SMU Law Review

Volume 52 | Issue 3 Article 11

January 1999

# Conflict of Laws

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AFTER a hiatus of four years, the Conflict of Laws Survey article is back. This Article does not try to make up for lost ground, instead focusing on activity during the last Survey period, from October 1, 1997 through September 30, 1998. And, in keeping with the spirit of a general survey, this Article devotes textual discussion only to those developments that appreciably add to, or detract from, understanding of Texas conflicts law, or otherwise merit the reader's attention. Other not-so-noteworthy developments are either relegated to the footnotes or omitted altogether.

As in the past, we cover the following topics: choice of law, personal jurisdiction, *forum non conveniens*, and enforcement of foreign judgments. Some collateral issues within each topic may be more completely covered elsewhere in this volume. For example, while we cover personal jurisdiction, the Civil Procedure Survey article examines the practice of special appearances. When another Survey article handles a particular subject, we try to point the reader in that direction.

## I. CHOICE OF LAW

Choice of law doctrines come in many shapes and sizes,[1] with little consensus as to the best doctrine.[2] Each jurisdiction is largely free to adopt the rules or approach it prefers.[3] The Texas Supreme Court has stated its

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1. *See* EUGENE SCOLES & PETER HAY, CONFLICT OF LAWS §§ 2.4 through 2.17, at 11-44 (1992) for an overview of the various choice of law approaches. *See also* Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979) (cases and commentary "reveal[ ] almost as many theories as there are theorists"); LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS (1991); JAMES A. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW (1980); Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 522-23(1983) ("Courts willing to consider the adoption of new choice of law theory in the United States today are faced with a bewildering array of academic theories, many with loyal judicial adherents.").

2. *See* Peters v. Peters, 634 P.2d 586, 592 (Haw. 1981) ("verdict on a generally acceptable approach to [choice of law] is yet to be returned by the scholarly jury"). *See also* Erwin v. Thomas, 506 P.2d 494, 495 (Or. 1973) ("It is with some trepidation that a court enters the maze of choice of law in tort cases. No two authorities agree.").

3. States are loosely constrained by the due process clause of the Federal Constitution. *See* U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life

preference, and, whether in Texas state or federal court,[4] Texas choice of law principles apply, and the generally applicable choice of law rules are those of the Second Restatement of Conflict of Laws.[5]

The Second Restatement sets forth general principles that leave courts much discretion. Over time, one would hope that Texas courts would bring some coherence and predictability to the application of these principles. Such an assessment is beyond the scope of this Article. Instead, this Survey addresses particular instances in which Texas courts invoked Texas choice of law principles. For this reason, this Article asks whether courts are considering the proper factors and focusing upon the crucial facts.

The Second Restatement commands a general quest for the elusive state with the "most significant relationship" to the parties and the issues of a particular case.[6] To guide this quest, the Second Restatement offers three levels of principles of increasing specificity. The broadest principles are stated in section 6:

> [T]he factors relevant to the choice of the applicable rule of law include (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 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.[7]

Section 6 applies to choice of law analysis in *all* substantive areas of law.[8]

The second level principles focus on specific substantive areas, such as torts,[9] contracts,[10] and property.[11] These general substantive provisions

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liberty, or property, without due process of law"). Due process requires that the state whose law is applied must have "a 'significant contact or significant aggregation of contacts' to the claims asserted by each . . . plaintiff." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985). *See also* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 57-67 (1986).

4. Applying its decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the U.S. Supreme Court has held that a federal district court exercising diversity jurisdiction must apply the choice of law rules of the state in which it sits. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

5. *See Gutierrez*, 583 S.W.2d at 318. This Article addresses only those cases dealing with interstate choice of law. Thus, cases dealing with either federal pre-emption of state law or choices between federal and state law are not covered.

6. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(1), 187(1) (1971) [hereinafter SECOND RESTATEMENT]. Courts undertake choice of law analysis under the Second Restatement only in the absence of a *statutory* directive regarding the applicable law. *See id.* at § 6(1) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."); *see, e.g.*, TEX. BUS. & COM. CODE ANN. §§ 1.105 (general choice of law rule for the Texas version of the Uniform Commercial Code) and 4A.507 (choice of law for certain funds transfers) (Vernon 1994).

7. SECOND RESTATEMENT § 6 (emphasis added).

8. Except where a specific statute sets forth the applicable choice of law rule. *See id.*

9. *See id.* § 145.

10. *See id.* § 188.

11. *See id.* § 222.

provide additional factors for consideration *along with* the factors in section 6. For example, section 145 lists the following factors in torts cases: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."[12] The section 145 factors are to be weighed with the section 6 factors in determining the state with the "most significant relationship to the parties and the transaction."[13]

The Second Restatement's third level principles apply to specific issues within a substantive area.[14] For example, within torts, the Second Restatement has third level rules for the standard of care,[15] the duty owed to the plaintiff,[16] and contributory negligence[17] and assumption of the risk.[18] These third level principles erect a sort of presumption in favor of a particular state's law. This presumption determines the applicable law unless "some other state has a *more significant relationship* under the principles stated in [section] 6 to the transaction and the parties, in which event the local law of the other state will be applied."[19] The third level principles, then, act as rules-of-thumb for identifying the state with the most significant relationship to a particular issue. These rules-of-thumb, however, may give way to a particularized, "*more* significant relationship" analysis based on the first and second level principles.[20]

The Texas Supreme Court appears to have a specific method for analyzing the Second Restatement's three levels of principles.[21] The Court begins by identifying a specific third-level provision, if any, that addresses the specific issues raised. If the Court finds an applicable third level provision, a strong presumption exists in favor of the law chosen by the third-

12. *Id.* § 145(2).

13. *Id.* § 145(1).

14. By providing different choice of law principles for different issues of law, the Second Restatement allows the possibility that different issues in the *same case* may be governed by the law of different states. *See* SCOLES & HAY, *supra* note 1, § 3.16, at 74. This "issue-by-issue approach in choice of law" is known as "depecage." *Id.* This author has not identified a Texas case addressing the doctrine of depecage. Other states, however, have employed the concept. *See* Bryant v. Silverman, 703 P.2d 1190, 1193 n.1 (Ariz. 1985); Stutsman v. Kaiser Found. Health Plan of the Mid-Atlantic States, Inc., 546 A.2d 367, 373 (D.C. 1988); Buchanan v. Doe, 431 S.E.2d 289, 291 (Va. 1993); Hunker v. Royal Indemn. Co., 204 N.W.2d 895, 905 n.1 (Wis. 1973). *See also* Willis L. M. Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973); Christian L. Wilde, *Depecage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329, 329 n.3 (1968).

15. SECOND RESTATEMENT § 157.

16. *See id.* § 159.

17. *See id.* § 164.

18. *See id.* § 165.

19. *See, e.g., id.* § 196 (emphasis added).

20. *See* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 59[d], at 160 (1984) (the "more significant relationship" exception to the third level principles "builds flexibility into the system, providing an escape device for judges.").

21. *See* Maxus Exploration Co. v. Moran Bros., Inc., 817 S.W.2d 50, 54 (Tex. 1991).

level provision.[22]

Next, regardless of whether a third-level principle exists, the court identifies the applicable second-level provision and analyzes the factors of this provision along with the factors of section 6. This analysis determines the state with the "most/more significant relationship."[23] If no third-level provision applies, the second-level provision and section 6 determine the applicable law.

