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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, parallel lawsuits, and judgments from other jurisdictions can create problems with personal jurisdiction, choice of law, and the recognition of foreign judgments. This Article reviews Texas conflict cases from Texas state and federal courts during the Survey period from November 1, 2008, through October 31, 2009. The Article excludes cases involving federal-state conflicts; intrastate issues, such as subject matter jurisdiction and venue; and conflicts in time, such as the applicability of prior or subsequent law within a state. State and federal cases are discussed together because conflict of laws is mostly a state-law topic, except for a few constitutional limits, resulting in the same rules applying to most issues in state and federal courts.¹

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, as well as a civil-law nation, and its involvement in international shipping. Only California shares these factors, with the partial exception of the states bordering Quebec. Texas courts experience every range of conflict-of-laws litigation. In addition to a large number of opinions on garden-variety examples of personal jurisdiction, Texas courts produce case law every year on Internet-based jurisdiction, prorogating and derogating forum-selection clauses, federal long-arm statutes with nationwide process, international forum non conveniens, parallel litigation, international family-law issues, and private lawsuits against foreign sovereigns. Interstate and international judgment recognition and enforcement offer fewer annual examples, possibly a sign of that subject's administrative nature that results in only a few reported cases.

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. Accordingly, this Survey period's article focuses on selective cases.

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

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

of notice are purely matters of forum law, this Article will focus primarily on the issues relating to amenability.

A. CONSENT AND WAIVER

Contracting parties may agree to a forum-selection clause designating either the optional or exclusive site for litigation or arbitration. When a contracting party sues in the designated forum, the clause is said to be a prorogation clause, that is, one supporting the forum's jurisdiction over the defendant.² When a contracting party sues in a non-selected forum in violation of the contract, the clause is said to be a derogation clause, that is, one undermining the forum's jurisdiction.³ Because derogation clauses attack rather than establish jurisdiction, that topic is discussed in the section on Declining Jurisdiction.⁴

Prorogation clauses tend to be routine because they establish the forum's jurisdiction. One Survey-period case stood out for its discussion of a non-signatory's ability to enforce a forum clause. *Dos Santos v. Bell Helicopter Textron, Inc.*⁵ dealt with a wrongful death claim arising from a helicopter crash in the Amazon jungle in Brazil. The pilot's widow brought this action against the manufacturer, Bell Helicopter, which then impleaded Helisul Taxi Aero, LTDA, the Brazilian company which operated the helicopter. Helisul objected to Texas jurisdiction, and Bell countered with a Texas forum clause in Helisul's lease agreement for the helicopter. However, Helisul had leased the helicopter from Bell's related entity, Textron Financial Corporation, and Helisul objected to Bell's invocation of an agreement to which it was not a party.⁶ After a careful analysis, the federal district court found that the lease agreement had clear assignment provisions that gave Bell Helicopter—and its parent Textron, Inc.—the right to enforce the agreement⁷ and that the lease agreement's scope was sufficiently broad to cover this indemnity claim.⁸ The court also rejected Helisul's judicial estoppel claim that Bell could not assert Texas jurisdiction because it had argued in a prior case that "personal jurisdiction [over Helisul] does not exist in the United States."⁹ In this case, jurisdiction did exist.¹⁰

In other Survey period cases, courts enforced Texas forum clauses in (1) TGI Friday's licensing, trademark, and unfair competition disputes

2. EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 361 (2d ed. 1992).

3. *Id.*

4. James P. George, *Parallel Litigation*, 51 *BAYLOR L. REV.* 769, 813-49 (1999); *see id.* at 360-61. For a discussion of forum derogation clauses, *see infra* notes 96-109 and accompanying text.

5. 651 F. Supp. 2d 550, 551 (N.D. Tex. 2009).

6. *Id.* at 552.

7. *Id.* at 554-56.

8. *Id.* at 557-58.

9. *Id.* at 552-54.

10. *Id.* at 562.

with former franchisees in California, Washington, and Oregon;¹¹ (2) American Airlines' contract and business tort claims against travel agencies based in New York and British Columbia;¹² and (3) a Houston-based tax consulting firm's non-compete and misappropriation claims against a former employee in Massachusetts who worked mostly in the northeast United States.¹³

B. TEXAS LONG-ARM AND MINIMUM CONTACTS

Texas uses "limits-of-due-process" long-arm statutes, meaning that the minimum contacts test is the only necessary foundation for personal jurisdiction in Texas.¹⁴ The Texas long-arm statutes also apply in Texas federal courts, except where Congress has enacted a federal long-arm statute for certain federal law claims.¹⁵

1. Commercial Cases

Two Survey period cases demonstrate that a nonresident entering a single contract to be performed in Texas may or may not establish jurisdiction. In *Fleischer v. Coffey*, the Dallas Court of Appeals reversed the trial court's dismissal for lack of jurisdiction, holding that there was jurisdiction over a Nebraska resident for his purchase of a dog in Dallas.¹⁶ Fleischer, who lived in California and did business both there and in Texas, bred, trained, and sold German Shepherd dogs. Coffey, a Nebraska resident without Texas contacts, traveled to Texas and purchased the dog. Coffey closed the deal but left the dog in Texas for additional training. When the dog arrived in Nebraska, a veterinarian examined it and determined that the dog had hip dysplasia. Coffey then contacted Fleischer and demanded a refund and reimbursement of expenses. Fleischer offered another dog; however, Coffey refused and also failed to pay the balance owed.¹⁷ Fleischer then sued Coffey but the district court in Dallas dismissed for lack of jurisdiction.¹⁸ Although the trial court

11. *TGI Friday's Inc. v. Great Nw. Rests., Inc.*, 652 F. Supp. 2d 750, 754 (N.D. Tex. 2009).

12. *Luxury Travel Source v. Am. Airlines, Inc.*, 276 S.W.3d 154, 160 (Tex. App.—Fort Worth 2008, no pet.).

13. *Alliantgroup, L.P. v. Feingold*, No. H-09-0479, 2009 WL 1109093, at *1 (S.D. Tex. Apr. 24, 2009).

14. See *U-Anchor Adver., Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977). The primary Texas long-arm statutes are found at TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.045 (Vernon 2009), and others are scattered throughout Texas statutes, e.g., TEX. AGRIC. CODE ANN. § 161.132 (Vernon 2004) (violation of certain agricultural statutes); TEX. FAM. CODE ANN. § 6.305 (Vernon 2006) (nonresident respondents in divorce actions); TEX. INS. CODE ANN. § 823.457 (Vernon 2009) (violations of duties imposed on insurance holding companies).

15. See FED. R. CIV. P. 4(k)(1)(A) (state long-arms in federal court); FED. R. CIV. P. 4(k)(1)(D) (federal long-arm statutes). Examples of federal long-arm statutes include 28 U.S.C. § 2361 (2006) for statutory interpleader and 15 U.S.C. § 78aa (2006) for claims under the Securities Exchange Act of 1934.

16. 270 S.W.3d 334, 336 (Tex. App.—Dallas 2008, no pet.).

17. *Id.* at 336-37.

18. *Id.* at 337.

ruled without issuing findings of fact, the court of appeals inferred a trial court finding that no part of the contract was to be performed in Texas.¹⁹ Finding to the contrary regarding the dog's sale and training in Texas, the court of appeals reversed.²⁰ Interestingly, Coffey filed a parallel action against Fleischer in Nebraska. The Nebraska court stayed that case pending the Texas ruling on jurisdiction. Had it not stayed the action, or had the Texas district court's dismissal stood, Nebraska's jurisdiction over California- and Texas-based Fleischer would have apparently been based solely on his Internet site.²¹

*Lansing Trading Group, LLC v. 3B Biofuels GmbH & Co.*²² reached the opposite result, albeit on very different facts. Lansing Trading Group (LTG), a commodities trader, was a Delaware limited liability company headquartered in Overland Park, Kansas. LTG contracted with 3B Biofuels (3B), a German entity, for the sale of biodiesel fuel. The fuel was to be shipped to 3B in six separate shipments from the Port of Houston. The first two deliveries in July and August 2008 went as planned. However, the September delivery was late, and when 3B repudiated LTG's invoice, LTG sued 3B in federal court in Houston.²³ The district court sustained 3B's jurisdictional objection, finding a lack of minimum contacts in spite of its assessment that most, if not all, of LTG's performance was rendered in Texas.²⁴ In reaching this conclusion, the court noted that "merely contracting with a resident of the forum state is insufficient to subject the nonresident defendant to personal jurisdiction in the forum state"²⁵ and then examined a number of cases in which Texas-based contracts did not lead to Texas jurisdiction.²⁶

The holding in *Assurances Generales Banque Nationale v. Dhalla*²⁷ underscores the need to plead and prove the jurisdictional bases. Nadir Dhalla was a Canadian citizen who lived in Texas as a resident alien. Dhalla was involved in an automobile accident (presumably in Texas, although the opinion does not say), and when he was sued, he brought a third-party claim against his insurer, Assurances Generales, seeking indemnification. The trial court found jurisdiction over Assurances Generales but the Dallas Court of Appeals reversed, rejecting Dhalla's claim that the Canadian insurer was foreseeably subject to suit anywhere in the United States.²⁸ In so ruling, the court of appeals emphasized several times that the holding was based more on the plaintiff's failure to plead or prove jurisdictional predicates than on the idea of an insurer's amena-

19. *Id.*

20. *Id.*

21. *See id.* at 337 n.2.

22. 612 F. Supp. 2d 813 (S.D. Tex. 2009).

23. *Id.* at 816-18.

24. *Id.* at 828-29.

25. *Id.* at 822.

26. *Id.* at 822-28.

27. 282 S.W.3d 688 (Tex. App.—Dallas 2009, no pet.).

28. *Id.* at 695-701.

bility to a jurisdiction where a claim arose.²⁹

Although general jurisdiction—based on a defendant’s significant forum contacts regardless of their relation to the claims—is relatively uncommon, two Survey-period cases employed it. In *Construcciones Integrales del Carmen, S.A. de C.V. v. Goodcrane Corp.*, a Houston federal court found general jurisdiction over a Washington-state company regarding a Mexican corporation’s action for nondelivery of a crane purchased through agents in Texas.³⁰ *ReedHycalog UK, Ltd. v. United Diamond Drilling Services, Inc.* is a patent infringement suit regarding oilfield drill bits where a Tyler federal court found general jurisdiction over a Canadian defendant based on the activities of Ulterra Canada, ULC, one of its owners.³¹

In two other patent cases, federal courts in the Eastern District of Texas upheld stream-of-commerce jurisdiction; in both cases the courts found jurisdiction over Taiwanese defendants who shipped the allegedly infringing fitness equipment for sale in Texas.³² In a fourth patent case, the court rejected the plaintiff’s “direction” theory of jurisdiction that a defendant is bound by forum contacts made by other companies but reserved its ruling pending further discovery.³³

Two multi-district litigation (MDL) cases produced opposite jurisdictional results. *In re Enron Corp. Securities, Derivative & “ERISA” Litigation*³⁴ originated in the Southern District of New York and was transferred to the Southern District of Texas under the MDL statute.³⁵ The plaintiffs sued various defendants for fraudulent stock transactions, alleging claims under federal law, New York law, and Texas law. Defendant Causey, a Texas resident and former Enron chief accounting officer, moved to dismiss the claims under New York law, arguing that he was not subject to New York jurisdiction. The court rejected this claim, noting that federal law provides a nationwide long-arm statute for securities claims, that the long-arm embraced pendent state claims, and that because Causey was amenable to Texas jurisdiction, he was amenable under

29. *Id.* at 698-700. After several references to the plaintiffs’ inadequate allegations and proof, the court of appeals closed, “We conclude, on this record, the evidence is legally insufficient to support the trial court’s implied findings in support of general and specific jurisdiction.” *Id.* at 700.

30. No. H-08-3427, 2009 WL 1883928, at *1, *8 (S.D. Tex. June 30, 2009).

31. No. 6:07CV251, 2009 WL 2834274, at *1, *4 (E.D. Tex. Aug. 31, 2009).

32. *ICON Health & Fitness, Inc. v. Horizon Fitness, Inc.*, No. 5:08CV26, 2009 WL 1025467, at *1, *14 (E.D. Tex. Apr. 16, 2009); *ATEN Int’l Co. v. Emine Tech. Co.*, 261 F.R.D. 112, 118-20 (E.D. Tex. 2009).

