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## Conflict of Laws

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# CONFLICT OF LAWS

James P. George\*  
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**S**TATE and national 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 state and federal courts during the Survey period from October 1, 2005, through November 30, 2006. 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 subse-

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quent 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>

## I. CONFLICTS AT LARGE IN TEXAS—AN OVERVIEW

In the conflict-of-laws surveys from 2002 through 2005, this Article attempted to cover the broad range of conflicts issues dealing with every aspect of personal jurisdiction, choice of law, and cross-border judgment recognition and enforcement. Although no data is 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 bordering four states, from being a civil-law nation, and from hosting international shipping. Only California shares these factors, with the partial exception of the states bordering Quebec. Texas courts experience every variety of conflict-of-laws litigation. In addition to a large number of opinions on common examples of personal jurisdiction,<sup>2</sup> Texas courts produce case law every year on internet-based jurisdiction,<sup>3</sup>

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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).

2. The Texas Supreme Court's only opinion on personal jurisdiction during the Survey period was a per curiam reversal of the lower courts' assertion of jurisdiction, in an insurance claim, over a nonresident parent corporation whose only Texas contacts related to its acquisition of the subordinate insurer. See *Commonwealth Gen. Corp. v. York*, 177 S.W.3d 923, 925-26 (Tex. 2005). Other personal jurisdiction cases during the Survey period are too numerous to report here. A few of the more noteworthy legal discussions (in addition to the internet cases discussed *infra* note 3 and the forum-clause cases cited *infra* note 4) are: *Hoffmann v. Dandurand*, 180 S.W.3d 340, 352 (Tex. App.—Dallas 2005, no pet.) (denied jurisdiction in action against Chicago resident for claim regarding stock purchase rights in Chicago-based company); *Huynh v. Nguyen* 180 S.W.3d 608, 627 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (upholds jurisdiction for claim by Texas medical patients against California health care providers for claims arising in California); *The Paul Gillrie Inst., Inc. v. Universal Computer Consulting, Ltd.*, 183 S.W.3d 755, 764 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (upheld jurisdiction over Florida-based trade publication for defamation action); *Credit Commercial de France, S.A. v. Morales*, 195 S.W.3d 209, 223 (Tex. App.—San Antonio 2006, pet. denied) (denied jurisdiction for class action by Mexican nationals against foreign defendants for alleged complicity in the failure of Sharp Financial, a Texas corporation owned by Mexican nationals); *Doe v. Roberts*, 198 S.W.3d 466, 475 (Tex. App.—Dallas 2006, no pet. h.) (reversed lower court and found general jurisdiction over retired priest living in Ohio for alleged sexual assaults in Missouri, based on links to Dallas diocese); *Bergenholtz v. Cannata*, 200 S.W.3d 287, 297 (Tex. App.—Dallas 2006, no pet.) (jurisdiction denied in Texas residents' legal malpractice claim against California attorneys regarding a lawsuit in California); *Berry v. Lee*, 428 F. Supp. 2d 546, 564 (N.D. Tex. 2006) (finds personal jurisdiction against two employers, one in South Korea and the other in the People's Republic of China, for sexual harassment and assault claims allegedly occurring in Asia); *Sarmiento v. Producer's Gin of Waterproof, Inc.*, 439 F. Supp. 2d 725, 733 (S.D. Tex. 2006) (found jurisdiction for claim by migrant workers against Louisiana employer).

3. *Schexnayder v. Daniels*, 187 S.W.3d 238, 249 (Tex. App.—Texarkana 2006, pet. dismissed w.o.j.) (rejected internet arguments but upheld specific jurisdiction on other contacts); *Karstetter v. Voss*, 184 S.W.3d 396, 405 (Tex. App.—Dallas 2006, no pet.) (dismissed enforcement of Kansas default judgment based on lack of Kansas jurisdiction); *Paolino v. Argyll Equities, L.L.C.*, 401 F. Supp. 2d 712, 732-33 (W.D. Tex. 2005) (jurisdiction denied as to all parties in action arising from interstate loan); *AdvanceMe, Inc. v. Rapidpay LLC*,

prorogating and derogating forum-selection clauses,<sup>4</sup> federal long-arm statutes with nationwide process,<sup>5</sup> international forum non conveniens,<sup>6</sup>

450 F. Supp. 2d 669, 674 (E.D. Tex. 2006) (found jurisdiction for patent-infringement claim); EpicRealm Licensing, LLC v. Autoflex Leasing, Inc., Nos. 2:05-cv-163-DF, 2:05-CV-356-DF, 2006 WL 1984223, at \*7 (E.D. Tex. 2006) (jurisdiction denied in patent-infringement action); Action Tapes, Inc. v. Weaver, No. CIV. 3:05-CV-1693H, 2005 WL 3199706, at \*3 (N.D. Tex. 2005) (jurisdiction denied in case arising from eBay transaction); Flowserve Corp. v. Midwest Pipe Repair, L.L.C., No. 3:05-CV-1357-N, 2006 WL 265521, at \*4 (N.D. Tex. 2006) (jurisdiction upheld in action for misappropriation of confidential information); Moore v. Harney Hardware, Inc., No. H-05-4054, 2006 WL 1342820, at \*3 (S.D. Tex. 2006) (jurisdiction upheld in patent-infringement case); Pettus v. Combs, No. SA-06-CA-0028-XR, 2006 WL 1677778, at \*4 (W.D. Tex. 2006) (jurisdiction denied in defamation case).

4. Prorogating forum clauses support the immediate forum's jurisdiction, while derogating clauses designate a forum other than the immediate forum. The distinction is important. In prorogation cases (where plaintiff has filed in the parties' earlier-chosen forum), the issues will turn mostly on contract law—if the clause is contractually valid, defendant has consented and waived amenability arguments. In derogation cases (where a forum clause designates a place other than the immediate forum), defendant's arguments will often include not only the enforceability of the forum clause under contract principles, but also an attack on amenability to the immediate forum. Well-drafted forum clauses are not litigated often in prorogation settings and are generally upheld. *See, e.g.*, Swanscan, LLC v. Whetstone, No. Civ-A H-05-3306, 2006 WL 492161, at \*4 (S.D. Tex. 2006) (upholding Texas forum clause); Taisheng Int'l Ltd. v. Eagle Maritime Servs., Inc., No. Civ.A. H-05-1920, 2006 WL 846380, at \*5 (S.D. Tex. 2006) (upholding ambiguous Texas forum clause in bill of lading); XPEL Techs. Corp. v. Maryland Performance Works Ltd., No. SA-05-CA-0593-XR, 2006 WL 1851703, at \*7 (W.D. Tex. 2006) (upholding Texas forum clause). However, they are sometimes denied. *See, e.g.*, PCC Sterom, S.A. v. Yuma Exploration and Prod. Co., Inc., No. 01-06-00414-CV, 2006 WL 2864478, at \*7 (Tex. App.—Houston [1st Dist.] 2006, no pet. h.) (rejecting Texas forum clause). The opposite is true of derogating forum clauses. *See, e.g.*, William Noble Rare Jewels v. Christie's Inc., 231 F.R.D. 488, 491-92 (N.D. Tex. 2005) (honoring New York forum clause); Nicolas v. MCI Health & Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006) (rejecting forum clause designating Washington, D.C. or Loudon County, Virginia); Braspetro Oil Servs. Co.—Brasoil v. MODEC (USA) Inc., 423 F. Supp. 2d 680, 682 (S.D. Tex. 2006) (honoring forum clause designating Brazil); Dominguez v. Finish Line, Inc., 439 F. Supp. 2d 688, 691 (W.D. Tex. 2006) (rejecting arbitration clause designating Indianapolis, Indiana, and requiring parties to meet to agree on more reasonable site for arbitration); Guterthum Invs., Inc. v. Coolbrands Smoothies Franchise, L.L.C., No. 5A-06-CA-0471 RF (NN), 2006 WL 2933886, at \*3 (W.D. Tex. 2006) (honoring forum clause designating Suffolk County, New York); BBC Chartering & Logistic Allcaps & Co., KG v. Suzlon Wind Energy Corp., No. H-05-04128, 2006 WL 1007524, at \*3 (S.D. Tex. 2006) (rejecting forum clause designating Hamburg, Germany); *In re* Talent Tree Crystal, No. 01-05-00686-CV, 2006 WL 305015, at \*3 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (honoring forum clause designating federal courts in Houston where a parallel case was pending); Prosperous Maritime Corp. v. Farwah, 189 S.W.3d 389, 393-94 (Tex. App.—Beaumont 2006, no pet.) (rejecting contract's selection of Bombay, India, as situs for wrongful death suit); Int'l Demographics, Inc. v. SF Newspaper Co., No. H-06-0342, 2006 WL 1897042, at \*10 (S.D. Tex. 2006) (successor to defendant not sufficiently tied to forum clause to be bound), *aff'd*, No. 06-20657, 2007 WL 1676984 (5th Cir. June 12, 2007).