If, on the other hand, a third level provision and the "more significant relationship" analysis select *different* states, the court must decide whether the second-level and section 6 factors overcome the third-level presumption in favor of the other state's law. Unfortunately, the Second Restatement provides little guidance on this issue, and only a periodic examination of the cases—as done in this Survey—can provide helpful guidance.

### A. Choice of Law Under the Texas Uniform Commercial Code

The Texas Uniform Commercial Code contains its own choice of law provision. Section 1.105(a)[24] provides:

> Except as provided hereafter in this section, when a transaction bears a *reasonable relation* to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this title applies to transactions bearing an *appropriate relation* to this state.[25]

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22. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 679 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (1991) (The third level principle "[a]s a rule, . . . is conclusive in determining what state's law is to apply."); *see also Maxus*, 817 S.W.2d at 54. If courts did not apply a strong presumption in favor of the state selected by a third level provision, such provisions would become largely superfluous. In other words, if the general "most significant relationship" analysis always overrode the third level analysis, why not simply drop the third level analysis? The answer lies in the description of the third level principles heuristic devices intended to identify the state with the most significant relationship. In other words, the drafters of the Second Restatement have distilled the first and second level factors in relation to a specific issue of law, and have determined that the factors will, on average, reduce to a single consideration reflected in the third level provision. For example, in torts, the issue of the standard of care will generally reduce to consideration of the place of injury. *See* Second Restatement § 157. In other words, when analyzing choice of law for the standard of care, the section 145 torts factors along with the general section 6 factors generally points towards the state where the injury occurred. Thus, section 157 embodies that shorthand rule. Yet, section 157 recognizes that particular factual situations may require a different result. Thus, flexibility is allowed by the "more significant relationship" analysis.

23. Some third level provisions, however, do not provide for consideration of the state with a "more significant relationship" to override the choice of law rule in the third level principle. *See* Second Restatement §§ 223-43 (law governing transfers of interests in land taken from situs of the property).

24. The remaining subsections provide special rules for specific types of transactions. *See* Tex. Bus. & Com. Code Ann. § 1.105(b) & (c) (Vernon 1994 & 1998 Supp.).

25. Tex. Bus. & Com. Code Ann. § 1.105(a) (Vernon 1994) (emphasis added).

This provision distinguishes between transactions where the parties' contract selects the applicable law and transactions where the parties' contract does not. If the parties' contract selects the applicable law, that law controls if the chosen state has a "reasonable relation" to the transaction. If the parties' contract does not, Texas law applies if the transaction has an "appropriate relation" to Texas.

*J. Parra e Hijos, S.A. v. Barroso*[26] involved a transaction in which the parties had not contractually selected a state's law. A Mexican corporation had sued to recover money owed for goods sold to a Texas corporation, and the question was whether Texas or Mexico law applied to the dispute. Section 1.105(a) was the applicable choice of law rule because the transaction involved a sale of goods within Article 2 of the UCC.

Since the parties had not made a contractual choice of law, section 1.105 required application of the Texas UCC if Texas has an "appropriate relation" to the parties' transaction.[27] The Texas UCC does not further define "appropriate relation," and, as the court explained, the issue "is not clarified by our state's jurisprudence."[28] The court's task was further complicated by the somewhat-even distribution of contacts between Mexico and Texas.[29] The court ultimately broke the tie based on a single contact: the plaintiff had filed suit in Texas.[30] The court did not explain why this contact was dispositive, and it is not clear why this contact should receive special weight under the Texas UCC. Regardless, in the Beaumont court of appeals, simply filing suit in Texas state court may select Texas law.

### B. Parties' Contractual Choice of Law

In *Lemmon v. United Waste Systems, Inc.*,[31] the court of appeals analyzed a contractual choice of law provision in an employer-employee dispute. *Lemmon* involved an employee's suit for wrongful termination, breach of employment contract, promissory estoppel, and breach of a post-termination oral agreement. The employee's written employment contract allowed termination for "good cause" or without cause if the employer paid a severance package. The employer later terminated the employee for cause and the employee disputed the action. The employer and the employee then began post-termination negotiations, with the employee claiming that an oral agreement was reached. The employee's suit claims that the employer breached the oral post-termination agreement. The issue was which states law applied to the employee's claims.

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26. 960 S.W.2d 161 (Tex. App.—Corpus Christi 1997, no pet.).

27. *See id.* at 167.

28. *Id.* The comments to the Texas UCC were equally unhelpful, merely noting that what constitutes an "appropriate relation" is left to "judicial decision." Tex. Bus. & Com. Code Ann. § 1.105 cmt. 3 (Vernon 1994).

29. *See Barroso*, 960 S.W.2d at 167.

30. *See id.*

31. 958 S.W.2d 493 (Tex. App.—Fort Worth 1997, writ denied).

A clause of the written employment contract selected New York law. The first issue for the court of appeals, then, was whether the parties' contractual choice of law should settle the issue. The court began its analysis with a rough statement of Texas law on the issue. The court derived its rule from the Texas Supreme Court case *DeSantis v. Wackenhut Corp.*,[32] which adopted section 187 of the Second Restatement for reviewing contractual choice of law clauses. The court of appeals paraphrased that rule as follows: "Under the concept of 'party autonomy,' we respect the parties' choice of law unless the chosen law has no relation to the parties or the agreement, or their choice would offend the public policy of the state whose laws otherwise ought to apply."[33] As discussed below, while not entirely accurate, this quote captures most of the Texas rule. Based on this rule, the court concluded that the parties had unequivocally chosen New York law, and that "neither party had contested application of New York law under the *DeSantis* framework."[34] Thus, New York law applied.

While *Lemmon* is a fairly unremarkable and straightforward case, it raises two points that are worth further discussion. First, the court of appeals made a common error in setting forth Texas choice of law rules that could cause confusion in future cases, even though it did not affect the outcome in this case. The court started on the right foot when it stated that Texas generally follows section 187 of the Second Restatement to determine whether the parties' contractual choice of law should be enforced. Section 187 provides in full:

> Law of the State Chosen by the Parties
>
> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if *the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.*
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either:
>
> (a) the chosen state has *no substantial relationship* to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be *contrary to a fundamental policy* of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188 [the general contract choice of law rule discussed in the preceding section], would be the state of the applicable law in the absence of an effective choice of law by the parties.

32. 793 S.W.2d 670 (Tex. 1990).

33. *Lemmon*, 958 S.W.2d at 498.

34. *Id.* at 499.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.[35]

Section 187 has two main parts, set forth in subsections (1) and (2) respectively. Subsection (1) grants blanket approval of the parties' choice of law if the issue involved is one the parties could have resolved in their contract. This rule allows the parties to incorporate a rule of law into their contract instead of actually adding extra language to the contract. As comment c to section 187 explains:

> The parties, generally speaking, have power to determine the terms of their contractual engagements. They may spell out these terms in the contract. In the alternative, they may incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law. In such instances, the forum will apply the applicable provisions of the law of the designated state in order to effectuate the intentions of the parties.[36]

For example, instead of drafting a contract clause that requires each party to perform the contract in good faith, the parties could simply choose the law of a state that requires good faith performance of contractual obligations.[37] In these situations, the choice of law clause is just another tool in drafting the agreement to reflect the parties' intent.

