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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, 2006, through September 30, 2007. 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.[1]

Although no data are readily available to confirm this, Texas is no doubt a primary state in the production of conflict of laws precedent. This results not only from its size and population, but also from its placement; it borders four states, a civil-law nation, and is a hub for international shipping. Among the states, only California shares these factors, with the partial exception of the states bordering Quebec. Texas courts experience the entire 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. The topics of interstate and international judgment recognition and enforcement offer fewer annual examples, possibly a sign of their administrative nature which 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 the Survey's ability to report on them, a function both of journal space and authors' time. Accordingly, this Survey period's article focuses on a select number of 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 will focus primarily on issues relating to amenability.

A. CONSENT AND WAIVER

Contracting parties may agree to a forum selection clause designating either an 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

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).

is, one undermining the forum's jurisdiction.[2]

In re AutoNation, Inc., involved both personal jurisdiction and choice-of-law issues in a parallel litigation setting.[3] Hatfield began working for AutoNation's Houston outlet in 2002 as an at-will general manager. A year later AutoNation required Hatfield to sign a "Confidentiality, No-Solicitation/No-Hire and Non-Compete Agreement" as a condition of employment. The agreement included a choice-of-law clause and a forum selection clause, both selecting Florida. Hatfield left AutoNation in January 2005 for a position with a competing Mercedes-Benz dealership in Houston.[4]

AutoNation sued Hatfield in Florida a month later, seeking enforcement of the non-compete agreement. Hatfield and his new Texas employer then sued AutoNation in Texas for a declaratory judgment that the non-compete clause was governed by Texas law and was unenforceable. Hatfield also sought an anti-suit injunction against the Florida action. AutoNation moved to dismiss the Texas action because of the Florida forum clause, and alternatively, moved to stay the Texas suit in favor of the first-filed Florida action. The Texas trial court found for Hatfield, denying AutoNation's motion to stay the Texas case and enjoining AutoNation from pursuing the Florida case. AutoNation sought both an accelerated appeal and mandamus from the court of appeals, which were both denied. AutoNation then petitioned the Texas Supreme Court for mandamus relief.[5]

Hatfield argued that a *DeSantis* analysis compelled both Texas litigation and invalidation of the Florida non-compete agreement.[6] The supreme court disagreed, distinguishing this case as turning on a forum clause rather than a choice-of-law clause, even though both were present here. The supreme court noted that Hatfield did not demonstrate fraud, overreaching, or undue hardship that would provide an exception of the rule that forum-selection clauses are generally honored.[7]

The supreme court pointed to 2004 precedent that established that even where Texas statutory provisions specify the application of Texas law, those provisions are irrelevant to the enforceability of a forum-selection clause where no statute requires suit be brought or maintained in

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, 924 (1999).

3. 228 S.W.3d 663, 678 (Tex. 2007).

4. *Id.* at 665.

5. *Id.* at 664-66.

6. In *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990), Florida-based Wackenhut sued former Texas employee DeSantis to enforce a non-compete agreement to prevent him from starting up a rival business. The parties' non-compete agreement was enforceable under Florida law, which was expressly designated in the parties' contract. *Id.* at 678. In a classic application of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971), the Texas Supreme Court held that non-compete agreements as strict as Wackenhut's violated Texas public policy, which overrode the parties' contractual choice of law. *Id.* at 680-81.

7. *In re AutoNation*, 228 S.W.3d at 668.

Texas.[8] The supreme court found the parties' bargained-for agreement required judicial respect and "should be heard in the first-filed Florida action, as the parties explicitly contracted."[9] The supreme court also stated, "[W]e will not presume to tell the forty-nine other states that they cannot hear a non-compete case involving a Texas resident-employee and decide what law applies, particularly where the parties voluntarily agree to litigate [elsewhere]."[10] The supreme court directed the trial court to dismiss the case in favor of first-filed Florida suit.[11]

In other forum clause cases, Texas courts addressed the issue of whether successor corporations can enforce a forum clause;[12] the corollary question of whether successors or subsidiaries are bound by forum clauses;[13] and yet another corollary question of whether spouses are bound.[14] Another court refused to enforce a forum clause designating Lake County, Illinois, where the contract was signed and the services were performed in Dallas.[15]

B. 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. The test breaks down internet use into a spectrum of three areas. One end of the spectrum finds defendants clearly doing business in the forum based on contracts entered into with forum residents; at the spectrum's other end are passive websites not involving defendants' intentional contact with the forum and not leading to jurisdiction. The spectrum's difficult middle involves the forum resident's exchange of information with the defendants' host computer, with jurisdiction based on the level of interactivity and the commercial nature of the information exchange.[16] Five cases during the Survey period considered internet con-

8. *Id.* at 669 (citing *In re* AIU Ins. Co., 148 S.W.3d 109 (Tex. 2004)).
9. *Id.*
10. *Id.* at 670.
11. *Id.*
12. Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc., 234 S.W.3d 679, 686-87 (Tex. App.—Houston [14th Dist.] 2007, pet. filed) (enforcing a forum clause designating the Hague, Netherlands, on behalf of a non-party to the contract who was the successor company to the original contracting party).
13. CNOOC Se. Asia Ltd. v. Paladin Res. (SUNDA) Ltd., 222 S.W.3d 889, 894-95 (Tex. App.—Dallas 2007, pet. denied) (binding successor corporations to a forum clause, but not non-signatory subsidiaries).
14. St. Clair v. Brooke Franchise Corp., No. 2-06-216-CV, 2007 WL 1095554, at *2-4 (Tex. App.—Fort Worth, Apr. 12, 2007, no pet.) (mem. op., not designated for publication) (holding that non-signatory spouse was not bound by a forum clause in spite of her signing a "Consent of Spouse" form).
15. *In re* Int'l Profit Ass'n, No. 05-07-00454-CV, 2007 WL 1866894, at *1 (Tex. App.—Dallas June 29, 2007, orig. proceeding).
16. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). The Fifth Circuit adopted the *Zippo* test in *Mink v. AAAA Dev., L.L.C.*, 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 v. Doctor, 76 S.W.3d 496 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

tacts as a basis for specific personal jurisdiction.

In *State Farm Fire & Casualty Co. v. Miraglia*,[17] a California resident was subject to Texas jurisdiction for Yahoo website postings. In that case, Miraglia, a California resident, posted information on a Yahoo! website that disparaged Texas-based First Cash Financial Services, Inc. The postings were directed at First Cash's shareholders, officers, and directors, who were all Texas residents. When these postings resulted in two defamation suits in Texas against Miraglia, State Farm provided his defense based on his homeowner's insurance policies while still reserving a claim of non-coverage. State Farm then filed this action for a declaration that it had no duty to indemnify.[18]

In denying Miraglia's challenge to Texas jurisdiction for State Farm's claim, the court found that the Yahoo! website was not passive.[19] Instead, it had an interactive bulletin board where users could post information and, when others responded, the original poster would receive the responses. Miraglia's comments were directed at Texas residents, and he should have reasonably anticipated being haled into Texas courts.[20] As for fair play and substantial justice—the balancing of convenience and interest factors—the two defamation lawsuits were both being litigated in Texas. In addition, Texas had an interest in the indemnification issues involved. If the suit were litigated in California, as Miraglia requested, there was no guarantee State Farm would obtain full relief since the parties would not be bound to a California judgment.[21]

In other Internet jurisdiction cases, Texas courts found no jurisdiction in a trademark claim by a New York plaintiff regarding two steak restaurants in Nevada;[22] in a second trademark and cybersquatting claim by a Dallas plaintiff against a California defendant who had no Texas connections at all other than the fact this his web activity could be accessed in Texas;[23] in a third trademark action for the energy drink "Deezel" by a Houston-based plaintiff against a California defendant;[24] and in a Texas resident's negligence claim for a personal injury occurring in South Carolina, against an Alabama forklift leasing company who the court found had never leased equipment in Texas through their website.[25]

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17. No. 4:07-CV-013-A, 2007 WL 2963505 (N.D. Tex. Oct. 11, 2007).