5. *See, e.g.*, Verizon Employee Benefits Comm. v. Jaeger, No. 3:05-CV-1860-L ECF, 2006 WL 2880451, at \*4-5 (N.D. Tex. 2006) (applying 29 U.S.C. § 1132 regarding ERISA claims); Yearby v. York Casket Co., No. H-06-1719, 2006 WL 1900647, at \*2 (S.D. Tex. 2006) (denies application of 15 U.S.C. § 22 to antitrust action, although the court's analysis that federal long-arm statutes merely reiterate the minimum-contacts test and require sufficient contacts with Texas appears to be erroneous, *see id.* at \*1, contradicting *Verizon's* analysis, 2006 WL 2880451 at \*3).

6. *See, e.g.*, Perforaciones Maritimas Mexicanas S.A. de C.V. v. Seacor Holdings, Inc., 443 F.Supp.2d 825, 835-36 (S.D. Tex. 2006) (dismissal sought for forum in Mexico; denied as moot after lengthy analysis and other dispositive rulings); Seung Ok Lee v. Ki Pong Na,

parallel litigation,<sup>7</sup> international family-law issues,<sup>8</sup> and private lawsuits against foreign sovereigns.<sup>9</sup> The range of issues with annual examples is similar for choice of law. International judgment enforcement and interstate judgment enforcement offer fewer annual examples,<sup>10</sup> possibly a sign of the 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. Accordingly, this Survey period's article focuses almost entirely on choice-of-law issues, with only this brief reference in the introduction to personal jurisdiction and judgment enforcement.

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198 S.W.3d 492, 493 (Tex. App.—Dallas 2006, no pet.) (reversed trial court's dismissal of divorce action for refiling in Korea); *Gomez de Hernandez v. Bridgestone/Firestone N. Am. Tire, L.L.C.*, 204 S.W.3d 473, 483-84 (Tex. App.—Corpus Christi 2006, pet. denied) (dismissed for refiling in Mexico).

7. "Parallel litigation" refers not merely to lawsuits having some or all issues being litigated in related actions, but instead to the determination of motions for relief from pending multiple litigation, either by staying or dismissing the instant action or by enjoining the other litigation. *See, e.g., In re State Farm Mutual*, 192 S.W.3d 897, 903 (Tex. App.—Tyler 2006, no pet.) (Texas action stayed pending outcome of Louisiana case); *AutoNation, Inc. v. Hatfield*, 186 S.W.3d 576, 582 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (injunction against employer proceeding in Florida suit); *In re Talent Tree Crystal*, No. 01-05-00686-CV 2006 WL 305015, at \*4 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (dismissing case in deference to parallel action in federal court); *Youngblood v. JTH Tax Servs., Inc.*, No. SA:06-CA-380-XR, 2006 WL 1984656, at \*5 (W.D. Tex. 2006) (transferred to be consolidated with action in the Eastern District of Virginia); *4052898 Manitoba, Ltd. v. Titan Oil and Gas, Inc.*, No. CIVASA05CA31505NN, 2006 WL 617953, at \*10-11 (W.D. Tex. 2006) (transferred to be consolidated with action in the Central District of California).

8. *See, e.g., Seligman-Hargis v. Hargis*, 186 S.W.3d 582, 587 (Tex. App.—Dallas 2006, no pet.) (no child custody jurisdiction because of superior contacts with Germany); *Ruffier v. Ruffier*, 190 S.W.3d 884, 890 (Tex. App.C El Paso 2006, no pet.) (no child custody jurisdiction because of superior contacts with Belarus and Argentina); *Kogel v. Robertson*, No. 03-04-00246-CV, 2005 WL 3234627, at \*1 (Tex. App.—Austin 2005, no pet.) (mother fled to Belgium with child in violation of Texas custody order); *Boyo v. Boyo*, 196 S.W.3d 409, 414 (Tex. App.—Beaumont 2006, no pet.) (Texas divorce between Nigerian nationals, including ancillary claims against a Nigerian company for diversion of community assets).

9. *See, e.g., Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 425 (5th Cir. 2006) (attempted judgment enforcement failed); *Evans v. Petroleos Mexicanos (PEMEX)*, No. 05-20434, 2006 WL 952265, at \*2 (5th Cir. 2006) (denied jurisdiction over foreign-government-owned corporation); *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 282 (5th Cir. 2005) (denied jurisdiction over Pope Benedict XVI and the Holy See); *Wahba v. Nat'l Bank of Egypt*, 457 F. Supp. 2d 721, 735 (E.D. Tex. 2006) (denied jurisdiction over government-owned bank).

10. Foreign country judgments include: *Af-Cap*, 462 F.3d at 425 (lacked jurisdiction to garnish assets); *FG Hemisphere Assocs., LLC v. Republique du Congo*, 455 F.3d 575, 596 (5th Cir. 2006) (denied enforcement because targeted property was not subject to the court's jurisdiction); *Motalvo v. Park Drilling Co. of S. Am. Sucursak Ecuador*, No. H-03-1745, 2006 WL 1030012, at \*4 (S.D. Tex. 2006) (enforcement denied because Ecuadoran document did not qualify as judgment); Interstate judgment enforcement actions include: *Karstetter v. Voss*, 184 S.W.3d 396, 405 (Tex. App.—Dallas 2006, no pet.) (dismissed enforcement of Kansas default judgment based on lack of Kansas jurisdiction); *Navarro v. San Remo Mfg., Inc.*, No. 05-04-01511-CV, 2006 WL 10093, at \*4 (Tex. App.—Dallas 2006, no pet.) (Wisconsin judgment enforced).

## 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>11</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>12</sup> Third, the forum state has broad power to make choice-of-law decisions, either legislatively or judicially, subject only to limited constitutional requirements.<sup>13</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 states’ laws, based on events or people important to the operation of that specific law.<sup>14</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>15</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>16</sup> This Survey article is organized according to the hierarchy in 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

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

12. The RESTATEMENT (SECOND) creates a presumption against *renvoi* except for limited circumstances. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1988). Although commentators defend *renvoi*’s limited use, they acknowledge its general lack of acceptance in the United States, except in limited circumstances where statutes direct its use. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 134-39 (3d 2000) [hereinafter SCOLES]; WEINTRAUB, *supra* note 1 at 88-94. Texas law provides for *renvoi* in TEX. BUS. & COM. CODE ANN. §§ 2.402(b) & 4.102(b) (Vernon 2005). For federal courts, *Klaxon* reiterates the forum state’s control of choice of law. 313 U.S. at 497.