Subsection (2) addresses the case where the issue is not one that the parties could have resolved in their agreement. The most common example of such an issue is the validity of the agreement itself.[38] When such an issue is involved, the parties may still choose the applicable law, but only if neither subsection (2)(a) nor (b) is triggered. Subsection (2)(a) avoids the parties' choice of law if the chosen state has "no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."[39] Subsection (2)(b) avoids the parties choice of law if the law of the chosen state violates a "fundamental policy" of the state whose law would otherwise apply, which is usually Texas.[40] If either subsection (2)(a) or (b) is triggered, the court should not enforce the parties' contractual choice of law.

Section 187, then, sets forth a number of detailed rules for reviewing a parties' choice of law, and the court of appeals correctly identified it as the applicable rule. The court, however, then took a wrong turn when it stated that the Texas legislature had "codified" *DeSantis* and its adoption of section 187 in section 1.105(a) of the Texas Business and Commerce Code. Section 1.105(a),[41] also discussed in the preceding section, pro-

35. SECOND RESTATEMENT § 187 (emphasis added).
36. *See id.* cmt. c.
37. Comment c gives other examples: "rules relating to construction, to conditions precedent and subsequent, to sufficiency of performance and to excuse for nonperformance, including questions of frustration and impossibility." *Id.*
38. *See id.* cmt. d. ("Examples of such questions are those involving capacity, formalities and substantial validity").
39. *Id.* § 187(2)(a).
40. *See id.* § 187(2)(b).
41. *See supra* note 25 and accompanying text.

vides: "[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights or duties."[42] *Lemmon*'s claim that section 1.105(a) codifies *DeSantis* is wrong for three reasons; each reason is considered in turn.

First, since section 1.105 was passed *before* the Texas Supreme Court decided *DeSantis*, it is hard to see how section 1.105(a) codified the holding of that case. Section 1.105(a) is verbatim the Uniform Commercial Code as promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.[43] The UCC was promulgated in 1967, and Texas adopted its version of the UCC, including section 1.105, in 1971; and section 1.105(a) has not been amended since.[44] *DeSantis*, however, was decided in 1990. Thus, it makes no sense to find that section 1.105 codified *DeSantis*.

Second, the legislative history of section 1.105 shows that it was not meant to codify any part of Texas law, even cases that might have foreshadowed *DeSantis*.[45] As noted above, section 1.105 is verbatim the UCC, and the Texas legislature enacted that section without any substantive changes to its text or comments.[46] The necessary implication is that section 1.105 is part of a unified code drafted on its own that sets forth the choice of law rule for transactions.[47] Section 1.105 does not on its terms apply to non-UCC transactions and was not enacted in response to, or to reflect any, specific rule of Texas law.

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42. TEX. BUS. & COM. CODE ANN. § 1.105(a) (Vernon 1994). The court also set forth the Texas Supreme Court's prior statement of the rule, taken from the Second Restatement § 187, established in *DeSantis*: "[W]e respect the parties' choice of law unless the chosen law has no relation to the parties or the agreement, or their choice would offend the public policy of the state whose laws otherwise ought to apply." *Lemmon*, 958 S.W.2d at 498; *see also DeSantis*, 793 S.W.2d at 677.

43. UCC § 1-105 (1967).

44. TEX. BUS. & COM. CODE ANN. § 1.105 (Vernon 1994).

45. Of course, it is temporally plausible to argue that section 1.105 codified Texas case law that pre-existed adoption of the Texas UCC. For example, the Eastland Court of Civil Appeals opined that section 1.105 codified the holding of an 1891 Texas Supreme Court case. *See* Walker v. Associates Fin. Servs. Corp., 588 S.W. 2d 416, 417 (Tex. Civ. App.—Eastland 1979) (citing Dugan v. Lewis, 14 S.W. 1024 (1891)). There are still two problems with such an argument. First, the Texas Supreme Court has gradually adopted the Second Restatement's choice of law rules in a series of cases decided *after* adoption of section 1.105. Thus, section 1.105 could not be a codification of the court's current, evolving choice of law rules. Second, as is discussed below, the legislative history of the Texas UCC strongly suggests that section 1.105 was not intended to codify any existing Texas law.

46. Section 1-105(1) of the UCC reads as follows:

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

UCC § 1-105(1) (1978).

47. *See* SCOLES & HAY, *supra* note 1, § 18; Thomas W. Pounds, *Party Autonomy—Past and Present*, 12 S. TEX. L. REV. 214, 226 (1970) ("[T]he Code is applicable only to commercial transactions.").

Third, the rule in section 1.105 substantially differs from the rule set forth in section 187 of the Second Restatement. Section 187 allows the parties to choose a state's law, regardless of the relationship with that state, if the parties could have resolved the issue in their agreement. Section 1.105 does not have a similar allowance.[48] Section 187 will uphold a choice of law provision if "the chosen state has [a] substantial relationship to the parties or the transaction"; section 1.105 merely requires "a reasonable relation."[49] And, section 187 says that the parties' choice of law need not be honored where the law of the chosen state offends a fundamental public policy of the state whose law would otherwise apply. Section 1.105 has no such exception.[50] Section 1.105, then, would be a very poor attempt to codify section 187 of the Second Restatement.

On the whole, then, section 1.105 should not be read to codify *DeSantis* and section 187. *Lemmon* and other court of appeals cases, however, have done so without explanation.[51] But why? One reason might be that these courts of appeals have misread a passage from the Texas Supreme Court's opinion in *DeSantis*.

In *DeSantis*, the Texas Supreme Court had to decide "what effect should be given to contractual choice of law provisions."[52] The court began its analysis by noting that conflicts law generally recognizes the right of contracting parties, within certain limits, to choose the applicable law.[53] This right generally belongs under the heading of "party autonomy." Next, the court addressed whether the principle of party autonomy had any support in Texas law. It is this discussion that may be the source of current confusion. The court reasoned:

> The party autonomy rule has been recognized in this state. The Legislature has provided in the Uniform Commercial Code . . . [(quotes

48. While cmt. 1 to section 1.105 suggests that the parties may do so, *see* TEX. BUS. & COM. CODE ANN. § 1.105, cmt. 1 (Tex. UCC 1971) ("an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen."). The courts split on whether section 1-105 should be read to allow the parties to do so. *See* SCOLES & HAY, *supra* note 1, §18.12, at 677.

49. *See* SECOND RESTATEMENT § 187; TEX. BUS & COM. CODE ANN. § 1.105 (Vernon 1994). Of course, it is a question of statutory interpretation whether a "reasonable relation" requires more, less, or substantially the same connection between the chosen state and the parties' transaction.

50. *See* SCOLES & HAY, *supra* note 1, § 18.12, at 677.