33. *Centre One v. Vonage Holdings Corp.*, No. 6:08CV467, 2009 WL 2461003, at *1, *3-4 (E.D. Tex. Aug. 10, 2009). The court noted, “In simple terms, doing business with a company that does business in Minnesota is not the same as doing business in Minnesota.” *Id.* at *4 (quoting *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed. Cir. 1998)).

34. No. H-03-0815, 2009 WL 311311, at *1 (S.D. Tex. Feb. 9, 2009).

35. See 28 U.S.C. § 1407 (2006) (a venue statute permitting transfer of related cases to a single district for pre-trial purposes) Please note that the 2010 U.S.C.A. Supp. includes the text of § 1407(a); however, the text remains identical to the 2006 U.S.C.

the nationwide long-arm.³⁶ *Hildebrandt v. Indianapolis Life Insurance Co.* reached the opposite result, because the case dealt with a diversity claim without a nationwide long-arm statute.³⁷ The dispute arose from the plaintiff's establishment of a defined benefit plan only to learn that the defendant had allegedly misrepresented the federal tax consequences. Several plan beneficiaries sued, and the various actions were transferred to the Northern District of Texas under the MDL statute. The court agreed with the defendant insurer that it was not subject to Arizona jurisdiction, and thus it dismissed the claim.³⁸

In other commercial cases involving challenges to personal jurisdiction, a Texas bankruptcy court upheld jurisdiction over Mexican residents and entities for the trustee's claim of fraudulent stock transfer, despite the defendants' allegations that the transfer occurred entirely in Mexico;³⁹ the Houston First Court of Appeals found no jurisdiction in a Texas resident's action against a Florida construction company for payment of commissions relating to his services as an insurance adjuster in Florida and held that the defendant's trips to Texas did not create sufficient contacts;⁴⁰ a Houston federal court found no jurisdiction in a Texas entity's action to enforce a non-compete agreement against a Massachusetts resident whose work was mostly out of state;⁴¹ and another Houston federal court denied jurisdiction in a Texas company's secondary claim against a shipper of power supply units from Nevada.⁴²

2. Non-Commercial Tort Cases

Gathering the conflict-of-laws cases during different Survey periods always produces aberrations, with some areas of the subject disproportionately represented in one period or another. Sometimes those aberrations are statistical oddities; other times they are signs of change. This year's tort cases are more likely a sign of change for two reasons. First, there appear to be far fewer tort cases in the sampling, both when compared to past years and when compared to the interstate commercial cases being litigated in Texas. Second, as the following two cases demonstrate, Texas

36. *In re Enron Corp.*, 2009 WL 311311, at *1-2 (citing 15 U.S.C. §§ 77v(a), 78aa (2006)). The Survey period produced two other cases using a federal nationwide long-arm statute: *Oblio Telecom, Inc. v. Patel*, No. 3:08-CV-0279-L, 2008 WL 4936488, at *4 (N.D. Tex. Nov. 18, 2008) (subjecting defendant Asia Telecom, a New Jersey resident, to jurisdiction in a RICO fraud action); *Affco Investments, LLC v. KMPG, LLP*, No. H-07-3379, 2008 WL 5070053, at *2 (S.D. Tex. Nov. 20, 2008) (upholding jurisdiction for a RICO claim involving a tax shelter but requiring plaintiffs to replead).

37. No. 3:08-CV-1815-B, 2009 WL 398097, at *3, *5 (N.D. Tex. Feb. 17, 2009).

38. *Id.* at *5.

39. *Smith v. Lecuona (In re IFS Fin. Corp.)*, Bankr. No. 02-39553, 2009 WL 3063353, at *1 (S.D. Tex. Sept. 21, 2009).

40. *Ross v. Nikon Constr., Inc.*, No. 01-08-00228-CV, 2008 WL 4837562, at *1, *5 (Tex. App.—Houston [1st Dist.] Nov. 6, 2008, no pet.) (mem. op.).

41. *Alliantgroup, L.P., v. Feingold*, No. H-09-0479, 2009 WL 2498551, at *1 (S.D. Tex. Aug. 12, 2009).

42. *U.S. LED, Ltd. v. Nu Power Assocs., Inc.*, No. H-07-0783, 2008 WL 4838851, at *1, *7 (S.D. Tex. Nov. 5, 2008).

courts appear more inclined to reject tort claims. Phrased another way, this Survey period produced seventeen noteworthy commercial cases with jurisdictional challenges and only two such tort cases. In the commercial cases, Texas state and federal courts both upheld and denied jurisdiction. In contrast, both tort cases were dismissed for lack of personal jurisdiction. Of course, it could be true that a number of interstate tort cases are being litigated in Texas without appellate reports (or federal trial reports) of the jurisdictional challenge. But to the extent the printed cases reveal overall numbers, tort litigation appears markedly down in Texas, and Texas courts appear inclined to reject them.

In *Moki Mac River Expeditions v. Drugg*, the parents of a thirteen-year-old child who died on a river-rafting expedition in Arizona brought a wrongful death action against a Utah company.⁴³ The trial court denied Moki Mac's special appearance, finding specific jurisdiction based on defendant's massive marketing efforts directed at Texas residents.⁴⁴ This included individual solicitations in which Moki Mac gave a "free float" to customers who signed up a group of ten or more customers.⁴⁵ The Dallas Court of Appeals affirmed, but the Texas Supreme Court reversed, remanding the case to the court of appeals for consideration of general jurisdiction, because the plaintiffs received the brochure from another customer rather than directly from the defendants.⁴⁶ The court of appeals found no general jurisdiction, although its opinion continued to emphasize the defendant's strong intent to serve the Texas market, which the court used earlier to find specific jurisdiction.⁴⁷ The anomaly here lies with the Texas Supreme Court's decision, which, though not part of this Survey period, deserves brief comment. The supreme court based its opinion not on Texas law but on federal due process, indicating that the question was one of first impression.⁴⁸ The supreme court's conclusion, that the boy's death in Arizona lacked a due process connection to the massive customer solicitation in Texas, compels a rule that negligence claims may be brought only at the situs of the negligence or in a state where the defendant is subject to general jurisdiction (such as the defendant's home state).⁴⁹ While those two forum categories account for the vast majority of tort cases, it is a strained argument that due process draws such categorical lines.

In *Nabulsi v. Al Nahyan*, the plaintiff brought an interesting claim for damages from his alleged torture at the hands of his business partner in the United Arab Emirates (UAE).⁵⁰ The plaintiff, Nabulsi, was a Texas resident who took a job with Sheikh Issa Bin Zayed Al Nahyan in Abu

43. 270 S.W.3d 799, 800 (Tex. App.—Dallas 2008, no pet.).

44. *Id.*

45. *Id.* at 803.

46. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 572-73, 585, 588 (Tex. 2007).

47. *Moki Mac*, 270 S.W.3d at 803-04.

48. *See Moki Mac*, 221 S.W.3d at 579-88 (constitutional analysis).

49. *Id.*

50. No. H-06-2683, 2009 WL 1658017, at *1-2 (S.D. Tex. June 12, 2009).

Dhabi. Nabulsi alleged that Al Nahyan's behavior became increasingly bizarre after Al Nahyan's father's death, that he began videotaping the torture of his employees, and that as part of this, Al Nahyan had Nabulsi imprisoned and tortured for several days.⁵¹ Al Nahyan raised objections as to personal jurisdiction—both amenability and service of process—and forum non conveniens. The plaintiff attempted to support service of process with expert testimony on UAE law, but the federal district court disallowed the expert for his lack of expertise in UAE law⁵² and further found a lack of adequate service.⁵³ The court also found that in spite of showing Al Nahyan's periodic presence in Texas, the plaintiff failed to make a prima facie showing of the contacts necessary for specific or general jurisdiction.⁵⁴ Jurisdictional questions like this occurrence of allegedly horrible actions taken against a Texas resident in a foreign country are difficult. Texas is a poor litigation site where the evidence is in Abu Dhabi, but the plaintiff has no other realistic forum.

3. Internet-Based Jurisdiction

A number of American jurisdictions, including Texas and the Fifth Circuit, apply the *Zippo* sliding scale to assess personal jurisdiction based on Internet contacts.⁵⁵ The test breaks down Internet use into a spectrum of three areas. One end of the spectrum finds the defendant clearly doing business in the forum based on contracts entered into with forum residents; the spectrum's other end is passive websites not involving the defendant's intentional contact with the forum and not leading to jurisdiction.⁵⁶ The spectrum's difficult middle involves the forum resident's exchange of information with the defendant's host computer, and jurisdiction is based on the level of interactivity and the commercial nature of the information exchanged.⁵⁷ Five cases during the Survey period considered Internet arguments and resulted in an interesting profile. Three of the five cases were defamation claims, and the other two were employment and patent actions. Courts found no jurisdiction in four of the five cases, and in the fifth, the patent claim, the court found both general and specific jurisdiction.

The three Internet defamation claims indicate the increasing difficulty of establishing jurisdiction in the plaintiff's home state. In *Chang v. Vir-*

51. *Id.* at *2-3.

52. *Id.* at *3.

53. *Id.* at *4-11.

54. *Id.* at *12-23.

55. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). The Fifth Circuit adopted the *Zippo* test in *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999). Intermediate Texas appellate courts have used it as well. See, e.g., *Townsend v. Univ. Hosp.—Univ. of Colo.*, 83 S.W.3d 913, 922 (Tex. App.—Texarkana 2002, pet. denied); *Experimental Aircraft Ass'n v. Doctor*, 76 S.W.3d 496, 506-07 (Tex. App.—Houston [14th Dist.] 2002, no pet.), *remanded sub nom. by Doctor v. Pardue*, 186 S.W.3d 4 (Tex. App.—Houston [1st Dist.] 2005).

56. *Zippo*, 952 F. Supp. at 1124.

57. *Id.*

gin Mobile USA, a Fort Worth resident brought a claim against an Australian company which expropriated her web-posted picture for an ad campaign.⁵⁸ Alison Chang had her picture taken by her church counselor who then posted it on Flickr, a public photo-sharing website. Flickr uses a license agreement that provides for the most unrestricted use available. Australia-based Virgin Mobile used Chang's image in an advertising campaign "encouraging viewers to 'DUMP YOUR PEN FRIEND' and advertising 'FREE VIRGIN TO VIRGIN TEXTING.'"⁵⁹ Chang sued Virgin Mobile in Texas state court for invasion of privacy, libel, breach of contract, and copyright infringement. The defendant removed the case to federal court and moved to dismiss for lack of personal jurisdiction.⁶⁰

Chang argued that Virgin Mobile's access to a Flickr server located in Texas was sufficient minimum contacts; however, Flickr also had servers in California and Virginia, and Chang was unable to prove which server was implicated in her claim. Even if the Texas server had been used, the federal district court held that its fortuitous location in Texas was not purposeful availment in regard to Chang's claims.⁶¹ That is, although Virgin deliberately directed its activity toward Flickr by downloading the photo from the Flickr website, there was no harm directed at the Flickr server.⁶² The court found that even if Virgin Mobile had contracted under the Flickr license directly with Chang's church counselor (who posted the picture) and then breached the contract, this alone would not establish specific jurisdiction.⁶³ The contract did not require Virgin to perform any obligations in Texas and was centered outside of Texas since the advertising campaign was launched only in Australian cities.⁶⁴

HEI Resources, Inc. v. Venture Research Institute is the second defamation claim, also dismissed for lack of jurisdiction.⁶⁵ HEI Resources, a Texas corporation, and Colorado resident Charles Cagle sued Venture Research Institute, a California corporation, for defamation and related torts for negative postings to investors on an interactive message board on Venture's website.⁶⁶ The court first noted that this was the third time in a year that Venture had been sued for defamation in the Northern District of Texas.⁶⁷ Both of the two prior suits were dismissed for lack of personal jurisdiction because the Venture posts were from anonymous authors. In this case, however, Venture President Bernaldo Bicoy had written the posts.⁶⁸

58. No. 3:07-CV-1767-D, 2009 WL 111570, at *1 (N.D. Tex. Jan. 16, 2009).

59. *Id.*

60. *Id.* at *1.

61. *Id.* at *3.

62. *Id.* at *4.

63. *Id.*

64. *Id.*

65. No. 3:09-cv-403-M, 2009 WL 2634858, at *1 (N.D. Tex. Aug. 26, 2009).

66. *Id.*

67. *Id.* at *3.