13. See *infra* notes 81-91 and accompanying text for a brief description of these constitutional requirements.

14. RESTATEMENT (SECOND) § 6(1), cmt. a (1971). See, e.g., *Owens Corning v. Carter*, 997 S.W.2d 560, 574 (Tex. 1999) (applying an earlier version of the Texas wrongful death statute, requiring that the court “apply the rules of substantive law that are appropriate to the case.” TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon Supp. 2005) (as amended in 1997, with the same wording as this provision).

15. RESTATEMENT (SECOND) § 187 (“Law of the State Chosen by the Parties”) allows contracting parties to choose a governing law, within defined limits as explained *infra* notes 25-45 and accompanying text. Texas has adopted § 187. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-78 (Tex. 1990).

16. See *infra* note 46 for the factors in RESTATEMENT (SECOND) § 6.

Court.<sup>17</sup>

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

The Survey period offered five cases involving choice-of-law statutes, all from federal district courts, with the first three applying the Texas codification of the “internal affairs doctrine.” *Kira, Inc. v. All Star Maintenance*<sup>18</sup> is instructive on several issues of choice-of-law advocacy, which the federal district court found necessary in spite of the parties’ agreement, both in their contract and their less-than-adequate trial briefs, that Nevada law governed. *Kira* was an action between LLC owners for several claims arising from two owners’ alleged misappropriation of funds and misuse of the trade name. The parties had formed the company under Nevada law to provide maintenance services at Fort Hood, Texas. Two company members then used the company’s name and money to form a similar company in Delaware.<sup>19</sup> The operating agreement designated Nevada law, but the court, being precise, pointed out that Texas had a statutory choice-of-law rule designating the law of the state of incorporation to determine the rights, powers, and duties of entity members. This also leads to Nevada law, but the court asked for additional briefs to clarify any conflicts between Nevada and Texas, both as to internal affairs and contractual claims that would be controlled by the parties’ choice-of-law clause. The parties’ response failed to highlight specific conflicts and alternatively cited Nevada and Texas cases, leading the court to hold that Nevada law would govern, which it apparently determined on judicial notice.<sup>20</sup>

The same statute controlled in *Enigma Holdings, Inc. v. Gemplus International S.A.*,<sup>21</sup> ruling that Luxembourg law governed the corporate governance claims in an action for fraud and corporate internal misdealing,<sup>22</sup> and again in *In re Dodgin*,<sup>23</sup> an Amarillo bankruptcy case where the court ruled that the laws of the jurisdiction of incorporation of a foreign corporation govern the shareholders’ liabilities for the corporation’s debts, leading to the application of New Mexico law.<sup>24</sup>

In *Webber v. Federal Bureau of Prisons*, the Fifth Circuit Court of Appeals upheld the district court’s application of Texas law to the prisoner’s

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17. 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, 672-73 (Tex. 2004) (legislative jurisdiction) discussed *infra* note 71 and accompanying text; *Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 132 S.W.3d 477, 484 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (full faith and credit).

18. No. A-03-CA-950LY, 2006 WL 2193006 (W.D. Tex. July 31, 2006).

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

20. *Id.* at \*5-6, construing TEX. BUS. CORP. ACT ANN., art. 8.02 (Vernon 2003).

21. No. 3:05-CV-1168-B ECF, 2006 WL 2859369 (N.D. Tex. 2006).

22. *Id.* at \*8.

23. No. 05-21729-RLJ-13, 2006 WL 3069714 (N.D. Tex. 2006).

24. *Id.* at \*5.

claims of malpractice against the prison.<sup>25</sup> In *Kimberly-Clark Corp. v. Continental Casualty Co.*,<sup>26</sup> a Dallas federal court, conducting a forum non-conveniens analysis, held that the Texas statute requiring that Texas law govern certain locally insured interests did not apply because the company, despite its primary location in Texas, was a Delaware corporation.<sup>27</sup>

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

Texas law and the Restatement (Second) permit contracting parties to choose a governing law,<sup>28</sup> reflected in thirteen Survey-period cases. In a case of first impression that will eventually be cited as one of the more interesting conflicts cases, the Fifth Circuit Court of Appeals considered dual choice-of-law clauses. *International Interests, L.P. v. Hardy*<sup>29</sup> arises simply enough from a Texas limited partnership's deficiency action against an Oklahoma resident. Hardy, the Oklahoma resident, was a co-owner of The Concierge of Houston, Inc., a Texas corporation in the nursing-home business. In 2002, Concierge borrowed \$4,820,000 from Keybank in Ohio to buy a nursing home in Houston. The resulting promissory note was secured by a deed of trust to the purchased property and, in turn, personally guaranteed by Hardy. The deed of trust had an Ohio choice-of-law clause and Hardy's personal guaranty designated Texas law, but all were executed and delivered in Houston. When Concierge filed for bankruptcy a few months later, Keybank sold Hardy's promissory note to International Interests, which foreclosed on the nursing home and then filed this action in a Houston federal court against Hardy for the deficiency exceeding \$3 million. Hardy counterclaimed, attacking the foreclosure sale as deficient.<sup>30</sup> The trial court granted summary judgment to plaintiff International, based on Ohio law's lack of a deficiency offset. On appeal, the Fifth Circuit Court of Appeals identified the controlling issues as the following: (1) under Texas choice-of-law rules, what law governs a deficiency action where the deed of trust and the personal guaranty have competing choice-of-law clauses; and (2) although the right of deficiency offset is waivable under Texas law, does a general choice-of-law clause amount to a waiver? Because the Texas Supreme Court has addressed neither question, the Fifth Circuit certified the two questions for the supreme court's response.<sup>31</sup>

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25. *Id.* at \*2 (citing to 29 U.S.C. § 1346(b)(1), which grants jurisdiction to federal district courts to hear claims for money damages against the United States, "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.").

26. No. 3:05-CV-0475-D, 2005 WL 2679698 (N.D. Tex. 2005).

27. *Id.* at \*7 (construing TEX. INS. CODE ANN. art. 21.42 (Vernon 1981)).

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

29. 448 F.3d 303, 304 (5th Cir. 2006).

30. *Id.* at 304B06.

31. *Id.* at 307-09.



The Fifth Circuit also questioned whether Ohio law could properly be applied to this case since, after Keybank's sale of the Hardy note, Ohio lacked any further contact with the case.<sup>32</sup> One additional Texas statute, though the court did not mention it, might provide part of the answer to this third question. Section 35.51(c) of the Texas Business and Commerce Code provides that contracting parties may choose the law of a state having no relation to them or the contract, subject to listed exceptions.<sup>33</sup> One of those exceptions is a transaction which "transfers or creates an interest in real property for security or otherwise."<sup>34</sup> Thus, Texas law would not permit the parties here to choose an unrelated Ohio law to govern any aspect of this transaction involving Hardy's guaranty on a real property transaction. The question remains whether Ohio, which had a relation to the original transaction through the Ohio-based lender, retains that relation when the Ohio bank sells its interest.