18. *Id.* at *1, *3-4.

19. *Id.* at *3.

20. *Id.* at *4.

21. *Id.*

22. *See* Glazier Group, Inc. v. Mandalay Corp., No. H-06-2752, 2007 WL 2021762, at *11 (S.D. Tex. July 11, 2007).

23. *See* Drive Fin. Servs., LP v. Ginsburg, No. 3:06-CV-1288-G, 2007 WL 2084113, at *6-7 (N.D. Tex. July 19, 2007).

24. Optimal Beverage Co., Inc. v. United Brands Co., Inc., No. H-06-1386, 2007 WL 654614, at *1 (S.D. Tex. Feb. 27, 2007).

25. *See* Soto v. Dyna-Lift, Inc., No. B-06-122, 2007 WL 703927, at *2 (S.D. Tex. Mar. 2, 2007) (mem. op.).

C. Other Jurisdiction Cases

IRA Resources, Inc. v. Griego was an action against California-based defendants for participating in an illegal sale of securities in Texas.[26] In 2001, Martinez, a Texas resident, approached Griego, also a Texas resident, about investing in "Customer Owned Coin Operated Telephones," a scheme in which Griego would purchase public pay phones from American Telecommunications Company in return for a share of the profits. Griego used $25,500 of his retirement account to fund this, which Martinez arranged for him through IRA Resources and Eldorado Bank, both located in California. When the investment eventually failed, Griego sued IRA Resources and Eldorado alleging that Martinez was their agent and that they had engaged in an illegal sale of securities in Texas, which defrauded investors.[27] The trial court denied the California defendants' objection to personal jurisdiction in spite of its finding that Martinez was not their agent. The court of appeals affirmed, but the Texas Supreme Court reversed, finding that neither IRA Resources nor Eldorado had purposefully directed their activities at Texas.[28]

In *Moki Mac River Expeditions v. Drugg*,[29] the Texas Supreme Court reversed the lower courts' finding of specific jurisdiction over a Utah-based river-rafting company for the death of a thirteen-year-old Texas boy in Arizona. Moki Mac had not actively solicited business in Texas, but had mailed the decedent's parents two brochures after the parents learned of the company through a friend in Texas. The supreme court found that specific jurisdiction required a substantial connection between forum contacts and the facts of the litigation, which was missing here.[30]

In *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, the Texas Supreme Court reversed the lower courts' finding of general jurisdiction for a third-party claim against a Louisiana hospital by Kimberly-Clark Corporation in a toxic-tort wrongful death claim related to tampons.[31]

In another jurisdiction case, the Beaumont Court of Appeals held that Texas lacked specific and general jurisdiction over a Bermudan ship manager, a Canadian ship-management company, and an Indian crew manager for a crew member's death in a traffic accident while ashore in Texas to purchase supplies for the ship.[32]

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26. 221 S.W.3d 592, 594 (Tex. 2007).

27. *Id.* at 595.

28. *Id.* at 596-99.

29. 221 S.W.3d 569, 573 (Tex. 2007).

30. *Id.* at 576-89. The opinion develops a detailed argument on the substantial connection requirement, including elements of "but-for relatedness;" "substantive relevance/proximate cause;" "sliding scale relationship;" and "substantial connection to operative facts." *Id.* at 579-85. Two dissenting justices argued that the majority's application of the relatedness requirement was misplaced and that Moki Mac had, at best, a forum non conveniens argument. *Id.* at 588-92 (Johnson, J., dissenting).

31. 235 S.W.3d 163, 171 (Tex. 2007).

32. *See generally* Farwah v. Prosperous Mar. Corp., 220 S.W.3d 585 (Tex. App.—Beaumont 2007, no pet.).

D. Forum Non Conveniens Dismissals

Forum non conveniens, or inconvenient forum, is an old common law objection to jurisdiction that now is also available through some statutes, such as 28 U.S.C. § 1404 for intra-jurisdictional transfers based on convenience.[33] Because intra-federal transfers under § 1404 do not implicate conflicts between states or nations, they are not considered here. This article is limited to inter-jurisdictional forum non conveniens under the common law, available in state and federal courts in Texas under the same two-part test requiring the movant to show the availability of an adequate alternative forum and that the balance of private and public interests favors transfer.[34]

In *Dtex, L.L.C. v. BBVA Bancomer, S.A.*,[35] the United States Court of Appeals for the Fifth Circuit upheld the federal district court's forum non conveniens dismissal of an action in favor of litigation in Mexico. Plaintiff Dtex was a South Carolina company engaged in trading used textile equipment. Dtex bought used textile equipment at a foreclosure sale in Mexico "several years ago," and then became embroiled in a series of lawsuits with Bancomer, a Mexican bank, who claimed a security interest and superior right to the textiles. Dtex's efforts included a lawsuit in South Carolina, which was dismissed for lack of personal jurisdiction over Bancomer. Dtex then sued Bancomer in Texas where it was subject to personal jurisdiction because of a branch located in Houston. Bancomer moved for forum non conveniens dismissal, which the federal district court granted in April 2007. The Fifth Circuit upheld the dismissal, adopting the district court's memorandum opinion and noting the "long, dramatic, and sordid history of the parties' efforts," and that "even this ongoing conflict's relatively small chapter in the Southern District of Texas has produced a record on appeal comprising fourteen volumes, il-

33. 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).

34. *See, e.g.*, Piper Aircraft v. Reyno, 454 U.S. 235, 242 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947); McLennan v. Am. Eurocopter Corp., 245 F.3d 403, 423-24 (5th Cir. 2001). The private factors look to (1) the parties' convenience, including the relative ease of access to sources of proof, the availability of compulsory process for the attendance of unwilling witnesses, and the cost of obtaining their attendance; (2) the possibility of viewing the premises, if appropriate; and (3) all other practical problems that make the trial easy, expeditious and inexpensive. *McLennan*, 245 F.3d at 423. The public factors look to (1) the courts concerns and the forum state's interests, including the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home; (3) the interest in having the trial of a diversity case in a forum familiar with the law that must govern the action; (4) the avoidance of unnecessary conflict of laws problems; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* Texas forum non conveniens law is multi-faceted. Tex. Civ. Prac. & Rem. Code Ann. § 71.051 (Vernon 2008) applies to personal injury and wrongful death claims. Common law forum non conveniens, in line with *Gulf Oil*, 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).

35. 508 F.3d 785 (5th Cir. 2007).

lustrative of the extent of this international brouhaha."[36]

II. CHOICE OF LAW

Choosing the applicable substantive law is a question, like personal jurisdiction and judgment enforcement, involves 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.[37] 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.[38] Third, the forum state has broad power to make choice-of-law decisions, either legislatively or judicially, subject only to limited constitutional requirements.[39]

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, which are statutes directing the application of certain state's laws based on events or people important to the operation of that specific law.[40] Second in the choice-of-law hierarchy is party-controlled choice of law, which are choice-of-law clauses in contracts that control unless public policy dictates otherwise.[41] 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*.[42] 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

36. *Id.* at 787. The district court's opinion, adopted in the Fifth Circuit's opinion, displays a textbook analysis of the *Piper Aircraft* forum non conveniens factors. *Id.* at 793-804 (citing *Piper Aircraft*, 454 U.S. at 235).

