and (3) appealing a state district court's approval of a

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233. *See id.* at \*2–8.

234. 512 S.W.3d 399 (Tex. App.—Corpus Christi, Jan. 28, 2016, orig. proceeding).

235. *Id.* at 403, 411.

236. *See id.* at 406–07, with continuing analysis at 410–15.

237. *Id.* at 410–11.

238. No. 05-15-00417-CV, 2016 WL 3137536 (Tex. App.—Dallas, June 6, 2016, no pet.) (mem. op.).

239. *Id.* at \*1–2.

240. *Id.* at \*4.

241. *Id.* at \*2–4. The Texas court analyzed whether the summary judgment order by the District Court for the Virgin Islands had properly disposed of all claims such that it was a final judgment and whether the final judgment was void since it included relief that was not requested.

242. *See Collins v. Schonau-Riedweg*, No. 09-15-00212-CV, 2016 WL 2766058, at \*1 (Tex. App.—Beaumont May 12, 2016, no pet.) (mem. op.).

243. *See Ferguson v. Great Am. Ins. Co.*, No. 06-15-00054-CV, 2016 WL 3356743, at \*1, \*3 (Tex. App.—Texarkana June 16, 2016, no pet.) (citing TEX. R. EVID. 902(1)).

foreign judgment.<sup>244</sup>

## B. FOREIGN COUNTRY JUDGMENTS

Texas enforces judgments from foreign countries that award or deny a sum of money and meet other criteria listed in the Uniform Foreign Country Money Judgment Recognition Act (UFCMJRA).<sup>245</sup> *DeJoria v. Maghreb Petroleum Exploration, S.A.*<sup>246</sup> illustrates defenses to enforcement in a series of legal battles dating back to 2001. The opinion by a federal magistrate judge added at least one more skirmish. In 1998, Texas resident DeJoria invested in a Moroccan oil development. When the venture fell apart in 2001, DeJoria fled Morocco—for his safety according to him and to avoid fraud prosecution according to the Moroccan authorities.<sup>247</sup> Maghreb and another Moroccan entity sued DeJoria in a Moroccan court and obtained a \$122 million judgment. In turn, DeJoria filed a pre-emptive action in a Texas state court to block enforcement, seeking a declaration that the Moroccan judgment did not comply with the UFCMJRA.<sup>248</sup> The Moroccan judgment-creditors removed the Texas state case to the U.S. District Court for the Western District of Texas, which ruled in DeJoria's favor, but the U.S. Court of Appeals for the Fifth Circuit reversed, finding specifically that the Moroccan judicial system was adequate, that it granted reciprocity to Texas judgments, and that DeJoria was subject to personal jurisdiction there.<sup>249</sup> A footnote to the appellate opinion noted that the Fifth Circuit had not addressed two arguments—public policy and forum non conveniens—because DeJoria had not raised them on appeal.<sup>250</sup> On remand, DeJoria sought reconsideration of his two unaddressed arguments over Maghreb's objection that he had waived them by not raising them on appeal, even though he had raised them originally in the district court. The district court assigned the question to the magistrate judge whose opinion recommends in DeJoria's favor, which, if accepted by the district court, will deny entry of judgment and allow DeJoria argument on those two points.<sup>251</sup> At the time of this article's drafting, no further action had occurred.

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244. See *Tayob v. Quarterspot, Inc.*, No. 05-15-00897-CV, 2016 WL 7163842, at \*1 (Tex. App.—Dallas Nov. 28, 2016, no pet.) (mem. op.). The discussion included how to perfect a restricted appeal, and what points can be appealed (very few). *Id.*; see also *Johnson v. Hansen*, No. 14-15-01082-CV, 2016 WL 402182, at \*1 (Tex. App.—Houston [14th Dist.] Feb. 2, 2016, no pet.) (another example of how to perfect an appeal (defendant failed there)).

245. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001–.008 (West 2015).

246. No. A-13-CV-654-JRN-AWA, 2016 WL 4250488 (W.D. Tex. Aug. 11, 2016).

247. *Id.* at \*1.

248. *Id.* at \*2.

249. *Id.* at \*3 (citing *DeJoria v. Maghreb Petroleum Expl., S.A.*, 804 F.3d 373 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2486 (2016)).

250. *Id.* (citing *DeJoria*, 804 F.3d at 384 n.12).

251. *Id.* at \*9.