*Washington Mutual Bank v. Crest Mortgage Co.*<sup>35</sup> raises an interesting dual choice-of-law issue involving the laws governing pre-judgment and post-judgment interest. The parties had an agreement regarding the sale of loans, with an arbitration clause and a choice of California law. Following a breach in 2004, Washington Mutual initiated an arbitration in California. Crest defaulted, and the arbitrator awarded \$9,704,075.17 to Washington Mutual. Washington Mutual then sought confirmation and enforcement in a Dallas federal court.<sup>36</sup> In confirming the award, the court ruled that pre-judgment interest was governed by the parties' agreement and that their California choice was valid.<sup>37</sup> Post-judgment interest, however, was governed by federal law.<sup>38</sup>

*Illinois Tool Works, Inc. v. Harris*<sup>39</sup> concerns an employee's action to recover on a consulting agreement. The parties' contract designated Illinois law, which the trial court applied in granting summary judgment to plaintiff. The court of appeals reversed and routinely applied Illinois law to construe the contract as not requiring payment after plaintiff's voluntary resignation.<sup>40</sup> The analysis in *Illinois Tool Works* was sufficiently straightforward that it would hardly merit mention here except for the appellate court's footnote stating that, "In this opinion, when referring to 'courts,' or 'we,' we simply mean any court utilizing Illinois substantive law."<sup>41</sup> Although the Texas appellate court is entitled to cite to any opinion applying pertinent Illinois law to construe this employment contract,

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32. *Id.* at 308 n.9.

33. TEX. BUS. & COM. CODE § 35.51(c) (Vernon 2002).

34. *Id.* § 35.51(f)(1).

35. 418 F. Supp. 2d 860 (N.D. Tex. 2006).

36. *Id.* at 861.

37. *Id.* at 862.

38. *Id.* at 862-63. These holdings are well supported by precedent as cited by the court. To the extent the disparity seems odd, the reason is that pre-judgment interest is a matter of contract law, and is thus governed by the parties' agreement, while post-judgment interest is a matter of forum (and thus federal) procedure.

39. 194 S.W.3d 529 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

40. *Id.* at 533-38.

41. *Id.* at 533 n.1.

this footnote suggests that the court did not distinguish between controlling authority from the Illinois Supreme Court and mere persuasive authority from other courts applying Illinois law.

Choice-of-law clauses may also be dispositive on the validity of arbitration agreements, as illustrated by four Survey period opinions. Two Texas courts of appeals affirmed the parties' choice of federal arbitration law over the Texas Arbitration Act or other arbitration law,<sup>42</sup> contrasted with two appellate opinions holding that a choice-of-law clause can render arbitration agreements unenforceable.<sup>43</sup> Similarly, a federal district court upheld an arbitration clause governed by Connecticut law.<sup>44</sup> In other cases, a Houston court of appeals affirmed the trial court's ruling that a promissory note's designation of Oregon law governed a Texas corporation's usury claim, in spite of the Oregon-based note's incorporation of an earlier promissory note designating Texas law;<sup>45</sup> and Texas federal courts enforced choice-of-law clauses choosing (1) Pennsylvania law to interpret plaintiff's claim that FedEx wrongly reconfigured his delivery route, which was apparently in Texas;<sup>46</sup> (2) Illinois law to govern indemnity agreements on construction performance bonds issued in Texas to a Texas company and Texas residents but issued by Illinois residents;<sup>47</sup> and (3) Texas law to govern an arbitration enforcement, where the choice of law determined in turn whether plaintiff had standing to enforce the award against five Mexican companies and a Cayman Island corporation.<sup>48</sup>

Only one Survey-period opinion rejected a choice-of-law clause, and on the most basic of premises. The Austin Court of Appeals held a choice-of-law clause inapplicable to the plaintiff's tort claims, but then made a cursory conclusion backing any factual analysis that Texas law would govern the tort claims under the most significant relationship test.<sup>49</sup>

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42. *In re Raymond James & Assocs., Inc.*, 196 S.W.3d 311, 321 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, no pet. h.).

43. *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 480-81 (Tex. App.—Dallas 2006, no pet.) (parties' contract provided that New York law governed, thus negating application of the Texas Arbitration Act); *West Tex. Positron, Ltd. v. Cahill*, No. 07-05-0297-CV 2005 WL 3526483, at \*2 (Tex. App.—Amarillo 2005, no pet.) (parties' choice of Texas law pointed to Texas interpretation of waiver).

44. *Bagley v. Allied Domecq Spirits & Wine USA, Inc.*, No. 3:06-CV-0617-6, 2006 WL 2035660 at \*2 (N.D. Tex. 2006).

45. *Saturn Capital Corp., H.F. v. Dorsey*, No. 01-04-00626-CV, 2006 WL 1767602, at \*9 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

46. *Montoya v. FedEx Ground Package Sys., Inc.*, No. Civ.A.5:04-CV-00101, 2006 WL 133455 at \*3 (S.D. Tex. 2006), applying RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971).

47. *Am. Motorist Ins. Co. v. Southcrest Constr., Inc.*, No. Civ. A. 3:04-CV-2575M, 2006 WL 995202, at \*3 (N.D. Tex. 2006).

48. *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana S.A. de C.V.*, No. 3:01-CV-1140-G ECF, 2006 WL 2217478, at \*3-4 (N.D. Tex. Aug. 3, 2006).

49. *Parker Barber & Beauty Supply, Inc. v. The Wella Corp.*, 2006 WL 2918571 at \*11 (Tex. App.—Austin 2006, no pet. h.) (citing *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 433 (Tex. 1999)).

### 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 (Second) of Conflict of Laws.<sup>50</sup> The Survey period produced fifteen cases applying the test.

#### 1. Contract Cases

In *Sunshine Traders of El Paso, Inc. v. Dolgencorp, Inc.*,<sup>51</sup> the United States District Court for the Western District of Texas committed what appears to be an error in analyzing the defendant's choice-of-law argument. Dolgencorp, a Kentucky corporation with its principal place of business in Tennessee, ordered men's jeans from the plaintiff, an El Paso company. The agreement designated Kentucky law as controlling. The district court first noted correctly that "[d]istrict courts sitting in diversity apply the choice-of-law rules of the forum state,"<sup>52</sup> and that "[i]n Texas, contractual choice-of-law provisions are typically enforced."<sup>53</sup> But because plaintiff had not signed the purchase orders containing the choice-of-law clause, the court found the choice-of-law clause inapplicable—another sound holding. But then the court noted the longstanding rule of *Erie Railroad Co. v. Tompkins*<sup>54</sup> that "a federal court must apply state law to cases not governed by federal law," and used this to conclude that "the Court is of the opinion that *Erie* binds the Court to apply Texas law to this dispute."<sup>55</sup> *Erie* does nothing of the sort. Rather, *Erie* dictates that in cases governed by state law, the appropriate state law is the one in which the federal court sits, and that this includes the local state's choice-of-law rule.<sup>56</sup> In this case, the court had already said as much. It even took the first correct steps by applying Texas law regarding contractual choice-of-law clauses, even though the court inappropriately cited a Tenth Circuit Court of Appeals precedent for its conclusion when the appropriate citation would have to be from a Texas court.<sup>57</sup> But having held the unsigned choice-of-law provision inapplicable, the next step is to

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

51. No. EP-02-CA-438-DB, 2006 WL 1472467 (W.D. Tex. May 24, 2006).

52. *Id.* at \*2 (citing *Smith v. EMC Corp.*, 393 F.3d 590, 597 (5th Cir. 2004)).

53. *Id.*

54. 304 U.S. 64 (1938).

55. *Id.* (referring to *Erie*, 304 U.S. at 64).

56. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

57. 2006 WL 1472467, at \*2 (citing *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1223 (10th Cir. 2000)).

continue following Texas choice-of-law rules to choose the governing substantive law. That would no doubt involve the application of the most significant relationship test, not an *Erie*-induced application of Texas law.

