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January 2009

## Conflict of Laws

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### Recommended Citation

Stephanie K. Marshall et al., *Conflict of Laws*, 62 SMU L. REV. 1021 (2009)  
<https://scholar.smu.edu/smulr/vol62/iss3/10>

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# CONFLICT OF LAWS

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STATES' and nations' laws collide when foreign factors appear in a lawsuit. Nonresident litigants, incidents outside the forum, parallel lawsuits, and judgments from other jurisdictions can create problems with personal jurisdiction, choice of law, and the recognition of foreign judgments. This article reviews Texas conflicts cases from Texas state and federal courts during the Survey period from October 1, 2007, through September 30, 2008. 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.<sup>1</sup>

Although no data are readily available to confirm this, Texas is no doubt a primary state in the production of conflict-of-laws precedents. This results not only from its size and population, but also from its placement, bordering four states, a civil-law nation, and international shipping. Only California shares these factors, with the partial exception of the states bordering Quebec. Furthermore, 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 of notice are purely matters of forum law, this article focuses primarily on the issues relating to amenability.

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

## A. CONSENT AND WAIVER

Contracting parties may agree to a forum selection clause designating either the optional or exclusive site for litigation or arbitration. When a contracting party sues in the designated forum, the clause is said to be a prorogation clause, that is, one supporting the forum's jurisdiction over the defendant. When a contracting party sues in a non-selected forum in violation of the contract, the clause is said to be a derogation clause, that is, one undermining the forum's jurisdiction.<sup>2</sup> The Survey period produced one noteworthy case involving a prorogating forum clause—*BBC Chartering & Logistic GmbH & Co. K.G. v. Siemens Wind Power A/S*.<sup>3</sup> Because the case also involves a forum non conveniens analysis, it is discussed in that section.<sup>4</sup> In addition, two derogating-clause cases are discussed in the Declining Jurisdiction section below.<sup>5</sup>

## B. TEXAS LONG-ARM AND MINIMUM CONTACTS

## 1. Commercial Cases

*First Oil, PLC v. ATP Oil & Gas Corp.* was an action by a Texas parent corporation and its English subsidiary against a Scottish parent company and its English subsidiary over a failed joint venture for North Sea drilling.<sup>6</sup> The opposing English subsidiaries first litigated in England without the parent entities, based in part on choice of forum and choice of law clauses designating England. When that suit was dismissed, Texas parent ATP sued in Houston and as a non-party to the joint venture, it was apparently able to circumvent the choice of forum clause.<sup>7</sup> First Oil objected to Texas jurisdiction and ATP responded that the single-business enterprise rule linked the parent corporation to its subsidiaries' actions in Texas. The trial court upheld jurisdiction but the court of appeals reversed, rejecting the single-business-enterprise doctrine's application<sup>8</sup> and finding neither specific nor general jurisdiction.<sup>9</sup>

The single-business-enterprise issue arose again in *Davaco, Inc. v. AZ3, Inc.*, where a Dallas federal court dismissed a Canadian corporate defendant for lack of personal jurisdiction.<sup>10</sup> In doing so, the judge rejected the plaintiff's argument that the Canadian corporation was subject to Texas jurisdiction because of its alter ego relationship with a subsidiary which apparently had contacts with Texas. The judge did so based on a choice-of-law rule that corporate alter ego is governed by the law of the

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2. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 466-69 (3d ed. 2000); James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 912-41 (1999).

3. 546 F. Supp. 2d 437 (S.D. Tex. 2008).

4. See *infra* notes 66-67 and accompanying text.

5. See *infra* notes 98-105 and accompanying text.

6. 264 S.W.3d 767, 772 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

7. *Id.*

8. *Id.* at 784 (citing *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 175 (Tex. 2007)).

9. See *id.* at 784-86.

10. No. 3:07-CV-803, 2008 WL 2243382, at \*2 (N.D. Tex. May 30, 2008) (mem.).

state of incorporation, which in this case was Quebec for both the dismissed parent and the subsidiary.<sup>11</sup>

Parties from the United Arab Emirates figured into two other jurisdictional cases where Texas federal courts (1) found jurisdiction over some but not all Arkansas defendants for the sale, partly in Texas, of a genetically defective Arabian horse purchased by a buyer from the United Arab Emirates,<sup>12</sup> and (2) denied plaintiffs' second motion for service by mail (after the first mailing failed) on foreign defendants for alleged torture occurring in the United Arab Emirates.<sup>13</sup>

## 2. *Non-Commercial Tort Cases*

*Olympia Capital Associates, L.P. v. Jackson* was an action brought by Texas investors against defendants operating an offshore hedge fund.<sup>14</sup> In a textbook analysis of Texas law and due process, the court reversed the trial court's finding of specific and general jurisdiction over one defendant based in New York and affirmed the finding of no specific or general jurisdiction over the Caribbean defendant.<sup>15</sup>

## 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.<sup>16</sup> The test breaks down internet use into a spectrum of three areas. One end of the spectrum finds a defendant clearly doing business in the forum based on contracts entered with forum residents; the spectrum's other end finds passive websites not involving defendant's intentional contact with the forum do not lead to jurisdiction.<sup>17</sup> The spectrum's difficult middle involves the forum resident's exchange of information with defendant's host computer, with jurisdiction based on the level of interactivity and the commercial nature of the information exchange. Nine cases during the Survey period considered arguments where the internet was a basis for specific personal jurisdiction.

In *First Fitness International, Inc. v. Thomas*, the court found the intentional infliction of tortious actions sufficient to establish specific personal jurisdiction.<sup>18</sup> The case arose from defendants Sapp and Thomas making

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11. *Id.*

12. See *Al-Qasimi v. Pallone*, No. H-08-1523, 2008 WL 4178776 (S.D. Tex. Sept. 5, 2008) (mem.).

13. See *Nabulsi v. Nahyan*, No. H-06-2683, 2008 WL 1924235 (S.D. Tex. Apr. 29, 2008) (mem.).

14. 247 S.W.3d 399, 408 (Tex. App.—Dallas 2008, no pet.).

15. *Id.* at 422.

16. See generally *Zippo Mfg. Co. v. ZippoDotCom, Inc.*, 952 F. Supp. 1119 (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 *Townsend v. Univ. Hosp.*, 83 S.W.3d 913 (Tex. App.—Texarkana 2002, pet. denied); *Experimental Aircraft Ass'n, Inc. v. Doctor*, 76 S.W.3d 496 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

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

18. 533 F. Supp. 2d 651, 657 (N.D. Tex. 2008).

unauthorized use of domain names to resell nutritional and dietary foods and supplements under the assumed name “1st Fitness” and others.<sup>19</sup> Sapp’s and Thomas’s website was registered to a non-existent address in Florida and used numerous federal trademarks registered to First Fitness International (FFI). Prior to the Florida address, the website reported its location as Dallas, Texas.<sup>20</sup> Both defendants were also previously authorized distributors of FFI and governed by Texas law as stated in their terms of distribution agreements.<sup>21</sup> After terminating their distribution agreements with FFI, defendants began to market FFI products on their own without permission, which led to this suit.<sup>22</sup>

In denying Sapp’s and Thomas’s challenge to Texas jurisdiction, the court found that Sapp and Thomas “intentionally infringed FFI’s trademarks and registered [www.1stfitness.net](http://www.1stfitness.net) in bad faith in an attempt to divert customers from FFI and trade off FFI’s goodwill” knowing those actions would harm First Fitness in Texas.<sup>23</sup> The court expressly noted that the record would not likely support personal jurisdiction based on the defendants’ interactive website.<sup>24</sup> Instead the court found specific personal jurisdiction based on defendants’ intentional actions directed toward Texas.<sup>25</sup>

The court in *Fowler v. Litman* found jurisdiction lacking when Fowler, a Texas resident, hired Litman, a Virginia attorney, to assist with a copyright registration.<sup>26</sup> Fowler found Litman’s information on the internet and called and left a message for Litman.<sup>27</sup> Litman then returned Fowler’s phone call determining he could help.<sup>28</sup> Litman instructed Fowler to complete a form available on the website and also pay a fee through the website.<sup>29</sup> Fowler complied, and Litman mailed him their agreement.<sup>30</sup> Fowler subsequently sued Bell Helicopter for using the software he had copyrighted with Litman’s help. The suit was dismissed and the attorneys representing Fowler sued for their attorneys’ fees.<sup>31</sup> Fowler in turn filed a third-party claim against Litman for negligence in obtaining the copyright application, and Litman filed a special appearance.<sup>32</sup>

While Fowler’s conduct was interactive by completing information on Litman’s website and paying for services on Litman’s website, the court

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19. *Id.* at 654.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 657.

24. *Id.* at 657 n.4.

25. *Id.*

26. No. 05-07-01056-CV, 2008 WL 2815086, at \*1 (Tex. App.—Dallas July 23, 2008, pet. denied) (mem. op.).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

found it lacked jurisdiction over Litman.<sup>33</sup> Litman's website did not allow anyone from his office to respond directly over the internet to any potential clients and required direct contact to establish an attorney-client relationship.<sup>34</sup> The court explained that Fowler's own conduct in Texas cannot supply a basis for exercising specific jurisdiction over Litman.<sup>35</sup>

*GJP, Inc. v. Ghosh* is one of the Survey period's more thoroughly-analyzed conflicts cases, both on personal jurisdiction and choice of law.<sup>36</sup> Avijit Ghosh was a recent Texas immigrant from England who bought a red 1967 Jaguar E-type convertible through an online advertisement.<sup>37</sup> Seller GJP was a South Dakota company primarily engaged in the plastering business, but which also owned a dozen Jaguars restored by GJP's owner.<sup>38</sup> Ghosh made the contact from his new home in Houston, but when the car arrived it did not meet his expectations.<sup>39</sup> Ghosh's suit in a state district court in Houston alleged deceptive trade practices and the South Dakota seller objected both to Texas jurisdiction and the application of Texas law.<sup>40</sup> The trial court rejected both arguments, and the jury found actual and exemplary damages totaling \$34,500 and attorneys' fees of \$112,500.<sup>41</sup>

The court of appeals analyzed a host of notable cases—both Texas and national—invoking various jurisdictional standards, but relied primarily on negative inferences from *Michiana Easy Livin' Country, Inc. v. Holten*.<sup>42</sup> In *Michiana*, the Texas Supreme Court reversed the lower courts' findings of personal jurisdiction based only on telephone conversations and held that a nonresident's electronic contacts with Texas would not support jurisdiction unless they were purposeful as opposed to fortuitous.<sup>43</sup> The GJP panel found that defendants' acts of advertising on the internet, coupled with a defendant's personal visit to Texas to complete the deal, were sufficient for purposeful availment.<sup>44</sup>

In other internet jurisdiction cases, Texas courts found jurisdiction lacking in a defamation claim against a California corporation hosting an interactive forum website with postings about oil and gas companies in Texas;<sup>45</sup> a defamation claim against an English company that publishes research on competing products on its website;<sup>46</sup> a trademark infringe-

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33. *Id.* at \*3.

34. *Id.*

35. *Id.* at \*4.

36. 251 S.W.3d 854 (Tex. App.—Austin 2008, no pet.).

37. *Id.* at 862-63.

38. *Id.* at 862.

39. *Id.* at 865.

40. *Id.* at 861-62.

41. *Id.*

42. 168 S.W.3d 777 (Tex. 2005).

43. *Id.* at 785.

44. *GJP*, 251 S.W.3d at 872-83.

45. See *Triple Diamond Energy Corp. v. Venture Research Inst., Inc.*, No. 3:08-CV-0050-M ECF, 2008 WL 2620352 (N.D. Tex. July 3, 2008) (mem.).