51. *See, e.g.*, Salazar v. Coastal Corp., 928 S.W.2d 162, 166 (Tex. App.—Houston [14th Dist.] 1996, n.w.h.); First Commerce Realty Investors v. K-F Land Co., 617 S.W.2d 806, 809 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *see* Walker v. Associates Fin. Servs. Corp., 588 S.W.2d 416, 417-18 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.); Hi Fashion Wigs Profit Sharing Trust v. Hamilton Inv. Trust, 579 S.W.2d 300, 302 (Tex. Civ. App.—Eastland 1979, n.w.h.). The Dallas and Forth Worth courts seem to have avoided this problem, properly invoking section 1.105 in a UCC case and not contending that the section codifies prior Texas law. *See* Mostek Corp. v. Chemerton Corp., 642 S.W.2d 20, 23 (Tex. App.—Dallas 1982, writ dism'd by agr.); Cook v. Frazier, 765 S.W.2d 546, 551 (Tex. App.—Fort Worth 1989, n.w.h.) ("The contracts at issue involve the sale of land. The Texas Business and Commerce Code is not applicable.").

52. *DeSantis*, 793 S.W.2d at 677.

53. *See id.*

> section 1.105)]. In a *different context*, one court of appeals has elaborated further . . . [(quoting court of appeals)]. We believe the rule is best formulated in section 187 of the Restatement and will therefore look to its provisions in our analysis of this case.[54]

Several courts of appeals have read this passage to say that section 1.105 codifies section 187 of the Second Restatement.[55] These courts, however, misread the preceding passage. In that passage, the Texas Supreme Court is saying (1) parts of Texas law have recognized the principle of party autonomy, (2) for example, in the UCC context, section 1.105 sets forth a version of the party autonomy rule, (3) outside the UCC context, one court of appeals had recognized the principle, (4) the Texas Supreme Court recognized the principle, and (5) the Texas Supreme Court adopts section 187 to implement the principle. As this chain of reasoning reveals, the Texas Supreme Court cited section 1.105 as an *illustration* of Texas law that embraced party autonomy, *not* as the applicable rule. Indeed, the passage states that section 1.105 operated in "a different context" from *DeSantis*. This makes sense because section 1.105 governs choice of law for UCC issues, and *DeSantis* did *not* involve any UCC questions. Thus, *DeSantis* does not interpret section 1.105(a) to codify section 187 of the Second Restatement.

While section 1.105(a) does not codify *DeSantis*, it is still possible that the rule in *DeSantis* could apply to UCC choice of law cases. Whether *DeSantis* and the Second Restatement approach should be read into section 1.105 depends on the answers to several questions that Texas courts have yet to address. For example, courts could interpret section 1.105's requirement of a "reasonable relation" to have the same meaning as section 187's "substantial relationship." Or, courts could rely on section 1.103 of the Texas UCC, which allows courts to "supplement" the UCC with the common law, to incorporate general choice of law rules into the UCC context.[56] For example, courts could supplement section 1.105 with the section 187 requirement that the law of the chosen state not violate a fundamental policy of the state whose law would otherwise apply.[57] Regardless of whether and how the courts address such issues, two things should remain clear: (1) section 1.105 applies to UCC issues, and (2) if the courts wish to import non-UCC choice of law rules into the UCC context, they must explain why doing so makes sense.

*Turford v. Underwood*[58] illustrates an important exception to the parties' power to contractually choose the applicable law. *Turford* involved a special thorn in the side of Texas employment law, the covenant not to

54. *Id.* (emphasis added).

55. *See supra* note 51 and accompanying text.

56. *See* SCOLES & HAY, *supra* note 1, § 18.12, at 676 ("There is a split of authority and opinion concerning the question whether the section [§ 1-105] adopts and restates the common law or whether it modifies and departs from it, except for purposes of gap-filling.").

57. *See id.* at 677 ("At least one court has read the traditional public policy limitation into § 1-105.").

58. 952 S.W.2d 641 (Tex. App.—Beaumont 1997, n.w.h.).

compete. An employee sought a declaration invalidating the non-compete clause in the employment contract with his former employer. The agreement containing the non-compete clause also contained an agreement to arbitrate and a clause selecting Michigan law. Under the arbitration clause, the employer moved to compel arbitration and the trial court granted the motion. The employee then sought a writ of mandamus to overturn the order compelling arbitration, making four arguments: (1) the arbitration agreement was invalid, (2) his claims were outside the scope of the arbitration agreement, (3) a condition precedent to the arbitration proceedings had not occurred, and (4) that the employer had waived arbitration by participating in the trial court proceedings.[59]

On appeal, the question was whether Texas or Michigan law applied to the employee's four arguments against arbitration. To decide this question, the court applied section 187 of the Second Restatement, as required by *DeSantis*[60] Under section 187 a court will enforce the parties' contractual choice of law only if (1) the issue was one that the parties could have resolved in their contract, or (2) the chosen state was significantly related to the parties' transaction and the law of the chosen jurisdiction did not violate a fundamental policy of the jurisdiction whose law would otherwise apply.[61] Presumably, this test would be applied to each of the employee's four arguments. The court of appeals, however, applied section 187 to only *one* of those issues—whether the agreement was valid. Thus, the single issue of the validity decided what law would apply to the separate issues of scope of the agreement, conditions precedent, and waiver.

The court of appeals easily concluded that the parties could not choose which state's law applied to the issue of validity of an agreement to arbitrate a non-compete clause. The choice of law clause failed the first prong of section 187 because "enforceability of the employment contract addendum is not an issue which the parties could have resolved by an explicit provision in their agreement."[62] The clause failed the second prong because Texas law, which would have applied absent the choice of law clause,[63] has a fundamental policy disfavoring non-compete clauses.[64] Thus, any state's law that would favor such clauses would violate a fundamental policy of Texas law.

On its face, the *Turford* court's analysis seems sound. Generally, parties cannot contractually resolve the issue of a contract's validity and, thus, they cannot contractually choose the law on that issue. Also, to the extent that the validity of a non-compete clause is at issue, the Texas

59. *See id.* at 643.
60. 793 S.W.2d 670, 681 (Tex. 1990).
61. *See id.* at 677-78.
62. *Turford*, 952 S.W.2d at 642-43.
63. The court of appeals merely stated this conclusion without analysis. *See id.* at 643. ("Texas law would govern the agreement absent a choice of law clause").
64. *See id.* "The law governing enforcement of non-competition agreements is fundamental policy in Texas." *See id.* at 643 (citing *DeSantis*, 793 S.W.2d of 681).

Supreme Court, in the teeth of legislation directly to the contrary, desperately clings to the fiction that Texas law has a clear public policy against such agreements.[65] But, despite this surface appeal, the court's logic is flawed in several respects.

First, only *one* issue before the court of appeals challenged the validity of the parties' agreement. The employee's remaining three issues did not touch on validity of the agreement. Indeed, all the other issues *assumed the validity of the agreement.* And, the court ultimately disposed of the case *based on one of those other issues* — whether the employer had waived its right to arbitrate.

The *Turford* court never explained why it did not perform a separate choice for law analysis for each issue. While some states characterize an entire case and choose the applicable law based on that characterization, the Second Restatement specifically rejects this approach.[66] Rather, the Second Restatement instructs courts to choose the applicable law issue by issue. To do so, the court of appeals should have applied section 187 to the other three issues, or at least to the issue it used to dispose of the case—waiver of arbitration.