In other contract cases, Texas courts of appeals held that (1) Texas law governed alleged fraudulent misrepresentations made in Pennsylvania but received and relied upon in Texas, thus negating plaintiffs' claims;<sup>58</sup> and (2) Louisiana law, unsurprisingly, governed indemnification for oil field deaths in Louisiana.<sup>59</sup> Federal district courts in Texas held that (1) Texas law governed Kimberly-Clark's insurance claim for losses arising from the purchase of invalid tax credits by three of its Brazilian subsidiaries;<sup>60</sup> (2) Illinois law governed, over plaintiff's un-analyzed objection, a claim for breach of contract and wrongful disposal of salvage material located in Illinois, where the contract was made and to be performed in Illinois;<sup>61</sup> and (3) Nebraska law governed plaintiff's claim against his insurance company for a car accident in Mexico.<sup>62</sup> As discussed further below, the Fifth Circuit Court of Appeals certified a case to the Texas Supreme Court for clarification of Texas law regarding the parties' right to choose the law of a state unrelated to the contract.<sup>63</sup>

## 2. Tort Cases

In *Cates v. Creamer*,<sup>64</sup> the Fifth Circuit Court of Appeals rendered a significant decision regarding a car rental company's liability. In 1998, Matthew and Lamae Creamer rented a minivan from Hertz in Florida, with an agreement allowing them to drive anywhere in the United States or Canada but requiring them to return the minivan to Florida. The Creamers drove through the night toward Texas, where they were headed for a family reunion. Near daybreak, Mr. Creamer fell asleep while driving and hit plaintiff Cates's car, with Cates standing beside it. Cates is now incapacitated and lives in a long-term care facility. His guardian sued the Creamers for negligence and sued Hertz under Florida's "dangerous instrumentality doctrine," which imposes vicarious liability on the owner-lessor of a vehicle for a bailee's negligence. The federal district court in Dallas rejected the application of Florida law and dismissed the action against Hertz because it had no liability under Texas law. In the subsequent trial, the jury found Creamer not to be negligent, but the trial

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58. Prospect High Income Fund, ML CBO IV (Cayman), Ltd. v. Grant Thornton, LLP, 203 S.W.3d 602, 610 (Tex. App.—Dallas 2006, pet. filed).

59. Cudd Pressure Control, Inc. v. Sonat Exploration Co., 202 S.W.3d 901, 910-11 (Tex. App.—Texarkana 2006, no pet.), discussed *infra* at notes 131-33 and accompanying text.

60. *Kimberly-Clark*, 2005 WL 2679698 at \*7, discussed *supra* at note 24 and accompanying text.

61. *Comex Int'l v. Norfolk S. Ry. Co.*, No. Civ.A.4-04-3637, 2006 WL 355230 at \*5 (S.D. Tex. 2006).

62. *Guillen v. State Farm Mut. Auto. Ins. Co.*, No. B-05-292, 2006 WL 1295060 at \*3 (S.D. Tex. 2006).

63. *Int'l Interests, L.P. v. Hardy*, 448 F.3d 303, 309 (5th Cir. 2006).

64. 431 F.3d 456 (5th Cir. 2005).

court granted a motion for new trial, which Cates won. Creamer appealed the verdict, and Cates appealed Hertz's dismissal.<sup>65</sup> On the applicability of Florida law, the Fifth Circuit applied Restatement (Second) section 174 regarding vicarious liability and found that, contrary to the trial court's dismissal, Florida law governed.<sup>66</sup> This issue—applying the rental state's law to vicarious liability in other states and thus benefiting nonresident third parties having no relation to the rental company—has caught the eye of conflicts scholars for the past few years.<sup>67</sup> With *Cates*, the Fifth Circuit has added to the case law discussion with a precise and well-reasoned opinion. An equally well-reasoned dissent argued not for Texas law but for the federal appellate court to certify this important question to the Texas Supreme Court for a clearer direction on Texas choice of law regarding interstate vicarious liability.<sup>68</sup>

*Greenwell v. Davis*<sup>69</sup> involves interstate claims of government immunity and presents another fact pattern from this Survey period that has caught national attention in the past few years. Greenwell, an on-duty police officer in Texarkana, Arkansas, collided with Davis's car on the Texas side of State Line Avenue in Texarkana. When Davis sued Greenwell and Texarkana, Arkansas, in a Texas state court, defendants claimed immunity under Arkansas law. Arkansas waives immunity only to the extent the liability is insured, limiting liability here to \$20,000. Texas, on the other hand, limits liability to \$250,000 for each claimant and \$500,000 for each occurrence. The trial court held that Texas law governed, but the Texarkana Court of Appeals reversed on a finding that, while the Constitution's Full Faith and Credit Clause did not mandate the application of Arkansas law,<sup>70</sup> non-binding comity should be extended to Arkansas and did not violate Texas public policy.<sup>71</sup>

In other cases, federal district courts (1) applied the general tort sections of the Restatement (Second) to hold that Texas law governed the nonfederal claims in a copyright infringement and tortious interference action by a California company against a California defendant and its former employees for alleged infringements in Texas;<sup>72</sup> (2) applied the workers' compensation section of the Restatement (Second) to hold that Louisiana law governed a Texas employer's claim of immunity for injury to its worker in Louisiana but further found that the employer had no immunity under Louisiana law and that Texas law consequently governed

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65. *Id.* at 458-60.

66. *Id.* at 462-66.

67. See Symeon C. Symeonides, *Choice-of-law in the American Courts in 2005: Nineteenth Annual Survey*, 53 AM. J. COMP. L. 559 (2005); see also *id.* at 560 n.1.

68. *Cates*, 431 F.3d at 466-69.

69. 180 S.W.3d 287 (Tex. App.—Texarkana 2005, pet. denied) (citing, *inter alia*, *Nevada v. Hall*, 440 U.S. 410, 421 (1979) and *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003)).

70. 180 S.W.3d at 295-96.

71. *Id.* at 292, 296-99.

72. *MGE UPS Sys., Inc. v. Fakouri Elec. Eng'g, Inc.*, 422 F. Supp. 2d 724, 739-40 (N.D. Tex. 2006) (applying RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(2) (1971)).

the award;<sup>73</sup> (3) denied two international forum non-conveniens motions based in part on the choice-of-law analysis;<sup>74</sup> and (4) did a cursory choice-of-law analysis to determine whether various tort claims fell under the parties' arbitration agreement.<sup>75</sup>

### 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>76</sup> Trial court certifications of multi-state or nationwide classes that fail to make a record on this issue are now routinely reversed, as illustrated by two cases during this Survey period. The most significant opinion comes from an El Paso federal district court that denied class certification in an action for personal injuries resulting from x-ray emissions. In *Norwood v. Raytheon Co.*,<sup>77</sup> the proposed class included all "radar technicians, operators, and/or mechanics who have suffered and/or are suffering certain illnesses, injuries and/or death as a direct and proximate result of exposure" to certain radar equipment, along with other persons with independent or derivative claims arising from their relationship with class members.<sup>78</sup> Defendants included several designers, manufacturers, and marketers of radar devices. The court found the class—including five subclasses—adequately defined<sup>79</sup> but inadequate on the commonality and typicality requirements. Class members lived in all fifty states and several foreign countries, and the claims would require a choice-of-law analysis particular to each individual's claims within each subclass.<sup>80</sup> This would entail not only the application of fifty states' laws but also those of various foreign countries, and the court accordingly held that class litigation was not superior to other available methods for the fair and efficient adjudication of the controversy.<sup>81</sup>

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73. *XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.*, 426 F. Supp. 2d (S.D. Tex. 2006) (citing Restatement (Second) Conflict of Laws § 184 (1971)).

74. *Bund Zur Unterstützung Radargeschadigter E.V. v. Raytheon Co.*, No. 5:04CV73, 2006 WL 3197645 at \*11 (W.D. Tex. 2006) (the fact that both German and American law would apply in the same case was not grounds for forum-non-conveniens dismissal in a claim by sixteen American and German plaintiffs for radiation exposure from defendant's products); *Sacks v. Four Seasons Hotel, Ltd.*, No. 5:04CV73, 2006 WL 783441, at \*12-20 (E.D. Tex. 2006) (Texas had the most significant relationship to this wrongful-death claim by a Texas family for a death in Mexico).