## C. FAMILY LAW CASES

Although federal courts generally abstain from family cases,<sup>252</sup> *Sierra v. Tapasco*<sup>253</sup> is one exception involving the enforcement of a foreign child custody order under the Hague Convention on the Civil Aspects of International Child Abduction.<sup>254</sup> The father was Mexican and the mother Colombian, and they met in North Carolina where they cohabitated and had a child. The mother was here legally, the father was not. The father was eventually arrested for domestic violence and given the choice to leave the United States voluntarily with the possibility of returning later, or be deported. The parties reached an agreement that he would leave voluntarily, and the mother allowed him to take the child to visit his family in Mexico.<sup>255</sup>

The legal dispute was whether that agreement was for a temporary visit or permanent custody. The mother visited Mexico several times, and the parties even traveled to Colombia together. When their daughter turned five, the relationship broke down again. When the father told the mother she would never be allowed to have possession again, the mother took her daughter to Houston.<sup>256</sup> The father filed an action in Houston for his daughter's return, but the one problem was his lack of a custody order from Mexico or anywhere else. The father won nonetheless by showing three elements of Hague enforcement: (1) Mexico was the child's habitual residence;<sup>257</sup> (2) he had custodial rights under Mexican law and custom;<sup>258</sup> and (3) he was exercising his custody rights at the time of removal.<sup>259</sup> After rejecting the mother's defenses to enforcement, the U.S. District Court for the Southern District of Texas ordered the child's return to father.<sup>260</sup>

*In re Salminen*<sup>261</sup> started with a Finnish mother's attempt to collect on a Finnish child support decree in Texas. The Texas-based father contested child custody and persuaded the Texas trial court to grant him emergency custody, modifying the Finnish custody order until further notice.<sup>262</sup> The First Houston Court of Appeals reversed, finding that Texas's acquisition-

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252. See, e.g., *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992) (explaining the greater suitability of state courts for most family matters, but noting exceptions for matters such as intra-family torts as alleged in that case).

253. No. 4:15-CV-00640, 2016 WL 5402933 (S.D. Tex. Sept. 28, 2016), *appeal docketed*, No. 16-20660 (5th Cir. Sept. 29, 2016).

254. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 19 I.L.M. 1501 (1980).

255. *Sierra*, 2016 WL 5402933, at \*1.

256. *Id.* at \*2–3.

257. *Id.* at \*5–6.

258. *Id.* at \*7.

259. *Id.* at \*8.

260. *Id.* at \*8–12. Her defenses included the father's alleged abuse and criminal activity, *id.* at \*8–9; crime in Mexico City, *id.* at \*10; and the child's physical and mental condition, *id.* at \*10–11.

261. 492 S.W.3d 31 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

262. *Id.* at 33–36.



of-child-support jurisdiction did not create child-custody jurisdiction,<sup>263</sup> and that the facts did not otherwise justify jurisdiction to modify the Finnish order.<sup>264</sup>

#### D. PRECLUSION

*Petroleum Workers Union of the Republic of Mexico v. Gomez*<sup>265</sup> offers a thirty-year story too complex to be explained in the short space here. Arriba Limited, a Bahamian oil importer, entered an agreement with the Petroleum Workers Union in 1984 regarding the shipment of residual oil to the United States for refinement. In 1985, Arriba sued the Union and other parties for breach of that agreement, resulting in a Texas default judgment for \$92 million.<sup>266</sup> In 1987, the parties reached a new agreement for refining oil that included a release of the 1986 default judgment. That venture failed too, leading to more litigation and a judgment that arguably revived the released 1986 default judgment.<sup>267</sup> Unrelated to this, the Mexican government asked the U.S. government to freeze \$43 million in a New York bank that had allegedly been embezzled from the Mexican government by two of the Union's officers.<sup>268</sup> Arriba filed a garnishment action in a Texas court against the frozen funds in New York. The parties negotiated an agreement to resolve the garnishment and all prior claims, but the Union then sought to avoid the agreement, claiming that the Union's negotiators lacked authority.<sup>269</sup> In 2006, the United States released the funds and transferred them to the Mexican government. In 2008, the Union obtained judgment in a Mexican court that voided the garnishment settlement and Ryerson's attorney-fee agreement. The Union then sought recognition for the Mexican judgment in the Texas court.<sup>270</sup> The issue in the Texas court at this point was Arriba's claim for specific performance of the Garnishment Agreement and collection on the 1986 default judgment. Based on jury findings supporting the Garnishment Agreement, the trial court found that Arriba should take nothing in damages but was entitled to enforcement of the 1986 default judgment.<sup>271</sup> The Fourteenth Houston Court of Appeals affirmed in a lengthy opinion addressing a number of issues, two that belong in this Survey article. First, the court of appeals rejected the Union's argument that the Garnishment Agreement was illegal under Mexican law because the Union failed to prove the applicable Mexican law.<sup>272</sup> Second, the court of appeals held that the Mexican judgment was not entitled to rec-

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263. *Id.* at 38 (citing *In re M.I.M.*, 370 S.W.3d 94, 97 (Tex. App.—Dallas 2012, pet. denied), and other cases).