68. *Id.*

The Venture website offered ten items of Texas-related information.⁶⁹ In spite of this, the court found that it fell in the middle of the *Zippo* interactivity scale, as merely posting information without creating contracts or selling products or services.⁷⁰ The court further rejected the plaintiffs' arguments under the *Calder* effects test, noting that such jurisdictional conclusions are rare.⁷¹ In a brief discussion of general jurisdiction, the court found that Venture lacked a continuous presence and the necessary substantial Texas contacts, specifically rejecting Venture's Internet presence as a basis for general jurisdiction.⁷²

The third defamation dismissal was *Orhii v. Omoyele*, a Houston man's claim for a libelous article regarding activities in Nigeria.⁷³ Paul Orhii was a native of Nigeria and a naturalized United States citizen who lived in Houston when he filed the lawsuit but has since been appointed to head the National Agency for Food and Drug Administration and Control (NAFDAC) in Nigeria. Defendant Omoyele Sowore was a Nigerian native and New Jersey resident who operated a website reporting on Nigerian activities.⁷⁴ In May 2008, Sowore posted an allegedly libelous article reporting on a one-billion-dollar out-of-court settlement in Nigeria against the pharmaceutical company Pfizer. The article claimed that Nigeria's attorney general would personally receive ten million dollars from the settlement and that Orhii was involved in the scheme.⁷⁵ Sowore did not conduct business in Texas, had no assets in Texas, and used no volunteer writers who resided in Texas. Instead, Sowore relied on Nigerian sources for his articles and had never used a source from Texas. The federal district court dismissed the claim for lack of personal jurisdiction, because the article was clearly focused on Nigeria and the references to Orhii's residence and work in Texas were "merely collateral."⁷⁶

Moving on from defamation, in *Qassas v. Daylight Donut Flour Co.*, the federal district court dismissed a Houston resident's claim against Tulsa-based Daylight Donut Flour Company for breach of his employment agreement and related claims.⁷⁷ Daylight regularly conducted business with thirty-five franchised stores in Texas, and the court found that inadequate for general jurisdiction, specifically rejecting Daylight's interactive website as a sufficient general contact.⁷⁸ The court also rejected

69. *Id.* at *4.

70. *Id.* at *3 (referring to *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W.D. Pa. 1997)).

71. *Id.* at *3-6. Rejecting the plaintiffs' argument that the Venture website targeted Texas, the court concluded that "the geographic focus of the allegedly defamatory posts was not Texas or its residents." *Id.* at *6. "The posts at issue are otherwise related to Texas only because of the mere fortuity that much of the oil and gas activity in this country is conducted in Texas." *Id.*

72. *Id.* at *6 & n.46.

73. No. 4:08-CV-3557, 2009 WL 926993, at *2 (S.D. Tex. Mar. 31, 2009).

74. *Id.* at *1.

75. *Id.* at *1-2.

76. *Id.* at *3-4.

77. No. 4:09-CV-0208, 2009 WL 1795004, at *1 (S.D. Tex. June 24, 2009).

78. *Id.* at *1, *3-5.

the plaintiff's claim of specific jurisdiction because the plaintiff had been hired as the defendant's international marketing representative, a claim unrelated to Daylight's Texas contacts.⁷⁹

Following these four rejections of Internet-based personal jurisdiction, the court in *Autobytel, Inc. v. Insweb Corp.* found both general and specific jurisdiction.⁸⁰ Autobytel sued Internet Brands and other defendants for infringing its patent regarding methods for "formulating and submitting purchase requests over a computer network."⁸¹ Rejecting Internet Brands' jurisdictional objection, the federal district court first found continuous and systematic contacts based on the defendant's Texas business license, the presence of its registered agent in Texas, and its filing of Texas corporation franchise taxes.⁸² In addition, Internet Brands owned and operated several websites that allow users to purchase software licenses, with one website physically present in Texas. The court concluded that the availability and use of this highly interactive, transaction-oriented website, combined with the business presence in Texas, established general jurisdiction over Internet Brands.⁸³ The court also found specific jurisdiction because the allegedly infringing activities were purposefully directed at Texas residents.⁸⁴

C. DECLINING JURISDICTION

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

1. *Forum Non Conveniens* Dismissals

Forum non conveniens, or inconvenient forum, is an old common-law objection to jurisdiction based on significant inconvenience to one or more defendants. It is also available by statute in the federal system and in many states for intra-jurisdictional transfers that do not require dismissal.⁸⁵ Where interstate or international case movement is involved, forum non conveniens is truly jurisdictional because it involves the forum's

79. *Id.* at *6.

80. No. 2:07-cv-524, 2009 WL 901482, at *2 (E.D. Tex. Mar. 31, 2009).

81. *Id.* at *1.

82. *Id.* at *2.

83. *Id.*

84. *Id.* The defendant's website connected Texas customers with Texas auto dealers for the purpose of purchasing automobiles. A Texas resident using the website could contact Texas dealers to inquire about vehicles for sale in Texas and could also submit financial data and apply for a loan. The site also provided toll-free telephone numbers and a "Live Help" link for users. *Id.* at *3.

85. 28 U.S.C. § 1404 (2006) is the federal statutory provision for inconvenient forum objections seeking transfer to another federal court. Texas law provides for in-state venue transfers based on convenience under TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (Vernon 2002).

declining of otherwise-valid jurisdiction, as well as the dismissal of the local case, for re-filing in a distinct forum.

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

Signature Management Team LLC v. Quixtar, Inc. is an action by a Michigan-based Nevada corporation against a Michigan-based Virginia corporation alleging various business torts.⁸⁷ Signature (known colloquially as Team) engaged in motivational training and sold its materials in Texas as well as other states. Team filed this action, in state court in Collin County, against Quixtar alleging tortious interference and various other common-law and statutory claims. Noting that both parties were based in Michigan, Quixtar moved for a forum non conveniens dismissal and conceded that the plaintiff could re-file in Michigan. The trial court granted Quixtar's dismissal motion, but the Dallas Court of Appeals reversed, concluding that the factors pointing to Michigan litigation were not enough to overcome the plaintiff's right to choose the forum.⁸⁸

The best practice tips for forum non conveniens practice appear in the briefest opinion of the Survey period. In *Dhaliwal v. Vanguard Pharmaceutical Machinery, Inc.*, a Canadian plaintiff brought a personal injury claim against a Canadian defendant for a job-site injury in which the plaintiff's hand became lodged in a pharmaceutical blister-pack ma-

86. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981); *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 424 (5th Cir. 2001). The private factors look to the parties' convenience and include "the 'relative ease of access to sources of proof; [the] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witness[es]; possibility of view of premises, if . . . appropriate . . . ; and all other practical problems that make trial . . . easy, expeditious and inexpensive.'" *McLennan*, 245 F.3d at 424 (alterations in original) (quoting *Dickson Marine, Inc. v. Panalpina, Inc.*, 179 F.3d 338, 342 (5th Cir. 1999)). The public factors look to the courts' concerns and the forum state's interests, and include the administrative difficulties flowing from court congestion, the local interest in having localized controversies decided at home the interest in having the trial of a diversity case in a forum familiar with the law that must govern the action, the avoidance of problems in conflict of laws problems, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* Texas forum non conveniens law is multi-faceted. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon 2008) applies to personal injury and wrongful death claims. Common-law forum non conveniens, in line with *Gulf Oil Corp. v. Gilbert*, governs all other interstate and international forum convenience issues in Texas state courts. See *In re Smith Barney, Inc.*, 975 S.W.2d 593, 596 (Tex. 1998).

87. 281 S.W.3d 666, 669 (Tex. App.—Dallas 2009, pet. filed).

88. *Id.* at 670, 675. Quixtar argued that its witnesses were primarily located in Michigan and that the expense of obtaining their testimony by deposition, or alternatively their attendance in Texas, compelled litigation in Michigan. The court of appeals disagreed, noting that Quixtar failed to offer any evidence quantifying that cost or otherwise demonstrating any disadvantage. *Id.* at 673.

chine.⁸⁹ This machine had been shipped directly from China to Vancouver, where the plaintiff lived and where the injury occurred. The federal district court denied the Canadian defendant's forum non conveniens motion, because the defendant failed to offer evidence showing that the British Columbia forum was adequate.⁹⁰ Specifically, the defendant failed to show that the Canadian forum would have jurisdiction over all defendants or that the limitations period had not run.⁹¹

In other Survey-period cases, Texas state or federal courts granted forum non conveniens dismissals in: (1) an action regarding an accident in Mexico that damaged a shipment of industrial gas heaters from Canada,⁹² and (2) a maritime claim occurring off the Virginia coast.⁹³ Additionally, Texas federal courts denied forum non conveniens motions in: (1) an action for breach of contract in a transaction for property in Mexico,⁹⁴ and (2) an action by a Canadian company against a New York insurer (an AIG subsidiary) for loss of property located in Longview, Texas.⁹⁵

2. *Derogating Forum-Selection Clauses*

The Consent section above discusses forum-selection clauses that establish local jurisdiction;⁹⁶ however, somewhat different considerations arise when the plaintiff sues in a forum contrary to the parties' earlier choice in a forum-selection clause. These are known as derogation clauses (in regard to that forum) and instead of justifying the court's retention of the case, derogation clauses require that the court consider declining its otherwise valid jurisdiction over the parties. The Survey period produced six such cases.

*In re International Profit Associates, Inc.*⁹⁷ adds a seeming tautology to Texas law on challenging forum-selection clauses. Riddell Plumbing contracted with International Profit Associates (IPA) to provide various business analyses. The contract had a clause giving Riddell the choice between binding arbitration or litigation in the state courts in Lake County, Illinois. When a dispute arose, Riddell chose neither and instead sued in Texas state court. IPA raised the Illinois forum clause to challenge jurisdiction, but the trial court rejected the challenge based on Riddell's argument that IPA had not shown it the clause, resulting in underlying fraud in the agreement. When the court of appeals rejected IPA's writ of mandamus, IPA filed another petition for writ of mandamus

89. No. H-08-2452, 2009 WL 3414405, at *1 (S.D. Tex. Oct. 22, 2009) (mem.).

90. *Id.* at *2.

91. *Id.*

92. *Totran Transp. Servs., Ltd. v. Fitzley, Inc.*, No. L-08-125, 2009 WL 3079246, at *1, *4 (S.D. Tex. Sept. 18, 2009).

93. *In re Omega Protein, Inc.*, 288 S.W.3d 17, 18-19, 24 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

94. *Festor v. Wolf*, 647 F. Supp. 2d 750, 751-53, 759 (W.D. Tex. 2009).

95. *Terroco Indus. Ltd. v. Am. Home Assurance Co.*, No. 2:07-CV-437, 2009 WL 901488, at *1-2, *7 (E.D. Tex. Mar. 30, 2009).

96. *See supra* Part I.A. .

97. 286 S.W.3d 921 (Tex. 2009).

with the Texas Supreme Court.⁹⁸ The supreme court granted the writ based on existing Texas law that forum-selection clauses are enforceable unless the opposing party shows “(1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching,” (3) the clause contravenes strong public policy, “or (4) the selected forum is seriously inconvenient for trial.”⁹⁹ Surprisingly, what was new to this holding was that Riddell could not establish invalidity for fraud or overreaching merely by arguing that IPA failed to show it the clause or that it was otherwise unaware of it. The supreme court conceded that if IPA had managed to conceal the clause from Riddell, then fraud would have been established. But all Riddell proved here was that IPA had not directed its attention to the clause, which fell short of Riddell’s burden in challenging the clause.¹⁰⁰

Two Survey-period cases provide lessons in drafting forum-selection clauses. *Cantex Energy Corp. v. World Stock Exchange, LLC* illustrates that courts will construe ambiguous forum-selection clauses against the drafter.¹⁰¹ This case arose from San Antonio-based Cantex’s agreement with Arizona-based World Stock Exchange (WSE) in which WSE would raise capital for Cantex. After a series of subsequent agreements and payments by Cantex failed to produce any work product from WSE, Cantex sued in federal court in San Antonio. WSE objected based on a forum-selection clause which read that “WSE will be entitled to any legal fees incurred resulting from the enforcing of this Agreement and will be litigated in AZ.”¹⁰² The court, however, agreed with Cantex that the agreement was ambiguous as to any requirement that Arizona was the exclusive forum for claims filed by Cantex. Because WSE had drafted the ambiguous clause, that ambiguity was construed against it, and the clause failed.¹⁰³

The second drafting lesson comes from *SOURCECORP BPS, Inc. v. Henderson*,¹⁰⁴ resting on the important distinction between the terms *in* and *of*. This was an action for damages resulting from the defendants’ alleged pirating of the plaintiff’s customers, talent, and confidential and strategic business information. The parties had been in a business relationship that included a contract with a forum clause providing that “[v]enue shall lie in the State and/or Federal Courts of Dallas[,] Texas.”¹⁰⁵ When the relationship soured, the plaintiff sued in state court in Dallas, and the defendant removed to federal court. The plaintiff moved to remand, objecting that the forum-selection clause waived the defendants’ removal rights by designating Texas state courts exclusively.

