



January 2005

Conflict of Laws

James P. George
Texas A&M University School of Law

Anna K. Teller

Recommended Citation

James P. George & Anna K. Teller, *Conflict of Laws*, 58 SMU L. REV. 679 (2005)
<https://scholar.smu.edu/smulr/vol58/iss3/10>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

CONFLICT OF LAWS

James P. George*
Anna K. Teller**

I. FORUM CONTESTS.....	681
A. CONSENT AND WAIVER	681
B. NONRESIDENTS' FORUM CONTACTS.....	682
1. <i>The Texas Long-Arm in Commercial Cases</i>	682
2. <i>The Texas Long-Arm in Noncommercial Tort Cases</i>	686
3. <i>Long-Arms in Federal Question Cases</i>	688
a. Texas contacts	688
b. Nationwide contacts	691
4. <i>Internet Jurisdiction</i>	692
5. <i>Status Jurisdiction</i>	692
a. Interstate custody disputes	693
b. International custody disputes	694
C. REASONS FOR DECLINING OTHERWISE VALID JURISDICTION	696
1. <i>Sovereign Immunity</i>	696
2. <i>Derogation Forum Selection Clauses</i>	696
3. <i>Forum Non Conveniens Dismissals</i>	696
4. <i>Parallel Litigation</i>	698
II. CHOICE OF LAW	699
A. STATUTORY CHOICE-OF-LAW RULES	700
B. CHOICE-OF-LAW CLAUSES IN CONTRACTS	701
C. THE MOST SIGNIFICANT RELATIONSHIP TEST.....	703
1. <i>Contract Cases</i>	703
2. <i>Tort Cases</i>	704
3. <i>Class Action Certifications</i>	704
D. OTHER CHOICE-OF-LAW ISSUES	706
1. <i>Legislative Jurisdiction and Other Constitutional Limits on State Choice-of-Law Rules</i>	706
2. <i>False Conflicts</i>	707
3. <i>Notice and Proof of Foreign Law</i>	708

* B.A., Oklahoma State University; J.D., University of Tulsa; L.L.M., Columbia University. Professor of Law, Texas Wesleyan University School of Law. George is active in the American Law Institute's project on Jurisdiction and Judgments and its joint project with UNIDROIT on Transnational Civil Procedure, and is a board member of the American Society of Comparative Law.

** B.A., Spring Hill College; J.D., Southern Methodist University; M.L.I.S., University of North Texas. Associate Director of the Law Library and Adjunct Professor of Law, Texas Wesleyan University School of Law.

4. <i>Use of the Forum's Procedural Rules</i>	710
III. FOREIGN JUDGMENTS	710
A. ENFORCEMENT	711
1. <i>The Uniform Enforcement of Foreign Judgments</i>	
<i>Acts</i>	711
a. Interstate enforcement	712
b. Foreign country money judgments	714
2. <i>Judgments Against Sovereigns</i>	715
3. <i>Arbitration Enforcement</i>	716
4. <i>Family Law Judgments</i>	716
B. PRECLUSION	717
1. <i>Interstate Preclusion</i>	717
2. <i>International Preclusion</i>	718

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, 2003 through November 31, 2004. The article excludes cases involving federal-state conflicts; intrastate issues such as subject matter jurisdiction and venue; and conflicts in time, such as the applicability of prior or subsequent law within a state. State and federal cases are discussed together because conflict of laws is mostly a state law topic, except for a few constitutional limits, resulting in the same rules applying to most issues in state and federal courts.¹ The Survey period saw continued growth in forum contests, a record number of choice of law decisions, and a static number of judgment enforcements. The Texas Supreme Court offered significant opinions on (1) child custody jurisdiction, finding continuing Texas jurisdiction where the children had not lived in Texas for five years;² (2) forum selection clauses, approving—in a case of first impression—a mandamus remedy for a trial court's refusal to honor a choice of forum clause;³ and (3) class actions, clarifying the requirement of a choice of law analysis in certifying multistate class actions.⁴

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

2. See *In re Forlenza*, 140 S.W.3d 373 (Tex. 2004), discussed *infra* notes 106-07 and accompanying text.

3. See *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004), discussed *infra* notes 116-18 and accompanying text.

4. See *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004), discussed *infra* notes 192-95 and accompanying text.

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 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 the issues relating to amenability.