Second, it is unclear why the court of appeals brought the non-compete clause into the section 187 analysis. *All* of the employee's issues dealt with *arbitration*, not non-compete clauses. Under the second prong of the section 187 test, then, the court should have asked whether Texas law (the state whose law would apply absent the contractual choice of law) had a policy favoring or disfavoring *arbitration agreements*, not non-compete agreements. If the court had done so, it would have found Texas Supreme Court decisions favoring the enforcement of agreements to arbitrate. Also, on the issue of waiver of arbitration agreements, as even the *Turford* court notes, Texas applies "a strong presumption against waiver."[67] Thus, by shifting the focus of its choice of law analysis from arbitration agreements to non-compete clauses, the court of appeals shifted from a Texas policy that favored the employer in this case (a pro-arbitration policy) to one that favored the employee in this case (an anti-non-compete policy).

Third, as the *Turford* court implicitly admits, its confused choice of law analysis is really beside the point because both Texas and Michigan law yield the same result. In Texas, arbitration is waived if the party seeking arbitration "acted inconsistently with the arbitration agreement and that . . . conduct prejudiced" the other party.[68] In Michigan, arbitration is waived when the party seeking arbitration "acts inconsistently with that right [to arbitration], and prejudice to the other party results."[69] The rules are substantially the same. Of course, this should have been the

65. The Texas Supreme Court's torturing of Texas legislation on non-compete agreements would make even the most cynical legal realist blush.

66. *See* SECOND RESTATEMENT § 187.

67. *Turford*, 952 S.W.2d at 643.

68. *Id.*

69. *Id.*

threshold determination—why do a choice of law analysis if the issue will not affect the outcome of the case? Thus, strictly speaking, the *Turford* court's entire choice of law analysis was dicta.

*Turford* is an example of how choice of law analysis can go awry. Instead of rigorously analyzing the issues in proper order, the analysis jumps from point to point without focus. As a result, we do not quite know what lessons to take away from the case.

### C. Contract Issues

In *Minnesota Mining and Mfg. Co. v. Nishika Ltd.*,[70] the Texas Supreme Court applied the Second Restatement to a suit for breach of express and implied warranties.[71] Specifically, the suit arose among four companies that participated in the business of three-dimensional photography. Minnesota Mining and Manufacturing Co., better known as 3M, provided a product known as an emulsion to be used in the developing process.[72] The other three companies sued in Texas state court, claiming that 3M's emulsion was defective and caused them damages (largely lost profits). Specifically, the question was whether the express and implied warranties applicable to 3M's product benefited only the immediate purchaser of its goods, or whether the warranties extended to subsequent users of the product. The trial court and the court of appeals concluded that Minnesota law applied to this dispute, and the Texas Supreme Court reviewed that issue.

At the outset, of course, the supreme court noted that Texas applies the Restatement (Second) of Conflict of Laws to choice of law issues.[73] Given that the case involved contract issues, the supreme court first fo-

70. 953 S.W.2d 733 (Tex. 1997).

71. *See id.* at 736.

72. The factual background of the case is described more fully in the Texas Supreme Court's opinion certifying questions of law to the Minnesota Supreme Court. The Texas Supreme Court announced its decision that Minnesota law applied to the case and certified the applicable questions to the Minnesota Supreme Court. *See* Minnesota Mining and Mfg. Co. v. Nishika Ltd., 955 S.W.2d 853, 853-54 (Tex. 1996). The Texas Supreme Court deferred an explanation of its choice of law decision until after receiving an answer from the Minnesota Supreme Court. *See id.* at 857-58. The opinion discussed above contains that explanation.

73. Since *Minnesota Mining* involved a sales of goods transaction covered by Article 2 of the UCC, one might rightly ask why the court did not turn to section 1.105 of the Texas UCC as the applicable choice of law rule. *See supra* notes 42, 44, and 45 and accompanying text (discussing role of section 1.105 in Texas choice of law analysis). While the supreme court did not address this point, a logical explanation exists. The specific issue in *Minnesota Mining* was whether express and implied warranties under the UCC extend to users of the product other than the initial buyer. Section 2-318 of the UCC offers three different approaches to this question: privity required, no privity required, and leave the issue to judicial resolution. The Texas UCC adopts the third approach, leaving the issue to Texas state courts. *See* Tex. Bus. & Comm. Code Ann. § 2.318 (Vernon 1994) ("These matters are left to the courts for their determination."). Who may sue on an express or implied warranty, then, is not a matter covered by the UCC, but rather is a matter covered by the contract case law of Texas. And, as the Texas Supreme Court held in *DeSantis*, the Second Restatement provides the general choice of law rules for contract cases. *DeSantis*, 793 S.W.2d 670, 677-79 (Tex. 1990).

cused on section 188 of the Second Restatement, which directs consideration of the following factors:

(a) the place of contracting;
(b) the place of negotiation;
(c) the place of performance;
(d) the location of the contract's subject matter; and
(e) the parties' domicile, residence, nationality, place of incorporation, and place of business.[74]

In terms of these factors, Minnesota was the place of contracting and negotiation; 3M partially performed its obligations in Minnesota "by developing, producing, and testing"[75] its product there; and Minnesota is the place of domicile and principal place of business for 3M. Even though the three other companies had contacts with five additional states,[76] the supreme court explained that the Minnesota contacts were the most important "because of their relevance to domestic warranty law and the policies underlying that law."[77] While the supreme court did not explain this point, it is presumably so because the acts of negotiating and making the contract create the contractual relationship to which the express and implied warranties attach. Also, express and implied warranties look to a certain quality of goods, which are the product of the seller's performance. For these reasons, the place of negotiation, contracting, and part performance are logically connected to the seller's express and implied warranties.[78]

After analyzing the specific factors in section 188, the supreme court turned to the general factors of section 6 of the Second Restatement. The supreme court found that these factors were a wash. Most significantly, the policies of the two primary jurisdictions, Minnesota and Nevada, were equally implicated. The specific issue involved—whether the seller's warranties protect only those in privity with the seller, or instead extend to other foreseeable users of the product—is addressed in section 2-318 of the Uniform Commercial Code, which offers three different resolutions of the issue.[79] Although Minnesota and Nevada enacted different versions of section 2-318, both states had the same goal: "to strike a balance between the competing interests of *manufacturers* and *consumers*."[80] Since in this case the manufacturer (3M) was located in Minnesota, and

74. SECOND RESTATEMENT § 188(2). The parties had not made a contractual choice of law. If they had done so, the supreme court would of first have to have addressed whether it should honor the parties' choice.

75. *Minnesota Mining*, 953 S.W.2d at 736.

76. *See id.* ("This case involves contacts in at least seven jurisdictions: Minnesota, Nevada, Oklahoma, Georgia, Pennsylvania, Texas, and Italy."). Also, one of the other companies used 3M's product in Nevada. *See id.*

77. *Id.*

78. *See* GXG, Inc. v. Texacal Oil & Gas, 977 S.W.2d 403, 408 (Tex. App.—Corpus Christi 1998, pet. denied) (relying on place of negotiation, formation, and performance of contract to hold that Texas law applied to contract issues).

79. *See supra* note 73 and accompanying text (describing UCC's approaches to whether privity is required to sue on implied or express warranties).