75. *Frindar Megasoft Int'l, Inc. v. Telcordia Techs., Inc.*, No. A-06-CA-600LY, 2006 WL 3063434 at \*2 (W.D. Tex. 2006).

76. See FED. R. CIV. P. 23(b)(3); TEX. R. CIV. P. 42(b)(3) (Vernon Supp. 2006). See also *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672-73 (Tex. 2004) (clarifying the need for an appropriate choice-of-law analysis in certifying multi-state class actions). *Lapray* is discussed at George & Teller, *Annual Survey of Conflicts*, 58 SMU L. REV. 679, 706-07 (2005).

77. 237 F.R.D. 581 (W.D. Tex. 2006).

78. *Id.* at 584-85.

79. *Id.* at 586.

80. *Id.* at 596.

81. *Id.* at 604-05 (citing FED. R. CIV. P. 23(b)(3)).

In *All American Life & Casualty Insurance Co. v. Vandeventer*,<sup>82</sup> the Fort Worth Court of Appeals reversed and remanded the trial court's certification of a class regarding claims by insured parties for breach of contract, illusory contract, and good faith and fair dealing breach, relating to the defendant's sale of policies to a Texas insurer, American Insurance Company of Texas, who then cancelled them.<sup>83</sup> The class numbered approximately five hundred and, according to an earlier appeal in the same case, purchased the policies while residing in Indiana and South Carolina.<sup>84</sup> In an earlier stage of the dispute, the trial court had agreed with defendant All American that class certification was inappropriate. The court of appeals reversed and remanded for reconsideration of the class formation, based in part on All American's failure to demonstrate any true conflict between the applicable states' laws.<sup>85</sup> On remand, the trial court ordered class certification, but, in the meantime, the Texas Supreme Court had decided *Lapray*, requiring the trial court to analyze choice-of-law when forming a multi-state class action.<sup>86</sup> This shifted the burden to plaintiffs to demonstrate the lack of any conflicts, and because the trial court had not conducted any choice of law analysis, the court of appeals reversed class certification and remanded for that analysis.<sup>87</sup>

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

##### 1. *Legislative Jurisdiction and Other Constitutional Limits on State Choice-of-law Rules*

Similar to the due-process limitation on state long-arm statutes,<sup>88</sup> the United States Constitution imposes limits on a state's ability to choose the governing law in its courts. Unlike the limits on state long-arm statutes (which arise only under the due process clause), the choice-of-law limits arise under several doctrines—due process (requiring a reasonable connection between the dispute and the governing law), full faith and credit (requiring the choice-of-law analysis to consider the interests of other affected states), and, to a lesser extent, equal protection, privileges and immunities, the commerce clause, and the contract clause.<sup>89</sup> Constitutional problems most often occur when a state court chooses its own law in questionable circumstances. But the inappropriate choice of forum

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82. No. 0205-016-CV, 2006 WL 742452 (Tex. App.—Fort Worth 2006, no pet.).

83. *Id.* at \*5.

84. See *Vandeventer v. All Am. Life & Cas. Co.*, 101 S.W.3d 703, 707 (Tex. App.—Fort Worth 2003, no pet.), discussed at James P. George & Anna Teller, *Conflict of Laws*, 57 SMU L. REV. 719, 749-50 (2004).

85. 101 S.W.3d at 711-712, 724.

86. See *supra* note 71.

87. 2006 WL 742452, at \*3-5.

88. See *supra* notes 30-36.

89. See RESTATEMENT (SECOND) § 9 and comments; see also SCOLES, *supra* note 12 at 145-76; WEINTRAUB, *supra* note 1 at 585-648; James P. George, *Choice-of-law: A Guide for Texas Attorneys*, 25 TEX. TECH. L. REV. 833, 844-46 (1994). Choice-of-law limits under full faith and credit are now questionable after *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003).

law is not the only conceivable constitutional issue, and even when choosing foreign law, courts must apply choice-of-law rules with an eye toward constitutional limitations.<sup>90</sup>

Two Survey-period cases addressed fact settings that could have raised this due-process issue, but instead resolved the conflicts question on non constitutional grounds. In *International Interests, L.P. v. Hardy*,<sup>91</sup> discussed above, the Fifth Circuit Court of Appeals certified two questions to the Texas Supreme Court regarding competing choice-of-law clauses and their application to the debtor's right to a deficiency offset in a Texas foreclosure sale. The Fifth Circuit also raised the point that Ohio law, designated in the debtor's personal guaranty, lost any connection to the transaction and resulting litigation when the Ohio bank sold its interests to the foreclosing plaintiff. Specifically, the Fifth Circuit raised this question under Texas case law that parties to a contract "cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement."<sup>92</sup> Although the Fifth Circuit referred only to Texas case law and the Restatement (Second) of Conflict of Laws, the requirement that a state apply only laws having a reasonable relation to the parties and the dispute is one of due process.<sup>93</sup> But this due-process limit has been applied only outside the setting of parties who have agreed to a choice of law.<sup>94</sup> That is, United States Supreme Court case law has never ruled for or against the application of the due process clause to contracts with choice-of-law clauses. The obvious reason is that if the forum state permits contracting parties to choose an unrelated law (as many states do, on limited grounds),<sup>95</sup> and if the choice-of-law clause at issue is contractually valid, and if the legal result does not contravene forum public policy,<sup>96</sup> then there is little opportunity for surprise or unfairness. As far as can be determined, this issue has not come up before. It does here, however, because the Fifth Circuit noted that Ohio lost its connection when the Ohio lender sold its interest to a non-Ohio party. Even with Ohio losing its connection to the dispute, it remains true that Hardy cannot be unfairly surprised by the application of Ohio law since

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90. See *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004), discussed at James P. George & Anna K. Teller, *Conflict of Laws*, 58 SMU L. REV. 679, 706-07 (2005).

91. 448 F.3d at 309, discussed *supra* note 58 and accompanying text.

92. *Id.* at 308 (quoting *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990) and citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) and cmt. d).

93. See *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930), *Phillips Petroleum v. Shutts*, 472 U.S. 797, 806-07 (1985), and other cases listed in the sources cited *supra* note 82.

94. Compare the cases discussed at Restatement (Second) of Conflict of Laws ' 9 cmt. c and Reporters Note (discussing the constitutionally decided choice-of-law cases) with those at Restatement (Second) § 187 cmt. f and Reporter's Note to Comment f (discussing case law regarding contractual choice-of-law clauses).

95. See, e.g., TEX. BUS. & COM. CODE § 35.51(c) (Vernon 2002); see also SCOLES, *supra* note 12, at 876-77.

96. See, e.g., TEX. BUS. & COM. CODE § 35.51. See also SCOLES, *supra* note 12 at 876.



he agreed to it earlier in writing. But it does raise an interesting constitutional issue, although the court did not apply that label.