A. CONSENT AND WAIVER

Contracting parties may agree to a forum selection clause designating either the optional or exclusive site for litigation or arbitration. When a contracting party sues in the designated forum, the clause is said to be a prorogation clause, that is, one supporting the forum's jurisdiction over the defendant. When a contracting party sues in a non-selected forum in violation of the contract, the clause is said to be a derogation clause, that is, one undermining the forum's jurisdiction. Only valid prorogation clauses establish personal jurisdiction, and they are discussed in this section. Derogation clauses are discussed below as a grounds for the forum to decline otherwise valid jurisdiction.⁵

The Survey period produced only one unreported case considering a forum clause designating Texas; enforcement of the clause was denied. Texas-based Toro Marketing LLC bought certain assets from Meshwerks, a Utah corporation partly owned by Utah resident Kevin Scheidle.⁶ As part of this transaction, Scheidle accepted membership in Toro and signed agreements containing choice of law clauses designating Dallas County, Texas as proper venue.⁷ Toro later determined that Meshwerks' assets had been exaggerated and requested for more information. Scheidle did not respond and Toro sued him in a Texas state court; Scheidle filed a special appearance and removed the case to federal court.⁸ The court found Scheidle's contact with Texas insufficient to support personal jurisdiction and specifically found the forum selection clause inapplicable because Meshwerks had sold the assets in question, and the agreements signed by Scheidle concerned membership in Toro, which was not at issue⁹. The court also noted that forum clauses do not create jurisdiction per se and are merely considered as part of the totality of contacts.¹⁰

5. See EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 360-61 (2d ed. 1992) [hereinafter *SCOLES & HAY*]; James P. George, *Parallel Litigation*, 51 *BAYLOR L. REV.* 899, 912-41 (1999) [hereinafter *Parallel Litigation*]. For a discussion of forum derogation clauses, see notes 115-19 and accompanying text.

6. *Toro Mktg., LLC v. Scheidle*, No. 3:03-CV-611-R, 2004 WL 330701 (N.D. Tex. Feb. 20, 2004).

7. *Id.* at *1.

8. *Id.*

9. *Id.* at *2-4.

10. *Id.* at *4 (citing *Stuart v. Spademan*, 772 F.2d 1185, 1195 (5th Cir. 1985)).

B. NONRESIDENTS' FORUM CONTACTS

Texas uses "limits-of-due-process" long-arm statutes, meaning that the minimum contacts test is the only necessary foundation for personal jurisdiction in Texas.¹¹ The Texas long-arms also apply in Texas federal courts except where Congress has enacted a federal long-arm statute for a very few federal claims.¹² In spite of due process's dominance, these personal jurisdiction cases are grouped under the long-arm categories.

1. *The Texas Long Arm in Commercial Cases*

Commercial cases in Texas state courts during the Survey period dealt with confidentiality agreements, the fiduciary shield doctrine, and general jurisdiction based on sometimes tenuous connections.

The Fifth District Court of Appeals considered two lawsuits seeking to enforce confidentiality agreements. Interestingly, the court denied jurisdiction over the Michigan-based employee of a Texas company and found jurisdiction for the transnational enforcement of a confidentiality agreement signed in Tennessee, and it reversed the trial court in both cases. In the first case, Texas-based Provider HealthNet Services ("PHNS") acquired employees from Detroit Medical Center ("DMC") in a plan for DMC to outsource its services to outside employers.¹³ These new employees signed confidentiality agreements with PHNS; the documents were sent from Dallas but were negotiated and signed in Detroit. PHNS fired one employee—Paul Gustafson—after seven months for poor job performance, and Gustafson immediately returned to work for DMC. PHNS sued Gustafson in a Dallas court, alleging that he was sharing PHNS's confidential information with its customer, DMC.¹⁴ The trial court found jurisdiction over Gustafson, but the court of appeals reversed based on the lack of pertinent events occurring in Texas.¹⁵