46. See *Dymatize Enter., Inc. v. Reflex Nutrition Ltd.*, No. 3:07-CV-907-M, 2008 WL 161021 (N.D. Tex. Jan. 17, 2008) (mem.).

ment, fraud, and cybersquatting claim against a New York company whose website allowed customers to complete information forms and view their medical records online;<sup>47</sup> a Deceptive Trade Practices Act claim against a Florida automobile dealer who sold a vehicle on eBay;<sup>48</sup> a fraud, negligence, and breach of fiduciary duty claim by shareholders seeking to enforce an environmental remediation indemnity provision applicable to property located in Texas;<sup>49</sup> and a dispute with an Illinois defendant concerning misappropriation of computer-based services.<sup>50</sup>

#### 4. Tolling Limitations and Extending Amenability

Perhaps the most newsworthy case of the Survey period goes only indirectly to personal jurisdiction, dealing instead with the tolling period that extends a non-resident's susceptibility to suit in Texas. *Kerlin v. Saucedo* involved mineral interests on Padre Island, with claims from 275 heirs of the original grantee, Juan Jose Balli.<sup>51</sup> The defendants were Gilbert Kerlin and others who engaged in a series of transactions dating back to 1937.<sup>52</sup> Plaintiffs alleged fraud and breach of fiduciary duty.<sup>53</sup> Two key arguments were the claimants' (current plaintiffs and their predecessors) failure to sue over the past forty years was excused under common law fraudulent concealment and their failure to sue was additionally excused under the Texas tolling statute that tolls the limitations period for non-resident defendants under certain circumstances.<sup>54</sup> The trial court held that Kerlin and the other defendants were all non-residents who satisfied the tolling statute's terms.<sup>55</sup> The jury found for plaintiffs on unpaid royalties and related damages, but the trial court denied plaintiffs' request for an equitable accounting.<sup>56</sup> The court of appeals upheld the jury verdict and reversed the trial court's denial of equitable accounting.<sup>57</sup>

The Texas Supreme Court reversed, holding that fraudulent concealment did not apply because plaintiffs could have discovered the existence of their claims through reasonable diligence.<sup>58</sup> The jurisdictional reference came in the supreme court's rejection of statutory tolling; the court held that statutory tolling reflected a rule that predated long-arm statutes,

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47. See *Healix Infusion Therapy, Inc. v. Helix Health LLC*, No. H-08-0337, 2008 WL 1883546 (S.D. Tex. Apr. 25, 2008) (mem.).

48. See *Choice Auto Brokers, Inc. v. Dawson*, 274 S.W.3d 172 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

49. See *Carpenter v. Exelon Corp.*, No. 14-07-00149-CV, 2007 WL 3071998 (Tex. App.—Houston [14th Dist.] Oct. 23, 2007, no pet.) (mem. op.) (holding that the website was operated by a holding company with no employees or business operations of any type and only passively provided information).

50. See *Exchequer Fin. Group, Inc. v. Stratum Dev., Inc.*, 239 S.W.3d 899 (Tex. App.—Dallas 2007, no pet.).

51. 263 S.W.3d 920, 921-22 (Tex. 2008).

52. *Id.* at 922-24.

53. *Id.* at 924.

54. *Id.* at 922.

55. *Id.* at 924.

56. *Id.*

57. *Id.*

58. *Id.* at 925-26.



and that where a nonresident defendant was subject to a Texas long-arm service, as Kerlin was here, the tolling statute did not apply.<sup>59</sup>

### 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 in which convenience dictates another forum, and cases parallel to other litigation.

#### 1. *Foreign Sovereign Immunities Act*

The federal Foreign Sovereign Immunities Act<sup>60</sup> governs every initial aspect of suing foreign sovereigns, both in state and federal courts. This includes personal jurisdiction, subject matter jurisdiction, venue, and the law to be applied. *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia* involved a breach of contract regarding the repair and maintenance of defense aircraft.<sup>61</sup> The defendant Kingdom objected to jurisdiction on grounds of sovereign immunity and moved for forum non conveniens dismissal. The district court found that Kingdom had engaged in a commercial activity and thus waived immunity in this case.<sup>62</sup> It further denied the forum non conveniens dismissal, finding that Texas was a sufficiently convenient forum and the likelihood that Saudi law would govern was not enough to compel dismissal.<sup>63</sup>

#### 2. *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 many states for intra-jurisdictional transfers that do not require dismissal.<sup>64</sup> Where interstate or international case movement is involved, forum non conveniens is truly jurisdictional because it involves the forum declining otherwise-valid jurisdiction, as well as dismissing the local case for re-filing in a distinct forum.

Because intra-federal transfers under 28 U.S.C. §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

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59. *Id.* at 926-28.

60. 28 U.S.C. § 1330 (2000); *id.* at §§ 1602-11 (2000 & Supp. 2008). See *Elixir Shipping Sav., Ltd. v. Peruachaan Pertamina Minyak Dan Gas Bumi Negara*, 267 F. Supp. 2d 659, 662-67 (S.D. Tex. 2003).

61. No. SA-04-CA-1008-WRF, 2008 WL 2946059, at \*1-3 (W.D. Tex., July 25, 2008).

62. *Id.* at \*6-14.

63. *Id.* at \*15-24.

64. 28 U.S.C. § 1404 (2000) is the federal statutory provision for inconvenient forum objections seeking transfer to another federal court. Texas law provides for in-state venue transfers based on convenience under TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (Vernon 2002).

law, available in state and federal courts in Texas under the two-part test. The test requires movant to show the availability of an adequate alternative forum and balancing of private and public interests favors transfer.<sup>65</sup>

Although the Survey period includes two Texas Supreme Court cases, the lead-off case is from the Southern District of Texas where the court supplied a keen analysis of forum selection clauses, forum non conveniens, and parallel litigation. *BBC Chartering & Logistic GmbH & Co. K.G. v. Siemens Wind Power A/S* was a declaratory judgment action for non-or-limited liability under COGSA, the Carriage of Goods by Sea Act.<sup>66</sup> BBC, a German-based corporation, sued Danish corporation SWP to avoid liability for cargo damaged while en route from Denmark to Corpus Christi. SWP filed a parallel suit against BBC in Hamburg, Germany, pursuant to the jurisdictional clause in the parties' contract, and also filed a motion to dismiss for forum non conveniens in the Texas suit. BBC argued that the court should deny SWP's motion because the jurisdictional clause, which entitled BBC to file suit in any jurisdiction of its choosing, is analogous to a forum selection clause, thereby precluding SWP from arguing that the forum is inconvenient.<sup>67</sup>

The jurisdictional clause provided that:

All claims against Carrier arising from or in connection with this Bill of Lading or the underlying contract of carriage shall be brought in the court of relevant jurisdiction, in Hamburg, Germany with German law to apply. Nothing in this clause shall be construed to prevent the Carrier from filing suit in any jurisdiction for claims arising under or in connections with this Bill of Lading or the underlying contract of carriage.<sup>68</sup>

The court held the first sentence was mandatory, binding parties suing BBC to one exclusive forum in Hamburg but the second sentence was permissive, authorizing BBC to sue in Hamburg or any other forum (presumably one with jurisdiction).<sup>69</sup> The second sentence—the permissive forum clause—thus justified BBC's declaratory judgment suit in Houston.<sup>70</sup>

However, the permissive clause did not preclude SWP from arguing for a forum non conveniens dismissal. Because the second sentence did not actually designate a forum, it was not a forum selection clause.<sup>71</sup> The

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65. See generally *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 423-24 (5th Cir. 2001). For a list of the private factors, see *infra* note 74. 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 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).

66. 546 F. Supp. 2d 437, 440 (S.D. Tex. 2008).

67. *Id.* at 439-40.

68. *Id.* at 441.

69. *Id.* at 441-42.

70. *Id.*

71. *Id.* at 442.

court then turned to the traditional multi-step forum non conveniens analysis, first determining whether an available and adequate foreign forum existed.<sup>72</sup> Finding that Hamburg was an available and adequate forum, the court then analyzed the private and public interest factors.<sup>73</sup> The court found that a majority of factors—ease of access to proof, cost of obtaining witnesses to appear, the language barrier, the lack of a meaningful connection to Texas—strongly favored dismissal.<sup>74</sup>

*In re General Electric Co.* is an asbestosis claim filed by a Maine resident who had never been to Texas.<sup>75</sup> Plaintiff Richards worked his entire life as a mason in Maine and was diagnosed with mesothelioma in 2005.<sup>76</sup> He filed suit in a Texas district court in Dallas against General Electric and more than twenty other defendant companies, including three headquartered in Texas.<sup>77</sup> The court transferred the case to the multi-district litigation court in Houston, where seven defendants filed forum non conveniens objections.<sup>78</sup> Richards argued that if his case had to be re-filed in Maine, it would be removed to federal court and then transferred to the Multi-District Litigation Court No. 875 where it would languish, in Richards's estimation.<sup>79</sup> At the initial hearing, the trial judge asked if the defendants would agree not to remove the case if it were re-filed in Maine.<sup>80</sup> General Electric and some other defendants refused to agree to that term, and the trial judge denied the forum non conveniens dismissal.<sup>81</sup> Defendants sought mandamus relief from the Texas Supreme Court, which set aside the trial judge's ruling and held that the forum non-conveniens factors weighed "strongly, if not conclusively, in favor of Richards's action being heard in a forum outside Texas."<sup>82</sup>

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72. *Id.* at 443.

73. *Id.* at 445.

74. *Id.* at 445-50. The private factors include: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses; (3) possibility of view of premises, if view would be appropriate to the action; and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive. The public interest factors include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies resolved at home; (3) the interest in having a trial in a forum that is familiar with the law that must govern the action; (4) the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty.

75. 271 S.W.3d 681, 684 (Tex. 2008).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 684-85.

80. *Id.* at 684.

81. *Id.* at 685.

82. *Id.* at 686-94. A national conflicts survey for 2008 that discusses *General Electric*, comments that, "[t]he plaintiff stated that he was seriously ill with asbestosis and that if he had to litigate in Maine, he would not survive long enough to have his case tried. Indeed, the plaintiff died before the case was heard by the Texas Supreme Court, but this did not prevent the court from dismissing his arguments as 'speculative.'" See Symeon Symeonides, *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 AM. J. COMP. L. (forthcoming 2009).

*In re Pirelli Tire, L.L.C.* involved a vehicle rollover in Mexico allegedly caused by defective tires manufactured in Iowa by a Delaware corporation headquartered in Georgia.<sup>83</sup> A Mexican driver and passenger were delivering a load of seafood when the truck rolled over, killing the driver.<sup>84</sup> The truck had been purchased two years before in Arkansas and was used, maintained, and serviced in Mexico from the time of purchase.<sup>85</sup> The driver's wife and son, all Mexican citizens, sued in Cameron County, Texas, where the truck was located for eleven days pending the sale to the Mexican purchaser.<sup>86</sup> The trial court denied the *forum non conveniens* motion but the Texas Supreme Court reversed on a *mandamus writ*.<sup>87</sup>

Plaintiffs argued that Mexico was not an alternative or adequate forum because Mexican law did not provide for strict liability or survival damages, and the law severely restricted damages for death.<sup>88</sup> They also argued that Mexico did not have American-style discovery or a jury system.<sup>89</sup> The Texas Supreme Court rejected these arguments relying on the Fifth Circuit's decision in *Vasquez* holding that a Mexican court could be adequate "if the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court."<sup>90</sup> Plaintiffs further objected that a Mexican forum might not be available because Pirelli's concession to Mexican court jurisdiction might not be enforceable in Mexico.<sup>91</sup> The supreme court rejected this argument, noting that the trial court could condition dismissal on a Mexican court's acceptance of jurisdiction.<sup>92</sup> The supreme court found the Texas connection insufficient and further found that the evidence was primarily located in Mexico and that Mexican policy interests were paramount.<sup>93</sup> Two justices dissented, arguing that the majority's interpretation of the Texas *forum non conveniens* statute exceeded its language and the court had improperly invaded the trial court's discretion.<sup>94</sup>

In *Hart v. Kozik*, the Eastland Court of Appeals affirmed the trial court's declining jurisdiction in a custody modification action in favor of Baldwin County, Alabama, the children's home since 2000.<sup>95</sup> Although the facts make this opinion unremarkable, the court's analysis provides a

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83. 247 S.W.3d 670, 673 (Tex. 2008).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 678.