## 2. *Comity Recognizing Neighboring State's Sovereign Immunity*

In *Greenwell v. Davis*,<sup>97</sup> the Texarkana Court of Appeals reversed a trial court's rejection of Arkansas's sovereign immunity for an automobile accident in Texas.<sup>98</sup> State Line Avenue straddles the Arkansas-Texas border in Texarkana, with the northbound lanes on the Arkansas side and the southbound lanes in Texas. Greenwell is a police officer in Texarkana, Arkansas, and he collided with Davis on the Texas side of State Line Avenue. She sued in a Texas court, which rejected Greenwell's invocation of the Arkansas immunity statute limiting defendants' liability to \$20,000. Texas law, assuming its tort claims act could be applied to Arkansas, would allow Davis to claim \$250,000.<sup>99</sup> On interlocutory appeal, the court of appeals agreed with defendants and ruled that, while full faith and credit did not compel the Texas court to recognize the Arkansas immunity statute, comity required deference to the neighboring sovereign.<sup>100</sup>

## 3. *False Conflicts*

A false conflict exists when other potentially applicable laws are the same as the forum's laws or at least reach the same result.<sup>101</sup> Defining a clear, outcome-changing difference between the forum's laws 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>102</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, or 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>103</sup> The Survey period produced

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97. 180 S.W.3d 287 (Tex. App.—Texarkana 2005, pet. denied).

98. *Id.* at 291-99.

99. *Id.* at 290-92.

100. *Id.* at 295-98.

101. This is the Restatement's definition of false conflict. See RESTATEMENT (SECOND) § 145, cmt. i; *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, *supra* note 12 at 29-30. Unfortunately, Texas courts have used both definitions. See 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, 493-98 (2004).

102. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 837-45 (1985) (Stevens, J., concurring in part and dissenting in part).

103. In the 2004 Survey period, a case involving arguments for the application of five states' laws ended up with a false conflict. See Senior Living Props. L.L.C. Trust 309 B.R. 223, 233 (Bankr. N.D. Tex. 2004), reported at George & Teller, *Conflict of Laws*, 59 SMU L. REV. 1039, 1069 (2006).

twelve false-conflict cases. *Railroad Management Co., L.L.C. v. CFS Louisiana Midstream Co.*<sup>104</sup> involved the right to license payments from a pipeline owner who had obtained rights from a railroad company. A series of assignments on both sides led to plaintiffs owing the license and CFS having the obligation. The federal district court in Houston granted summary judgment for CFS, and plaintiffs appealed, arguing among other points that the trial court should have applied Louisiana law. But plaintiffs' failure to "indicate any salient difference" between Louisiana and Texas law led to the Fifth Circuit's quick rejection of this argument. The appellate court went on to find that plaintiffs failed to prove an enforceable contract, which fell under the same standard under both Louisiana and Texas laws.<sup>105</sup>

The same rule applied in *Lennar Corp. v. Great American Insurance Co.*,<sup>106</sup> a homebuilder's action against several insurance carriers for indemnity on buyers' claims for defective exterior insulation on homes built in the Houston area. The trial court granted summary judgment to the insurers on the grounds that these losses were not covered under the policies. On appeal, one of the defendant insurers—American Dynasty Surplus Lines—argued that Florida law governed the all-important coverage issue. The opinion does not indicate why Florida law might be applied to insurance coverage on homes built in Houston. There is no report of a Florida connection, although a choice-of-law clause in the insurance agreement is likely. In any event, the Florida connection was moot because American Dynasty failed in its burden to demonstrate a conflict between Texas and Florida law.<sup>107</sup>

*Berg v. Sage Environmental Consulting of Austin, Inc.*<sup>108</sup> is a study in careful choice-of-law analysis that will avoid appellate reversal. This was an employment claim, with Berg suing Sage in a Louisiana federal court for breaches of his compensation package as a manager in Louisiana. Sage filed an inconvenient-forum objection and won a transfer to the Northern District of Texas, thus requiring the Dallas federal court to apply Louisiana's choice-of-law rule.<sup>109</sup> The district court carefully applied Louisiana's comparative impairment analysis, determined that the Louisiana choice-of-law rule pointed to Louisiana law, and held that Louisiana law did not differ from Texas law.<sup>110</sup> Further insulating against error, the district court rejected Sage's argument that the false conflict dictated that Texas law apply. Instead, the court held that false conflicts require that forum law be applied, and that forum was Louisiana.<sup>111</sup> In the event a

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104. 428 F.3d 214 (5th Cir. 2005).

105. *Id.* at 222.

106. 200 S.W.3d 651 (Tex. App.—Houston [14th Dist.] 2006, pet. filed).

107. *Id.* at 676-77.

108. No. 3:05-CV-1215-G, 2006 WL 2381593 (N.D. Tex. 2006).

109. *Id.*; 2006 WL 2381593 at \*2-3 (citing *Van Dusen v. Barrack*, 376 U.S. 612 (1964) construing 28 U.S.C.A. § 1404 as requiring transferee courts to apply the choice-of-law rule of the transferor forum).

110. *Berg*, 2006 WL 2381593, at \*3.

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

conflict materialized, the court would have correctly applied the law chosen by the Louisiana choice-of-law rule.

Other false conflicts during the Survey period included legal malpractice in an automobile accident in Pennsylvania;<sup>112</sup> in an action to collect lease payments for equipment used in Nevada;<sup>113</sup> in an insurance claim for business interruption in Arkansas for a policy brokered in Texas by an Indiana insurer;<sup>114</sup> in antitrust and breach of contract claims regarding the broadcasting of *Judge Judy* and *Judge Joe Brown* television programs in the Houston area, where the contract designated California law;<sup>115</sup> in a debt claim based on an oral contract arising in Pennsylvania;<sup>116</sup> and in a fraudulent transfer claim relating to loans partly based in Mexico, with the loan agreement designating Arizona law.<sup>117</sup>

The cases above are the first kind of false conflicts, where the court believes the different states' laws are the same. The second false-conflict category is where the laws differ but reach the same result. These are sometimes not identified as false conflicts but just as the cases with identical laws; the same-result false conflicts do not require the court to determine which law governs, although it might require the court to analyze the outcome under both (or all) potentially applicable laws. Three examples occurred during the Survey period. In *Motiva Enterprises, LLC v. Liberty Mutual Insurance Co.*,<sup>118</sup> the United States District Court for the Southern District of Texas held that the LLC operating agreement's indemnity clause was not enforceable either under Delaware law (the plaintiff entity's formation state) or Texas law (situs of some of the insured interests), in spite of distinctly different approaches in the two states.<sup>119</sup> The district court held that plaintiff's theory of successor liability for wrongful discharge failed both under New York and Texas law, with the laws not being identical.<sup>120</sup> *John v. Key Energy Services, Inc.*<sup>121</sup> employs the same approach in holding that, even though Pennsylvania law varies from Texas law on the award of attorney fees in declaratory judgment actions, the fees in this case were not recoverable under either states' laws.<sup>122</sup> These cases are also examples of the error-avoidance ap-

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112. *Fogarty v. USA Truck, Inc.*, No. Civ.A.3:05-CV-1783-M, 2006 WL 42364 at \*3 (N.D. Tex. 2006).

113. *Fin. Fed. Credit, Inc. v. Dinardo*, 2006 WL 734391 at \*3 (S.D. Tex. 2006).

114. *Allianz Cornhill Int'l v. Great Lakes Chem. Corp.*, No. Civ.A.H-04-1668, 2006 WL 778618 at \*3 (S.D. Tex. 2006).

115. *Paramount Pictures Corp. v. Johnson Broad. Co.*, No. Civ.A.H.04-03488, 2006 WL 367874 at \*5 (S.D. Tex. 2006).

116. *Bocchi Ams. Assocs., Inc. v. Commerce Fresh Mktg., Inc.*, No. H-04-02411, 2006 WL 2882721 at \*6 (S.D. Tex. 2006).

117. *Smith v. Am. Founders Fin. Corp.*, No. H-05-1779, 2006 WL 2844251 at \*7 (S.D. Tex. 2006).

118. No. H-05-1473, 2006 WL 3246039 (S.D. Tex. 2006).

119. *Id.* at \*4-6.

120. 2006 WL 2842008 at \*9-10 (N.D. Tex. 2006).

121. 2006 WL 2266262 (S.D. Tex. 2006).