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

38. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS 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, e.g.*, SCOLES, *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, 2.402(b), 4.102(b), 8.106, 9.103 (Vernon 1994 & 2002). For federal courts, *Klaxon* reiterates the forum state's control of choice of law. 313 U.S. at 497.

39. See *infra* notes 109-136 and accompanying text for a brief description of these constitutional requirements.

40. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1), cmt. a (1971). *See e.g.*, Owens Corning v. Carter, 997 S.W.2d 560, 573 (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" (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon Supp. 2007), as amended in 1997, with the same wording as this provision)).

41. RESTATEMENT (SECOND) OF CONFLICT OF LAW § 187 (1971) ("Law of the State Chosen by the Parties") allows contracting parties to choose a governing law, within defined limits as explained *infra* notes 56-65 and accompanying text. Texas has adopted this section. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 679, 677-78 (Tex. 1990).

42. See *infra* note 66 for the factors in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

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 note that because choice of law is a state law issue, the only binding opinions are those of the Texas Supreme Court.[43]

A. Statutory Choice-of-Law Rules

The Survey period offered two significant cases involving choice-of-law statutes. *Citizens Insurance Co. of America v. Daccach*,[44] discussed below at length, turned on a statutory application that was not necessarily a choice-of-law statute. The case involved a thirty-five nation class action for selling securities in other nations in violation of Texas law. The Texas Supreme Court held that plaintiffs may, in some cases, specify the controlling law and bypass routine choice-of-law analysis in a multinational suit by bringing the claim under a specific forum statute that does not dictate the controlling law, but merely proscribes certain behavior in Texas.[45] The case is more notable for its discussion of legislative jurisdiction, that is, the due process limits on Texas applying its regulatory law to events outside of Texas, even though the supreme court found that these activities occurred in Texas.[46]

In *Hyde v. Hoffman-La Roche, Inc.*,[47] the Fifth Circuit made an unusual analysis of statutory choice-of-law rules in a claim against a pharmaceutical company for injuries from the drug Accutane. Hyde was a Texas resident who sued Hoffman-La Roche in a Texas state court. Hoffman-La Roche removed the case to federal court and then moved to dismiss under Texas's statute of repose of fifteen years for product liability actions.[48] In response, Hyde filed an identical action in New Jersey state court, where several similar claims were pending, and moved for voluntary dismissal of his Texas case. The federal district court granted that dismissal, but the Fifth Circuit Court of Appeals reversed on the grounds that (1) the applicable Texas personal injury statute barred actions that were not timely filed under Texas law; (2) this included the Texas statute of repose in spite of its status as substantive law rather than a forum-limitation rule; and (3) the dismissal deprived Hoffman-La Roche of the opportunity to argue in New Jersey that the action was barred by Texas

43. 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, 672-74 (Tex. 2004) (legislative jurisdiction). See also the cases discussed *infra* notes 109-36.

44. 217 S.W.3d 430 (Tex. 2007). The case is discussed *infra* in notes 112-28 and accompanying text.

45. *Id.* at 442-46.

46. *Id.* at 446-48.

47. 511 F.3d 506, 507, 511 (5th Cir. 2007).

48. *Id.* at 507 (citing Tex. Civ. Prac. & Rem. Code Ann. § 16.012(a), (b) (Vernon Supp. 2007)).

law.[49]

In re Vartec Telecom, Inc. displays a more typical statutory choice-of-law rule, though ultimately rejecting it.[50] In 2004, Vartec Telecom filed a Chapter 11 bankruptcy action, which was then converted into a Chapter 7. The trustee then filed an adversary proceeding against certain officers and directors, followed by Federal Insurance Company ("Federal") filing a declaratory judgment action seeking to rescind the directors' and officers' insurance policy based on fraud during the application process. The trustee, along with the directors and officers, moved to dismiss for failure to state a claim, arguing that Federal had failed to give the required notice under Texas law. Federal countered that Mississippi law governed because Vartec was a Mississippi entity and the policy was issued in Mississippi.[51]

In choosing the applicable law, the court noted that it must first look to the forum's statutory directives, in this case the Texas Insurance Code, which provides that Texas law governs any insurance contract (1) with proceeds payable to a Texas citizen or inhabitant, (2) issued by an insurer doing business in Texas, and (3) issued in the course of the insurer's doing business in Texas.[52] The court found that Federal had issued the policy in Mississippi in the course of doing business there and not in Texas; accordingly, the statute did not apply.[53] The court then selected Mississippi law under a most significant relationship analysis.[54]

B. Choice-of-Law Clauses in Contracts

Texas law and the *Restatement (Second) of Conflict of Laws* permit contracting parties to choose a governing law,[55] as reflected in four cases during the Survey period. In *Nexen, Inc. v. Gulf Interstate Engineering Co.*,[56] the Houston Court of Appeals for the First District used a *DeSantis* analysis to conclude that the Alberta, Canada statute of repose applied. Canadianoxy Offshore International (COIL) contracted with Gulf Interstate Engineering (GIE) to provide engineering services for a proposed oil processing and development facility and pipeline in Yemen. The contract contained an Alberta choice-of-law clause. In July or August 1993, the pipeline became operational, but GIE still had a punch list and "ROW clean-up" items to complete. In July 1994, GIE certified it had completed all engineering services. In April 2002, flooding in Yemen

49. *Id.* at 511-14. See also Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 Am J. Comp. L. 243, 273-78 (2007), discussing this and other related claims against Hoffman-La Roche, including their choice-of-law implications.

50. No. 07-03056, 2007 WL 2142499 (Bankr. N.D. Tex. July 23, 2007).

51. *Id.* at *4.

52. *Id.* at *2 (discussing Tex. Ins. Code Ann. art. 21.42 (Vernon 1981)).

53. *Id.* at *4.

54. *Id.* at *4-5.

55. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990). *See also* Restatement (Second) of Conflict of Laws § 187 (1971).

56. 224 S.W.3d 412, 419-23 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

caused the pipeline to move and caused damages to the pipeline.[57]

Nexen, COIL's corporate successor, sued GIE alleging breach of contract, breach of warranty, negligence, and strict liability. GIE answered, alleging the affirmative defense of the ten-year statute of repose under Texas or Alberta law. GIE moved for summary judgment against all claims, arguing that under both the Alberta and Texas statutes, the date of completion of July 1993 applied as the accrual date for purposes of repose. Nexen responded that Alberta and Texas law differed and, as the clause stated, Alberta law governed. The trial court took judicial notice of relevant law, and without specifying which law it applied, rendered a take nothing summary judgment for GIE on all claims.[58]

Using a *DeSantis* analysis under section 187 of the *Restatement (Second) of Conflict of Laws*, the First Houston Court of Appeals held that the Alberta statute of repose applied.[59] Unlike many limitation statutes, statutes of repose are considered substantive rather than procedural. Section 187 requires courts to consider whether the application of the parties' chosen law would be contrary to a fundamental Texas public policy. The court noted that the Texas repose statute applied to a more specified group of plaintiffs, while the Alberta statute was of general application. Both repose statutes, however, had ten-year periods and both had similar underlying policies and purposes. Finally, the court recognized that at least one other Texas court had applied another jurisdiction's statute of repose.[60] The court concluded that the application of Alberta's statute of repose did not offend any fundamental public policy of Texas and affirmed the trial court's judgment.[61]

Parker Barber & Beauty Supply, Inc. v. Wella Corp. was an unusual case with bifurcated clauses—a choice-of-forum clause designating Virginia, and choice-of-law clause designating New York.[62] The suit, involving both contract and tort claims, arose over Wella's termination of an exclusive distribution agreement for hair care products. The trial court refused to enforce the Virginia forum clause, and then noted that the New York choice-of-law clause governed only the contract claims. The parties did not dispute that Texas had the most significant relationship to the tort claims. The Austin Court of Appeals affirmed on all points, with the interesting result of a dispute with a Virginia choice-of-forum clause and a New York choice-of-law clause being litigated in Texas with Texas law governing some of the claims.[63]

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57. *Id.* at 415.