98. *Id.* at 922.

99. *Id.* at 923.

100. *Id.* at 923-24.

101. No. SA-09-CA-0218-XR, 2009 WL 2407959, at *10 (W.D. Tex. Aug. 4, 2009).

102. *Id.*

103. *Id.*

104. No. 3:08-CV-552-L, 2008 WL 4965857 (N.D. Tex. Nov. 20, 2008).

105. *Id.* at *2 (alteration in original).

The federal court agreed and remanded the case, noting that “[f]ederal district courts may be *in* Texas, but they are not *of* Texas.”¹⁰⁶

In other derogating forum-clause cases, a Texas state court enforced a derogating clause designating Delaware or New York courts for a partnership dissolution case;¹⁰⁷ a Dallas bankruptcy court enforced a derogating clause to transfer a case to bankruptcy court in New York;¹⁰⁸ and a Houston federal court rejected a derogating forum clause favoring Bermuda courts because of the plaintiffs’ expense in litigating there, and because of Bermuda law’s failure to allow class actions.¹⁰⁹

3. *Parallel Litigation*

Parallel litigation is difficult to define, sometimes meaning identical lawsuits with exactly the same parties bringing the same claims and sometimes meaning two or more lawsuits that may result in claim preclusion for some or all parties. Parallel litigation occurs both intra- and inter-jurisdictionally and involves remedies of transfer and consolidation (intra-jurisdictional only), stay, dismissal, and anti-suit injunction, or in many cases, allows both cases to proceed and the first-to-judgment to preclude the other.¹¹⁰ The Survey period had five notable parallel actions, all involving second-filed cases that the courts deferred to the first-filed action.

*Wells Fargo Bank, N.A. v. West Coast Life Insurance Co.*¹¹¹ offers a classic scenario of parallel litigation and a straightforward resolution. The dispute concerned life insurance policies Wells Fargo obtained from West Coast, although the opinion does not explain Wells Fargo’s role in acquiring these policies. West Coast complained that the policies were obtained with fraudulent applications and sought to rescind them by filing a declaratory judgment action in federal court in Florida on August 13, 2008. Wells Fargo asked the federal court in Florida to transfer the case to federal court in Texas, and then on October 1, 2008, it filed eight reactive lawsuits in the Northern District of Texas, presumably one action per policy. West Coast moved to transfer those actions to Florida or, alternatively, to dismiss them.¹¹²

106. *Id.* (citing *Dixon v. TSE Int’l, Inc.*, 330 F.3d 396, 398 (5th Cir. 2003)); *see also* *Hydro Green Energy, LLC v. Concepts ETI, Inc.*, No. H-09-2271, 2009 WL 3681678, at *2 (S.D. Tex. Nov. 3, 2009).

107. *In re Lehman Bros. Merch. Banking Partners IV L.P.*, 293 S.W.3d 349, 353 (Tex. App.—Dallas 2009, no pet.).

108. *Manchester, Inc. v. Lyle (In re Manchester, Inc.)* 417 B.R. 377, 378 (Bankr. N.D. Tex. 2009).

109. *In re Vistaprint Corp Mktg. & Sales Practices Litig.*, No. 4:08-md-1994, 2009 WL 2884727, at *1 (S.D. Tex. Aug. 31, 2009).

110. *See generally* George, *Parallel Litigation*, *supra* note 4; James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 *TEX. INT’L L.J.* 499 (2002).

111. 631 F. Supp. 2d 844 (N.D. Tex. 2009).

112. *Id.* at 845-46.

In considering the transfer motions, the Dallas federal court outlined the first-filed rule which provides that where two substantially similar actions are filed in federal court, the second-filed forum may decline to hear the case and transfer it to the first forum.¹¹³ The court then noted the substantial overlap in the Florida and Texas pleadings, the Florida pleadings alleging the insureds' fraud and the Texas pleadings complaining of West Coast's wrongful attempts to rescind the policies based on false allegations of fraud. Wells Fargo argued that: (1) Wells Fargo had a right to the application of Texas law, and that (2) West Coast was the true defendant but had re-characterized that by filing an anticipatory lawsuit in Florida. The court, however, was unpersuaded, noting that Wells Fargo had made the same argument in its motion to transfer filed in Florida.¹¹⁴ The court also rejected Wells Fargo's argument that West Coast was forum shopping in Florida and had simply won the race to the courthouse. The court noted that such an argument, if substantiated, would be grounds for keeping the Texas action, but found no evidence of West Coast filing the Florida action in anticipation of Wells Fargo's Texas action, which was not filed until a month and a half later. Thus, the court granted the motion and transferred the eight Texas lawsuits to federal court in Florida.¹¹⁵

Sanofi-Aventis Deutschland GmbH v. Novo Nordisk, Inc. provides a variation on the first-filed rule in patent actions.¹¹⁶ Sanofi was a German corporation that had no offices or operations in the United States; however, its French parent entity did. "Novo [was] a Delaware corporation with its principal place of business in New Jersey" and with a Danish parent, Novo Nordisk A/S. A dispute arose concerning Sanofi's argument that the NovoFine Needle had infringed on Sanofi's disposable injection needle, which was protected by a United States patent. Novo won the race to the courthouse with a declaratory judgment action in the Southern District of New York on January 6, 2009.¹¹⁷

Sanofi responded three days later with a patent-infringement action in the Eastern District of Texas. Novo moved to dismiss, stay, or transfer the Texas action, citing the first-filed rule. The court noted that for patent actions, the law of the Federal Circuit governed the objections to parallel actions.¹¹⁸ Applying Federal Circuit precedent, the court did an extensive inconvenient-forum analysis and concluded that the first-filed case in the Southern District of New York had priority. The court refrained, however, from transferring the Texas case because of unresolved first-forum issues, including personal jurisdiction. Instead, the court stayed

113. *Id.* at 846-47 & nn.1-4. It is also appropriate for the second-filed court to dismiss the case. See George, *supra* note 4, at 778-80.

114. *Wells Fargo*, 631 F. Supp. 2d at 848 & n.7.

115. *Id.* at 848-49.

116. 614 F. Supp. 2d 772, 773 (E.D. Tex. 2009).

117. *Id.* at 773-74.

118. *Id.* at 775 n.2. The court also observed the potential for a different result under Fifth Circuit law. *Id.* at n.3.

the action pending the resolution of the first-forum issues that might up-end first-forum jurisdiction.¹¹⁹

Evanston Insurance Co. v. Tonmar, L.P. is an example of the somewhat different standards applied for parallel state–federal actions.¹²⁰ Like the two cases discussed above, this case involved a declaratory judgment action, but unlike the two cases above, the declaratory judgment action here was second-filed.¹²¹ Hitchcock fell through a skylight while trimming trees on top of a warehouse owned by Tonmar. When Tonmar’s insurer, Evanston, denied the claim, Hitchcock sued Evanston in a county court in Dallas and separately sued Tonmar in state district court in Dallas.¹²² Evanston then filed an action in federal court against Hitchcock and the Tonmar partners, seeking a declaration of no duty to defend or indemnify. The court used a thorough *Brillhart* analysis to conclude that it should dismiss the second-filed federal action in favor of the earlier action in a county court at law in Dallas.¹²³ In all three parallel cases—*Wells Fargo*, *Sanofi*, and *Evanston*—the second-filed court deferred to the first. Readers should not conclude that this result is inevitable, as the thorough discussion in each of these cases demonstrates.

*In re Viking Offshore (USA) Inc.*¹²⁴ was an adversary claim in a Houston bankruptcy proceeding. Viking, the debtor, sued Bodewes Winches, B.V., a Netherlands entity which itself was a successor to a bankrupt Dutch company, termed “Old Bodewes” by the court. Viking bought four winches from Old Bodewes to be used in refurbishing Viking’s oil rigs for sale in the bankruptcy proceeding. The winches were never delivered because of Old Bodewes’s bankruptcy in the Netherlands. Viking brought an adversary action in the Houston bankruptcy court against the successor entity, termed “New Bodewes,” seeking injunctive relief. New Bodewes moved to dismiss for lack of personal jurisdiction and, alternatively, asked the court to abstain in deference to the existing bankruptcy proceeding in the Netherlands. The Houston bankruptcy court found specific jurisdiction over New Bodewes based on its claim on the winches but granted its abstention motion.¹²⁵ Bankruptcy courts have discretion to abstain from specific proceedings “in the interest of justice, or in the interest of comity with State courts or respect for State law.”¹²⁶ Although this statutory power does not authorize comity for foreign-country proceedings, federal common law does, using a forum non conveniens analysis. Based on a careful analysis of forum non conveniens factors, the

119. *Id.* at 778-82.

120. 699 F. Supp. 2d 725, 732–33 (N.D. Tex. 2009).

121. Readers should note that parallel actions do not invariably involve one or more declaratory judgment actions. See George, *supra* note 4.

122. *Evanston Ins. Co.*, 699 F. Supp. 2d at 728.

123. *Id.* at 732-34 (citing *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942)).

124. 405 B.R. 434 (Bankr. S.D. Tex. 2008).

125. *Id.* at 440.

126. 28 U.S.C. § 1334(c)(1) (2006).

court dismissed the action in deference to the Dutch bankruptcy court.¹²⁷

TrueBeginnings, LLC v. Spark Network Services, Inc. demonstrates a plaintiff's unsuccessful use of a Texas forum clause to challenge a first-filed claim in Illinois, asserting that clause not in Illinois but in Texas.¹²⁸ The parties in this case were rival online dating services. When Illinois-based Spark threatened a patent-infringement claim in Illinois federal court, Dallas-based TrueBeginnings responded by suing Spark and its Chicago attorneys in Texas federal court. TrueBeginnings accused Spark and its attorneys of signing on to the TrueBeginnings website and then, contrary to the use agreement, searching the website for evidence of patent infringement.¹²⁹ The TrueBeginnings user agreement had an exclusive Texas forum clause. Based on this, TrueBeginnings sought a declaratory judgment arguing that it could not be sued by Spark or its attorneys anywhere but Texas. The Texas federal court rejected this argument, concluding that the TrueBeginnings user agreement applied only to the use of the site and not to patent-infringement claims.¹³⁰ The plaintiff's assertion of the Texas forum clause is not unusual in parallel litigation. What is unusual is its assertion in Texas to defeat the Illinois forum. Because courts are not inclined to divest another court of jurisdiction, the better approach would be to assert the Texas forum clause in Illinois. That might not be successful either, but it has a better chance than asking a Texas court, state or federal, to issue a declaratory judgment action against first-filed litigation elsewhere.

Although not specifically addressing the parallel-litigation issue, the Texas Supreme Court's decision in *Zurich American Insurance Co. v. Nokia, Inc.*¹³¹ is of tangential interest. In *Zurich*, various insurers filed suit in Dallas seeking a declaration that they owed no duty to defend or indemnify in various lawsuits, all outside of Texas, seeking damages from Nokia and others for alleged biological injuries from cell phone radiation.¹³² The supreme court first noted that none of the class action suits were filed in Texas, that the substantive law relied upon in those suits was not Texas law, and that every other state and federal court which had construed "identical claims" for bodily injury held that a duty to defend existed.¹³³ The supreme court then noted "the importance of uniformity 'when identical insurance provisions will necessarily be interpreted in various jurisdictions.'"¹³⁴ The supreme court concluded that failing to rec-

127. *In re Viking Offshore*, 405 B.R. at 440-42 (citing the factors in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)).

128. 631 F. Supp. 2d 849, 852 (N.D. Tex. 2009).

129. *Id.* at 851-52.