80. *Minnesota Mining*, 953 S.W.2d at 736-37 (emphasis added).

one of the consumers was located in Nevada, this case equally implicated the policies behind both states' laws.[81] Because the section 6 factors did not favor either state, the supreme court followed the section 188 preference for Minnesota law.[82]

The Beaumont court of appeals made a similar analysis in *In re Estate of Rhymer*.[83] *Rhymer* involved a contract made through a home solicitation. Both Texas and California, the two potentially applicable jurisdictions, had statutes that provided a time period to rescind contracts made during a home solicitation. The question was which state's statute applied.

The court first applied the section 188 factors. These factors favored California as it was the place of negotiation, contracting, and performance.[84] Next, the court explained that the section 6 factors also pointed to California.[85] Most significantly, the policy underlying both the Texas and California statutes was to protect their respective citizens from the pressure of home solicitations.[86] Since the solicitation took place in California, the transaction implicated the policy underlying the California statute, not the Texas statute.[87] Based on these factors, the court held that California law applied to the dispute.

## II. FORUM NON CONVENIENS

The general principle of forum non conveniens in Texas is that although a court properly has jurisdiction to resolve a dispute which involves a claim that arose outside of the state, the court nevertheless, in the exercise of "sound judicial discretion," resists the imposition of its jurisdiction on such litigation.[88] The legislature recently added statutory factors which must be considered by a court in deciding a forum non conveniens motion. Those factors are:

(1) an alternative forum exists in which the claim or action may be tried;
(2) the alternate forum provides an adequate remedy;
(3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;

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81. *See id.*

82. *See id.* at 738.

83. 969 S.W.2d 126 (Tex. App.—Beaumont 1998, no pet.). The federal district court relied on the same factors in its choice of law analysis of a contract case. Barnes v. Forest Hills Inv., Inc., 11 F. Supp. 2d 699, 703 (E.D. Tex. 1998). The court chose Texas law because Texas was the place of negotiation, making, and performance of the contract. *Id.* at 704.

84. *See In re* Estate of Thomas Boyd Rhymer, 969 S.W.2d 126, 128 (Tex. App.—Beaumont 1998, no pet.).

85. *See id.*

86. *See id.* at 129.

87. *See id.*

88. *See* Flaiz v. Moore, 359 S.W.2d 872 (Tex. 1962); *In re* Smith Barney, 975 S.W.2d 593, 595-96 (Tex. 1998). *See generally* McDONALD & CARLSON, TEXAS PRACTICE GUIDE §§ 3.16[a] and 3.19.

(4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all defendants properly joined to the plaintiff's claim;
(5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum; and
(6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.[89]

The Texas Supreme Court; has set out similar factors relevant to a forum non conveniens determination.[90] Presumably, the common law factors continue to be effective only for non-residents of the U.S. who bring an action in Texas.[91] A plaintiff from outside Texas may only bring an action in Texas "if the action is begun in this state within the time provided by the laws of the foreign state or country in which the wrongful act, neglect or default took place."[92] Also, the law of the foreign state must permit the plaintiff to bring their cause of action in the foreign state both in law and within in the state's statute of limitations.[93] This borrowing statute permits courts to dismiss for forum non conveniens actions where the plaintiff's suit is barred by the plaintiff's state of residence.

In *Robinson v. TCI/US West Communications, Inc.*,[94] the Fifth Circuit held that the failure to include a return jurisdiction clause in a dismissal pursuant to forum non conveniens was an abuse of discretion. The Fifth Circuit, quoting an earlier opinion, stated that "if the district court decides that the [public and private interest factors] favor trial in a foreign forum, it must finally ensure that a plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice and that if the defendant obstructs such reinstatement in the alternative forum that the plaintiff may return to the American forum."[95] This return jurisdiction clause could prove important for litigators using the new provisions of the Texas forum non conveniens statute.[96] Section 71.051(c) of the Texas Civil Practice and Remedies Code permits a trial court to set conditions, such as a return jurisdiction clause, in a forum non conveniens dis-

89. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (Vernon 1997).
90. *See Flaiz*, 359 S.W.2d at 874 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)) ("(1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses; (3) the enforceability of a judgment if one is obtained; (4) the burden imposed upon the citizens and court of Texas in trying a case hat has no relation to Texas; (5) the general interest in having localized controversies decided locally; and (6) the interest in having a diversity case tried in a forum that is familiar with the law that must govern the action."); Dow Chem. Co. v. Alfaro, 786 S.W.2d 674, 695-96 (Gonzalez, J., dissenting); *see also In re* Smith Barney, 975 S.W.2d 593 (Tex. 1998).
91. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.051(a).
92. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (a)(3) and 71.052 (Vernon 1997)(asbestos claimants "borrowing statute").
93. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (a)(1) and (2) (Vernon 1997).
94. 117 F.3d 900 (5th Cir. 1997). *See* Tjontvet v. Den Norske Bank ASA, 997 F. Supp. 799, 804-07 (S.D. Tex. 1998) (factors used in determining a federal forum non conveniens motion).
95. *Robinson*, 117 F.3d at 907 (citing *In re* Air Crash Disaster Near New Orleans, Louisiana, 821 F.2d, 1147, 1166 (5th Cir. 1987) (en banc)).
96. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon 1997).

missal. Texas litigants should benefit from using the *Robinson* principle of having a return clause in the forum non conveniens order because without this defendants may evade jurisdiction of the foreign courts and may also try to evade discovery or service of process in those foreign courts.

In *In re Smith Barney, Inc.*,[97] the Texas Supreme Court overruled *H. Rouw Co. v. Railway Express Agency.*[98] H. Rouw, a supreme court opinion by virtue of "writ refused" designation, stood for the proposition that corporations qualified to do business in Texas cannot be dismissed on the basis of forum non conveniens.[99] *Smith Barney* was before the court of review of a mandamus petition. Accordingly, the supreme court did not review the merits of the relater's motion for dismissal for forum non conveniens. Rather, the supreme court used the opportunity to add reason to Texas' forum non conveniens jurisprudence by holding corporations qualified to do business in Texas who sue in Texas may dismissed for forum non conveniens doctrine. As Justice Hecht noted, "It simply makes no sense to allow foreign corporations an absolute right to sue non-residents in Texas courts when individuals have never been accorded the same right."[100]

In *Smith Barney*, plaintiff brought suit in Texas alleged a Texas Corporation whose principal place of business was in New York, Smith Barney agreed to form a joint venture to bid for selection as manager of 15 national investment funds created by the Republic of Poland as part of its mass privatization program to sell state-owned enterprises to private investors and "wrongfully withdrew from the venture and that as a result, the venture's bid to become an investment fund manager ceased to be viable."[101] Smith Barney moved to dismiss the case for forum non conveniens arguing that New York was a more appropriate forum because all the events and alleged wrong doings occurred in New York or Poland, and all the witnesses resided in New York, Poland, or Great Britain. Plaintiff argued H. Rouw did not permit the court to dismiss for forum non conveniens because plaintiff was a Texas corporation. The trial court denied Smith Barney's motion to dismiss for forum non conveniens. Smith Barney sought mandamus relief from the denial of this motion. The supreme court granted relief and overruled H. Rouw and held Texas corporations may be dismissed for forum non conveniens.