In the second case, Texas-based Delta Brands sued Rautaruukki Steel, a Finnish steel manufacturer, to enjoin it from revealing trade secrets acquired during meetings with Delta.¹⁶ Rautaruukki wished to construct a new mill that would produce steel with less residual stress and met with

11. See *U-Anchor Adver., Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977). The primary Texas long arm statutes are found at TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.045 (Vernon 1997). Others are scattered throughout Texas statutes. See, e.g., TEX. AGRIC. CODE ANN. § 161.132 (Vernon 2004) (violation of certain agricultural statutes); TEX. FAM. CODE ANN. § 6.305 (Vernon 1998 & Supp. 2004) (nonresident respondents in divorce actions); TEX. INS. CODE ANN. § 823.457 (Vernon 2004) (violations of duties imposed on insurance holding companies).

12. See FED. R. CIV. P. 4(k)(1)(A) (state long-arms in federal court); FED. R. CIV. P. 4(k)(1)(D) (federal long arm statutes). Examples of federal long-arm statutes include 28 U.S.C.A. § 2361 (West 1994) for statutory interpleader and 15 U.S.C.A. § 78aa (West 1997 & Supp. 2004) for claims under the Securities Exchange Act of 1934.

13. *Gustafson v. Provider Healthnet Servs., Inc.*, 118 S.W.3d 479 (Tex. App.—Dallas 2003, no pet.).

14. *Id.*

15. *Id.* at 484-85.

16. *Delta Brands, Inc. v. Rautaruukki Steel*, 118 S.W.3d 506 (Tex. App.—Dallas 2003, pet. denied).

Delta to learn about its in-line temper mill. Rautaruukki first visited Delta's Memphis plant where they signed a confidentiality agreement before learning of the process and then visited Delta's headquarters in Irving, Texas, where they had access to detailed technical drawings and specifications.¹⁷ In the following months, Rautaruukki sent numerous e-mails seeking additional information but ultimately told Delta they would not buy Delta's mill. Delta then learned that Rautaruukki was negotiating with a European manufacturer for a similar mill; Delta sued in Dallas to enforce the confidentiality agreement.¹⁸ The trial court sustained Rautaruukki's special appearance, but the Dallas Court of Appeals reversed, finding ample contacts with Texas regarding the information gained under the confidentiality agreement.¹⁹

Two court of appeals cases, both concerning oilfield claims, illustrated the fiduciary-shield doctrine with opposite but consistent results. In *Carone v. Retamco Operating, Inc.*, the San Antonio Court of Appeals held that the plaintiff failed to show that a nonresident shareholder was the alter ego of his corporation regarding its oil and gas operations in Texas; the court relied on the fiduciary-shield doctrine to protect the same shareholder from jurisdiction arising from his activities in Texas on behalf of his corporation.²⁰ The fiduciary shield failed to protect a Swiss citizen from specific jurisdiction for his corporate activities regarding oilfield testing equipment, because, as the court explained, the doctrine protects corporate officers and directors from claims based on general jurisdiction but does not apply to claims based on specific jurisdiction.²¹ This reasoning—that the fiduciary shield works only in general jurisdiction cases where the corporate agent's forum contacts are unrelated to the claim—was the basis for its denial in two additional specific jurisdiction cases (one involving nonresident lawyers claiming the shield).²² Three other cases split on nonresident officer's liability, with the first easily finding specific jurisdiction over nonresident members of a Texas limited liability company for misappropriate funds.²³ The second reversed the trial court's assertion of personal jurisdiction over a Mississippi officer for his corporation's failure to pay rent for a West Texas radio oper-

17. *Id.* at 509.