130. *Id.* at 857-58.

131. 268 S.W.3d 487 (Tex. 2008).

132. *Id.* at 489. Among the issues considered by the supreme court was the fact that the underlying class action complaints sought recovery for "bodily injury," thus bringing the claims within the insurer's duty to defend. *See id.* at 490.

133. *Id.* at 496.

134. *Id.* at 497 (quoting *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 (Tex. 1997)).

ognize the duty to defend would mean Nokia and Samsung, both Texas corporations, would be deprived of a defense to which parties in other jurisdictions were entitled.¹³⁵

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.¹³⁶ Second, it is a question of forum state law. *Renvoi*—the practice of using another state’s choice-of-law rule—is almost never employed unless the forum state directs it, and even then, the forum state remains in control.¹³⁷ Third, the forum state has broad power to make choice-of-law decisions, either legislatively or judicially, subject only to limited constitutional requirements.¹³⁸

Within the forum state’s control of choice of law is a hierarchy of choice-of-law rules. At the top are legislative choice-of-law rules, that is, statutes directing the application of a certain state’s laws, based on events or people important to the operation of each specific law.¹³⁹ 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.¹⁴⁰ Third in the hierarchy is the common law, now controlled in Texas by the most significant relationship test of the

135. *Id.* The dissent takes issue with the majority’s conclusion and pointedly notes that some courts have already reached an opposite conclusion. *Id.* at 504 (Hecht, J., dissenting).

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

137. The Restatement (Second) creates a presumption against *renvoi* except for limited circumstances. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971). Although commentators defend the limited use of *renvoi*, they acknowledge its general lack of acceptance in the United States except in limited circumstances, usually found in statutes directing the use of *renvoi*. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 134-39 (3d ed. 2000); WEINTRAUB, *supra* note 1, at 88-94. Texas law provides for *renvoi* in TEX. BUS. & COM. CODE ANN. §§ 1.105, 2.402(b), 4.102(b), 8.106, and 9.103 (Vernon 2009). For federal courts, *Klaxon* reiterates the forum state’s control of choice of law. 313 U.S. at 497.

138. 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. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799 (1985); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407 (1930); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 680 (Tex. 2004). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 and comments following; SCOLES & HAY, *supra* note 2, at 145-76; WEINTRAUB, *supra* note 1, at 585-648. Choice-of-law limits under full faith and credit are now questionable after *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003).

139. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) & cmt. a; see e.g., *Owens Corning v. Carter*, 997 S.W.2d 560, 564 (Tex. 1999) (applying an earlier version of the Texas wrongful death statute, requiring that the court “apply the rules of substantive law that are appropriate under the facts of the case,” citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 2008) (as amended in 1997 with the same wording as this provision)).

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

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

A. STATUTORY CHOICE-OF-LAW RULES

The Survey period offered one significant case involving a Texas choice-of-law statute. In *Cantu v. Jackson National Life Insurance Co.*, the United States Court of Appeals for the Fifth Circuit explained the relationship of the statutory choice-of-law rules in the Uniform Commercial Code to common-law rules under the Restatement.¹⁴³ The case involved the plaintiff Cantu's claim for insurance proceeds for her deceased husband, Jose Martinez. Martinez was a citizen and resident of Mexico who bought two \$500,000 life insurance policies from an agent of the defendant, Jackson National Life (JNL), in Texas. On April 15, 2004, JNL notified Martinez that his check paying for the policy had been rejected for insufficient funds. Martinez died in an automobile accident the next day, and his widow, Alejandra Cantu, immediately submitted the appropriate payment to JNL by overnight delivery and filed a claim on the policy. JNL rejected her claim, and Cantu sued under both Texas and Mexican law. Because the policies designated Texas law as controlling, the federal district court dismissed her claims under Mexican law. After the plaintiff lost a summary judgment motion on her Texas claims, she appealed as to both the Mexican and Texas claims. As to the dismissal of her Mexican law claims, she argued that the transaction and resulting claim had no reasonable relationship to Texas.¹⁴⁴

The Fifth Circuit affirmed the district court's dismissal, noting first that the Texas Uniform Commercial Code (UCC), found in the Texas Business & Commerce Code, has two choice-of-law provisions. The first permits the parties to choose the forum state's law as governing any transaction that bears a reasonable relation to the forum state; in turn, this provision looks to the Restatement § 187 to determine the reasona-

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

142. The exception is when a federal court rules on a constitutional issue, such as legislative jurisdiction or full faith and credit, or federal questions such as foreign sovereign immunity. See, e.g., *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657, 680 (Tex. 2004) (legislative jurisdiction).

143. 579 F.3d 434, 437 (5th Cir. 2009).

144. *Id.* at 436.

ble relation.¹⁴⁵ The second UCC choice-of-law provision states that, for qualified transactions under UCC § 271.001, the parties may choose a governing law from any state that bears a reasonable relation to the transaction; this second provision does not look to the Restatement, but instead to five situations defining reasonable relation.¹⁴⁶ The Fifth Circuit summarized that if the insurance policy was a qualified transaction under UCC § 271.001, then the policy's designation of Texas law would be appropriate if it fell under one of the five situations defining "reasonable relation." If, on the other hand, it was not a qualified transaction under UCC § 271.001, then Restatement § 187 would control the reasonable relation issue.¹⁴⁷ The Fifth Circuit concluded that the insurance policy was a qualified transaction because it involved a party's obligation to pay "consideration with an aggregate value of at least \$1 million."¹⁴⁸ The Fifth Circuit then found a reasonable relation to Texas under UCC 271.001's first factor—whether a party to the transaction was a resident of the chosen jurisdiction. JNL's agent, Cuellar, was a Texas resident. The plaintiff argued that Cuellar was not a party to the contract, but the Fifth Circuit correctly pointed out that Cuellar was nonetheless a party to the transaction. The Fifth Circuit affirmed the trial court's dismissal of the plaintiff's claims under Mexican law.¹⁴⁹

B. CHOICE-OF-LAW CLAUSES IN CONTRACTS

Texas law and the Restatement permit contracting parties to choose a governing law,¹⁵⁰ which is reflected in three Survey-period cases. *Floyd v. CIBC World Markets, Inc.*¹⁵¹ provides an instructive discussion regarding breadth. The case also points out the Texas practice of issue and claim splitting, or *dépeçage*.¹⁵² Seven Seas Petroleum Inc. operated oil and gas fields in Colombia, and after losing money from 1995 to 2000, it sought additional funds for further exploration and hired CIBC as its financial advisor. This resulted in a forty-five-million-dollar joint venture with Chesapeake Energy Exploration, half of which was Chesapeake's loan to Seven Seas. When this venture failed, Seven Seas announced its intention to wind down and sell its interests in Colombia, a task it also

145. *Id.* at 437 (citing TEX. BUS. & COM. CODE ANN. § 1.301(a) (Vernon 2008)).

146. *Id.* (citing TEX. BUS. & COM. CODE ANN. §§ 1.301(c), 271.005(a)(2) (Vernon 2008)).

147. *Id.*

148. *Id.* at 437-38 (citing TEX. BUS. & COM. CODE ANN. § 271.001(1)).

149. *Id.* at 438; *see also* *Norfolk S. Ry. v. Trinity Indus., Inc.*, No. 3-07-CV-1905-F, 2009 WL 856340, at *3 (N.D. Tex. Mar. 31, 2009) (applying Illinois law to claims arising from the plaintiff's purchase of rail cars, and citing generally to UCC § 1-105(1) as honoring contractual choice-of-law clauses).

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

151. 426 B.R. 622 (S.D. Tex. 2009).

152. *Dépeçage* is the practice of splitting multiple claims in a lawsuit, or multiple issues in a claim, and applying different states' laws to the separate issues or claims. Texas law requires *dépeçage*, that is, choice of law on an issue-by-issue basis. *See id.* at 639. *See also* *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

assigned to CIBC. In 2002, some of Seven Seas' creditors pursued involuntary bankruptcy against the company, and Seven Seas responded by filing its own Chapter 11 petition. The bankruptcy court appointed Ben Floyd as trustee, and Floyd filed suit in Houston federal court against Chesapeake, CIBC, and various Seven Seas directors, alleging negligence and breach of fiduciary duty. Floyd then dismissed CIBC from the suit and settled with the remaining defendants.¹⁵³

Subsequently, Floyd filed the instant action against CIBC for aiding and abetting Seven Seas' directors' fraud, breaches of fiduciary duty, and other wrongs. Among other defenses, CIBC argued that New York law governed, based on a choice-of-law clause in the original engagement letter. That clause read: "This letter agreement will be governed by and construed in accordance with the laws of the State of New York applicable to agreements made and to be fully performed therein."¹⁵⁴ The court ruled this clause ineffective as to the plaintiff's tort claims, citing Fifth Circuit precedent construing an identically worded clause.¹⁵⁵ CIBC further argued that the clause should not be read so narrowly, because other language in the engagement letter broadened its application to "any suit, action or other proceeding arising out of this letter agreement or the engagement of CIBC World Markets."¹⁵⁶ The court handily rejected this argument because that specific language came from the engagement letter's choice-of-forum clause and not its choice-of-law clause.¹⁵⁷ With the choice of New York law not applying to the plaintiff's tort claims, the court noted the pertinence of the Restatement's tort sections but found that the record in this complex case was inadequately developed for an adequate analysis.¹⁵⁸ The court accordingly deferred the choice-of-law decision pending further discovery and briefing.¹⁵⁹

*CMA-CGM (America) Inc. v. Empire Truck Lines, Inc.*¹⁶⁰ was a personal injury claim arising from a job-site injury. Empire Truck Lines hired Aguirre to transport cargo, which was stored in a container leased by CMA, from Longview to the Port of Houston. When Aguirre was injured by allegedly faulty transport equipment, he sued Empire, CMA, and others. CMA filed an indemnity cross-claim against Empire pursuant to those parties' agreement. The trial court interpreted the indemnity agreement against CMA and dismissed the cross-claim.¹⁶¹ On appeal, CMA urged the application of Maryland law as designated in the indemnity contract; however, Empire objected, arguing that indemnity was a procedural matter governed by forum law, and further, that Maryland law violated Texas public policy. The Houston First Court of Appeals

153. See Floyd, 426 B.R. at 630-31.

154. *Id.* at 639.

155. *Id.* at 639-40.

156. *Id.* at 640.

157. *Id.*

158. *Id.*

159. *Id.* at 641.

160. 285 S.W.3d 9 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

161. *Id.* at 11-13.

reversed the trial court's dismissal, finding Maryland law to be substantive and, thus, subject to the parties' choice-of-law agreement.¹⁶² The court of appeals further held that Maryland law did not violate Texas public policy merely because it differed.¹⁶³

*Settlement Capital Corp. Inc. v. Pagan*¹⁶⁴ was a multi-faceted dispute arising from a 1995 settlement agreement and its beneficiary's (Pagan's) subsequent assignment of her rights to various parties. The original agreement had a non-assignability clause and was governed by New York law. In 2007, Pagan began assigning her rights in return for various structured-settlement agreements. Pagan was originally a New York resident and later lived in Florida. The opinion does not make clear why Texas became the forum, but it did when Settlement Capital Corporation sued Pagan and others in 2007. A primary issue was whether New York law governed the original 1995 agreement's non-assignability feature. The federal district court rejected New York law, not because of the clause's invalidity but because the only parties seeking to invoke it were not part of the 1995 agreement.¹⁶⁵

C. THE MOST SIGNIFICANT RELATIONSHIP TEST

In the absence of a statutory choice-of-law rule or an effective choice-of-law clause, Texas courts apply the most significant relationship test¹⁶⁶ from the Restatement.¹⁶⁷

1. *Contract-Based Claims*

The Survey period produced only two contracts cases governed by the Restatement, that is, contract disputes not involving a valid choice-of-law clause. The two cases are set in two federal districts, Houston and Dallas, and involve different plaintiffs seeking insurance coverage against the same defendant in unrelated disputes. *Pennzoil-Quaker State Co. v. American International Specialty Lines Insurance Co.* provides a good discussion of the law governing insurance coverage claims, highlighting that for multi-state coverage, the issue is not the location of the underlying risk in the instant suit but the location of all the risks covered in the pol-

162. *Id.* at 14.

163. *Id.*

164. 649 F. Supp. 2d 545 (N.D. Tex. 2009).

165. *Id.* at 553-56.

166. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 678 (Tex. 1990).

167. 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." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). This listing is not by priority, which varies from case to case. *Id.* at cmt. c. In a larger sense, the most significant relationship test includes the other choice-of-law sections throughout the Restatement.

icy.¹⁶⁸ Pennzoil sought coverage regarding five pollution lawsuits in which it was a defendant in Louisiana. The defendant in the instant action, American International (AISLIC), had two defenses: first, it owed no coverage on the fifth suit because Pennzoil failed to give timely notice of the claim; and second, AISLIC acknowledged coverage in the remaining four actions but contended that they arose from distinct occurrences and were each subject to the policy's two-million-dollar deductible per occurrence. Pennzoil argued that the events were sufficiently related as to constitute a single coverage, requiring a single two-million-dollar deductible. Both sides filed summary judgment motions arguing that both disputes were contract interpretation issues.¹⁶⁹

The first issue, coverage on the fifth underlying lawsuit, did not raise a conflict-of-laws issue, and AISLIC won that claim.¹⁷⁰ On the second issue, regarding the deductible, the defendant AISLIC argued that Louisiana law governed because the other four lawsuits and the underlying facts were in Louisiana. The court rejected this argument, pointing out that this policy covered multiple risks for Pennzoil in sixteen states.¹⁷¹ Because of that, the location of the underlying lawsuits was not determinative.¹⁷² Instead, the court turned to the factors of Restatement § 188, including "the places of contracting and negotiation, and the parties' domicile, residence, nationality, place of incorporation, and place of business."¹⁷³ Under those factors, Texas law governed. Although Pennzoil won the choice-of-law argument, it lost the summary judgment. Under Texas law, the occurrences were distinct, and Pennzoil owed an eight-million-dollar deductible.¹⁷⁴

*Advanced Environmental Recycling Technologies, Inc. v. American International Specialites Insurance Co.*¹⁷⁵ was a second coverage lawsuit against AISLIC. The underlying dispute was a consolidation of two lawsuits in the Western District of Washington, each seeking damages for Advanced Environmental's allegedly mold- and fungus- inclined composite wood products. Advanced argued that AISLIC was obligated to defend those suits under "Coverage B" of the parties' umbrella policy, a provision that expressly applied to damages not insured in the parties' underlying policy. AISLIC denied that "Coverage B" applied.¹⁷⁶

Before turning to the choice-of-law analysis, the court concluded that the parties' two argued-for laws, those of Arkansas and Texas, in fact

168. 653 F. Supp. 2d 690, 703 (S.D. Tex. 2009).

169. *Id.* at 693-96.

170. *Id.* at 698.

171. *Id.* at 702-03.

172. *Id.* at 703 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 cmt. a ("The location of the insured risk will be given greater weight than any other single contact" if the risk can be located in a single state. If the insured risk cannot be located in a single state, other factors determine choice of law)).

173. *Id.*

174. *See id.* at 703-09.

175. No. 3:08-CV-0837-O ECF, 2009 WL 3177604 (N.D. Tex. Sept. 30, 2009).

176. *Id.* at *1-2.

conflicted on the issue of whether the facts alleged in the underlying lawsuits triggered an occurrence in the parties' policy.¹⁷⁷ The court then conducted a thorough analysis of the factors in Restatement § 188, the basic rule for contract cases. Although several factors touched both Arkansas and Texas, the Arkansas contacts prevailed. Arkansas was the primary place of the insurance policy's negotiation (including being the place the policy was delivered), the place of performance if coverage was due, the situs of Advanced Environmental's headquarters, and the state whose law the parties observed in drafting the contract.¹⁷⁸ The court also pointed out that Texas courts do not apply one factor of § 188, the place of the subject matter of the contract, to insurance policies.¹⁷⁹

2. Commercial Torts

*McCall v. Southwest Airlines Co.*¹⁸⁰ illustrates the court's use of a plaintiff's venue allegations as a determinative choice-of-law factor. The plaintiff was a pilot who filed suit against her employer and her union, the Southwest Airlines Pilot's Association (SWAPA). McCall is a Southwest pilot with the rank of First Officer. On December 5, 2007, she was paired with Captain Austin for a flight from Philadelphia to Nashville. McCall claims that before departure, each pilot conducted an inspection of the plane for ice and concluded independently that de-icing was unnecessary. The flight was uneventful. After landing in Nashville, two deadheading Southwest pilots, who were flying as passengers on the flight, told Austin of ice accumulation on the wings. McCall alleges that when she learned of the incident, she immediately filed an internal safety report, a procedure that protects pilots from disciplinary action in certain limited circumstances. McCall claims that the Southwest team reviewing her report ruled unanimously that "she should be returned to work with retraining."¹⁸¹ Austin filed his report twenty-six minutes after McCall's but was

177. *Id.* at *6. The issue of false conflicts is seldom discussed in cases. A false conflict exists when other potentially applicable laws are the same as the forum's, or at least reach the same result. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145 cmt. 1, § 186 cmt. c (1971). Defining a clear, outcome-changing difference between the forum's and the foreign law is the first step in conducting a choice-of-law analysis, and the absence of a clear conflict should result in the application of forum law. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823-45 (1985) (Stevens, J., concurring in part and dissenting in part). Survey period cases involving false conflicts include *Tobin v. AMR Corp.*, 637 F. Supp. 2d 406 (N.D. Tex. 2009) (Texas and Illinois law the same on various claims arising from airline passenger's heart attack); *Lattimore Materials Co., L.P., v. Sedgwick Claims Mgmt. Servs. Inc.*, No. 4:08cv163, 2009 WL 1351099 (E.D. Tex. May 12, 2009) (Texas and Tennessee laws the same for contract interpretation in insurance coverage case); *CMS Energy Res. Mgmt. Co. v. Quicksilver Res., Inc.*, No. 2-07-260-CV, 2009 WL 1815776 (Tex. App.—Fort Worth June 25, 2009, no pet.) (not designated for publication) (Texas and Michigan laws the same regarding fraudulent inducement claim in the sale of natural gas).

178. *Advanced Envtl. Recycling Techs.*, 2009 WL 3177604, at *7-10.

179. *Id.* at *9 (citing *Reddy Ice Corp. v. Travelers Lloyds Ins. Co.*, 145 S.W.3d 337, 345 (Tex. App.—Houston [14th Dist.] 2004, pet denied); *Houston Cas. Co. v. Certain Underwriters at Lloyd's London*, 51 F. Supp. 2d 789, 797 (S.D. Tex. 1999)).

180. 661 F. Supp. 2d 647 (N.D. Tex. 2009).

181. *Id.* at 650.

nonetheless fired. According to McCall, in response to Austin's protest of disparate treatment, Southwest fired McCall, a move she attributed to Southwest's wish to get rid of Austin, who had a history of bad relations with Southwest and the union.¹⁸²

In the subsequent grievance, SWAPA obtained reinstatement with a thirty-day suspension without pay. McCall complains that the settlement was negotiated without her consent; she sued Southwest and SWAPA in a Dallas federal court, seeking relief under Illinois law. The case does not state McCall's argument for Illinois law other than the in-person and telephone discussions there pertinent to this case. The defendants argued for Texas law. Because McCall's retaliatory and defamation claims were tort-based, the court employed the basic tort principle in Restatement § 145, which includes the place of injury, the place of the conduct causing the injury, the parties' domiciles, and the place of the parties' relationship.¹⁸³ The choice was straightforward. While both Southwest and SWAPA were based in Texas, McCall resided in neither Texas nor Illinois. In particular, the court highlighted McCall's venue allegation that "a substantial part of the acts giving rise to this action took place in Dallas."¹⁸⁴

Wilson v. Hawker Beechcraft Services was an action seeking damages for an aircraft accident in Texas.¹⁸⁵ The damage was limited to the plane and was allegedly caused by faulty equipment. It is not unusual for Texas state and federal judges to issue brief, even one-sentence, choice-of-law discussions which are sometimes adequate, perhaps because the parties have not presented thorough arguments. Often, however, these short analyses are inadequate. *Wilson* is an excellent example of a short and thorough choice-of-law discussion, rendered in a case touching five states. This opinion was authored by United States District Judge Lynn Hughes, who has raised succinctness to an art form. She states in full:

Wilson sues for an accident in Texas on an intra-state flight. Wilson is a Delaware company doing business in Texas. Hawker is from Kansas. Wilson bought the airplane in Georgia seven months before the accident from a Maryland company through a Texas broker for delivery in Texas. Hawker inspected it in Georgia before the sale. The site of the inspection was fortuitous since the inspector and inspected are intrinsically mobile. Texas has the most significant relationship to Wilson's claims.¹⁸⁶

3. *Non-Commercial Torts*

The Survey period included three noteworthy choice-of-law opinions involving non-commercial torts in a non-class-action setting. The most

182. *Id.*

183. *Id.* at 657.

184. *Id.* at 658.

185. No. H-08-1652, 2008 WL 5378067, *1 (S.D. Tex. Dec. 24, 2008).

186. *Id.* at *3 (citing *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 205 (Tex. 2000)).

notable case has seen several Survey reports and ends here with a whimper in an unreported Fifth Circuit opinion. *Cates v. Hertz Corp.*¹⁸⁷ raised the question of what law governs vicarious or direct liability of a car rental company whose customer negligently kills or injures someone in another state.¹⁸⁸ The case began with Matthew Creamer renting a car in Florida from Hertz. Creamer fell asleep while driving through Texas, severely injuring Texas resident Bobby Cates, who later died. Cates filed a federal diversity claim against both Creamer and Hertz in a federal court in Wichita Falls. The trial court held that Texas law governed all claims and granted summary judgment to Hertz, finding that Hertz was not vicariously liable under Texas law.¹⁸⁹ At the first trial, the jury found for defendant Creamer; however, the district court granted a second trial, which held Creamer seventy percent at fault.¹⁹⁰

The parties appealed several issues, including Hertz's dismissal.¹⁹¹ The Fifth Circuit upheld the jury verdict against Creamer but reversed Hertz's summary-judgment dismissal. The Fifth Circuit determined that Florida law governed Hertz's vicarious liability and, on remand, directed the district court to consider whether Florida's dangerous instrumentality doctrine applied to non-residents.¹⁹² Noting that this was a question of first impression under Florida law, the Fifth Circuit instructed the district court to conduct an "Erie educated guess" on Florida's likely position.¹⁹³ In 2008, the district court ruled that Florida's dangerous instrumentality law did apply to Cates's claim.¹⁹⁴

Hertz appealed again, and on August 11, 2009, the Fifth Circuit affirmed the district court's ruling on Texas law.¹⁹⁵ In particular, the Fifth Circuit held that the rental company's situs law could apply to accidents occurring outside the state where the rental occurred, even if the rental state's law were more favorable than the state whose resident was injured or killed.¹⁹⁶

*Union Pacific Railroad Co. v. Cezar*¹⁹⁷ is an example of the court boilerplating its decision to apply another state's law. The claim arose from a train-pickup collision in Louisiana and was filed in Texas against various defendants, including Burlington Northern Santa Fe, whose train was involved, and Union Pacific, which maintained the right of way. Because the evidence established Union Pacific's liability to the exclusion of

187. 347 F. App'x 2 (5th Cir. 2009) (per curiam).

188. Symeon Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 244-45 (2010).

189. *Cates*, 347 F. App'x at 3.

190. *Id.*

191. *Cates v. Creamer*, 431 F.3d 456, 462 (5th Cir. 2005).

192. *Id.* at 466.

193. *Id.* (discussed in James P. George & Anna K. Teller, *Conflict of Laws*, 59 SMU L. REV. 1039, 1067 (2006)).

194. *Cates v. Creamer*, No. 7:00-CV-0121-O ECF, 2008 WL 2620097, at *2 (N.D. Tex. June 27, 2008).

195. *Cates*, 347 F. App'x at 3.

196. *Id.* at 4-5.