58. *Id.* at 417.

59. *Id.* at 419-20.

60. *Id.* at 422 (citing Crisman v. Cooper, 748 S.W.2d 273 (Tex. App.—Dallas 1988, writ denied)).

61. *Id.* at 422.

62. No. 03-04-00623-CV, 2006 WL 2918571, at *1, 11 (Tex. App.—Austin Oct. 11, 2006, no pet.) (mem. op.).

63. *Id.* at *5-11.

In two other Survey-period cases, one Texas district court upheld a California choice-of-law clause in a store's indemnity claim against a manufacturer for a customer injured by a collapsing chair,[64] and another Texas district court upheld a Texas choice-of-law clause for claims and counterclaims between a Texas-based company and a Tennessee-based cabinet supplier.[65]

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 as stated in the *Restatement (Second) of Conflict of Laws*.[66] The award for the most adept handling of the greatest number of choice-of-law issues goes to the Southern District of Texas in *Deep Marine Technology, Inc. v. Conmaco/Rector, L.P.*[67] Plaintiff Deep Marine was a Texas company engaged in offshore diving operations. It leased a winch, which was reputed to operate up to a depth of ten thousand feet, from Louisiana-based Conmaco. When the winch failed and resulted in business losses, Deep Marine sued in a state court in Houston alleging breach of contract, negligent misrepresentation, and fraud. Conmaco removed to federal court, where Deep Marine moved for partial summary judgment on the ground that Texas law governed rather than Louisiana law. The parties' contract had no choice-of-law clause, so the analysis of all three claims occurred under the *Restatement (Second) of Conflict of Laws*.[68]

The court carefully but efficiently analyzed the choice-of-law issues, beginning with the need to find a material conflict between Texas and Louisiana law on each claim. For the contract claim, Texas law allowed attorney fees for the prevailing party, while Louisiana law allowed fees only if provided by contract. Applying section 187 of the *Restatement (Second) of Conflict of Laws*, the court found that Louisiana law governed because of the location of the winch, the place of negotiation, and the place of performance and alleged failure.[69] For the negligent misrep-

64. Hegwood v. Ross Stores, Inc., No. 3:04:CV-2674-BH(G), 2007 WL 2187245, at *6 (N.D. Tex. July 28, 2007) (upholding California choice-of-law clause for an initially tort-based claim because the indemnity agreement was contractual).

65. B.J. Tidwell Indus., Inc. v. Diversified Home Prods., Inc., No. SA-06-CA-0264 FB (NN), 2007 WL 3377184, at *8 (W.D. Tex. Nov. 11, 2007) (mem. op.).

66. The embodiment of the most significant relationship test are seven factors to be balanced according to the needs of the particular case: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states, and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). This listing is not by priority, which varies from case to case. *Id.* at cmt. c. In a larger sense, the most significant relationship test includes the other choice-of-law sections found throughout the *Restatement (Second) of Conflict of Laws*.

67. 515 F. Supp. 2d 760 (S.D. Tex. 2007).

68. *Id.* at 770-72.

69. *Id.* at 770-71.

resentation claim, the court found no meaningful difference between the two states' laws and accordingly applied Texas law.[70] The fraud claim was also governed by Texas law under the analysis in section 148 of the *Restatement (Second) of Conflict of Laws*, which applies specifically to fraud. Here, the district court found that even though the contract was centered in Louisiana, the alleged fraud occurred during meetings in Houston.[71] In bifurcating the choice-of-law results, the district court also correctly noted that Texas choice-of-law rules require an issue-by-issue analysis, which may result in the application of different states' laws to the same dispute.[72]

1. Contract Cases

In re AutoNation, Inc. is discussed above in the Forum Contest section but has significant choice-of-law implications.[73] It involved a non-compete agreement between Florida-based AutoNation and a Texas employee who went to work for a competitor. The non-judicial facts are identical to those in *DeSantis*, where the Texas Supreme Court held that a Florida company's non-compete agreement with a Texas employee was unenforceable in Texas, and that the parties' choice of Florida law had to yield to Texas public policy interests.[74] The difference in *AutoNation* was the contract's exclusive Florida forum clause. The Texas Supreme Court held that nothing in Texas law dictates that all Texas employment disputes be litigated in Texas.[75] In *DeSantis*, the Florida employer sought enforcement in Texas. The supreme court thus dismissed the Texas employee's local lawsuit in favor of AutoNation's first-filed suit in Florida.[76]

Jose Diaz de Leon v. Tesco Corp. was a parallel case of wrongful discharge with an interesting holding that no choice-of-law analysis is required where the plaintiff merely seeks a declaratory judgment under Texas law.[77] Tesco, a Canadian corporation with subsidiaries in the United States and Mexico, hired de Leon in 1996 as a financial and contract administrator for its United States territory. When Tesco terminated his position five years later, de Leon sued in Mexico, asserting claims relating to profit sharing, overtime pay, unjustified termination, back salary, and other benefits de Leon claimed under Mexican law. Tesco responded by seeking a declaratory judgment from a Texas court, alleging that de Leon's suit in Mexico had breached his severance agreement with Tesco. The Texas trial court granted Tesco's partial summary

70. *Id.* at 771.
71. *Id.* at 771-72.
72. *Id.* at 769 (citing Scottsdale Ins. Co. v. Nat'l Emerency Servs. Inc., 175 S.W.3d 284, 291 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).
73. 228 S.W.3d 663 (Tex. 2007). The case is discussed *supra* at notes 3-11 and accompanying text.
74. *See generally* Desantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990).
75. 228 S.W.3d at 669.
76. *Id.* at 670; *see also* Symeonides, *supra* note 49, at 273-78
77. No. 14-04-00513-CV, 2006 WL 3313357, at *2 (Tex. App.—Houston [14th Dist.] Nov. 16, 2006, no pet.) (mem. op.).

judgment on the issue that the severance agreement barred the suit in Mexico, but the court declined to rule on whether de Leon had breached the agreement.[78]

De Leon appealed, arguing that the trial court erred in applying Texas law rather than Mexican law because most of his employment either occurred in Mexico or benefitted the Mexican subsidiary. In the Mexican lawsuit, de Leon sought relief under Mexican law, which negated the severance agreement. De Leon argued that he was not seeking relief under Texas law, thereby making the Texas suit inappropriate. The Houston Fourteenth District Court of Appeals disagreed, holding that the trial court did not determine what law would apply but merely made the declaration that to the extent Texas law applies, de Leon's claims would be barred by the legal effect of the release, including all claims asserted within the Mexican lawsuit.[79] The court further found that no law on record precluded a Texas court from issuing a declaratory judgment while a lawsuit is pending in a foreign jurisdiction.[80]

In other cases, Dallas federal courts used section 188 of the *Restatement (Second) of Conflict of Laws* to (1) choose Texas over French law in a lawsuit over a distributorship agreement to be performed in France;[81] (2) confirm the parties' concession that Tennessee law governed an insurer's disputed duty to defend Home Depot in a related action, with the confirmation diminishing that issue on any appeal;[82] and (3) apply Mississippi law to a claim for rescinding a directors and officers insurance policy in a bankruptcy case.[83]