18. *Id.*

19. *Id.* at 511-12.

20. *Carone v. Retamco Operating, Inc.*, 138 S.W.3d 1, 12-13 (Tex. App.—San Antonio 2004, pet. denied).

21. *A.C.S. Wright v. Sage Eng'g, Inc.*, 137 S.W.3d 238, 250-51 (Tex. App.—Houston [1st dist.] 2004, pet. denied). See also *Carone*, 138 S.W.3d at 12.

22. *Jackson v. Kincaid*, 122 S.W.3d 440, 448 (Tex. App.—Corpus Christi 2003, pet. granted, judgment vacated & remanded by agr.) (lawyers from Oklahoma firm representing companies in Texas bankruptcy); *Stern v. Kei Consultants, Ltd.*, 123 S.W.3d 482, 488-92 (Tex. App.—San Antonio 2003, no pet.) (subjecting the president and vice president of Canadian pulp mill to specific jurisdiction).

23. *Hagerty Partners P'ship v. Livingston*, 128 S.W.3d 416 (Tex. App.—Dallas 2004, pet. denied).

ation.²⁴ The third reversed the trial court's assertion of jurisdiction over a nonresident embryologist sued in her capacity as a corporate officer of an animal genetics company.²⁵

*Bruno's Inc. v. Arty Imports, Inc.*²⁶ illustrates the difference between ruling on jurisdiction and ruling on the merits. Dallas-based Arty Imports allegedly lost thousands of dollars when its employee, Castaneda, conspired with a Florida man named Bultron to pilfer Arty's money through fraudulent purchases and forged endorsements.²⁷ Bultron worked in a Florida store owned by Bruno, an Alabama corporation. Arty sued Bruno, alleging respondeat superior liability based on Bruno having authorized Bultron to cash checks.²⁸ Although vicarious liability for intentional torts is very difficult to establish, for jurisdictional purposes, plaintiff's allegations are taken as true and must be refuted. Defendant failed to refute them and was subject to trial on the merits.²⁹

Unlike the *Bruno* decision, another court of appeals missed the distinction between jurisdictional facts and the merits of the case. *Mabry v. Reid* involved a Texas resident's action against a foreign corporation—Citation Corporation—and its nonresident employee—Reid—regarding fraudulent statements Reid allegedly made to Mabry about salary and benefits to be paid to Mabry for his work in Beaumont.³⁰ The trial court granted Reid's special appearance and the court of appeals affirmed, finding that the jurisdictional allegations were based on Reid's alleged fraudulent statements and that the trial court had "made an implied finding that no such representation was made."³¹ A dissent correctly pointed out that this finding went to the merits of the case and was inappropriate for a jurisdictional dismissal.³²

The Fourteenth Court of Appeals reversed trial court findings of jurisdiction in two cases involving foreign business operations with mostly foreign parties and only tenuous Texas connections. In *Moni Pulo Ltd. v. Trutec Oil & Gas, Inc.*, the court of appeals agreed that Texas lacked jurisdiction over Moni Pulo, a Nigerian corporation, in an action by another Nigerian corporation regarding the development of an oil field in Nige-

24. *Dowdy v. Miller*, 122 S.W.3d 816 (Tex. App.—Amarillo 2003, no pet.). The court also rejected the Mississippi officer's non-compete agreement as a basis for Texas jurisdiction, as well as statutory duties imposed on officers of foreign corporations. *Id.* at 821-22 (citing TEX. BUS. CORP. ACT ANN. art. 8.02 (Vernon 2003)).

25. *Morris v. Powell*, 150 S.W.3d 212 (Tex. App.—San Antonio 2004, no pet. h.). Plaintiffs' additional arguments of alter ego and general jurisdiction also failed. *Id.* at 219-23. The court of appeals upheld the finding of jurisdiction over a second defendant, a veterinarian, based on his direct contacts with Texas related to the medical negligence claim. *Id.* at 223.