89. *Id.* at 677.

90. *Id.* at 678 (quoting *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 671 (5th Cir. 2003)).

91. *Id.*

92. *Id.* at 677-78.

93. *Id.* at 675-79.

94. *Id.* at 684-89 (Johnson, J., dissenting, joined by Jefferson, C.J.).

95. 242 S.W.3d 102, 112 (Tex. App.—Eastland 2007, no pet.) (applying the *forum non conveniens* rule in TEX. FAM. CODE ANN. § 152.207 (Vernon 2002)).

worthwhile template for arguing or adjudicating the unusual conclusion of declining jurisdiction in a child custody case.

Other cases include *Snaza v. Howard Johnson Franchise Systems, Inc.*, a wrongful death case arising in Mexico, where the court rejected dismissal for re-filing in Mexico and opted instead for transfer to the District of Massachusetts,<sup>96</sup> and *UNC Lear Services, Inc.*, a sovereign immunity case discussed above.<sup>97</sup>

### 3. *Derogating Forum Selection Clauses*

As explained above, forum selection clauses designating jurisdictions other than Texas provide grounds for declining otherwise valid jurisdiction. *In re Lyon Financial Services, Inc.* illustrates the presumption favoring such clauses.<sup>98</sup> McAllen North Imaging, Inc. (MNI) entered into two agreements with Lyon Financial Services (Lyon) to finance the leasing of magnetic resonance equipment.<sup>99</sup> Both agreements designated Pennsylvania as a proper forum, one optionally and the other exclusively.<sup>100</sup> Despite this, MNI sued Lyon in Hidalgo County alleging that Lyon was charging for equipment that was not yet leased.<sup>101</sup> Lyon invoked the forum clauses but lost in both the trial court and the court of appeals.<sup>102</sup> The Texas Supreme Court reversed in a per curiam opinion, noting the strong presumption favoring forum clauses and rejecting MNI's arguments that the clause was overreaching, that the Pennsylvania forum would be inconvenient, and that Pennsylvania law did not permit MNI's usury claims.<sup>103</sup>

In *Breakbulk Transportation, Inc. v. M/V Renata, Her Equipment*, a federal court in Houston considered a somewhat vague forum clause providing that "[a]ny dispute arising under this bill of lading shall be decided in the country where the carrier has his principle places of business."<sup>104</sup> Parallel litigation was also underway in Germany. The court dismissed the case in spite of plaintiff's arguments that the clause was permissive, that Germany was inconvenient, and that German law lessened the remedy.<sup>105</sup>

### 4. *Parallel Litigation*

Parallel litigation is difficult to define, sometimes meaning identical lawsuits with exactly the same parties bringing the same claims and sometimes meaning two or more lawsuits that may result in claim preclusion

96. No. 3:07-CV-0495-O, 2008 WL 5383155 (N.D. Tex. Dec. 24, 2008) (mem. op.).

97. See *supra* notes 61-63 and accompanying text.

98. See generally 257 S.W.3d 228 (Tex. 2008) (per curiam).

99. *Id.* at 230.

100. *Id.* at 230-31.

101. *Id.* at 231.

102. *Id.*

103. *Id.* at 232-35.

104. No. H-07-2985, 2008 WL 1883790, at \*1 (S.D. Tex. Apr. 25, 2008).

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

for some or all parties. It occurs both intra- and inter-jurisdictionally and involves remedies of transfer and consolidation (intra-jurisdictional only), stay, dismissal, and anti-suit injunction, or, in many cases, allowing both cases to proceed and using the first-to-judgment to preclude the other.<sup>106</sup> This article will discuss only parallel litigation involving at least one case outside of Texas: that is, it will not consider multiple, related actions involving courts all located in Texas. The Survey period had two notable parallel actions, one retaining the Texas case and the other dismissing the case for re-filing in the other forum.

The litigation in *Rimkus Consulting Group, Inc. v. Cammarata (Rimkus I)* brought two noteworthy opinions to the Survey period.<sup>107</sup> The first was the court's denial of Cammarata's motion for abstention in the Texas action, seeking deferral to Louisiana litigation.<sup>108</sup> The case involved a non-compete agreement being litigated in a Houston federal court and a Louisiana state court.

Employee Cammarata signed an agreement with Rimkus, a Texas-based corporation, which included noncompetition and nonsolicitation clauses and a choice of law provision specifying Texas law as controlling.<sup>109</sup> Cammarata resigned from Rimkus and formed a competing company.<sup>110</sup>

The day Cammarata resigned, he sued Rimkus in Louisiana state court seeking a declaratory judgment that the noncompetition and nonsolicitation covenants in the agreement were unenforceable.<sup>111</sup> Rimkus filed a parallel action against Cammarata in a Texas federal court for violation of the noncompetition and nonsolicitation covenants and to enjoin Cammarata from continuing to work in competition with Rimkus during the period of the noncompete provision, from soliciting Rimkus employees and customers, and from using Rimkus's trade secrets.<sup>112</sup>

Cammarata asked the Texas federal court to abstain in favor of the Louisiana action where he was plaintiff. The court engaged in a textbook analysis of the Colorado River doctrine, finding factors weighing both for and against abstention.<sup>113</sup> After thorough consideration, the court rejected abstention and found that (1) a forum selection clause established the suitability of the Texas forum,<sup>114</sup> and (2) the resolution of either case would not dispose of all issues in the other.<sup>115</sup>

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106. See generally George, *supra* note 2; James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 TEX. INT'L L.J. 499 (2001).

107. No. H-07-0405, 2007 WL 4223434 (S.D. Tex. Nov. 29, 2007).

108. *Id.* at \*1.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

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

114. *Id.*

115. *Id.* at \*6-7. Readers may wonder why this forum selection clause was not dispositive of the issue of the lawsuit's location. Forum clauses can be dispositive if they are derogating clauses, that is, clauses favoring *another* jurisdiction and thus disfavoring the instant forum. This clause was a prorogating clause, which validated the instant forum but

*Rimkus II*,<sup>116</sup> equally well-reasoned, came after the Louisiana court had reached a judgment. The Texas federal court considered the Louisiana judgment's preclusive effect and found room to continue with the Texas case.<sup>117</sup> This opinion fits under the foreign judgments section below but is better discussed here for the parallel litigation implications.

The Louisiana court had held that under Louisiana law, the noncompetition and nonsolicitation covenants, as well as the choice-of-law and forum selection provisions in the agreement, were unenforceable.<sup>118</sup> Cammarata then filed a motion to dismiss in the Texas case based on the Louisiana decision, contending Rimkus's claims regarding the validity of the noncompetition and nonsolicitation covenants were barred by the Full Faith and Credit Clause and *res judicata*.<sup>119</sup> Rimkus argued that the prior judgment was limited because the Louisiana court was only asked to declare whether the noncompete and nonsolicitation provisions were enforceable under Louisiana law, not to decide the issue of whether the choice-of-law provisions of the agreement were enforceable under Texas law.<sup>120</sup>

Without resolving the issue of whether the prior ruling was binding under the Full Faith and Credit Clause, the Texas court concluded that the prior determination—that the noncompetition and nonsolicitation covenants as well as the choice-of-law and forum selection provisions in the agreement were unenforceable—had preclusive effect as to Louisiana law.<sup>121</sup> However, the Court concluded that it was free to determine whether those same covenants and provisions were unenforceable under Texas law.<sup>122</sup>

The court found that Texas law determines the enforceability of choice-of-law provisions and the analysis of the Restatement (Second) of Conflict of Laws (Restatement).<sup>123</sup> The Restatement applies the state law chosen by the parties (1) if the chosen state has a substantial relationship to the parties or transaction, and (2) if the chosen state law would not be contrary to the fundamental policy of a state that has a materially-greater interest than the chosen state in determining the issue.<sup>124</sup> After reviewing the record, the court held that Texas had a substantial relationship to the parties and the transaction—the parties signed the contract in Texas, Rimkus is headquartered in Texas, both Rimkus and Cammarata's new

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did not give the court the power—short of an anti-suit injunction—to do more than deny abstention.

116. *Rimkus Consulting Group, Inc. v. Cammarata (Rimkus II)*, 255 F.R.D. 417 (S.D. Tex. 2008).

117. *Id.* at 432.

118. *Id.* at 428.

119. *Id.* at 429.

120. *Id.*

121. *Id.* at 432.

122. *Id.* at 432-33.

123. *Id.* at 432.

124. See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187, 188 (1971); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-78 (Tex. 1990).

company advertise and do business in Texas, and Cammarata received work assignments from Texas and traveled there for training and other employment-related purposes.<sup>125</sup> Because of this substantial relationship to the parties and the transaction, and the absence of another state having a materially greater interest in the enforceability of the agreement, the court held that the parties' contractual choice of law was enforceable under Texas law.<sup>126</sup>

*Capacitive Deionization Technology Systems, Inc. v. Water & Sand International Capital, Inc.* was a defensive response to a related lawsuit in the District of Columbia concerning Capacitive's defaulted business loans.<sup>127</sup> The parties executed several documents during the life of the loans, and the later documents designated Nevada law and a District of Columbia forum. Water & Sand filed first in D.C., followed by Capacitive's action in a Dallas state court that Water & Sand removed to federal court.<sup>128</sup> Capacitive contended that the loans were usurious and that the choice-of-law and choice-of-forum clauses were fraudulently inserted in the later loan documents to circumvent Texas usury laws.<sup>129</sup> Capacitive, a Nevada corporation operating out of Addison, Texas, also contended that Nevada law was unconnected to the transactions. The court did not reach the choice-of-law issue and instead dismissed the case after examining the forum clause to assure that its terms included the instant claims.<sup>130</sup>

## II. CHOICE OF LAW

Choosing the applicable substantive law is a question, like personal jurisdiction and judgment enforcement, involving both forum law and constitutional issues. Understanding these issues requires a clear focus on basic principles. First, choice of law is a question of state law, both in state and federal courts.<sup>131</sup> 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.<sup>132</sup> Third, the forum state has broad power to make choice-of-law decisions, either legislatively or judicially, subject

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125. *Rimkus II*, 255 F.R.D. at 433.

126. *Id.*

127. No. 3:08-CV-0038-P, 2008 WL 2796071, at \*2 (N.D. Tex. Apr. 21, 2008).

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

129. *Id.*

130. *Id.* at \*3.