## III. PERSONAL JURISDICTION

In *Stroman Realty, Inc. v. Antt*,[102] the district court held there was jurisdiction over the states of Florida and California in an injunction action

97. 975 S.W.2d 593 (Tex. 1998).
98. 154 S.W.2d 143 (Tex. Civ. App.—El Paso 1941, writ ref'd).
99. *See id.* at 145; '21' Int'l Holdings, Inc. v. Westinghouse Elec. Corp., 856 S.W.2d 479, 481 (Tex. App.—San Antonio 1993, no writ).
100. *Smith Barney*, 975 S.W.2d at 597-98.
101. *Id.* at 594.
102. 20 F. Supp. 2d 1050 (S.D. Tex. 1998).

where the plaintiff sought to enjoin Florida and California from enforcing their regulations on him in Texas.[103] Plaintiff operated land fills in Florida and California. Florida and California said that there is no personal jurisdiction over them because "enforcement of their statutes against Stroman occurr[ed] within their state, they do not have minimum contact with Texas."[104] The district court called this "disingenuous sophistry"[105] and found specific jurisdiction over California and Florida. In this case, California sent cease-and-desist orders to the plaintiff in Texas, and Florida had written letters to the plaintiff in Texas demanding a release of documents. The court called this "part of a deliberate effort to exert [the state's] authority in Texas."[106]

The district court did not agree with California's jurisdictional argument that a Texas federal court had no jurisdiction over it. After quoting from the California Department of Real Estate's web site, the court said, "[a]pparently, California has jurisdiction over anyone using the information superhighway—the entire worldwide web—but is subject to jurisdiction only within its borders."[107] The district court then observes that California and Florida cannot "have their cake and eat it too"[108] when they argue that they can regulate the plaintiff while he is in Texas for landfills in their state, but yet, they are not subject to jurisdiction in Texas when the Texas plaintiff seeks to attack the regulations in a Houston federal court. As the court stated, "A federal court sitting in Houston is a reasonably logical place to litigate a federal constitutional question arising from [Florida and California's} attempt to impose their power on a Texas resident."[109]

In *Gorman v. Grand Casino of Louisiana, Inc.—Coushatta*,[110] the Grand Casino Coushatta was sued because allegedly the security guards at the casino had placed a date-rape drug in the plaintiff's drink and subsequently made sexual advances towards her. Grand Casino Coushatta objected to Texas jurisdiction stating it neither resided in nor had sufficient minimum contact with Texas. The court, while noting that Grand Casino Coushatta had a "wide-spread regional advertising"[111] in Texas, found the plaintiff's allegations did not arise by the gambling activities promoted on the advertisements. Accordingly, there was no specific jurisdiction to hold jurisdiction over Grand Casino Coushatta in Texas. The district court next analyzed whether this wide-spread "continuous and systematic"[112] advertisement of Grand Casino Coushatta in Texas would give the court general jurisdiction over Grand Casino Coushatta. The

103. *See id.* at 1052.
104. *Id.*
105. *Id.*
106. *Id.* at 1053.
107. *Id.* at 1054.
108. *Id.*
109. *Id.* at 1053.
110. 1 F. Supp. 2d 656 (E.D. Tex. 1998).
111. *Id.* at 658.
112. *Id.* at 659.

district court held Grand Casino Coushatta's targeted advertising to Texans was evidence of continuous and systematic contact with Texas such that Grand Casino Coushatta could "reasonably expect to be haled into court" in Texas.[113] Jurisdiction in Texas did not offend notions of fair play and substantial justice because: (1) Beaumont is just across the state line from Louisiana, and (2) Texas had a legitimate interest in this suit where a Texas resident was allegedly enticed to the casino by Grand Casino Coushatta's advertising that is targeted to Texans.[114]

In *Thompson v. Handa-Lopez, Inc.*,[115] the district court had to decide whether there was jurisdiction over a California corporation which operated an Internet casino game. The defendant argued that the district court had no personal jurisdiction over it because the server's principal place of business, being the corporation, is located in California. The plaintiff responded, and the court agreed, that minimum contacts existed with Texas because the defendant "advertised its casino over the Internet knowing that Texas citizens [would] see its advertisement. Further [the defendant] has conducted business within the State of Texas by entering into contacts with Texas citizens to play those games, which the Texas citizens played while in Texas."[116] The defendant next argued that a clause in his contract, which stated that any dispute would be governed by the laws of the State of California and "shall be resolved exclusively by final and binding arbitration in the City of San Jose, County of Santa Clara, State of California"[117] does not satisfy the fair play and substance justice clause of the personal jurisdiction formula. The court dismissed this argument by stating that these contractual provisions were not a forum selection clause because they do not mandate that all disputes be resolved in California, nor that the arbitration be conducted or that a lawsuit be filed in California. The court also noted that Texas had a strong interest in protecting citizens which had been defrauded.

In another Internet case, *Mieczkowski v. Masco Corp.*,[118] the federal district court held it had general jurisdiction over a manufacturer of a bunk bed because of the manufacturer's Internet web site.[119] The district court found general jurisdiction even though: "(1) [the defendant] has no offices in Texas; (2) it has no employees in Texas; (3) it has no registered agent in Texas; (4) it has no real or personal property, including warehouses in Texas; and (5) it does not local advertising in Texas."[120] The court analyzed Masco's web site using the three-prong analysis from *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*[121] According to *Zippo*, "At one end of the spectrum are those situations where a defendant . . . enter into

113. *Id.*
114. *See id.*
115. 998 F. Supp. 738 (W.D. Tex. 1998).
116. *Id.* at 743.
117. *Id.* at 744 (quoting contract language).
118. 997 F. Supp. 782, 785 (E.D. Tex. 1998).
119. *See id.* at 787-88.
120. *Id.* at 785.
121. 952 F. Supp. 1119 (W.D. Pa. 1997).

contacts with residents"[122] by way of the Internet and downloads, transmits, or exchanges files. In these cases, the exercise of personal jurisdiction will almost always be proper.[123] On the other end of the spectrum are those cases in which the defendant has done nothing more than advertise on the Internet.[124] Such web sides have called "passive" cites.[125] In cases dealing with this type of activity, courts have found that personal jurisdiction cannot be exercised.[126] In the middle of the spectrum, one finds the web sites that allow the parties to exchange information with the host computer (the person or company maintaining the web site). In these cases, where the jurisdiction can be exercised is determined by examining the "level of interactivity and commercial nature of the exchange of information."[127] The district court concluded that Masco's website is in the middle ground of cases and thoroughly examines Masco's website to determine if jurisdiction is proper. Combining the defendant's presence on its web site and its corporate sales to Texas, constituted enough evidence for the court to find general jurisdiction over Masco such that it should reasonably anticipate being haled into court in Texas.