197. 293 S.W.3d 800 (Tex. App.—Beaumont 2009, no pet.).

other defendants, the trial court submitted jury instructions only as to Union Pacific, and the jury returned a plaintiff's verdict.¹⁹⁸ On appeal, the Beaumont Court of Appeals raised the choice-of-law issue *sua sponte* and held that Louisiana law governed under Restatement § 145.¹⁹⁹ The court of appeals then noted that the parties had all argued under Louisiana law and that neither party argued application under Texas law.²⁰⁰

D. OTHER CHOICE-OF-LAW ISSUES

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

Similar to the due-process limitation on state long-arm statutes,²⁰¹ the United States Constitution imposes limits on a state's ability to choose the governing law in its courts. Unlike the limits on state long-arm statutes (which arise only under the due process clause), the choice-of-law limits arise under several doctrines, including 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.²⁰² Constitutional problems most often arise when a state court chooses to apply its own law in questionable circumstances. But, the inappropriate choice-of-forum law is not the only conceivable constitutional issue, and even when choosing foreign law, courts must apply choice-of-law rules with an eye toward constitutional limitations. Many Survey periods produce no examples of this, but one such example occurred during this period.

Patel v. Pacific Life Insurance Co. involved Dallas residents who invested in a tax shelter that turned out to be illegal, resulting in legal and auditing expenses.²⁰³ The plaintiffs sued Pacific Life, as the vendor, and the law firm Bryan Cave for its 1999 opinion favoring the plan. The plaintiffs brought statutory claims under Texas and California law and common-law claims not specifying a particular state's law. First addressing Pacific Life's various objections to the laws being applied, the federal district court held that Texas law governed the common-law claims based on the presumption that forum law governs unless a party pleads otherwise.²⁰⁴ There were no choice-of-law objections for the plaintiffs' claims under Texas statutory law, although the court dismissed one for inad-

198. *Id.* at 803-04.

199. *Id.* at 807.

200. *Id.*

201. *See supra* note 14.

202. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 & cmts.; *see also* Scoles & Hay, *supra* note 2, at 78-109; Weintraub, *supra* note 1, at 585-648; James P. George, *Choice of Law: A Guide for Texas Attorneys*, 25 TEX. TECH. L. REV. 833, 844-46 (1994).

203. No. 3:08-CV-0249-B, 2009 WL 1456526, *1 (N.D. Tex. May 22, 2009).

204. *Id.* at *7.

quate fraud allegations.²⁰⁵

The legislative jurisdiction issue arose as to the plaintiffs' California statutory claims. Pacific Life argued that it was not subject to California law for this Texas transaction, a sale in Texas by a Texas broker to Texas residents, notwithstanding Pacific Life's principal location in California. As noted above, legislative jurisdiction has two prongs—legislative intent and constitutional limitations on that intent.²⁰⁶ The parties' argument and the court's analysis were limited to California's legislative intent, which the court found extended to transactions outside California, including this one, based on cases from California and a federal court in Florida construing California's legislative intent for the statute in question.²⁰⁷ In the irony that often accompanies such holdings, the court then dismissed the plaintiffs' California claim due to inadequate pleadings.²⁰⁸

2. Notice and Proof of Foreign Law

Litigants seeking the application of another state's or nation's law must comply with the forum's rules for pleading and proving foreign law. In both Texas and federal courts, judicial notice is sufficient for the application of sister states' laws.²⁰⁹ On the other hand, parties must adequately plead and prove foreign-country law.²¹⁰ One significant Survey-period opinion underscored the need for timely notice of a party's intent to rely on foreign law.

*Northrop Grumman Ship Systems, Inc. v. Ministry of Defense of the Republic of Venezuela*²¹¹ originated in a federal district court in Mississippi, but its instructiveness on Fifth Circuit practice makes it appropriate for Survey inclusion. Northrop sued the Republic in connection with a

205. *Id.*

206. *See supra* Part II.D.1.

207. *Patel*, 2009 WL 1456526, at *19.

208. *Id.*

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

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

211. 575 F.3d 491 (5th Cir. 2009).

contract dispute.²¹² During the litigation, one of the Republic's attorneys agreed to settle the case with the Republic, paying Northrop seventy million dollars.²¹³ The district court accepted the settlement and entered an order of dismissal in October 2005.²¹⁴ Five days after the dismissal, the Republic protested the settlement, contending the attorney had no authority to settle on its behalf, and it filed a motion to vacate the order of dismissal.²¹⁵ In April 2007, the Republic gave notice that it intended to rely on the law of Venezuela with respect to the scope of the attorney's authority.²¹⁶ The district court held that the notice of reliance on foreign law, provided eighteen months after the filing of the motion to vacate, was untimely.²¹⁷

In reversing, the Fifth Circuit first noted that, because the federal rules give a court discretion in determining reasonable notice, the decision can be reversed only for abuse of discretion, and the purpose is to "avoid unfair surprise."²¹⁸ While conceding eighteen months was an extended delay, the Fifth Circuit based its reversal on the absence of any proof of unfair surprise.²¹⁹ The Fifth Circuit noted the extenuating circumstances justifying the delay—the attorney who allegedly had no authority to enter into the settlement was the Republic's attorney, and he had to be replaced.²²⁰ Another turning point was the Fifth Circuit's finding Venezuelan law as crucial to a resolution of the case since the validity of the settlement turned on Venezuelan law.²²¹

3. Federal Choice-of-Law Rules

Although state law controls choice of law in most state and federal courts, federal law has choice-of-law rules, both statutory²²² and common-law, in matters such as admiralty cases.²²³ Although the Survey period produced a number of admiralty cases, only one had a noteworthy choice-of-law discussion. *Bourg v. BT Operating Co.*²²⁴ provides a concise example of the court's solution when parties fail to support their choice-of-law arguments. In non-maritime actions, a failure to prove the basis for which a state's law governs results in a default to forum law.²²⁵

212. *Id.* at 493.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 495-96; *see also* FED. R. CIV. P. 44.1 ("A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing.")

217. *Northrop Grumman Ship Sys.*, 575 F.3d at 496.

218. *Id.* at 496-97.

219. *Id.* at 497.

220. *Id.*

221. *Id.*

222. *See, e.g.*, 12 U.S.C. § 85 (2006) (providing for choice of law for rates of interest charged by federally regulated banking associations); 28 U.S.C. § 1346(b) (2006) (providing for choice of law in claims under the Federal Tort Claims Act).

223. *See* *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

224. No. H-08-0596, 2009 WL 960011 (S.D. Tex. Apr. 8, 2009).

225. *Id.* at *3-5.

Admiralty and maritime claims, however, differ in that default.

Bourg was a claim for injury while working on an oil-rig barge on Eugene Island, off the coast of Louisiana. Bourg sued in Houston federal court under the Outer Continental Shelf Lands Act,²²⁶ which provides that gaps in the Act should be filled by “the law of the adjacent state.”²²⁷ In turn, federal common law provides a four-factor test to identify the adjacent state: “(1) geographic proximity,” (2) federal agency opinions regarding the platform’s proximity to which state’s coast, “(3) prior court determinations, and (4) projected boundaries.”²²⁸ When the defendants moved for summary judgment, all parties agreed that state negligence law governed as a surrogate to federal law but disagreed as to which state. Two defendants failed to address choice of law and simply argued under Texas law in their summary judgment motions. Another defendant argued for summary judgment under both Texas and Louisiana law. Bourg argued against summary judgment under Louisiana law but offered no argument as to why it controlled. Using a map from the Department of the Interior, the court took on judicial notice that Eugene Island was “directly south of St. Mary and St. Martin Parishes” in Louisiana, thus pointing to Louisiana law.²²⁹

III. FOREIGN JUDGMENTS

Foreign judgments from other states and countries create Texas conflict-of-laws issues in two ways: (1) their local enforcement, and (2) their preclusive effect on local lawsuits. Texas recognizes two methods of enforcing foreign judgments: the common-law method using the foreign judgment as the basis for a local lawsuit,²³⁰ and, since 1981, the more direct procedure under the two uniform judgments acts.²³¹ Section

226. 43 U.S.C. §§ 1331-1356a (2006).

227. *Bourg*, 2009 WL 960011, at *3 (citing *Bartholomew v. CNG Producing Co.*, 862 F.2d 555, 557 (5th Cir. 1989); 43 U.S.C. § 1333(a)(2)(A) (1988)).

228. *Id.* at *4 (citing *Snyder Oil Corp. v. Samedan Oil Corp.*, 208 F.3d 521, 524 (5th Cir. 2000)).

229. *Id.*

230. The underlying mandate for the common-law enforcement is the full faith and credit clause of the United States Constitution, U.S. CONST. art. IV, § 1, and its statutory counterpart, 28 U.S.C. § 1738 (2006). The Uniform Enforcement of Foreign Judgments Act specifically reserves the common-law method as an alternative. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon 2008).

231. Sister-state judgments are enforced under the Uniform Enforcement of Foreign Judgments Act (UEFJA). TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-.008 (Vernon 2008). The Act requires (1) the judgment creditor to file a copy of the judgment authenticated under federal or Texas law, and (2) notice to be sent to the judgment debtor from the clerk or the judgment creditor. *Id.* §§ 35.003-.005. The judgment debtor may (1) move to stay enforcement if grounds exist under the law of Texas or the rendering state, and (2) challenge enforcement along traditional full faith and credit grounds such as the rendering state’s lack of personal or subject matter jurisdiction. *Id.* §§ 35.006, 35.003.

Foreign-country judgments for money are enforced under the Uniform Foreign Country Money-Judgments Recognition Act (UFCMJRA). TEX. CIV. PRAC. & REM. CODE ANN. § 36.001-.008 (Vernon 2008). Like the UEFJA, the UFCMJRA requires the judgment creditor to file a copy of the foreign-country judgment that has been authenticated under federal or Texas law, with notice to the debtor provided either by the clerk or the creditor.

36.007 of the Texas Civil Practice and Remedies Code expressly reserves the right of enforcement of non-money judgments under traditional, non-statutory standards,²³² along with similar acts for arbitration awards,²³³ child custody,²³⁴ and child support.²³⁵ Federal judgments may be enforced in any other federal district as local judgments,²³⁶ but may also be enforced as sister-state judgments in Texas state courts.

The Survey period's one notable Uniform Enforcement of Foreign Judgments Act (UEFJA) case is *Jonsson v. Rand Racing, L.L.C.*, where the plaintiff sought enforcement of a default judgment from the California Labor Commission.²³⁷ Niclas Jonsson filed his claim in the California agency for unpaid wages for his work as a race car driver. When the defendant Rand failed to respond, the California agency issued a default judgment, which Jonsson then sought to enforce in Collin County, Texas. The state district court rejected UEFJA enforcement, finding that Rand had not submitted itself to California jurisdiction.²³⁸ The Dallas Court of Appeals upheld the denial, emphasizing that Rand's telephone message to the California agency that disputed the claim did not constitute a general appearance.²³⁹

*Ponder Research Group, LLP v. Aquatic Navigation, Inc.*²⁴⁰ is a would-be UEFJA case that provides an interesting twist on foreign judgment enforcement—start your enforcement action in the original forum. Texas-based Ponder sued Florida-based Aquatic over a failed business relationship, bringing claims in contract and fraud in federal court in Fort Worth.²⁴¹ The court granted Aquatic's motion to dismiss most of Ponder's claims for lack of personal jurisdiction but retained some fraud claims over Aquatic's owner, defendant Brian Coffin.²⁴² In reaching this

Id. §§ 36.0041-0043. The judgment debtor has thirty days to challenge enforcement, or sixty days if “domiciled in a foreign country,” with a twenty-day extension available for good cause. *Id.* at § 36.0044. Unlike the UEFJA, the UFCMJRA explicitly states ten grounds for non-recognition—three mandatory and seven discretionary. *Id.* § 36.005. Briefly stated, the mandatory grounds are (1) lack of an impartial tribunal, (2) lack of personal jurisdiction, and (3) lack of subject matter jurisdiction. *Id.* § 36.005(a). The discretionary grounds for non-recognition are that the foreign action (1) involved inadequate notice, (2) “was obtained by fraud,” (3) violates Texas public policy, (4) is contrary to another final judgment, (5) is contrary to the parties' agreement (e.g., a contrary forum selection clause), (6) was in an inconvenient forum, and (7) is not from a country granting reciprocal enforcement rights. *Id.* § 36.005(b). The UFCMJRA also provides for stays. *Id.* § 36.007.

232. TEX. CIV. PRAC. & REM. CODE ANN. § 36.008 (Vernon 2008); see generally *Hilton v. Guyot*, 159 U.S. 113 (1895) (comity as discretionary grounds for recognizing and enforcing foreign-country judgments).

233. See Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006); Texas International Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 172.082(f) (Vernon 2005).