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

132. The Restatement creates a presumption against *renvoi* except for limited circumstances. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971). Although commentators defend *renvoi*'s limited use, they acknowledge its general lack of acceptance in the United States except in limited circumstances, usually found in statutes directing the use of *renvoi*. See SCOLES ET AL., *supra* note 2, at 134-39; WEINTRAUB, *supra* note 1, at 88-94. Texas law provides for *renvoi* in TEX. BUS. & COM. CODE ANN. §§ 1.105(b), 2.402(b), § 4.102(b) (Vernon 2009), §§ 8.106 (Vernon 2002 & Supp. 2008), § 9.103 (Vernon 2002). For federal courts, *Klaxon* reiterates the forum state's control of choice of law. 313 U.S. at 497.



only to limited constitutional requirements.<sup>133</sup>

Within the forum state's control of choice of law is a hierarchy of choice-of-law rules. At the top are legislative choice-of-law rules, that is, statutes directing the application of certain state's laws based on events or people important to the operation of that specific law.<sup>134</sup> Second in the choice-of-law hierarchy is party-controlled choice of law, that is, choice-of-law clauses in contracts that control unless public policy dictates otherwise.<sup>135</sup> Third in the hierarchy is the common law, now controlled in Texas by the most significant relationship test of the Restatement (Second) of Conflict of Laws.<sup>136</sup> This Survey article is organized according to this hierarchy, that is, statutory choice of law, followed by choice-of-law clauses, and concluding with choice of law under the most significant relationship test. Special issues such as constitutional limitations are discussed in the following section. This grouping results in a discussion that mixes Texas Supreme Court opinions with those of Texas intermediate appellate courts, federal district courts, and the Fifth Circuit. In spite of this mix, readers should of course note that because choice of law is a state law issue, the only binding opinions are those of the Texas Supreme Court.<sup>137</sup>

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

The Survey period offered one significant case involving a Texas choice-of-law statute. In *Krafsur v. Spira Footwear, Inc.* the court engaged in a somewhat unusual choice-of-law analysis in which federal law, and not Texas, determined whether a federal court in El Paso had subject matter jurisdiction.<sup>138</sup> *Spira Footwear* is a Delaware corporation located in El Paso in which David Krafsur and Francis LeVert were former direc-

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133. The due process clause is the primary limit on state choice of law rules, requiring a reasonable or at least a minimal connection between the dispute and the law being applied. See *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 and cmts. following; SCOLES ET AL., *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 Board of California v. Hyatt*, 538 U.S. 488 (2003).

134. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) and cmt. a. See, e.g., *Owens Corning v. Carter*, 997 S.W.2d 560, 566 (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." TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 2008) (as amended in 1997).

135. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 ("Law of the State Chosen by the Parties") allows contracting parties to choose a governing law, within defined limits as explained *infra* notes 53-61 and accompanying text. Texas has adopted § 187. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-78 (Tex. 1990).

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

137. 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 (Tex. 2004) (legislative jurisdiction).

138. No. EP-07-CA-401-DB, 2008 WL 821576, at \*2 (W.D. Tex. Mar. 27, 2008) (mem.).

tors. In 2007, Spira intervened in a state court case in which Krafzur and LeVert were parties, alleging that the two former directors had conspired to breach their fiduciary duties to the corporation. Krafzur, a Colorado resident, and LeVert, from Tennessee, demanded indemnification in the state court action pursuant to Spira's corporate bylaws.<sup>139</sup> When Spira refused, Krafzur and LeVert filed this diversity claim in federal court in El Paso. Spira conceded diversity but contested subject matter jurisdiction on amount-in-controversy grounds, arguing that plaintiffs' claims for attorneys' fees could not be included in the calculation. The court rejected defendant's challenge, finding that the Texas Business Corporation Act directed the application of the incorporating state's law.<sup>140</sup> This directed the court to Delaware law which permitted recovery of attorneys' fees, thus satisfying the amount in controversy.<sup>141</sup>

## B. CHOICE-OF-LAW CLAUSES IN CONTRACTS

Texas law and the Restatement permit contracting parties to choose a governing law,<sup>142</sup> reflected in eight Survey-period cases. Validity is the primary issue in choice of law clauses and *Herkner v. Argo-Tech Corp. Costa Mesa* provides an instructive guide.<sup>143</sup> The issue in *Herkner* was plaintiff's entitlement to attorneys' fees after winning a jury trial on wrongful denial of severance pay. The employment contract had a clause designating Ohio law, which conflicted with Texas law by limiting contractually based attorneys' fees to (1) those expressly included in the contract, and (2) claims where the losing party had acted in bad faith.<sup>144</sup> Plaintiff argued for Texas law, contending that Ohio lacked a sufficient connection to the dispute. The company operated out of Ohio, but plaintiff was hired in Texas and then required to transfer to California. The court relied on the pertinent Restatement section governing choice-of-law clauses, which provides that the parties' choice applies unless it lacks a substantial relation to claim or contravenes strong forum policy.<sup>145</sup> The court found in defendant's favor on both points, thus negating plaintiff's attorneys' fees claim.<sup>146</sup>

Breadth of coverage is another common issue with choice-of-law clauses, that is, the coverage of claims that may be outside the contract's boundaries. Three Survey period cases addressed this issue. *Spectrum*

139. *Id.* at \*1.

140. *Id.* at \*3 (citing TEX. BUS. CORP. ACT. ANN. art. 8.02 (Vernon 2003)).

141. *Id.* (citing DEL. CODE ANN. tit. 8, § 145(e) (2009)).

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

143. No. H-06-2491, 2008 WL 2838115 (S.D. Tex. July 21, 2008) (mem.).

144. *Id.* at \*2 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187).

145. *Id.*

146. *Id.* at \*2-4 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187 & 188). *See also* Epcor Indus. Sys., L.P., v. Progressive Design, Inc., No. H-06-4123, 2007 WL 4591740 (S.D. Tex. Dec. 28, 2007) (mem.), which examined the parties' relation to Virginia as a precondition of enforcing the Virginia choice-of-law clause in a dispute over the installation of an industrial incinerator in Virginia.

*Creations, L.P. v. Carolyn Kinder International, LLC* involved disputes resulting from a failed agreement for the manufacture of home lighting for retail sale at Home Depot.<sup>147</sup> The numerous claims included a range of contract and tort-based claims between multiple plaintiffs and defendants. The court held that the underlying contract's choice of Florida law was sufficiently broad to cover all the claims,<sup>148</sup> but had to turn to a Restatement analysis for opposing parties who lacked a contractual tie. Under that analysis, Texas law governed.<sup>149</sup> The court in *B.J. Tidwell Industries, Inc. v. Diversified Home Products, Inc.* similarly held that the parties' choice of Texas law barred plaintiff's claim under the Tennessee Consumer Protection Act, which plaintiff argued was a distinct tort claim not covered by the clause.<sup>150</sup>

The opinion in *Orion Refining Corp. v. UOP* raises the opposite end of the spectrum.<sup>151</sup> The case involved intellectual property and related claims arising from a licensing agreement regarding oil refinery processes.<sup>152</sup> On appeal from a summary judgment for defendant, the court noted that the Illinois choice-of-law clause did not appear broad enough to include the tort-based claims.<sup>153</sup> But because the plaintiff/appellant had argued only under Illinois law, the court would decline a *sua sponte* choice-of-law analysis.<sup>154</sup>

A possible conflict with federal law surfaced in *Sky Technologies LLC v. SAP AG*, an intellectual property case concerning a party's standing to litigate the assignment of patent rights.<sup>155</sup> Various agreements in the case designated both Massachusetts and Pennsylvania law, but the underlying federal issues required the court to consider whether federal law preempted state law.<sup>156</sup> It did not, and the court found that the plaintiff was a proper assignee under Massachusetts law and had standing to bring the claim.<sup>157</sup>

Three other Survey period cases discussed below involved choice-of-law clauses that were apparently too narrow to include non-contract claims (or the parties failed to argue the clause's breadth), thus requiring the court to conduct a Restatement analysis that sometimes led to multiple states' laws governing the dispute.<sup>158</sup>

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147. No. SA-05-CV-750-XR, 2008 WL 416264, at \*1 (W.D. Tex. Feb. 13, 2008).

148. *Id.* at \*18 (quoting the clause), \*55.

149. *Id.* at \*55-56.

150. No. SA-06-CA-264-FB, 2008 WL 559546, at \*5 (W.D. Tex. Jan. 29, 2008).

151. 259 S.W.3d 749 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

152. *Id.* at 756.

153. *Id.* at 759 n.17.

154. *Id.*

155. No. 2:06-CV-440(DF), 2008 WL 5234644, at \*5 (E.D. Tex. June 4, 2008).

156. *Id.* at \*6.

157. *Id.* at \*5-7.

158. See *infra* notes 193-99 and accompanying text.

### 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 test from the Restatement.<sup>159</sup>

#### 1. Commercial Cases

*Sonat Exploration Co. v. Cudd Pressure Control, Inc.* is a rehashing of a claim that has been up and down in the Texas judicial system for a decade.<sup>160</sup> The case concerned insurance claims arising from a 1998 well explosion in Louisiana that killed seven people and severely injured others.<sup>161</sup> Well-owner Sonat Exploration had entered a Master Service Agreement for snubbing operations with Cudd Pressure Control Inc. and both were sued over the explosion.<sup>162</sup> Sonat and Cudd had agreed to indemnify each other, and, according to Sonat's interpretation, Lumbermens was required to provide insurance.<sup>163</sup> Lumbermens was Cudd's excess insurer at the time.<sup>164</sup> When claimants sued Sonat and Cudd in Texas, Sonat cross-claimed against Cudd for indemnity and separately sued Cudd and Lumbermens for breach of contract.<sup>165</sup> Sonat and Cudd jointly settled the wrongful death and injury claims, leaving only the indemnity claims against Cudd and Lumbermens.<sup>166</sup> A potentially dispositive issue was whether Louisiana or Texas law governed the Sonat/Cudd agreement.<sup>167</sup> According to the parties' arguments, Louisiana law voided the indemnity provision while Texas law upheld it.<sup>168</sup> The trial court ruled that Texas law applied, and in the resulting jury trial Sonat won a \$20.7 million verdict.<sup>169</sup>

Although Lumbermens was a party in related lawsuits, it was not a party to this action which was then on appeal. Lumbermens nonetheless posted a \$29 million security bond for Cudd's appeal. When Cudd failed to raise the all-important choice-of-law issue on appeal, Lumbermens in-

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159. The embodiment of the most significant relationship test are 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 § 6(2) cmt. c. In a larger sense, the most significant relationship test includes the other choice of law sections throughout the Restatement.

160. 271 S.W.3d 228 (Tex. 2008).

161. *Id.* at 229.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 231.

168. *Id.*

169. *Id.* at 230.

tervened.<sup>170</sup> The court of appeals denied their intervention and Lumbermens brought a mandamus action in the Texas Supreme Court.<sup>171</sup> In what appeared to be a ruling of first impression—whether an indemnitor may intervene on appeal to raise a dispositive issue—the supreme court found in Lumbermens' favor and remanded to the court of appeals for review of the choice-of-law decision.<sup>172</sup>

On remand, the Texarkana Court of Appeals first found that the parties' Master Service Agreement was intended to be used for well operation in several states, and though there was no choice-of-law designation for any one state, the contract clearly indicated a wish that the law of the state where the wells were located would govern a particular dispute.<sup>173</sup> The court of appeals then found this to be an inadequate contractual choice of law and, in the absence of a clear choice by the parties, the court performed a thorough most-significant-relationship analysis and concluded that Louisiana law applied.<sup>174</sup>

At that point in 2006, the case had been (1) tried to a jury verdict, (2) appealed to the court of appeals on whether indemnitor Lumbermens could intervene regarding choice of law (the ruling was against Lumbermens), (3) appealed to the Texas Supreme Court on the same intervention issue (the ruling was for Lumbermens), and (4) remanded to the court of appeals to conduct the choice-of-law analysis (choosing Louisiana law). That 2006 court of appeals ruling then returned to the Texas Supreme Court, which heard oral argument on February 6, 2008, and rendered its opinion on November 21, 2008.<sup>175</sup> The supreme court affirmed the lower appellate court's choice of Louisiana law but disagreed with the reasoning on grounds that elude analysis here. The court of appeals had concluded that Louisiana law applied because it was the place of performance and impliedly chosen by the parties.<sup>176</sup>

The Texas Supreme Court rejected the conclusion that the Master Service Agreement, contemplating multi-state performance, could have impliedly chosen Louisiana law and instead found that the parties made no choice of law for the jobs in Louisiana.<sup>177</sup> But, in a puzzling conclusion, the court reasoned that, "Because contracts should be governed by the law the parties had in mind when the contract was made, we hold in these circumstances that Louisiana law applies."<sup>178</sup> The opinion does not ex-

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170. See *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex. 2006).