26. 119 S.W.3d 893 (Tex. App.—Dallas 2003, no pet.).

27. *Id.* at 895.

28. *Id.*

29. *Id.* at 899-900.

30. *Mabry v. Reid*, 130 S.W.3d 385, 387 (Tex. App.—Beaumont 2004, no pet. h.).

31. *Id.* at 389-90.

32. *Id.* at 390-91 (Burgess, J., dissenting).

ria.³³ Plaintiff based its Texas jurisdiction argument on the defendant's joint venture partner, another Nigerian company with a Houston-based parent corporation. The court found this connection too remote,³⁴ as it did plaintiff's argument regarding the contested proceeds flowing through a Texas bank,³⁵ defendant's having contracted with Texas drillers,³⁶ and other unrelated Texas contacts.³⁷ Similarly, in *Alenzia Spazio, S.P.A. v. Reid*, the same Houston Court of Appeals found no jurisdiction—either specific or general—over two Italian corporations regarding a proposed joint venture to commercialize Russian geosynchronous orbital slots for its communications satellites.³⁸ The court rejected several bases for jurisdiction, including one defendant's signed contract with a Texas corporation owned by one of the Russian parties, where the contract designated Texas law as controlling. The court disagreed with plaintiff's argument that this contract amounted to purposeful availment of Texas law and emphatically pointed out that, in any event, a choice-of-law clause was not consent to Texas jurisdiction.³⁹

The Fifth District Court of Appeals reached the opposite result in a similar case involving a Texas party but concerning a foreign-based dispute with little or no connection to Texas. *Siemens AG v. Houston Casualty Co.* was an action filed in a Houston state court regarding a power plant failure in Mexico.⁴⁰ The defendant was a German manufacturer of turbines whose failure allegedly caused the plant to shut down. The Texas plaintiff, joining plaintiffs from Mexico, was a Houston reinsurer who had to pay the Mexican power company's damages.⁴¹ Despite the Texas party's presence, the German defendant had no ties to Texas related to this action; plaintiffs asserted general jurisdiction based on Siemens's general contact with Texas unrelated to this claim arising in Mexico. The court of appeals affirmed the trial court's finding of jurisdiction, basing the decision on defendant's failure to refute bases for general jurisdiction.⁴² Defendant refuted only specific jurisdiction.⁴³

In other commercial cases, Texas state courts upheld specific jurisdiction (1) over an Ohio corporation which failed to pay for materials it purchased through the South Carolina office of a Dallas-based company but with knowledge that the materials were shipped from Dallas;⁴⁴ (2)

33. *Moni Pulo Ltd. v. Trutec Oil & Gas, Inc.*, 130 S.W.3d 170 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

34. *Id.* at 175-77.

35. *Id.* at 174-75 (as a specific jurisdiction argument); *see also id.* at 177-78 (as a general jurisdiction argument).

36. *Id.* at 178.

37. *Id.* at 179-80.

38. 130 S.W.3d 201, 206-07 (Tex. App.—Houston [14th Dist.] 2004, pet. filed).

39. *Id.* at 219.

40. 127 S.W.3d 436, 439 (Tex. App.—Dallas 2004, pet. struck).

41. *Id.*

42. *Id.* at 440-42.

43. *Id.* at 441.

44. *N. Coast Commercial Roofing Sys., Inc. v. Rmax, Inc.*, 130 S.W.3d 491 (Tex. App.—Dallas 2004, no pet. h.).

over a Canadian defendant who was a reinsurance intermediary regarding claims arising in Texas and insured initially by a Texas insurer;⁴⁵ (3) for deceptive trade practice and warranty claims against a nonresident seller of a motor home;⁴⁶ (4) over Alabama boat owners for breaching an agreement to provide boating services on the Gulf of Mexico to personnel and guests from an Austin-based company, where the initial agreement was made in Pensacola and none of the services were performed in Texas;⁴⁷ and (5) over nonresident insurers for a class action regarding unpaid claims.⁴⁸ Alter ego failed as a basis for jurisdiction in a Dallas commercial-property case that offered little in the way of new law or novel facts but illustrated the high standards necessary to prove jurisdiction based on alter ego.⁴⁹