In *Rowland & Rowland, P.C. v. Texas Employers Indem. Co.*,[128] the Austin court of appeals held there was specific jurisdiction over a Tennessee law firm that represented a Texas client who was killed by a rock slide in Cumberland County, Tennessee. His widow originally filed a successful workers' compensation claim for death benefits against Texas Employers Indemnity Co. (TEIC). At the conclusion of the Workers' Compensation suit, the Texas trucker's family brought a wrongful death action against the State of Tennessee, with Rowland & Rowland as the family's Tennessee lawyers. During the litigation TEIC informed Rowland & Rowland of its subrogation interest in the wrongful death action. In holding there was specific jurisdiction over TEIC's suit against Rowland and Rowland for its subrogation interest, the court of appeals determined that TEIC relied upon a series of letters between Rowland & Rowland and TEIC that stated the Tennessee law firm would protect TEIC's subrogation claim. TEIC, consequently, did not assert its claim in the Tennessee action. An additional factor in determining that Rowland & Rowland had specific jurisdiction was the distribution of a "substantial portion" of the $217,000 award from Tennessee to Texas residents. The court determined it was these specific contacts that gave rise to TEIC's subrogation claim against Rowland and Rowland and that these contacts are sufficient, purposeful, minimum contacts with Texas to satisfy due process.

122. *Id.* at 1124.
123. *See id.*
124. *See id.*
125. *Id.*
126. *See id.*
127. *Id.* at 1124.
128. 973 S.W.2d 432 (Tex. App.—Austin 1998, no pet. h.).

In *James v. Illinois Central Railroad Co.*,[129] the appellant had filed a personal injury suit in Harris County against Illinois Central as a result of an accident that occurred in Memphis, Tennessee. Illinois Central is a Delaware corporation whose principal place of business is located in Chicago, Illinois. Illinois Central leases an office in Harris County for one employee. This lone employee coordinates the supply of Illinois Central's services to its customers over a five state region. This employee and his duties allowed the court to conclude Illinois Central is "doing business"[130] in Texas. Personal jurisdiction over a non-resident defendant may be asserted if: "(1) the requirement of the Texas long-arm statute are fulfilled, and (2) the exercise of jurisdiction complies with the due process clause of the Fourteenth Amendment to the United States Constitution."[131] Once the court determined Illinois Central was doing business in Texas, it turned to the federal constitutional requirements of personal jurisdiction: whether the defendant has purposely established minimum contacts with the forum state and if so, does the maintenance of the suit offend "traditional notions of fair play and substantial justice."[132] Illinois Central did not dispute it generated $75 million of business in Harris County, operated railroad tracks in Texas and most importantly to the court, "continuous[ly] operat[ed] . . . an office in Harris County that employs an agent of Illinois Central."[133] This operation of a sales office in Harris County permitted the court to hold Illinois Central had purposefully availed itself of the laws of Texas and it "had sufficient minimum contracts with Texas to support jurisdiction."[134]

Even though the court noted that "it [is] rare when jurisdiction will not comport with fair play and substantial justice once minimum contacts analysis has been satisfied,"[135] the court reasoned that "the assertion of personal jurisdiction over Illinois Central would offend concepts of fair play and substantial justice"[136] because Texas has no interest in adjudicating this suit.

The dissent properly chastised the majority for not following established Texas precedent which would allow jurisdiction in Texas courts.[137] The dissent noted, forum non conveniens would have been more appropriate.[138] Forum non conveniens is decided after jurisdiction is asserted. This procedure, if granted, would have permitted the parties to transfer their dispute to Memphis.

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129. 965 S.W.2d 594 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

130. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997).

131. *Illinois Cent. R.R. Co.*, 965 S.W.2d at 596 (citing CSR Ltd. v. Link, 925 S.W.2d 591, 594 (Tex. 1996)).

132. *Id.* at 597 (citing *CSR Ltd.*, 925 S.W.2d at 594).

133. *Id.* (The court specifically noted that "this office solicits business from citizens of this state and generates substantial amounts of income.").

134. *Id.* at 599.

135. *Id.*

136. *Id.*

137. *See id.* at 602.

138. *See id.* at 603.

## IV. FULL FAITH AND CREDIT CLAUSE

The U.S. Constitution states that "[F]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."[139] The Full Faith and Credit Act[140] provides that "judicial proceedings of any state shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the court of such state . . . from which they are taken."[141] The U.S. Supreme Court has determined that "federal courts may not 'employ their own rules . . . in determining the effect of state judgments,' but must 'accept the rule chosen by the state from which the judgment is taken.'"[142]

Similarly, Chapter 35 of the Texas Civil Practices and Remedies Code provides that after a party files a "foreign judgment" with the clerk of any court of competent jurisdiction it is subject to the same procedures in Texas and proceedings for reopening, vacating, staying, enforcing or satisfying a judgment, as a judgment of the court in which it is filed.[143]

In *Stafford v. True Temper Sports*,[144] the court of appeals reaffirmed that state administrative proceedings which have been reviewed or are reviewable by a state district court have preclusive effect,[145] and that a federal court can apply state rules for issue preclusion in determining whether a matter litigated in state court may be relitigated in federal court.[146]

Challenges to foreign judgments filed under the Uniform Enforcement of Foreign Judgments Act (UEFJA) are generally in the nature of post-judgment proceedings because the filing of the judgment instantly creates a judgment enforceable in Texas. As a result, a motion to contest the recognition of a foreign judgment will operate as a motion for new trial.

The court in *Dear v. Russo*[147] held that in order to meet the burden under the UEFJA, to establish the finality of a judgment, a party must: (1) file a facially final foreign judgment; or (2) make a separate showing that he judgment was final.[148] The filing of a final judgment under UEFJA, "has the effect of initiating an enforcement proceeding and instantly rendering a final judgment in Texas."[149] Because the judgment in *Dear* did not facially appear to be a final judgment under the law of Ohio, the rendering state, the appellant bore the burden to establish that the judgment was, in fact, valid and enforceable in Texas.[150]

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139. U.S. CONST. amend. IV, § 1.
140. 28 U.S.C. § 17.38 (1998).
141. *Id.*
142. Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 373 (1996) (citing Kremer v. Chemical Constr. Corp, 456 U.S. 461, 481-82 (1982)).
143. TEX. CIV. PRAC. & REM. CODE ANN. § 35 (Vernon 1997).
144. 123 F.3d 291 (5th Cir. 1997).
145. *See id.* at 294.
146. *See id.*
147. 973 S.W.2d 445 (Tex. App.—Dallas 1998, no pet. h.).
148. *See id.* at 446-47.
149. TEX. CIV. PRAC. & REM. CODE ANN. § 35.003.
150. *See Dear*, 973 S.W.2d at 445.

In determining the res judicata effect of a bankruptcy court determination, federal not state res judicata applies. In *Blum v. Restland of Dallas*,[151] the court of appeals held that "a bankruptcy judgment bars a subsequent suit if: (1) both cases involve the same parties; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior decision was a final judgment on the merits; and (4) the same cause of action is at issue in both cases."[152] The court noted that finality "is interpreted more liberally in bankruptcy cases then in others"[153] and that final order of a bankruptcy court "is res judicata of all issues that were or could have been litigated in that action."[154] Further, "the Fifth Circuit has adopted the transactional test to determine if two cases involved the same causes of action for res judicata purposes."[155] The critical issue under that test is "whether the actions are based on the same nucleus of operative facts. The [federal] doctrine of res judicata operates to bar all claims arising from the same nucleus of operative facts that could have been brought in the previous lawsuit, not only those claims that actually were brought."[156].

151. 971 S.W.2d 546 (Tex. App.—Dallas 1997, pet. denied).
152. *Id.* at 550.
153. *Id.* at 551.
154. *Id.*
155. *Id.*
156. *Id.*