171. *Id.* at 722.

172. *Id.* at 722-29. The ruling was influenced by Louisiana lawsuits arising from the same explosion, in which the Louisiana appellate court had not ruled on the choice-of-law issue. See *id.* at 721 n.4.

173. See *Cudd Pressure Control, Inc. v. Sonat Exploration Co.*, 202 S.W.3d 901, 903-05 (Tex. App.—Texarkana 2006), *aff'd*, 271 S.W.3d 228 (Tex. 2008).

174. *Id.* at 905-12.

175. *Sonat Exploration Co. v. Cudd Pressure Control, Inc.*, 271 S.W.3d 228, 228 (Tex. 2008).

176. *Id.* at 232 (citing 202 S.W. 3d at 909-10).

177. *Id.*

178. *Id.* at 236.

plain how implied choices of law differ from “the law the parties had in mind.” In reaching this conclusion, the court cited current sources as well as older ones that significantly pre-date modern choice-of-law analysis.<sup>179</sup> The vague difference from the court of appeals’s reasoning does not undermine a valid choice of Louisiana law. Having now reached the point of determining what law applied to this 1998 explosion, the supreme court remanded to the trial court for application of Louisiana law to the indemnitee claims.<sup>180</sup>

*GJP, Inc. v. Ghosh*—discussed above in the personal jurisdiction section—also provides what may be the Survey period’s most instructive choice-of-law analysis.<sup>181</sup> Briefly restated, the case concerned a Houston buyer’s online-initiated purchase of a red 1967 Jaguar E-type convertible from a South Dakota seller.<sup>182</sup> The defendant-sellers lost a jury trial and appealed the application of Texas law along with other issues. The court of appeals’s thorough analysis included three preliminary steps often overlooked by courts, though arguably superfluous in some cases. First, the court noted that defendants properly requested South Dakota law and offered more than adequate proof of its content.<sup>183</sup> Second, the court observed that defendants properly preserved their objection when the trial court applied Texas law.<sup>184</sup> Third, the court identified an actual conflict between Texas and South Dakota law.<sup>185</sup> With the issue properly framed, the court applied both the Restatement’s most significant relationship test followed by the more specific fraud test.<sup>186</sup> The court found that while Texas and South Dakota were even on most factors, the fact that plaintiff’s reliance occurred in Texas was enough to tip the balance.<sup>187</sup> The court also noted that Texas courts have tended to apply the Texas Deceptive Trade Practices Act to residents’ claims against out of state sellers.<sup>188</sup>

*Cincinnati Insurance Co. v. RBP Chemical Technology, Inc.* raises an interesting issue of choice of law governing the court’s subject matter ju-

179. *Id.* (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990), which in turn quoted *Wayman v. Southard*, 23 U.S. 1, 48 (1825)). The citation also refers to RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b (1971).

180. *Sonat Exploration*, 271 S.W.3d at 237-38.

181. 251 S.W.3d 854 (Tex. App.—Austin 2008, no pet.); see *supra* notes 36-41 and accompanying text.

182. See *GJP, Inc.*, 251 S.W.3d at 862-63.

183. *Id.* at 883.

184. *Id.*

185. *Id.* at 883-84.

186. *Id.* at 884.

187. *Id.* at 885 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6(2) & 148(2) (1971) (fraud)). The court also noted that, “According to the Restatement, the place where one party made and the other party received misrepresentations are of equal importance, but the place of reliance outweighs either factor in importance to the choice of law inquiry.” *Id.* at 885 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(2) cmt. i).

188. *Id.* (citing *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 249 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *Busse v. Pac. Cattle Feeding Fund # 1, Ltd.*, 896 S.W.2d 807, 814 (Tex. App.—Texarkana 1995, writ denied)).

isdiction.<sup>189</sup> This federal case involves an insurer's declaratory judgment action seeking to avoid defending a pollution case brought in state court in Texas. In the federal declaratory judgment case, plaintiff Cincinnati Insurance Company also named the state court plaintiffs, who in turn moved to dismiss the federal case because Texas law did not give them an interest until judgment was rendered in the related case. This argument was correct under Texas law but not under Wisconsin law.<sup>190</sup> The court first rejected the Texas statutory choice of law rule regarding insurance interests in Texas,<sup>191</sup> and then ruled under Restatement section 6 that Texas had too little connection and too little interest for Texas law to apply, thus making Wisconsin law applicable.<sup>192</sup>

Some contract-based cases involve choice-of-law clauses that may not cover all the parties or all the claims, requiring an additional Restatement analysis. Three Survey period cases illustrate the right approach. *Super Future Equities, Inc. v. Wells Fargo Bank Minnesota, N.A.*,—a case reflecting many headlines this past year—was a suit on the servicing of various defaulted commercial mortgages.<sup>193</sup> Super Future was a borrower claiming that defendants manufactured defaults, pursued unnecessary litigation, falsified reports, and inflated values in order to sell loan securities, and several other tortious activities.<sup>194</sup> The loan agreements had New York choice-of-law clauses which the parties conceded as to the contract claims. On the many tort claims, however, the Texas-based plaintiffs urged that Texas law controlled. Applying the Restatement's basic tort analysis, the court concluded that the more qualitative factors pointed to Texas law.<sup>195</sup>

The court reached the same result in *Highland Crusader Offshore Partners, L.P. v. Lifecare Holdings, Inc.*, a case involving a fraud claim arising from a financing agreement with a hospital group.<sup>196</sup> When refinancing failed and the creditors sued, the parties conceded that the underlying agreement's choice of New York law governed the contract issues, and the court used a Restatement analysis to choose Texas law for the fraud and other business tort claims.<sup>197</sup>

*Malibu Consulting Corp. v. Funair Corp.* involved parties from five states—Texas, California, Florida, Oregon and Washington—but the choices of law were limited to the first two.<sup>198</sup> The claims arose from plaintiff's purchase of a Boeing 727 from a Florida-based seller, with

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189. No. 1:07-CV-699, 2008 WL 686156 (E.D. Tex. Mar. 6, 2008).

190. *Id.* at \*2.

191. *Id.* at \*3 (referring to TEX. INS. CODE ANN. § 21.42 (Vernon Supp. 2008)).

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

193. No. 3:06-CV-0271-B, 2007 WL 4410370, at \*3 (N.D. Tex. Dec. 14, 2007).

194. *Id.*

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

196. No. 3:08-CV-0102-B, 2008 WL 3925272 (N.D. Tex. Aug. 28, 2008).

197. *Id.* at \*3 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971) and based on "all or substantially all of the events giving rise to this litigation occur[ing] in Dallas County, Texas").

198. No. SA-06-CA-735-XR, 2008 WL 583882, at \*3 (W.D. Tex. Feb. 28, 2008).

claims also directed at the plane's Texas-based pre-sale inspector. No one disputed the California choice-of-law clause in the underlying contract, but plaintiff argued that its claims all sounded in tort. This argument was moot when the court held that California law also governed tort claims.<sup>199</sup>

In other Survey period cases, a Dallas federal court conducted what appears to be a *sua sponte* choice-of-law analysis in a general contractor's dispute with a subcontractor over the building of waterslides in a recreation park in Frisco, Texas,<sup>200</sup> and a Houston federal court held that Texas law, where the contract originated, governed an employment dispute over bonus-incentive compensation, rather than Alabama law where the work occurred.<sup>201</sup>

## 2. Non-Commercial Torts

The Survey period included no significant choice-of-law opinions involving non-commercial torts in a non-class-action setting, or at least no new analyses. Two cases are nonetheless worth reporting—one because it raises an earlier issue that has gathered national attention, and the second because it illustrates a too-sparse opinion.

The question garnering national attention is what law governs the vicarious or direct liability of car rental companies whose customer negligently kills or injures someone in another state.<sup>202</sup> The opinion in *Cates v. Creamer* also shows the careful procedural steps that must be observed in drawn-out litigation.<sup>203</sup>

Matthew Creamer rented a car in Florida from Hertz.<sup>204</sup> Creamer fell asleep while driving through Texas, severely injuring Texas resident Bobby Cates, who later died.<sup>205</sup> Cates filed a federal diversity claim against both Creamer and Hertz in a federal court in the Northern District of Texas.<sup>206</sup> The trial court held that Texas law governed all claims and granted summary judgment to Hertz, finding that it was not vicariously liable under Texas law.<sup>207</sup> At the first trial, the jury found for defendant Creamer. The trial court granted a second trial which held Creamer 70% at fault.<sup>208</sup>

199. *Id.* at \*2-4 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6 & 145).

200. *See* Robax Corp. v. Prof. Parks, Inc., No. 3:07-CV-1399-D, 2008 WL 3244150 (N.D. Tex. Aug. 8, 2008). Plaintiff was a Texas corporation and the subcontractor-defendant was from Tennessee. The pertinent facts occurred in both places, but the court chose Texas law as the place of performance. *Id.*, at \*9-10 (applying RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6 & 188). The court also cited precedent for the point that place of performance is the most important factor in choosing the law for contract disputes. *Id.*, at \*10.

201. *See* Talent Tree, Inc. v. Madlock, No. 4:07-CV-03735, 2008 WL 4104163, at \*3 (S.D. Tex. Sept. 2, 2008) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6 & 188).

202. *See* Symeonides, *supra* note 82.

203. No. 7:00-CV-0121-O ECF, 2008 WL 2620097 (N.D. Tex. June 27, 2008).

204. *Id.* at \*1.

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

206. *Id.* at \*1.

207. *Id.*

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



The parties appealed several issues, including Hertz's dismissal. The Fifth Circuit upheld the jury verdict against Creamer but reversed Hertz's summary judgment dismissal, finding that Florida law governed Hertz's vicarious liability.<sup>209</sup> The appellate court further directed that on remand, the trial court was to consider whether Florida's dangerous instrumentality doctrine applied to nonresidents of Florida, noting that this was a question of first impression under Florida law and instructing the trial court to conduct an "Erie guess" on Florida's likely position.<sup>210</sup> Based on the Fifth Circuit's ruling, the plaintiff moved for entry of judgment against Hertz, arguing that Florida's dangerous instrumentality doctrine did apply to Creamer's accident in Texas, thus rendering Hertz vicariously liable for Cates's death.<sup>211</sup> In a crucial misstep, Hertz filed an opposing motion limited to arguing that Florida law did not apply. What Hertz failed to do was ask for a re-assessment of damages in light of Bobby Cates's death after the original jury trial. On February 25, 2008, the trial court issued its opinion that Florida law did apply to Cates's claim.<sup>212</sup> Hertz then moved for new trial, which the court denied on the grounds that it had not been timely raised and it was time to put an end to the litigation.<sup>213</sup>

In *Flores v. DaimlerChrysler Corp.*, the court was faced with a wrongful death claim and survivors' claims arising from Maria Holstine's death when her idling minivan slipped out of park and struck the decedent who was unloading a sewing machine.<sup>214</sup> Michigan-based DaimlerChrysler made the improbable argument that Michigan law, which did not recognize punitive damages, should apply to negate plaintiffs' punitive damages claim. The court reached a no-doubt appropriate conclusion that Texas law applied but did so with sparse analysis.<sup>215</sup> It first noted that Texas follows the most significant relationship test and then erroneously quoted the secondary test for personal injury rather than the primary seven-factor balancing test found in Restatement section 6.<sup>216</sup> The Texas Supreme Court, on the other hand, has expressly adopted section 6's seven-factor test, but has not officially adopted the entire Restatement.<sup>217</sup> Those other sections are nonetheless persuasive and worth consulting, but the official law in Texas is primarily section 6 and all choice-of-law arguments not controlled by statute or contract should apply that test.