2. *Tort Cases*

Emke v. Compana, L.L.C.,[84] a case involving a conversion claim regarding a domain name, is an interesting example of choice of law controlling whether a plaintiff has stated a claim. It also highlights Texas law's odd exclusion of intangible property from conversion claims. Emke and Compana disputed ownership of the domain name "servers.com." Emke claimed he bought it in August 2000 and never expressed desire to abandon it, but it was placed in a deletion queue accidentally by a third-party, Network Solutions. Compana found the domain in the deletion queue and paid for it to be moved. Emke sued Texas-based Compana in a Nevada federal court, alleging conversion of personal property and cybersquatting and seeking return of the domain name without compen-

78. *Id.* at *1.
79. *Id.* at *2.
80. *Id.*
81. *See* AMX Corp. v. Pilote Films, No. 3:04-VCV-2035-D, 2007 WL 1695120, at *12-14 (N.D. Tex. June 5, 2007). The case is discussed *infra* at notes 147-50 and accompanying text.
82. *See* Home Depot U.S.A., Inc. v. Ohio Cas. Ins. Co., No. 3:06-CV-24-L, 2007 WL 2089390, at *4 (N.D. Tex. July 20, 2007).
83. *In re* Vartec Telecom, No. 04-81694, 2007 WL 2142499, at *4-5 (Bankr. N.D. Tex. July 23, 2007). The case is discussed *supra* at notes 50-54 and accompanying text.
84. No. 3:06-SV-1416-L, 2007 WL 2781661, at *1 (N.D. Tex. Sept. 25, 2007).

sation. Compana filed a motion to dismiss or alternatively, to transfer venue to the Northern District of Texas, where two other cases involving the parties were underway.[85]

The Nevada federal court transferred the case. Compana then moved for judgment on the pleadings, and Emke moved for summary judgment, or another venue transfer to Nevada or California. In spite of the myriad of procedural motions in the three cases, the focal issue became which law governed. Emke's claim was for conversion. Under Texas law, conversion applies only to physical property, whereas California law includes intangibles like domain names.[86]

The court first had to decide the basis for the venue transfer from Nevada. If Nevada was an improper venue, then Texas choice-of-law rules would govern. If the transfer was merely for convenience, then the original venue would control and Nevada choice-of-law rules would apply.[87] The transfer order only cited the legal standard for convenience, and the Texas federal court thus applied Nevada choice-of-law rules. Nevada uses the most-significant-relationship test—the same as Texas—and California prevailed as the situs of injury, the situs of domain registration, and the place of Emke's residence.[88] The court then concluded that Emke had sufficiently plead the elements for a conversion claim and denied the motion to dismiss.[89]

Red Roof Inns, Inc. v. Murat Holdings involved a claim of tortious interference flowing from a franchise agreement between Red Roof Inns, based in Ohio, and Murat, a Louisiana L.L.C. with its principle place of business in Florida.[90] Murat entered a franchise agreement with Red Roof for a hotel in Baton Rouge, Louisiana. The hotel needed renovations, and Red Roof initially approved the work done by Murat. But prior to the hotel's opening, Red Roof was acquired by Accor, which then disapproved of the renovations and blocked the hotel's scheduled opening. Accor also owned Motel 6. Murat sued in a Texas state court in Dallas asserting contract, statutory, and tort claims.[91] The trial court granted summary judgment to Red Roof on all but the contract claims, which resulted in a $5.8 million jury verdict for Murat. The parties ap-

85. *Id.* The first Texas action, a 2003 federal lawsuit filed by Compana, was dismissed without prejudice. *Id.* The second Texas action was a 2004 suit filed in Texas state court by Compana for declaratory judgment, slander of title, and tortious interference with prospective business relations. *Id.* Emke removed the second case to federal court in Dallas, but on Compana's motion, it was remanded to state court. *Id.*

86. *Id.* at *3.

87. *Id.* at *3-4. Venue transfers based on convenience under 28 U.S.C. § 1404(a) require that the transferee court apply the choice-of-law rule from the state where the transferor court is located. *See* Ferens v. John Deere Co., 494 U.S. 516, 522-23 (1990). This rule does not apply to venue transfers under 28 U.S.C. § 1406 for wrong venue, in which case the transferee court applies the local state's choice-of-law rules. *See* Lafferty v. St. Riel, 495 F.3d 72, 77 (3d Cir. 2007); *see also* WEINTRAUB, *supra* note 1, at 669 n.121.

88. *Emke*, 2007 WL 2781661, at *4-5.

89. *Id.* at *9.

90. 223 S.W.3d 676, 680-81 (Tex. App.—Dallas 2007, pet. denied).

91. *Id.*

pealed. The Dallas Court of Appeals reversed the jury verdict on the contract claims based on an erroneous jury instruction, but also reversed the summary judgment against Murat on the tort claims. Rejecting the trial court's application of Ohio law to the tort claims, the court of appeals held that the franchise agreement's choice-of-law provision applied only to contract claims, and that under section 145 of the *Restatement (Second) of Conflict of Laws*, Louisiana law governed.[92] The case was remanded for a new trial on all claims.[93]

In *Jelec USA, Inc. v. Safety Controls, Inc.*,[94] the court demonstrated how to use the various sections of the *Restatement (Second) of Conflict of Laws* to reach a decision in close calls. This was an employer's action against a competitor and a former employee for misappropriation of confidential information. Both employers were oilfield service companies located in Lafayette, Louisiana. The employee, Pope, lived in Caenco, Louisiana, near Lafayette. Pope marketed Jelec's products to oil companies in Louisiana and Texas. While employed at Jelec, Pope developed a database that he later took with him to a new job with Safety Controls, who soon won a Diamond Offshore contract, for which Jelec had previously bid. Some of Pope's contacts with Diamond occurred in Texas. Jelec sued Pope and Safety Controls in the United States District Court for the Southern District of Texas.[95]

Plaintiff Jelec argued that Louisiana and Texas laws were identical on the material points in this case. Defendants argued, and the court found, that Louisiana law had a stricter requirement for maintaining trade secrets. After a detailed analysis of the relevant choice-of-law facts under section 6 of the *Restatement (Second) of Conflict of Laws*, the court slightly favored Texas law.[96] Seeking further analysis, the court examined both section 145, the general tort principle, and section 156, the rule focusing on tortious conduct, which creates a presumption that the governing law is the place of conduct. Again using a detailed analysis leading to a close finish, the court concluded that this dispute between three Louisiana parties, regarding employment based in Louisiana, was to be governed by Texas law.[97]

In *Warfield v. Carnie*, a the United States District Court for the Northern District of Texas used a straightforward application of section 145 of the *Restatement (Second) of Conflict of Laws* to choose Washington state law for claims of fraudulent transfer of receivership assets following federal prosecution for securities fraud based on Washington being the situs of the assets, the affected companies, and the conduct, even though the affected investors resided in at least thirty-four states.[98] In *Harrison v.*

92. *Id.* at 685.
93. *Id.* at 690.
94. 498 F. Supp. 2d 945 (S.D. Tex. 2007).
95. *Id.* at 946-47.
96. *Id.* at 947-51.
97. *Id.* at 951-52.
98. No. 3:04-CV-633-R, 2007 WL 1112591, at *7-8 (N.D. Tex. Apr. 13, 2007).

Procter & Gamble Co.,[99] the same federal court—Judge Buchmeyer presiding—again used section 145 to apply Texas law to tortious interference claims arising from Proctor & Gamble's acquisition of Gillette. In doing so, the court rejected Proctor & Gamble's argument for enforcing a choice-of-law clause designating Delaware law because the claims sounded in tort rather than contract and the defendant argued precedent related to choice-of-forum clauses rather than choice-of-law clauses.[100] In *Perforaciones Maritimas Mexicanas, S.A. de C.V. v. Grupo TMM, S.A. de C.V.*,[101] a federal court used a federal choice-of-law rule—the *Lauritzen-Rhoditis* test—to apply Mexican law to a collision between a ship and an oil rig in the Bay of Campeche, Mexico.