264. *Id.* at 39–42.

265. 503 S.W.3d 9 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

266. *Id.* at 16–17.

267. *Id.* at 17.

268. *Id.* at 17–18.

269. *Id.* at 18–19.

270. *Id.* at 19.

271. *Id.* at 19–20.

272. *Id.* at 20–22, 31–34 (quoting and discussing TEX. R. EVID. 203).

ognition and preclusion in the Texas case because plaintiffs had no notice of the Mexican action and the Union failed to raise it at trial.<sup>273</sup>

In *Richardson v. Wells Fargo Bank, N.A.*,<sup>274</sup> the U.S. Court of Appeals for the Fifth Circuit analyzed the preclusive effect of a California state-court class action on a subsequent federal claim. Preclusion was not a straightforward procedure because of the circuitous route with the California litigation. The original California state action was removed to federal court, which certified a class only to be reversed by the U.S. Court of Appeals for the Ninth Circuit. On remand to the California federal court, plaintiffs sought class certification again and were denied.<sup>275</sup> In the meantime, the parties reached a settlement agreement that resulted in another state court filing to finalize that agreement, resulting in a California judgment in 2011.<sup>276</sup> The California settlement released plaintiffs' claims, including those under the Fair Labor Standards Act.<sup>277</sup> Class members received a notice that included a claim form they had to submit in order to receive their portion of the \$19 million settlement.<sup>278</sup>

The dispute was not over, though. In Texas, defendants' employees filed a related action in federal court under the Fair Labor Standards Act,<sup>279</sup> representing a class that included 1,516 class members from the California action (the California plaintiffs) along with additional class members.<sup>280</sup> After the U.S. District Court for the Southern District of Texas certified two collective actions, the parties reached a settlement that excluded the California plaintiffs, against whom the Texas district court issued a summary judgment based on the preclusive effect of the California judgment.<sup>281</sup>

On appeal, several issues figured into the preclusion analysis. One was the opt-in nature of the federal class action in Texas as opposed to the opt-out feature of the California class action.<sup>282</sup> A second was the questionable finality of the California case, where appeals were still pending—the Fifth Circuit held those appeals didn't relate to the settlement and were irrelevant to finality.<sup>283</sup> A third issue was the effect on 233 California plaintiffs who did not file claim forms and arguably did not opt in—the Fifth Circuit found that failing to submit a claim form was not the same as opting out.<sup>284</sup> The Fifth Circuit resolved all these issues in defendants' favor, along with a due process issue unrelated to preclusion,<sup>285</sup>

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273. *Id.* at 22–26.

274. 839 F.3d 442 (5th Cir. 2016).

275. *Id.* at 445 (citing *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. 604, 606–09, 614 (N.D. Cal. 2010)).

276. *Id.* at 445–46.

277. *Id.*

278. *Id.* at 445.

279. 29 U.S.C. §§ 201–19 (2012 & Supp. II 2014).

280. *Richardson*, 839 F.3d at 444–45.

281. *Id.* at 448.

282. *Id.* at 451–52.

283. *Id.* at 452.

284. *Id.* at 452–53.

285. *Id.* at 454–55.

and affirmed the district court's summary judgment.<sup>286</sup> It is also worth noting that California's preclusion law governed the preclusive effect of the California decision in the Texas federal court.<sup>287</sup>

*Wills v. Arizon Structures Worldwide, L.L.C.*<sup>288</sup> was a contract dispute over the sale of Arizon's air structures to a shrimp producer, Global Blue Technologies-Cameron, LLC (GBT). When Arizon sued GBT and other parties in a Missouri state court, GBT moved to dismiss in deference to an arbitration agreement. The Missouri court disagreed and issued an order staying arbitration that was upheld on appeal in Missouri.<sup>289</sup> Wills and Salmon (GBT employees and parties in the Missouri suit) sued in the U.S. District Court for the Southern District of Texas, seeking an order compelling arbitration. Arizon (Missouri plaintiff, defendant in Texas) moved to dismiss the Texas action based on the preclusive effect of the Missouri order staying arbitration. The Texas district court agreed that the Missouri ruling was preclusive and dismissed the Texas action.<sup>290</sup> The U.S. Court of Appeals for the Fifth Circuit reversed, finding that Wills and Salmon (plaintiffs in Texas) were not in privity with GBT (who lost the Missouri arbitration ruling), enabling Wills and Salmon to pursue their anti-arbitration claim in Texas.<sup>291</sup>

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286. *Id.* at 455.

287. *See id.* at 449.

288. 824 F.3d 541 (5th Cir. 2016).

289. *Id.* at 543–44.

290. *Id.* at 544–45.

291. *Id.* at 547.