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209. *Id.*

210. *Cates v. Creamer*, 431 F.3d 456, 466 (5th Cir. 2005) (discussed at James P. George & Anna Teller, *Conflict of Laws*, 59 SMU L. REV. 1039, 1067 (2006)).

211. *Id.*

212. *Cates v. Creamer*, No. 7:00-CV-0121-R, 2008 WL 495710 (N.D. Tex. Feb. 25, 2008).

213. *Cates*, 2008 WL 2620097, at \*1-2.

214. No. L-06-CV-53, 2008 WL 822008, at \*1 (S.D. Tex. Mar. 26, 2008) (mem.).

215. *Id.* at \*4.

216. *Id.*

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

### 3. Class Action Certifications

Class actions certified under the common-question-predominates standard of Texas and federal law require a showing that a common question of law or fact predominates over disparate issues in the case.<sup>218</sup> In *DaimlerChrysler Corp. v. Inman*, the Texas Supreme Court reaffirmed its prior mandate that trial courts must not postpone choice-of-law analysis until after certification because the courts cannot evaluate the predominance or individual claims and defenses issues without first knowing what law is applicable to those determinations.<sup>219</sup> The defendant argued that the trial court erred in certifying the class before selecting the governing law regarding defective seat belt buckle design.<sup>220</sup> According to defendant, a proper choice-of-law analysis required the court to apply the laws of forty-eight states and adjudicate issues peculiar to individual class members, thus precluding certification.<sup>221</sup>

The supreme court held that the lower court abused its discretion in certifying the class.<sup>222</sup> In the context of a nationwide class action, the determination of the applicable substantive law is of paramount importance. Following its holding in *Lapray*, which mandated a detailed choice-of-law analysis in multi-state class actions, the supreme court held that this issue was settled and that when reviewing a class certification, appellate courts must evaluate “the claims, defenses, relevant facts, and applicable substantive law.”<sup>223</sup> To evaluate the applicable substantive law, the trial courts must “abandon the practice of postponing choice-of-law questions until after certification,” concluding that appellate courts cannot evaluate the predominance and individual claims and defenses without knowing what law is applicable.<sup>224</sup>

In a similar case, *Government Employees Insurance Co. v. Patterson*, the court of appeals criticized the trial court’s failure to conduct a choice-of-law analysis of the proposed multi-state class prior to certification.<sup>225</sup> In that case, a chiropractor filed a class action suit against five insurance companies for providing an “Explanation of Reimbursement” form letter to his patients informing them of the physician reimbursement amount. The physician claimed that the letter was defamatory because it asserted that physicians committed malpractice and malfeasance and were incom-

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218. See FED. R. CIV. P. 23(b)(3); TEX. R. CIV. P. 42(b)(3); see also *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004), in which the Texas Supreme Court clarified the need for an appropriate choice-of-law analysis in certifying multi-state class actions. *Lapray* is discussed at James P. George & Anna Teller, *Conflict of Laws*, 58 SMU L. REV. 679, 706-07 (2005).

219. 252 S.W.3d 299, 316 (Tex. 2008).

220. *Id.* at 301-03.

221. *Id.* at 303.

222. *Id.* at 307-08.

223. *Id.* at 316 (citing *Sw. Ref. Co. v. Bernal*, 225 S.W.3d 425, 435 (Tex. 2002)) (Jefferson, C.J., dissenting).

224. *Id.* at 316-17 (quoting *Compaq Comp. Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004)).

225. Nos. 13-06-258-CV, 13-13-06-259-CV, 2007 WL 4225504, at \*8 (Tex. App.—Corpus Christi Nov. 29 2007, no pet.).

petent and dishonest. Further, he claimed the “letters induced the patient/recipient to breach [the] relationship with [the physician] and refrain from paying [the balance on the treatments already] received.”<sup>226</sup> On the patients’ behalf, he claimed that the insurer’s practice of disclosing confidential patient information in the letters was unlawful and sought certification of a libel and tortious interference “physician class,” and a breach of duty of confidentiality class on behalf of his patients.<sup>227</sup> The trial court certified both classes.

The defendants argued that the trial court failed to conduct a proper choice-of-law analysis prior to certification of the “physician class” and that this failure defeated the predominance requirement for class actions.<sup>228</sup> There was nothing in the trial court’s order to suggest that the trial court conducted a choice-of-law analysis. Following the Texas Supreme Court’s holding in *Compaq Computer Corp. v. Lapray*, the appellate court concluded that the trial court abused its discretion when it certified a class without first conducting an extensive choice-of-law analysis to determine if any differences in the state law of the parties would affect predominance in a Texas Rule of Civil Procedure 42 (b)(3) class action.<sup>229</sup> The appellate court reversed the certification of the “physician class” and remanded it to the trial court for further proceedings.<sup>230</sup>

#### 4. Corporate Governance

Choice of law rules generally determine which state’s or country’s laws will govern the claims raised by the parties. In *Davaco, Inc. v. AZ3, Inc.*, a Dallas federal court applied a choice-of-law rule to a personal jurisdiction question.<sup>231</sup> Arguing alter ego, plaintiffs sued a subsidiary and its parent corporation, both based in Quebec, for the subsidiary’s alleged misdeeds in Texas. The court noted that corporate alter ego is governed by the law of the state of incorporation and that under Quebec law the parent was not the subsidiary’s alter ego.<sup>232</sup>

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

#### 1. False Conflicts

“A false conflict exists either when other potentially-applicable laws are the same as the [forum laws], or when the laws reach the same re-

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226. *Id.* at \*1.

227. *Id.*

228. *Id.* at \*7 (citing TEX. R. CIV. P. 42(b)(3)).

229. *Id.* at \*8 (citing *Lapray*, 135 S.W.3d at 672).

230. *Id.* at \*10; see also *Karnes v. Fleming*, No. H-07-0620, 2008 WL 4528223, at \*6-7 (S.D. Tex. July 31, 2008) (mem.) (finding that the potential class members’ claims against their former attorneys occurred in all fifty states with various legal standards, thus defeating the commonality requirement).

231. No. 3:07-CV-803, 2008 WL 2243382 (N.D. Tex. May 30, 2008) (mem.).

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

sult.”<sup>233</sup> Defining a clear, outcome-changing difference between the forum 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.<sup>234</sup> The fact that the laws do not conflict may compel a conclusion that the cases are not worth reporting, but that is a hasty conclusion in some cases. Why the court determined the conflict to be false, the setting in which the laws appeared identical, or the necessary degree of similarity, are all issues that may prove valuable to readers contemplating a choice-of-law argument. Moreover, while some false-conflicts analyses may be cursory, some are complex.<sup>235</sup> *Teel v. Hospital Partners of America, Inc.* is a former employee’s attempt to collect a severance package against an employer who argued that Teel waived it by violating the non-compete clause.<sup>236</sup> Both parties moved for summary judgment under Texas law on a contract that expressly invoked North Carolina law. Citing the need for an abundance of caution, the court analyzed the claims under both and found the contract enforceable under both.<sup>237</sup>

## 2. *Dépeçage*

*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. *Dépeçage* is controlled by forum law and is largely within the court’s discretion. Texas law requires *dépeçage*, that is, choice of law on an issue-by-issue basis.<sup>238</sup> In *Coachmen Industries, Inc. v. Willis of Illinois, Inc.* the court—without offering its analysis—stated that Illinois law governed the contract claims while Texas law governed the negligence claims.<sup>239</sup> In its application of Illinois law, the court further noted that it was assumed to be identical to Texas law except where otherwise noted.<sup>240</sup> *Arkoma Basin Exploration Co. v. FMF Associates 1990-A, Ltd.*, discussed below, involved a less-common instance of *dépeçage* in the use of another state’s procedural rules.<sup>241</sup>

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233. This is the Restatement’s definition of false conflict. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. I (1971); *id.* § 186 cmt. c. A very different concept of false conflicts came from Professor Brainerd Currie’s government interest analysis, which defines a false conflict as one in which only one state has a real interest. See SCOLES ET AL., *supra* note 2 at 29-30. Unfortunately, Texas courts have used both definitions. See generally James P. George, *False Conflicts and Faulty Analysis: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 REV. LITIG. 489 (2004).

234. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823-45 (1985) (Stevens, J., concurring in part and dissenting in part).

235. In the 2004 Survey period, a case involving arguments for the application of five states’ laws ended up with a false conflict. George & Teller, *supra* note 210, at 1069 (citing *In re Senior Living Prop. LLC Trust*, 309 B.R. 223, 228 (N.D. Tex. 2004)).

236. No. H-06-3991, 2008 WL 346377, at \*4-7 (S.D. Tex. Feb. 6, 2008) (mem.).

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

238. See *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).

239. 565 F. Supp. 2d 755, 758 n.3 (S.D. Tex. 2008).

240. *Id.*

241. See 249 S.W.3d 380 (Tex. 2008); see also *infra* notes 255-59 and accompanying text.

### 3. 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.<sup>242</sup> Foreign country law, on the other hand, must be adequately pleaded and proven.<sup>243</sup> Three opinions from the Survey period underscored the need to plead and prove foreign law and the presumption that unproven law was the same as Texas law.

The Texas Supreme Court's split ruling in *Excess Underwriters at Lloyd's London v. Frank's Casing Crew & Rental Tools, Inc.* is one of 2008's more controversial opinions.<sup>244</sup> The case arose from the collapse of a drilling platform in the Gulf of Mexico. Frank's Casing manufactured the platform for ARCO/Vastar, which brought claims against Frank's Casing, which had a \$1 million primary liability policy and \$10 million excess liability coverage with Excess Underwriters at Lloyd's, London.<sup>245</sup>

The primary ruling concerned the excess insurer's right to reimbursement from the insured for settling uninsured claims, an issue won by the insured with strong dissents from three justices.<sup>246</sup> The history and analysis of the long-litigated case is beyond this article's scope, but the choice-of-law issues bear brief mention. On appeal, Excess Underwriters argued that Louisiana law controlled the underlying issue—their right to reimbursement. The supreme court rejected this argument because Excess Underwriters failed to raise choice of law at the trial stage and instead merely alluded to Louisiana law in a footnote to its summary judgment motion. The court additionally found that Excess Underwriter's citations

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242. Texas Rule of Evidence 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 Federal Rule of Evidence 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 Federal Rule of Evidence 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.

243. Texas Rule of Evidence 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. TEX. R. EVID. 203. 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. *Id.* Federal practice is similar. See FED. R. CIV. P. 44.1.

244. See generally 246 S.W.3d 42 (2008).

245. *Id.* at 44-45.