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.[102] In *Citizens Insurance Co. of America v. Daccach*, the Texas Supreme Court held that in cases where plaintiffs allege claims solely under a Texas statute that directs its application to that activity and that statute's regulation of extraterritorial activity is sound, the choice-of-law analysis under *Compaq* is unnecessary.[103]

4. *Corporate Governance*

National Architectural Products Co. v. Atlas-Telecom Services-USA, Inc. involved a dispute arising from the purchase of corporate assets.[104] Plaintiff National Architectural Products purchased convertible debentures in Millenium Armor, a Texas corporation, which it alleges disposed of the assets through an alter ego, JTA, in a series of transactions. Plaintiff sued under several theories, including securities fraud, fraudulent transfer, fraudulent concealment, conspiracy to defraud, unjust enrichment, breach of contract, and common law fraud. In addition to a number of motions to dismiss on other grounds, the court considered the

99. No. 7:06-CV-121-R, 2007 WL 431085 (N.D. Tex. Feb. 8, 2007).

100. *Id.* at *4-5.

101. No. G-05-419, 2007 WL 1428654, at *3-5 (S.D. Tex. May 10, 2007). The *Lauritzen-Rhoditis* test comes from two cases—Lauritzen v. Larsen, 345 U.S. 571 (1953), and Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970)—and applies eight factors: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant ship owner; (5) the place of the contract; (6) the inaccessibility of the forum; (7) the law of the forum; and (8) the shipowner's base of operations. *See id.*

102. *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, 680-81 (Tex. 2004) where 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 K. Teller, *Conflict of Laws*, 58 SMU L. REV. 679, 706-07 (2005).

103. 217 S.W.3d 430, 440-43 (Tex. 2007). The case is discussed *infra* notes 112-28. *See also Compaq*, 135 S.W.3d at 680-81.

104. No. 3:06-CV-0751-G, 2007 WL 2051125, at *1 (N.D. Tex. July 13, 2007).

defendants' motion to dismiss for failure to state a claim.[105] In determining which law governed the state law claims, the court rejected the contract and tort theories and held that the operative theory was corporate governance because a primary issue was successor liability.[106] The court noted that Texas had never expressly adopted section 302 of the *Restatement (Second) of Conflict of Laws*, which focuses on corporate governance, but chose to follow it in this case. Section 302 calls for the application of the law of the state of incorporation to corporate governance questions unless another state has a more significant relationship.[107] Examining the facts, the court concluded that North Carolina law governed as the state of JTA's incorporation, rather than the law of Delaware or Virginia.[108]

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,[109] 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.[110] Constitutional problems most often occur when a state court chooses its own law in questionable circumstances. But the inappropriate choice-of-forum law is not the only conceivable constitutional issue, and even when choosing foreign law, courts must apply choice-of-law rules with an eye toward constitutional limitations.[111]

Two cases raised during the Survey period issues of legislative jurisdiction. *Citizens Insurance Co. of America v. Daccach*,[112] this year's most interesting case, involved several choice-of-law questions, including the role of choice-of-law analysis in a world-wide class action, the state's

105. *Id.*
106. *Id.* at *10-11.
107. *Id.* at *11 (quoting Restatement (Second) of Conflict of Laws § 302(2) (1971)).
108. *Id.* at *10-13.
109. *See e.g.*, IRA Res., Inc. v. Griego, 221 S.W.3d 592, 596 (Tex. 2007).
110. *See* Restatement (Second) of Conflict of Laws § 9; *see also* Scoles, *supra* note 2, 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, 499 (2003).
111. *See* Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 680 (Tex. 2004), discussed at George & Teller, *supra* note 102, at 706-07.
112. 217 S.W.3d 430 (Tex. 2007).

power to regulate extraterritorial commercial activity, and the role of statutorily-designated choice of law as opposed to that under the *Restatement (Second) of Conflict of Laws*. Defendant Citizens and its subsidiary CICA were Colorado corporations with their primary offices in Austin, Texas. Their business was limited to selling life insurance policies to people outside the United States with purchasers in over thirty-five countries, including the United States (with the U.S.-based purchasers presumably buying policies to cover non-U.S. insureds). These policies allowed the policyholders—not necessarily the insureds—to assign dividends and other benefits to offshore trusts. In each year since 1996, there have been approximately 30,000 CICA policies in effect, with each policyholder paying average dividends of $2,000 and at least seventy-five percent assigning dividends and benefits to offshore trusts.[113]

In August 1999, two Colombian citizens brought a class action in a Texas state court alleging

> (1) violations of the Texas Deceptive Trade Practices Act, (2) breach of contract, (3) fraud, (4) fraud in the inducement (5) negligent misrepresentation, (6) breach of the duty of good faith and fair dealing, (7) violations of the Texas Insurance Code, (8) equitable reformation of the policies, (9) conspiracy to plan and implement this scheme, and (10) unjust enrichment and the imposition of a constructive trust.[114]

Four months later, an amended petition added seven named plaintiffs along with a claim for selling securities in violation of Texas law.[115]

The Texas Securities Act requires that securities dealers register in Texas,[116] and it provides a private cause of action against violators.[117] Citizens and CICA were not registered in Texas or anywhere else in the United States, nor were they registered in any jurisdiction where the insureds purchased the policies. The common stock purchased with the policy premiums from Citizens are listed on the American Stock Exchange.[118]

In June 2001, one of the added plaintiffs, Dr. Fernando Hakim Daccach, filed his own motion for class certification, naming himself as the only class representative and seeking only one claim for class certification—failing to register with the Texas Securities Board. He expressly disclaimed any plan to pursue the other ten causes of action, but the remaining named plaintiffs filed an amended petition maintaining those ten claims individually, not as class representatives.[119]

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113. *Id.* at 435.
114. *Id.* at 435-36.
115. *Id.* at 436.
116. "No person, firm, corporation or dealer shall, directly or through agents, offer for sale, sell or make a sale of any securities in this state without first being registered as in this Act provided." TEX. REV. CIV. STAT. ANN. art. 581, § 12(A) (Vernon Supp. 2008).
117. *Id.* at 33(A).
118. *Daccach*, 217 S.W.3d at 435.
119. *Id.* at 436.

The defendants objected to class certification, arguing that Texas law should not apply to this multi-national class action. Daccach responded with a choice-of-law analysis pointing to Texas law without analyzing the laws of any other jurisdictions. After a four-day hearing, the trial court certified Daccach's class of persons who, during the class period, "(1) purchased a CICA policy and executed an assignment to a trust for the purchase of Citizens, Inc. stock, or (2) paid any money that, pursuant to a CICA policy and assignment to a trust, was for the purchase of Citizens, Inc. stock, or (3) were entitled to any cash benefits from a CICA policy that were for the purchase of Citizens, Inc. stock."[120] On interlocutory appeal, defendants challenged the class definition, the applicability of Texas law to these claims, and the correct determination of class prerequisites. The Austin Court of Appeals upheld the class certification with a one-word change to the class definition.[121]

The Texas Supreme Court reversed and remanded on a point that does not concern this article's choice-of-law discussion—specifically that the trial court had failed to consider the preclusion possibilities of claims that are un-alleged, abandoned, or severed from the class action.[122] This holding was remarkable for its clarification of class action preclusion holding, but equally notable is the supreme court's choice-of-law holding that Texas law applies to a thirty-five nation class action.[123]