122. *Id.* at \*8-9. The court also held that neither Pennsylvania law nor Texas law applied because the issue was controlled by federal law. *Id.*

proach in the *Berg* case, discussed above.<sup>123</sup>

#### 4. Proof of Foreign Law

Litigants seeking the application of other state or national laws 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>124</sup> Foreign law, on the other hand, must be adequately pleaded and proven.<sup>125</sup> *Lee v. M/V Gem of Madras*<sup>126</sup> is a claim by a Hong Kong based oil company for fuel delivered in Korea to a ship, the *Gem of Madras*, registered in India. After defendant ignored plaintiff's \$233,550 invoice for 1,125 metric tons of fuel, plaintiff had the ship seized in Houston and then filed an admiralty claim for breach of contract. Admiralty claims filed in the United States are governed by federal law, which includes a choice-of-law rule based on federal common law requiring the court to consider the place of the wrongful act, the law of the ship's flag, the parties' allegiance or domicile, the place of contracting, the inaccessibility of a foreign forum, and the law of the forum.<sup>127</sup> The court was puzzled why neither party demonstrated the applicability of United States admiralty law to an event having nothing to do with the United States other than the site of seizure but nonetheless applied local law because of the parties' failure to object or plead anything else.<sup>128</sup>

*DalGLISH v. Royal Indemnity Co.*<sup>129</sup> illustrates the use of choice of law in a personal-jurisdiction analysis. *Royal* is a credit insurer seeking recovery for alleged fraud in tuition loans. In particular, *Royal* sought recovery from two Pennsylvania residents who operated a Delaware corporation,

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123. See *supra* notes 102-04 and accompanying text.

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

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

126. No. Civ.A. H-05-0631, 2006 WL 568545 at \*1 (S.D. Tex. 2006).

127. *Id.* at \*2 (citing *Lauritzen v. Larson*, 345 U.S. 571 (1953) and other cases).

128. *Id.* at \*4.

129. No. 09-06-069CV, 2006 WL 3334543 (Tex. App.C Beaumont 2006, no pet. h.).

also a defendant. The trial court applied Delaware law to govern the issue of veil piercing on which Royal based its argument for Texas having personal jurisdiction over the two people who allegedly committed the fraud in the defendant company's name. The court of appeals affirmed, found no evident conflict between Delaware and Texas law, and applied the presumption that Delaware was the same as Texas law.<sup>130</sup>

##### 5. *Use of the Forum's Procedural Rules*

*Illinois Tool Works, Inc. v. Harris*,<sup>131</sup> an employee's action to recover on a consulting agreement, is discussed elsewhere in this Survey but briefly raises a procedural distinction. The parties' employment agreement called for Illinois law, but the court of appeals noted at the outset that, while the choice-of-law clause required the court to apply Illinois law in construing the contract, this choice would not control the issue of the deference the appellate court gave the trial court's construction of that contract. The rule, as the court noted, is that "the forum will apply [its] own law to matters of remedy and procedure."<sup>132</sup>

##### 6. *Indemnitor's Intervention on Appeal to Raise Choice-of-law Issue Omitted by Insured*

The Texas Supreme Court produced only one choice-of-law discussion during the Survey period, an opinion that did not apply choice-of-law principles but instead demonstrated the importance of the choice-of-law question. *In re Lumbermens Mutual Casualty Co.*<sup>133</sup> concerned insurance claims arising from a 1998 well explosion in Louisiana that killed seven people and severely injured others. Well owner Sonat Exploration had entered a Master Service Agreement for snubbing operations with Cudd Pressure Control Inc., and both were sued. Sonat and Cudd had agreed to indemnify each other, and according to Sonat's interpretation, Lumbermens was required to provide insurance. Lumbermens was Cudd's excess insurer at the time. 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. Sonat settled the wrongful-death and injury claims, leaving only the indemnity claims against Cudd and Lumbermens. A potentially dispositive issue was whether Louisiana or Texas law governed the Sonat/Cudd agreement—according to the parties' arguments, Louisiana law voided the indemnity provision while Texas law upheld it. The trial court ruled that Texas law applied, and, in the resulting jury trial, Sonat won a \$20.7 million verdict.<sup>134</sup> Although Lumbermens was a party in related lawsuits, it was not a party to

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130. *Id.* at \*1, \*4.

131. 194 S.W.3d 529 (Tex. App.—Houston [14th Dist.] 2006, no pet.), discussed *supra* at notes 35-37 and accompanying text.

132. *Id.* at 532.

133. 184 S.W.3d 718 (Tex. 2006).

134. *Id.* at 720-22.

this action at the point it entered appellate status. 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 intervened.<sup>135</sup> The court of appeals denied Lumbermens' intervention and Lumbermens brought a mandamus action in the Texas Supreme Court.<sup>136</sup> In what appears 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>137</sup>

On remand, the Texarkana Court of Appeals entered an equally compelling choice-of-law opinion.<sup>138</sup> It 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>139</sup> The court 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, concluding that Louisiana law applied.<sup>140</sup>

### 7. Choice of law and In Rem Jurisdiction

In rem cases do not ordinarily raise conflict-of-laws issues. The general rule is that the first court asserting valid in rem jurisdiction over the property has exclusive control to the exclusion of other courts.<sup>141</sup> In *United States v. Holy Land Foundation for Relief and Development*,<sup>142</sup> this rule led to the unusual instance of the procedural laws of other jurisdictions having application here. Holy Land Foundation is a Texas based non-profit organization that raises money for causes in the Middle East. The United States government prosecuted the Foundation for supporting terrorist organizations, and, as part of that prosecution, sued for forfeiture of the Foundation's assets. Apart from the government's action against the Foundation, victims of attacks in Israel sued the Foundation in federal court in Rhode Island seeking civil damages. After obtaining a default judgment for \$116,409,123, plaintiffs pursued collection in three states—New York, South Carolina, and Washington—where the Foundation had

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135. *Id.* at 721-22.

136. *Id.* at 722.

137. *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. The opinion does not mention what choice-of-law analysis is appropriate on remand. That is, it is not clear if the Sonat/Cudd agreement had a choice-of-law clause or would be governed by the most significant relationship test.

138. *Cudd Pressure Control, Inc. v. Sonat Exploration Co.*, 202 S.W.3d 901 (Tex. App.—Texarkana 2006, no pet. h.).

139. *Id.* at 903-05.

140. *Id.* at 905-12.

141. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1938).

142. 445 F.3d 771 (5th Cir. 2006).

bank accounts. Federal courts in those states issued execution orders for the Rhode Island judgment. In the meantime, the federal forfeiture action led to a restraining order from a Dallas federal court against any disbursement of those funds. The Rhode Island creditors moved for summary disposition and to vacate the restraining order so that their judgment levies could be pursued.<sup>143</sup>

To resolve the dispute, the Fifth Circuit Court of Appeals had to examine the levies under the law of each issuing state. Although federal courts had issued the levies, federal courts use local state law for execution purposes. In separate analyses, the Fifth Circuit found that none of the levies had established in rem control over the funds in such a way as to divest the federal government's in rem seizure of the assets.<sup>144</sup> The Fifth Circuit went on to hold that the restraining order had been improperly issued because notice was not given to adverse parties—the Rhode Island creditors—as required by federal law.<sup>145</sup> The Fifth Circuit denied the civil creditors' attempted levies, vacated the restraining order, and remanded for relitigation of a preliminary injunction, with proper notice to the intervening creditors.<sup>146</sup>

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143. *Id.* at 777-78.

144. *Id.* at 783-85.

145. *Id.* at 789 (citing FED. R. CIV. P. 65(a)(1) (West 1992)).

146. *Id.* at 793.