246. *Id.* at 45-54 (majority); *id.* at 54-69 (Hecht, J., dissenting, joined by Green, J.); *id.* at 69-76 (Wainright, J., dissenting).

to Louisiana law did not establish a clear conflict with Texas law.<sup>247</sup>

In *Coachmen Industries, Inc. v. Alternative Service Concepts L.L.C.* plaintiff Coachmen sought leave to amend late in the case to add claims under other states' laws.<sup>248</sup> Coachman's suit alleged that two defendants, one with its principal place of business in Tennessee and the other with its principal place of business in Illinois, had breached various duties to Coachman in handling a personal injury claim in Texas. Coachman initially alleged claims under Texas law, but late in the case, defendants filed summary judgment motions arguing that Texas insurance law did not apply.<sup>249</sup> Coachman sought to amend its complaint to allege claims under Tennessee and Illinois law alleging that it discovered new information which involved choice-of-law issues, and that the "[d]efendants [bore] the burden of timely pleading choice-of-law as an affirmative defense."<sup>250</sup>

The court found that since Coachman filed suit against corporations that it knew were located in Illinois and Tennessee, it "was on notice that choice-of-law issues may be relevant to th[e] suit" early in the case.<sup>251</sup> Thus, the possible applicability of Illinois or Tennessee law could not be a newly-discovered issue.<sup>252</sup> Second, the court rejected the argument that choice of law was an affirmative defense because "[u]nder federal pleading requirements, [a defendant] need not plead the applicability of [another state's] law to preserve a choice-of-law question."<sup>253</sup>

In *Floyd v. Hefner*, the court observed that although Texas choice-of-law principles pointed to the application of Cayman Islands law (the place of incorporation), the court would assume that Texas law applies because no party had offered any proof of foreign law.<sup>254</sup>

#### 4. Choice of Procedural Law

Two Survey period cases demonstrated the unusual development of applying another state's procedural law. In *Arkoma Basin Exploration Co. v. FMF Associates 1990-A, Ltd.*, eight Virginia limited partnerships sued Arkoma Basin Exploration Company for fraud regarding its estimates of mineral reserves in southeastern Oklahoma.<sup>255</sup> The trial court instructed the jury to apply Virginia law, including its heightened burden of proof requiring clear and convincing evidence of fraud.<sup>256</sup> The court of appeals affirmed in part but set aside the remittur.<sup>257</sup> The Texas Supreme Court also affirmed in part, finding in favor of two plaintiffs and rejecting the other claims. The supreme court agreed that Virginia's heightened stan-

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247. *Id.* at 52-53.

248. No. H-06-0892, 2008 WL 177715, at \*1 (S.D. Tex. Jan. 17, 2008) (mem.).

249. *Id.*

250. *Id.* at \*2.

251. *Id.*

252. *Id.*

253. *Id.* (quoting *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir. 1987)).

254. 556 F. Supp. 2d 617, 633 n.11 (S.D. Tex. 2008).

255. 249 S.W.3d 380, 383 (Tex. 2008).

256. *Id.*

257. *Id.* (omitting internal citation).

dard applied not only at trial but also as the standard of review for fraud,<sup>258</sup> but rejected Arkoma's argument that Virginia law governed the sufficiency-of-evidence review for damages.<sup>259</sup>

A second opinion, *In re Crown Castle International Corp.*, went even further in applying another state's procedural law when it ruled that Delaware law governed the pleading requirements in a shareholders' derivative suit.<sup>260</sup> The argument was not directed to dismissal but to the pleading level—a heightened standard in Delaware—required as the threshold for discovery.<sup>261</sup>

### 5. *Statutes of Limitations*

Choice of law regarding limitations periods raised two of the more interesting points in two opinions during the Survey period—one an appellate opinion with a sharp dissent, and the other summarily decided in a federal trial court. *Satterfield v. Crown Cork & Seal Co., Inc.* addressed the issue of the retroactive effect of a barring limitation statute enacted after the plaintiff won a partial summary judgment on liability.<sup>262</sup> Jerrold Braley was a retired pipefitter who filed a mesothelioma action in Travis County in 2002. Defendants were a number of asbestos-related companies and successor entities, including Crown, which had acquired Mundet Cork Corporation, one of the asbestos sources. Braley died in the next few months and Satterfield substituted as plaintiff.<sup>263</sup>

In the pre-trial stage, Crown conceded that Texas had no interest in having its substantive law applied, and “only Pennsylvania has any interest in the outcome of this case.”<sup>264</sup> Based on this, the trial court granted a partial summary judgment against Crown, imposing successor liability

258. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 133 (1971) (providing that “The forum will apply its own local law in determining which party has the burden of persuading the trier of fact on a particular issue unless the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of the trial. In that event, the rule of the state of the otherwise applicable law will be applied.”)).

259. *Id.* at 387 (citing various sources including RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (providing that “A court usually applies its own local laws prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.”)).

260. 247 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2008, pet. granted).

261. *Id.* at 352-55.

262. 268 S.W.3d 190 (Tex. App.—Austin 2008, no pet.).

263. *Id.* at 199.

264. *Id.* at 196-97 n.4. Rather than Pennsylvania law, the trial court initially applied the most significant relationship test to hold that New York law (where both Mundet and Crown were incorporated) governed successor liability. *Id.* at 226-27 (Law, C.J., dissenting); see also *id.* at 223 n.7 (Law, C.J., dissenting) (citing *Torrington Co. v. Stutzman*, 26 S.W.3d 829, 848 (Tex. 2001); *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 204 (Tex. 2000); and RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971)). The majority side-stepped any definitive choice-of-law issue, holding instead that the retroactive limitations period—discussed below—abrogated rights not only under other states' possibly applicable laws, but under the prior Texas substantive law as well. See *Satterfield*, 268 S.W.3d at 208.

for Braley's exposure to Mundet's asbestos products.<sup>265</sup> Four days later, the Texas legislature enacted the comprehensive tort-reform law known as House Bill 4.<sup>266</sup> Pertinent to this case, House Bill 4 imposed a statutory choice of Texas limitations law on asbestos claims based on successor liability.<sup>267</sup> The new law went beyond limitations issues to abrogate the application of other states' laws that might apply under Texas choice-of-law rules,<sup>268</sup> and, most pertinent to the instant case, made the law effective immediately to pending cases.<sup>269</sup> Responding to the newly-enacted law, the trial court granted summary judgment for Crown.

The court of appeals reversed under the Texas Constitution's ban on retroactive laws.<sup>270</sup> The court deemed the ban to apply to laws negating or impacting vested rights, which existed here based not on the summary judgment, which of course was not final, but on the fact of the claim being accrued and filed in court.<sup>271</sup> A strong dissent argued that the Texas legislature had the power to alter common law choice-of-law rules and that it clearly did so in the pertinent portions of House Bill 4.<sup>272</sup>

In *Klein v. O'Neal* the court summarily rejected plaintiffs' argument that the limitation period in a wrongful death class action could be governed by anything other than forum law, relying on the United States Supreme Court's ruling in *Sun Oil Co. v. Wortman*.<sup>273</sup> In doing so, the court may have read more into *Wortman* than the court intended. *Wortman* determines whether the constitution *permits* a state to impose its own limitation period on a case arising elsewhere, but *Wortman* does not resolve the question here—whether Texas choice-of-law rules would apply a foreign limitation period. Texas precedents point in both directions,<sup>274</sup> and the Texas Supreme Court has thus far dodged any definitive ruling on this. Specifically, the Texas Supreme Court declined adoption of the Restatement's limitations rule, although this decision appears to be based on the advocating party's failure to support its argument rather

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265. *Satterfield*, 268 S.W.3d at 197.

266. TEX. CIV. PRAC. & REM. CODE ANN. § 26 (Vernon 2008).

267. See TEX. CIV. PRAC. & REM. CODE ANN. § 149.001-.006 (Vernon 2005).

268. *Satterfield*, 268 S.W.3d at 223 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 149.006).

269. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 149.001).

270. See *id.* at 200-14 (citing TEX. CONST. art. 1, §§ 16, 29, the open courts provision of TEX. CONST. art. 1, § 13, and numerous case citations).

271. *Id.* at 206-14.

272. *Id.* at 236 (Law, C.J., dissenting). The dissent further invoked the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 (1971) which provides that "choice-of-law rules are as open to reexamination as any other common-law rules." *Id.* at 226 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5).

273. No. 7:03-CV-102-D, 2008 WL 2152030, at \*2 n.2 (N.D. Tex. May 22, 2008) (mem.) (citing *Sun Oil v. Wortman*, 486 U.S. 717, 722, 727-28 (1988)).

274. See *Intevp, S.A. Research & Tech. Support Establishment v. Sena*, 41 S.W.3d 391, 394 (Tex. App.—Dallas 2001, no pet.) (applying a Venezuelan one-year limitation period (as opposed to the four-year Texas-period) to an employment case under the theory that limitations issues are procedural except when the statute creating the right of action incorporates an express limitation). See *generally Hill v. Perel*, 923 S.W.2d 636 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Rush v. Barrios*, 56 S.W.3d 88 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).



than the court's rejection of the Restatement rule.<sup>275</sup> If Texas were to adopt the Restatement position, it would support the court's application of the Texas limitation period in *Klein*.<sup>276</sup>

#### 6. Federal Choice-of-Law Rules

Although state law controls choice of law in most cases in state and federal courts, federal law has both statutory<sup>277</sup> and common law.<sup>278</sup> Three cases during the Survey period illustrate the pertinence of both statutory and common law to maritime choice-of-law analyses. In *Guillette v. Energy Partners, Ltd.*, the court applied the Outer Continental Shelf Lands Act to choose Louisiana law over general maritime law (that is, federal common law) to govern a personal injury claim,<sup>279</sup> with a similar analysis in *Baudoin v. Houston Exploration Co.*, also choosing Louisiana law while pointing out the strong policy that federal common law not override applicable state law even in offshore cases.<sup>280</sup> In *Najera v. M/V Clipper Lis*, a Houston federal court used the common law balancing test in *Lauritzen v. Larsen* to reject the application of Bahamian law, favoring instead American maritime law for a personal injury claim.<sup>281</sup>

Some federal choice-of-law rules have mixed origins, flowing from judicial construction of federal statutes. One example is inconvenient forum

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275. See *Monsanto Co. v. Boustany*, 73 S.W.3d 225, 233 (Tex. 2002). Monsanto involved an action by 110 former Monsanto employees suing for the right to exercise stock options that were originally promised for a fixed period, then extended as part of a severance package. For the contract claims, the Texas Supreme Court honored the parties' contractual choice of law, finding a reasonable relation to the agreement and no violation of Texas public policy. Monsanto won this claim but lost on the second choice of law issue regarding claims for fraud and conversion. The issue was limitations and Monsanto urged the court to adopt RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971), which it believed pointed to Delaware's three year period (rather than four years in Texas). But Monsanto's brief failed to argue the substance or effect of the Delaware limitation period, and the court accordingly declined to consider it and remanded for litigation of the fraud and conversion claims.

276. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142, which provides that: "Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable: (1) The forum will apply its own statute of limitations barring the claim; (2) The forum will apply its own statute of limitations permitting the claim unless: (a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence."

277. 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) (2000) (providing for choice of law in claims under the Federal Tort Claims Act).

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

279. No. G-06-0671, 2008 WL 828052, at \*3 (S.D. Tex. Mar. 26, 2008) (mem.) (citing the choice-of-law provisions in the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (2000)).