This conclusion involved two crucial analyses. First, the supreme court considered whether plaintiffs (in a class or otherwise) pursue a claim under a Texas statute that purports to regulate multinational transactions and thereby control the choice of law. Significantly, plaintiffs have no such option when suing under common law rights in a multi-state or multi-national setting. In addition the plaintiffs asserted a specific statutory claim that defendants sold securities internationally, and did so without complying with Texas law. The supreme court held that this statutory claim did not invoke a "traditional" choice-of-law analysis.[124] The supreme court pointed out that while Texas uses the most significant relationship test of the *Restatement (Second) of Conflict of Laws*, that test is qualified by a provision giving priority to legislative directives for choice of law.[125] The supreme court further found that the Texas antitrust law directed the application of Texas law to securities sold in Texas.[126] As a result, the supreme court held that the most significant relationship test is inapplicable to cases controlled by a statutory choice of law.[127]

120. *Id.* at 436-37.
121. *Id.*
122. *Id.* at 448-58.
123. *Id.* at 439-48.
124. *Id.* at 445.
125. *Id.*
126. *Id.* at 446.
127. *Id.* at 442-43. This holding seemingly diminished, and according to the supreme court abrogated, the recent holding in Compaq Computer Corp. v. LaPray, 135 S.W.3d 657 (Tex. 2004), that class certifications require a thorough choice-of-law analysis to determine

The second issue addressed was legislative jurisdiction: apart from any legislative intent, whether Texas securities laws can regulate activities in other countries. Noting the constitutional limits on a state applying its law extraterritorially, the supreme court found that because all the policies were generated from Texas, a major portion of the marketing and sales activities were initiated in Texas, and Citizen's offices were in Texas, the constitutional bar did not apply.[128]

Coca-Cola Co. v. Harmar Bottling Co. was the second legislative jurisdiction case.[129] It was decided in October 2006, and it was reported cursorily in the 2006 Survey. Now fully released, it is worthy of a full report here. Harmar and other soft drink bottlers sued Coca-Cola over "calendar marketing agreements," or CMAs, alleging violations of Texas antitrust laws and the laws of three other states: Louisiana, Arkansas, and Oklahoma.[130] The suit was brought in Texas because the CMAs specified Texas as the venue in the contracts with the retailers. The jury found that Coca-Cola engaged in conduct in violation of the Texas Free Enterprise and Antitrust Act ("TFEAA") and awarded damages. These damages did not distinguish between the damages as pertaining to each of the four states. The court further enjoined Coca-Cola from carrying out the CMAs in the region for a period of seven years.[131] The Texarkana Court of Appeals affirmed the decision, rejected Coca-Cola's argument that the lower court should not have awarded jury fees, and enjoined Coca-Cola from participating in the CMAs for conduct occurring outside of Texas.[132]

The Texas Supreme Court reversed, finding no antitrust violation on the merits but also discussed several difficult choice-of-law issues.[133] One question was whether the Texas antitrust laws could cover markets in other states, and if not, should those states' laws be applied. The supreme court answered that Texas antitrust laws could not apply in other states, and that Texas could not enforce the antitrust laws of other states.[134] A

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whether the class members claims will be governed by sufficiently-similar legal standards. *See Daccach*, 217 S.W.3d at 440-41.

128. *Id.* at 477 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818-19 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981).

129. 218 S.W.3d 671 (Tex. 2006).

130. *Id.* at 674. Plaintiffs alleged violations of the Texas Free Enterprise and Antitrust Act of 1983, TEX. BUS. & COM. CODE ANN. §§ 15.01-.26 (Vernon 2002) [hereinafter "TFEAA"]. CMAs are agreements between the manufacturer and the retailer to promote the sale of a particular product through shelf placement, price discounts, feature specific products, and otherwise elevate the marketing of the product over that of competing retailers. They are common in the carbonated beverage distribution industry and have frequently withstood antitrust challenges. The complaint here was that because Coca-Cola has such strong market domination within the stated region, the CMAs effectively operated as a restraint on trade and suppressed competition from other bottlers. *See Harman*, 218 S.W.3d at 674-76.

131. *Harman*, 281 S.W.3d at 678-79.

132. *Id.* at 679.

133. *Id.* at 680-82, 690.

134. *Id.* at 680-82. The supreme court found no legislative intent to regulate conduct outside of Texas or provide remedies for plaintiffs outside of Texas. *Id.* The supreme court further found that even if the Texas legislature had intended extraterritorial reach, that such action in this case would likely violate principles of federalism. *Id.* at 681-82.

strong four-justice dissent argued that because those other states' laws were identical to Texas law, at least as far as the record indicated, Texas courts had authority to address the entire claim.[135] The dissent also disagreed with the majority's ruling on the merits.[136]

2. *False Conflicts*

A false conflict exists when other potentially applicable laws are the same as the forum's, or at least reach the same result.[137] Defining a clear, outcome-changing difference between the forum's law 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.[138] 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, and 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.[139]

The Survey period produced four false-conflict cases. *Allice Trading, Inc. v. Shaw Environmental, Inc.*, was a suit for non-payment on the installation of storm sewers.[140] Under a commission by the Harris County Flood Control District, Allice Trading hired Shaw Environmental to install storm sewers at the Hills at Sims Greenway. Shaw was a Louisiana corporation, and the contract provided a choice-of-law clause designating Louisiana law as the governing law. After completing the work, Shaw sued in federal court in Houston for non-payment. The court examined the applicable legal principles regarding breach of contract under both Texas and Louisiana law, found no conflict, and accordingly applied Texas law.[141] The court noted that had a conflict existed, the court would have applied section 35.52 of the Texas Business and Commerce Code, which provides a statutory directive for invalidation of a choice-of-law clause when a construction contract is related to real property.[142]

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135. *Id.* at 694-99 (Brister, J., dissenting).

136. *Id.* at 699-704 (Brister, J., dissenting).

137. This is the Restatement's definition of false conflict. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, cmt. I (1971); *id.* at § 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 2, 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, 493-95 (2004).

138. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823-24 (1985) (Stevens, J., concurring in part and dissenting in part).

139. In the 2004 Survey period, a case involving arguments for the application of five states' laws ended up with a false conflict. *See In re* Senior Living Props. L.L.C., 309 B.R. 223, 233 (Bankr. N.D. Tex. 2004). The case is reported at George & Teller, *supra* note 102, at 1069.

140. No. H-06-217, 2007 WL 2873375, at *1-2 (S.D. Tex. Sept. 28, 2007).

141. *Id.* at *5-6.

142. *Id.* at *6 n.4.

In *AutonationDirect.com v. Civic Center Motors*,[143] the Fourteenth District Houston Court of Appeals avoided ruling on the parties' contractual choice of New York law for the quasi-contract claim because the parties agreed that New York and Texas law applied the same rule regarding the availability of quasi-contract remedies. The general rule for false conflicts is that forum law applies, but here the court of appeals analyzed the remaining issues under New York precedent.[144]

In other cases, the Fifth Circuit Court of Appeals affirmed the dismissal of a pro se mental anguish claim regarding a restaurant's jukebox playing the song "Redneck Mother," noting that the claim failed under both Texas and Kansas law.[145] In addition, the Fifth Circuit found no difference between Texas and Louisiana law on negligent misrepresentation in a diving company's claim for a failed deep sea winch.[146]

3. *Renvoi*

In *AMX Corp. v. Pilote Films*,[147] the United States District Court for the Northern District of Texas demonstrated an appropriate use of *renvoi*, not as a single rule but as one factor in a balancing test. *Renvoi* is a choice-of-law device calling for the forum state to apply not just the substantive law of another state or country, but also the choice-of-law rule of that state or country. Carried to an extreme, *renvoi* can then call for an examination of choice-of-law rules of third and fourth countries. It has been little used in the United States but has not died out entirely.[148]

In *AMX*, the court chose Texas law over French law in a lawsuit over a distributorship agreement to be performed in France. AMX, a Texas company that designs, develops, and markets hardware and software products for integrated control systems, agreed that Pilote could be its exclusive distributor in France. The agreement began in 1994 and called for an initial term of one year unless extended in writing. The parties never executed the written extensions but continued the relationship for ten years. In 2004, AMX notified Pilote that it intended to end the distributorship agreement, and Pilote responded that because of the value Pilote had added to AMX's marketing in France, it could not end the agreement without compensation.[149]

AMX filed a declaratory judgment action in federal court in Dallas to end the agreement. Both parties filed summary judgment motions, debating the application of Texas law (AMX) or French law (Pilote). In

143. No. 14-06000193-CV, 2006 WL 3511808 (Tex. App.—Houston [14th Dist.] Dec. 7, 2006, no pet.) (mem. op.).

144. *Id.* at *2-4.