234. TEX. FAM. CODE ANN. § 152.303 (Vernon 2008).

235. TEX. FAM. CODE ANN. § 159.601.

236. See 28 U.S.C. § 1963 (2006).

237. 270 S.W.3d 320, 322 (Tex. App.—Dallas 2008, no pet.).

238. *Id.* at 322-23.

239. *Id.* at 325.

240. No. 4:09-CV-322-Y, 2009 WL 2868456 (N.D. Tex. Sept. 4, 2009).

241. *Id.* at *1-3.

242. *Id.* at *3-11.

conclusion, the court also dismissed Ponder's action for declaratory judgment in which it sought a declaration that any judgment resulting from the Texas case would be enforceable against defendants in Florida.²⁴³ The court held that it could "not make such an abstract pronouncement."²⁴⁴

The Survey period included two foreign-country judgment cases, reaching opposite but correct results on jurisdiction. In *Naves v. National Western Life Insurance Co.*, the plaintiff obtained a default judgment in Brazil against National Western for the death of one of its insured, who died in Brazil two months after acquiring the policy.²⁴⁵ Beneficiary Naves then sought enforcement in Texas under the Uniform Foreign Country Money-Judgments Recognition Act (UFCMJRA). The trial court sustained the defendant's objection to Brazilian jurisdiction, and the Austin Court of Appeals affirmed.²⁴⁶ It is notable that the court of appeals did not hold that National Western was not amenable to Brazilian jurisdiction; after all, it had sold a life insurance policy to a resident. Instead, the court of appeals held that the plaintiff had not obtained proper service under Brazilian law.²⁴⁷ This is a good lesson for lawyers representing judgment debtors—whether the original forum is a sister state or a foreign country, do not overlook jurisdictional defenses under the judgment forum's law.

The other UFCMJRA case, *Beluga Chartering B.V. v. Timber S.A.*, reached the opposite conclusion, that is, the court denied the defendant's jurisdictional objection.²⁴⁸ In *Beluga*, however, the defendant was objecting to Texas jurisdiction for the enforcement of a Uruguayan judgment. The Houston Fourteenth Court of Appeals affirmed the trial court's holding that the UFCMJRA "does not require personal jurisdiction over a judgment debtor in Texas as a prerequisite for enforcing a foreign country judgment in Texas."²⁴⁹

The Survey period also included four preclusion cases. *In re Chenault* involved a wrongful death suit filed in Texas, contrary to the orders of a Michigan probate court.²⁵⁰ Richard Chenault died in a plane crash in Lake Michigan. The Michigan probate court appointed his wife Janet as his personal representative and appointed Richard's ex-wife Cheryl as the conservator of Richard's minor daughter Kayla. When Cheryl ignored the Michigan court's instructions and filed a wrongful death action in Bexar County, the Michigan court removed her as Kayla's conservator

243. *Id.* at *12.

244. *Id.*

245. No. 03-08-00525-CV, 2009 WL 2900755, *1 (Tex. App.—Austin Sept. 10, 2009, no pet.).

246. *Id.* at *1.

247. *Id.* at *2-5.

248. 294 S.W.3d 300, 302, 305 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

249. *Id.* at 305 (citing *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476, 479-80 (Tex. App.—Houston [14th Dist.] 2008, pet. denied)).

250. No. 04-09-00303-CV, 2009 WL 2525442, *1 (Tex. App.—San Antonio Aug. 19, 2009, orig. proceeding [mand. denied]).

and held her in contempt.²⁵¹ Cheryl nonetheless pursued the Texas action, and Janet intervened, seeking dismissal. The trial court rejected Janet's objection to Cheryl's prosecution of Richard's wrongful death suit, but the San Antonio Court of Appeals reversed on the grounds of full faith and credit for the Michigan's court's holding, which Cheryl had not appealed there.²⁵²

In other preclusion cases, Texas federal and state courts, respectively, granted full faith and credit to a Wisconsin judgment that barred a bankruptcy discharge in Texas²⁵³ and an Illinois divorce decree to carry out a marital property division.²⁵⁴ In a separate category applying the doctrine of preclusion, not full faith and credit, a Texas federal court granted summary judgment to defendant employers in regard to the plaintiff's unpaid overtime claim that had been decided by the Texas Workforce Commission.²⁵⁵

IV. CONCLUSION

As pointed out in the introduction to this Article, Texas litigation offers valuable insight into American and international conflict-of-laws issues because of its size, its commerce, and its location. The result is a range of cases coming to Texas courts that illustrate and sometimes contradict national trends. In spite of Texas's value as a conflicts laboratory, conclusions are difficult to reach when studying any one year or survey period. One reason is the anecdotal nature of the case sampling that occurs each year. A second reason is the nature of these annual Survey articles, assessing the more noteworthy cases and not necessarily quantifying the significant number of conflict-of-laws, personal jurisdiction, choice-of-law, and foreign judgments cases that occur in Texas every year. That quantification requires more research and analysis than this Survey endeavor permits. Nonetheless, some conclusions are possible if readers bear in mind that these conclusions are based on the authors' somewhat anecdotal experience in compiling this information during this Survey period and in past years.

One issue that the authors have examined is the growth or decline in contractually based determinations of jurisdiction, venue, and choice of law. That is, has the use of forum clauses and choice-of-law clauses had an effect on the need to litigate these issues? Two effects are conceivable:

251. *Id.* at *1-2.

252. *Id.* at *3-5.

253. *Schnolis v. Kosobud (In re Kosobud)*, No. 08-36581, 2009 WL 2524598, at *1 (Bankr. S.D. Tex. Aug. 13, 2009).

254. *Sill v. White*, No. 04-08-00324-CV, 2009 WL 1017708, at *1 (Tex. App.—San Antonio Apr. 15, 2009, no pet.).

255. *Thakkar v. Balasuriya*, No. H-09-0841, 2009 WL 2996727, at *1 (S.D. Tex. Sept. 9, 2009). The court had earlier denied summary judgment on the grounds that state agency decisions, unreviewed by state courts, are not entitled to full faith and credit. *Id.* at *3. On the defendants' motion to reconsider, the court vacated its earlier order and held that the Texas Workforce Commission ruling was entitled to res judicata and collateral estoppel under the common law. *Id.* at *4-8.

an increase in litigation as these issues become sophisticated, or a decrease if successful drafting made these issues routine. The results are unclear. This 2009 Survey period included a total of ten forum clause cases, four successfully designating Texas,²⁵⁶ and mixed results for six forum clauses pointing to other states or countries.²⁵⁷ In contrast, the three Survey periods from 2002 through 2004 produced a total of ten cases, or an average of about three a year.²⁵⁸ The results for choice-of-law clauses do not show an increase. This 2009 Survey period produced three cases resting on choice-of-law clauses, compared to three cases in 2002,²⁵⁹ two cases in 2003,²⁶⁰ and six cases in 2004.²⁶¹ This comparison is drawn from too small a sample to reach any conclusions and is perhaps more indicative of the random number of cases occurring during each Survey period.

A second assessment is judicial skill in applying the most significant relationship test and related rules from the Restatement. In 2004, one of the authors of this Article published a twenty-five year study of 119 Texas state and federal court decisions, examining the tendency to over-emphasize governmental interests.²⁶² The 2004 article concluded that in twenty-one percent of the decisions, Texas state and federal courts mistakenly applied a California-type governmental interest analysis instead of the correct balancing test under the Restatement.²⁶³ In the 2009 Survey period and recent Survey periods, none of the choice-of-law decisions makes this error.

A third assessment is Texas courts' alignment with national doctrines. That is not to say that alignment is necessarily correct, but merely to note the coincidence of Texas law with national trends. For choice of law, Texas follows the nation's majority approach, the most significant relationship test from the Restatement.²⁶⁴ As noted in the prior paragraph, Texas courts are applying it accurately. The issues of personal jurisdiction and interstate judgments are governed by the U.S. Constitution, theoretically allowing for little deviation.²⁶⁵ There is no sign of deviation for

256. See *supra* notes 5-13 and accompanying text.

257. See *supra* notes 97-109 and accompanying text.

258. See James P. George & Anna K. Teller, *Conflict of Laws*, 56 SMU L. REV. 1283, 1285-87, 1308-09 (three cases) [hereinafter 2002 *Conflicts*]; James P. George & Anna K. Teller, *Conflict of Laws*, 57 SMU L. REV. 719, 721-22, 737-38 (four cases) [hereinafter 2003 *Conflicts*]; James P. George & Anna K. Teller, *Conflict of Laws*, 58 SMU L. REV. 679, 681, 696 (three cases) [hereinafter 2004 *Conflicts*].

259. See 2002 *Conflicts*, *supra* note 258, at 1320-24.

260. See 2003 *Conflicts*, *supra* note 258, at 745-46.

261. See 2004 *Conflicts*, *supra* note 258, at 701-03.

262. James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 REV. LITIG. 489, 491-92, 531 (2004).

263. *Id.* at 492-93.

264. As of 2009, nineteen states use the Restatement for choice of law in both torts and contracts cases. See Symeonides, *supra* note 188, at 5-6. A total of twenty-eight states use the Restatement for torts or contracts or both. *Id.*

265. See generally *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945) (due process governs personal jurisdiction); see also U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2006) (full faith and credit governs interstate judgment enforcement).

judgments, although the vast case law surrounding personal jurisdiction does permit variances among the states. On issues such as Internet-based jurisdiction, Texas follows the national trend of using the sliding-scale doctrine of passive-to-active websites.²⁶⁶ The only aberrational sign in recent Texas caselaw is the *Moki Mac* decision in which the Texas Supreme Court seemed to violate the United States Supreme Court's caution about talismanic or bright-line approaches to the minimum contacts test.²⁶⁷ To its credit, the Dallas Court of Appeals appeared to take exception to the supreme court's ruling on remand.²⁶⁸

Apart from these anecdotal observations, several summaries can be made about this Survey period. Texas courts enforced Texas forum clauses in four cases in which business agreements led to tort litigation in Texas;²⁶⁹ issued differing opinions in two cases considering whether a nonresident's singular contract to be performed in Texas could establish jurisdiction;²⁷⁰ upheld general jurisdiction in three cases;²⁷¹ found stream-of-commerce jurisdiction in two patent cases;²⁷² reached opposite jurisdictional results in two multi-district litigation cases, the difference being a nationwide long-arm statute;²⁷³ considered seventeen commercial cases with long-arm issues but only two tort cases, both of which denied jurisdiction;²⁷⁴ considered a total of five Internet cases, four rejecting jurisdiction;²⁷⁵ considered five parallel litigation actions, all five deferring to first-filed actions in other states;²⁷⁶ provided Restatement choice-of-law analyses in two contracts cases, both involving insurance coverage,²⁷⁷ in two commercial tort cases,²⁷⁸ and in three non-commercial tort cases;²⁷⁹ and issued routine judgments from both sister states and foreign countries.²⁸⁰

266. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 155-57 (4th ed. 2005).

267. See *supra* notes 43-49 and accompanying text (discussing *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569 (Tex. 2007)). See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485-86 (1985) ("We share the Court of Appeals' broader concerns and therefore reject any talismanic jurisdictional formulas; 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" (quoting *Kulko v. Cal. Super. Ct.*, 436 U.S. 84, 92 (1978))).

268. See *Moki Mac River Expeditions v. Drugg*, 270 S.W.3d 799,801-04 (Tex. App.—Dallas 2008, no pet.).

269. See *supra* notes 5-13 and accompanying text.

270. See *supra* notes 16-26 and accompanying text.

271. See *supra* notes 30-31 & 80-84 and accompanying text.

272. See *supra* note 32 and accompanying text.

273. See *supra* notes 34-38 and accompanying text.

274. See *supra* notes 43-54 and accompanying text.

275. See *supra* notes 58-84 and accompanying text. Of the four Internet cases rejecting jurisdiction, three were defamation claims. See *supra* notes 58-76 and accompanying text.

276. See *supra* notes 111-30 and accompanying text.

277. See *supra* notes 166-79 and accompanying text. The 2008 Survey period included eight contract choice of law cases. See Stephanie K. Marshall, Wm. Frank Carroll, & James P. George, *Conflict of Laws*, 62 SMU L. REV. 1021, 1039-43 (2009).

278. See *supra* notes 180-86 and accompanying text.

279. See *supra* notes 187-200 and accompanying text.

280. See *supra* notes 237-55 and accompanying text.