280. *Id.*

281. *Id.* (listing a number of factors for determining maritime choice of law including (1) the wrongful act's situs, (2) the law of the ship's flag, (3) the injured party's domicile, (4) the shipowner's allegiance or domicile, (5) the contract's situs, (6) any foreign forum's accessibility, (7) the law of the forum, and (8) the shipowner's base of operations); see also *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970); *Lauritzen*, 345 U.S. at 583-90.

transfers within the federal system, with case law holding that in diversity cases the law of the transferor court governs choice of law. In *Eisentstadt v. Telephone Electronics Corp.*, a Dallas federal court applied this rule to a trio of cases, one filed originally in Dallas and the other two originally filed in federal courts in Mississippi and California.<sup>282</sup> After inconvenient forum transfers to the Northern District of Texas, the Dallas federal court found that the three states' choice-of-law rules differed enough to require separate choice-of-law analyses. After a careful and well-done assessment under the three states' choice-of-law approaches to various claims, the court concluded that (1) Texas law governed the claims for tortious interference with business opportunities; (2) Mississippi law governed tortious interference with contract; (3) California law governed claims for fraud and aiding and abetting; and (4) Texas law governed punitive damages.<sup>283</sup>

During the Survey period, two federal opinions applied what appear to be federal common law choice-of-law rules to the issue of piercing the corporate veil. The *Davaco* opinion, discussed above, rejected an alter-ego argument regarding personal jurisdiction over a Canadian corporate subsidiary.<sup>284</sup> In doing so, it announced that the law of the state of incorporation governs veil piercing.<sup>285</sup> This makes sense and is in fact consistent with the Restatement, but the court's only cited authorities were five other federal opinions with no reference to Texas law as providing the choice-of-law rule.

In *Ace American Insurance Co. v. Huntsman Corp.*, the court considered whether to bind a non-signatory corporate subsidiary to an arbitration clause.<sup>286</sup> Veil-piercing was an issue as well, and the court applied the same apparently-federal rule that the incorporating state's law governs veil-piercing in federal court.<sup>287</sup>

It may seem odd to suggest that federal courts are violating state interests by applying the incorporating state's law to an issue. But the Supreme Court has clearly stated more than once that in the absence of federal law, federal courts must use the local state's choice-of-law rule to select which state or foreign law governs the non-federal issue.<sup>288</sup> One of the *Davaco* opinion's federal citations made that point, that is, that the North Carolina choice-of-law rule was appropriate.<sup>289</sup> On the other

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282. No. 3:06-CV-1196-O, 2008 WL 4386993 (N.D. Tex. Sept. 26, 2008) (mem.).

283. *Id.* at \*12. For additional adjudication in the same case, see generally *Eisentstadt v. Tel. Elecs. Corp.*, No. 3:06-CV-1196-0, 2008 WL 4452999 (N.D. Tex. Sept. 30, 2008).

284. *Davaco, Inc. v. AZ3, Inc.*, No. 3:07-CV-803, 2008 WL 2243382, at \*2 (N.D. Tex. May 30, 2008) (mem.); see also discussion *supra* notes 10-13 and accompanying text.

285. *Id.* at \*1.

286. 255 F.R.D. 179 (S.D. Tex. 2008).

287. *Id.* at 195.

288. See, e.g., *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4-5 (1975).

289. See *Davaco*, 2008 WL 2243382, at \*1 (citing *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345, 348 (M.D.N.C. 1995)). In *Dassault*, the question of what law governed piercing the veil was one of first impression; the federal district court used persuas-

hand, there is an exception that may justify these two Texas federal opinions. Where federal law is silent, state law nonetheless may not apply if the issue is one of compelling federal interest. Those interests include such things as claims by and against the United States and interstate and international relations.<sup>290</sup> Whether issues such as personal jurisdiction or compelling arbitration present a compelling federal interest will require further analysis that exceeds this article's scope. In any event, the two Texas federal opinions on which state's law governs veil piercing are no doubt correct in their result. The question is whether a Texas choice-of-law rule, or an *Erie* guess as to that rule, needed to be part of the loop.

### III. FOREIGN JUDGMENTS

Foreign judgments from other states and countries create Texas conflict-of-laws issues in two ways: (1) their local enforcement, and (2) their preclusive effect on local lawsuits. Foreign judgments include those from sister states and foreign country judgments, but do not include federal court judgments from districts outside Texas because those judgments are enforced as local federal court judgments.<sup>291</sup>

Texas recognizes two methods of enforcing foreign judgments: the common law method using the foreign judgment as the basis for a local lawsuit<sup>292</sup> and, since 1981, the more direct procedure under two uniform judgments acts,<sup>293</sup> along with similar acts for arbitration

give authority from the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. b (1971). See *Dassault*, 909 F. Supp. at 348-49.

290. See, e.g., *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (discussed in CHARLES A. WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 413-420 (6th ed. 2002)).

291. See 28 U.S.C. § 1963 (2000).

292. 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 (2000). The Uniform Enforcement of Foreign Judgments Act (UEFJA) specifically reserves the common law method as an alternative. See TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon 2008).

293. Sister-state judgments are enforced under the UEFJA, *id.* §§ 35.001-.007. The Act requires (1) the judgment creditor to file a copy of the judgment authenticated under federal or Texas law; (2) notice to the judgment debtor from the clerk, or the judgment creditor. The judgment debtor may (1) move to stay enforcement if grounds exist under the law of Texas or the rendering state, *id.* § 35.006, and (2) challenge enforcement along traditional full faith and credit grounds such as the rendering state's lack of personal or subject matter jurisdiction. *Id.* §§ 35.003-.006. Foreign-country judgments for money are enforced under the Uniform Foreign Country Money-Judgment Recognition Act (UFCMJRA), *id.* §§ 36.001-.008. 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. *Id.* §§ 36.0041-.0043. The judgment debtor has thirty days to challenge enforcement, or sixty if domiciled in a foreign country, with a twenty-day extension available for good cause. *Id.* § 36.0044. Unlike the UEFJA, the UFCMJRA explicitly states ten grounds for non-recognition—three mandatory and seven discretionary. Briefly stated, the mandatory grounds are (1) lack of an impartial tribunal, (2) lack of personal jurisdiction, and (3) lack of subject matter jurisdiction. *Id.* § 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

awards,<sup>294</sup> child custody,<sup>295</sup> and child support.<sup>296</sup> This conflicts article will defer to the other topics in the Annual Survey for coverage of interstate and international child custody and child support issues.

The Survey period included three noteworthy foreign-judgment cases raising issues of death penalty sanctions from a New York court, the duration of the Texas court's jurisdiction to enforce judgments, and proper venue. All three cases involved sister-state judgments under the Uniform Enforcement of Foreign Judgments Act (UEFJA).

In *EnviroPower, L.L.C. v. Bear, Sterns & Co.*, the issue was whether a judgment resulting from a "death penalty" discovery sanction was enforceable under the Full Faith and Credit Clause.<sup>297</sup> Bear, Sterns sued EnviroPower in New York state court for breach of contract and quantum merit. The New York court found that EnviroPower had intentionally withheld discovery documents and struck its answer as a sanction. The Court thereafter entered a judgment for Bear, Sterns, who sought to domesticate it in a Harris County court.<sup>298</sup> EnviroPower moved to vacate the judgment, arguing that because the foreign judgment was based on a "death penalty" sanction, which is penal in nature, the judgment was not enforceable under the Full Faith and Credit Clause.<sup>299</sup> In a case of first impression, the appellate court affirmed the trial court's decision, finding that death penalty sanctions for discovery abuse were not excepted from enforcement under the Full Faith and Credit Clause. Relying on United States Supreme Court precedent, the court of appeals held that only criminal or quasi-criminal statutes are the types of penal statutes that fall under the exception to the Full Faith and Credit Clause.<sup>300</sup>

In *BancorpSouth Bank v. Prevot* the court of appeals held that a Texas court has jurisdiction to enforce a foreign judgment pursuant to the UEFJA even after the trial court's general plenary power expires.<sup>301</sup> In

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not from a country granting reciprocal enforcement rights. *Id.* § 36.005(b). The UFCM-JRA also provides for stays, and expressly reserves the right of enforcement of non-money judgments under traditional, non-statutory standards. *Id.* §§ 36.007-.008; *see also* *Hilton v. Guyot*, 159 U.S. 113 (1895) (comity as discretionary grounds for recognizing and enforcing foreign country judgments).

294. *See* Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2006 & Supp. 2008); Texas International Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 172.082(f) (Vernon 2005).

295. TEX. FAM. CODE ANN. §§ 152.001-.317 (Vernon 2008).

296. *Id.* §§ 159.001-.902.

297. 265 S.W.3d 16, 18 (Tex. App.—Houston [1st Dist.] 2008), *rev'd in part en banc*, 265 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

298. *Id.*

299. *Id.* at 19. "Under the Full Faith and Credit Clause, a state must give the same force and effect to a judgment of a sister state that it would give to its own judgments." *Id.* To avoid enforcement, a party must establish that "(1) the judgment is interlocutory, (2) the judgment is subject to modification under the law of the rendering state, (3) the rendering state lacked jurisdiction, (4) the judgment was procured by fraud or penal in nature, or (5) limitations has expired under the Texas Civil Practice and Remedies Code." *Id.* at 19-20 (quoting *Russo v. Dear*, 105 S.W.3d 43, 46 (Tex. App.—Dallas 2003, pet. denied); TEX. CIV. PRAC. AND REM. CODE § 16.066 (Vernon 2008)).

300. *EnviroPower*, 265 S.W.3d at 20-21 (citing *Huntington v. Attrill*, 146 U.S. 657, 668-69 (1892)).

301. 256 S.W.3d 719 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

1983, Bancorp obtained a default judgment against Prevot in Mississippi. Under Mississippi law, a judgment is valid for seven years. When seven years passed without payment, Bancorp filed another suit in Mississippi state court to renew the judgment. In addition, Bancorp sought to domesticate each “renewed” Mississippi judgment in Prevot’s home state of Texas by filing each judgment in a Texas state court. At no time did Prevot timely file a post-judgment motion challenging the foreign judgments, nor did he appeal the judgments. In 2005, Bancorp filed a motion in Texas to enforce the Mississippi judgment. After a hearing, the Texas court entered an order neither granting nor denying the motion because the courts had lost jurisdiction.<sup>302</sup> The court of appeals reversed, holding that the Mississippi judgment was instantly enforceable under the UEFJA when Bancorp filed it in a Texas court. As to the issue of jurisdiction to enforce the judgment later, the court held that while a trial court’s plenary power expires thirty days after a judgment is entered, a trial court retains the statutory and inherent power to enforce its judgment and held the Mississippi judgment enforceable.<sup>303</sup>

*Cantu v. Grossman* is a first-impression ruling on UEFJA venue.<sup>304</sup> Grossman obtained a Florida judgment for tortious interference with contract, then filed suit in Harris County to enforce the Florida judgment. Cantu objected to venue in Harris County but the trial court denied Cantu’s objection.<sup>305</sup> In a case of first impression, the court of appeals considered whether the general venue laws of Texas apply to foreign judgments filed pursuant to the UEFJA. First, the court acknowledged that “Texas courts have held repeatedly and consistently that the [defendant’s right] to be sued in the county of his residence is a valuable right of which he may not be deprived unless [an exception applies].”<sup>306</sup> Second, the Court found that the “UEFJA does not clearly indicate [an] intent to exempt the filing of a foreign judgment from the general venue laws of Texas.”<sup>307</sup> The court held that Hidalgo County, where the defendant resided, was the proper venue.<sup>308</sup>

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302. *Id.* at 721-22.

303. *Id.* at 724-29 (citing TEX. CIV. PRAC. & REM. CODE § 35.003 (b) & (c) (Vernon 2002)); *Walnut Equip. Leasing Co. v. Wu*, 920 S.W.2d 285, 286 (Tex. 1996).

304. 251 S.W.3d 731 (Tex. App.—Houston [14th Dist.] 2008, pet. filed).

305. *Id.* at 734.

306. *Id.* at 741; see TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(2) (Vernon 2002).

307. *Cantu*, 251 S.W.3d at 741.

308. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(2)).