Federal courts applying the Texas long-arm statutes found neither general nor specific jurisdiction in (1) an action involving the troubled WorldCom, relating to a defaulted commercial property lease in Tennessee;⁵⁰ and (2) an unpaid salary claim for a job as president of a South Dakota company, to be performed in South Dakota, where plaintiff was a Washington resident at the time she signed the contract but later moved to Texas.⁵¹

2. *The Texas Long-Arm in Non-Commercial Tort Cases*

In *Bridgestone Corp. v. Lopez*,⁵² the court of appeals used the single-enterprise theory to establish personal jurisdiction over Japan-based Bridgestone, linked to a finding of general jurisdiction over Bridgestone's American counterpart, Firestone North American Tire, L.L.C. The claim arose from a single-car accident in Mexico in 2000, allegedly caused by defective Firestone tires that were manufactured and sold in Mexico.⁵³ Defendant filed an interlocutory appeal of the trial court's finding of general jurisdiction, and most of its appellate argument centered on Bridgestone's lack of general jurisdiction in Texas courts for this accident in Mexico. The court of appeals noted that the Texas Supreme Court had not addressed the single-enterprise theory but cited its application in sev-

45. *Dion Durrell & Assoc., Inc. v. S.J. Camp & Co.*, 138 S.W.3d 460 (Tex. App.—Tyler 2004, no pet. h.).

46. *Michiana Easy Livin' Country Inc. v. Holten*, 127 S.W.3d 89 (Tex. App.—Houston [1st Dist.] 2003, pet. granted).

47. *Holk v. USA Managed Care Org., Inc.*, 149 S.W.3d 769 (Tex. App.—Austin 2004, no pet. h.).

48. *Commonwealth Gen. Corp. v. York*, 141 S.W.3d 840 (Tex. App.—Corpus Christi 2004, pet. filed).

49. *Le Meridien Hotels & Resorts v. LaSalle Hotel Operating P'ship*, 141 S.W.3d 870 (Tex. App.—Dallas 2004, no pet. h.).

50. *WorkPlaceUSA, Inc. v. Palmer Plaza Partners*, No. Civ. A. 3:04-CV-0019, 2004 WL 2058780 (N.D. Tex. Sept. 15, 2004).

51. *Sommer v. Compass, Int'l, Inc.*, No. Civ. A. 3:03-CV-1719-B, 2004 WL 859202 (N.D. Tex. 2004).

52. 131 S.W.3d 670 (Tex. App.—Corpus Christi 2004, pet. granted, judgment vacated & remanded by agr.).

53. *Id.* at 676.

eral Texas courts of appeal and further noted its distinction from alter ego theory, which requires fraud.⁵⁴ The single-enterprise theory resembles partnership concepts with five elements: (1) the use of common personnel, (2) the use of common facilities, (3) the use of centralized accounting and an unclear allocation of profits and losses, (4) the payment of wages and rendition of services by one corporation for the other, and (5) the use of a common business name. The court found that all elements existed between Bridgestone and Firestone⁵⁵ and affirmed the trial court's finding of general jurisdiction over Bridgestone.⁵⁶

In two related Houston cases, courts of appeal rejected jurisdiction for asbestosis claims against a nonresident corporation that was the alleged successor of M.W. Kellogg Company; one opinion found insufficient evidence of corporate succession,⁵⁷ and the second held that the new company's agreement to indemnify a third company for Kellogg's liabilities was not a basis for Texas jurisdiction.⁵⁸ In a similar but more straightforward case, a Texas court of appeals upheld specific jurisdiction over a Delaware/Kentucky insurer for claims of nonpayment against a Texas insurer that had just been purchased by the nonresident insurer.⁵⁹