145. *See* Brackens v. Tex. Roadhouse in Wichita, 216 F. App'x 408, 410 (5th Cir. 2007) (per curiam).

146. *See* Deep Marine Tech., Inc. v. Conmarco/Rector, L.P., 515 F. Supp. 2d 760, 769-71 (S.D. Tex. 2007).

147. No. 3:04-VCV-2035-D, 2007 WL 1695120, at *12-14 (N.D. Tex. June 5, 2007).

148. *See* WEINTRAUB, *supra* note 1, at 37-38, 91-94; SCOLES, *supra* note 2, at 134-39.

149. *AMX*, 2007 WL 1695120, at *1-2.

applying sections 6 and 188 of the *Restatement (Second) of Conflict of Laws*—and specifically section 6(2)(c)—the court considered the respective governmental interests of Texas and France. To ascertain France's interest, the court considered which law a French court would apply. The answer was that in litigating distributorship agreements, French law applies the law of the manufacturer's residence, thus pointing to Texas law and more on point, minimizing France's interests.[150]

4. 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.[151] Foreign country law, on the other hand, must be adequately pleaded and proven.[152]

Burlington Northern & Santa Fe Railway Co. v. Gunderson, Inc.[153] concerns a railroad derailment in Nebraska. In 1988, Burlington ("BNSF") bought boxcars from Gunderson, located in Oregon where the cars were designed and built. Gunderson had purchased a component, the draft-key retainer system, from ASF-Keystone, a Delaware corporation with general offices in Illinois and an end-of-car parts factory in Pennsylvania. In 2000, a BNSF line derailed in Nebraska, causing a chemical spill, extensive damage to property, environmental clean-up, personal injuries, and business interruption liabilities. BNSF's investigation concluded that the derailment was caused by a failure in the parts furnished by Keystone and sold to BNSF by Gunderson.[154]

BNSF sued Gunderson and Keystone in Texas for negligence, product liability, breach of warranty, contribution, equitable indemnity, and un-

150. *Id.* at *13.

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

152. 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. *Id.* 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.

153. 235 S.W.3d 287, 289 (Tex. App.—Fort Worth 2007, pet. withdrawn).

154. *Id.*

just enrichment. Both Gunderson and Keystone filed summary judgment motions, arguing that BNSF's claims were barred by the Texas statute of repose because of the twelve-year span between purchase and alleged failure. BNSF responded that it had too little time to conduct discovery on which state's law would govern its claims, but in any event, it was not Texas law. Crucially, BNSF never filed a Rule 202 motion asking the court to take judicial notice of any other state's law.[155] The Fort Worth Court of Appeals affirmed.[156]

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 from foreign countries, but do not include federal court judgments from districts outside Texas because those judgments are enforced as local federal court judgments.[157]

Texas recognizes two methods of enforcing foreign judgments: the common law method using the foreign judgment as the basis for a local lawsuit,[158] and since 1981, the more direct procedure under the two uniform judgments acts,[159] along with similar acts for arbitration

155. *Id.* at 290 (citing Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671, 695 (Tex 2006)).

156. *Id.* at 292.

157. *See* 28 U.S.C. § 1963 (2000).

158. 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).

159. Sister-state judgments are enforced under the Uniform Enforcement of Foreign Judgments Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-.007 (Vernon 2008). The UEFJA requires (1) the judgment creditor to file a copy of the judgment authenticated under federal or Texas law, *id.* § 35.003; (2) notice to the judgment debtor from the clerk, *id.* § 35.004, or the judgment creditor, *id.* § 35.005. 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.

Foreign-country judgments for money are enforced under the Uniform Foreign Country Money-Judgment Recognition Act, TEX. CIV. PRAC. & REM. CODE ANN. § 36.001-.008 (Vernon 2008) [hereinafter UFCMJRA]. 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, *id.* § 36.0041, with notice to the debtor provided either by the clerk, *id.* § 36.0042, or the creditor, *id.* § 36.0043. The judgment debtor has thirty days to challenge enforcement, or sixty if he is 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. *Id.* § 36.005. Briefly stated, the mandatory grounds are (1) lack of an impartial tribunal, (2) lack of personal jurisdiction, or (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 (for example, a contrary forum selection clause), (6) was in an inconvenient forum, or (7) is not from a country granting reciprocal enforcement rights. *Id.* § 36.005(b). The UFCMJRA also

awards,[160] child custody[161] and child support.[162] Interstate and international judgment recognition and enforcement offer fewer annual examples during this Survey period,[163] possibly a sign of the subject's administrative nature that results in only a few reported cases. 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.

provides for stays, *id.* § 36.007, and expressly reserves the right of enforcement of non-money judgments under traditional, non-statutory standards, *id.* § 36.008. *See generally* Hilton v. Guyot, 159 U.S. 113 (1895) (using comity as discretionary grounds for recognizing and enforcing foreign country judgments).

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

161. TEX. FAM. CODE ANN. §§ 152.001-.317 (Vernon 2002 & Supp. 2008).

162. *Id.* §§ 159. 001-.901 (Vernon 2002 & Supp. 2008).

163. Judgments from sister states include Enviropower, L.L.C. v. Bear Stearns & Co., Inc., No. 01-04-01111-CV, 2008 WL 456491, at *3-4 (Tex. App.—Houston [1st Dist.] Feb. 21, 2008), *on reconsideration*, 2008 WL 483666 (Tex. App.—Houston [1st Dist.] Feb. 21, 2008, pet. filed) (upholding the enforcement of a New York judgment and applying New York law to provisions for security); Playnation Play Sys., Inc. v. Guasjardo, No. 15-06-302-CV, 2007 WL 1439740, at *4 (Tex. App.—Corpus Christi May 19, 2007, no. pet.) (mem. op. not designated for publication) (reversing the trial court's decision not to enforce a Georgia judgment); Preferred Capital, Inc. v. Ward, Asel & Assoc., P.C., No. 05-05-01309-CV, 2006 WL 3291044, at *2-4 (Tex. App.—Dallas Nov. 14, 2006, no pet.) (mem. op.) (upholding the trial court's refusal to recognize an Ohio judgment for lack of jurisdiction there, and affirming its decision not to allow discovery of jurisdictional facts in a judgment enforcement hearing); H. Heller & Co., Inc. v. La. Pac. Corp., 209 S.W.3d 844, 849-55 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (upholding the trial court's enforcement of an Alabama judgment over the debtor's objections of lack of personal jurisdiction there). Foreign country judgments include Duruji v. Duruji, No. 14-05001185-CV, 2007 WL 582282, at *4-5 (Tex. App.—Houston [14th Dist.] Feb. 21, 2007, no pet.) (mem. op. not designated for publication) (affirming the trial court's refusal to recognize the husband's Nigerian divorce decree in a Texas divorce action).