In *State of Rio De Janeiro of the Federal Republic of Brazil v. Philip Morris, Inc.*, the Beaumont Court of Appeals conducted a thorough analysis of minimum contacts' second prong—the fair play and substantial justice test—and denied general jurisdiction over several tobacco companies, none located in Texas, for public health claims by a Brazilian attorney general.⁶⁰ Interestingly, the defendant tobacco companies conceded their continuous and systematic contacts with Texas in return for plaintiff's concession that it was arguing only general jurisdiction.⁶¹ These stipulations thus established the contacts prong for general jurisdiction and placed all the eggs for both parties in the outcome of the fair play and substantial justice test. The defendants won the omelet. In particular, the court noted Texas's lack of any interest in litigating Brazilian public health claims against nonresident companies for claims arising entirely outside of Texas, as well as the lack of any relevant evidence.⁶²

In other cases, Texas state courts (1) denied specific jurisdiction over the American Dental Association as an additional party in a medical malpractice claim, where plaintiffs alleged jurisdiction based on the associa-

54. *Id.* at 682 (citing *N. Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 119 (Tex. App.—Beaumont 2001, pet. denied)).

55. *Id.* at 682-86.

56. *Id.* at 686-87.

57. *Koll Real Estate Group, Inc. v. Howard*, 130 S.W.3d 308 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

58. *Koll Real Estate Group, Inc. v. Purseley*, 127 S.W.3d 142 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

59. *Commonwealth Gen. Corp. v. York*, 141 S.W.3d 840 (Tex. App.—Corpus Christi 2003, pet. filed).

60. 143 S.W.3d 497 (Tex. App.—Beaumont 2004, pet. denied).

61. *Id.* at 500.

62. *Id.* at 502-03.

tion's endorsement of amalgam fillings that, in this case, were used in a pregnant patient, allegedly resulting in birth defects;⁶³ (2) denied specific jurisdiction over a Michigan doctor and hospital for services rendered there to a Detroit Tigers baseball player who lives in Texas;⁶⁴ (3) upheld specific jurisdiction over a New York based company for slamming a Texas company, that is, for improper switching of telephone long distance services;⁶⁵ and (4) in reviewing the effects of a post-accident corporate relocation, denied specific jurisdiction but upheld general jurisdiction over an out-of-state insurer that had been located in Houston at the time of a Texas resident's death at a job site in Kentucky.⁶⁶

3. *Long-Arm Statutes in Federal Question Cases*

Federal courts ordinarily use the long-arm statute of the state in which they sit but use a federal long-arm statute in a few instances.

a. Texas Contacts—Federal Question Cases Applying the Texas Long-Arm

Most claims arising under federal law lack an accompanying federal long-arm statute and are limited to the forum state's jurisdictional reach. Because Texas extends its long-arm to the full reach of due process, federal question defendants are amenable if they satisfy any of the Texas long-arms. Federal courts decided four noteworthy Texas personal jurisdiction cases regarding intellectual property during the Survey period.

The most interesting case is *Isbell v. DM Records, Inc.*,⁶⁷ which thoroughly explored the jurisdictional bases for copyright claims. DM Records is a Florida corporation whose agents traveled to Texas in 1999 to buy assets from Isbell Records, which was in bankruptcy in Sherman, Texas. DM purchased certain assets from the bankruptcy trustee and thereafter began marketing music acquired from the purchase, including the songs "Whoomp There It Is!" and "Dazzey Duks." Alvertis Isbell, a individual who was president of the now-bankrupt Isbell Records, disputed DM's copyright on those songs; he claimed that the bankrupt company owned only the sound recordings and not the copyrights, and he sued in a Dallas federal court for copyright infringement and other relief.⁶⁸

63. *Botter v. Am. Dental Assoc.*, 124 S.W.3d 856 (Tex. App.—Austin 2003, no pet.).

64. *Brocail v. Anderson*, 132 S.W.3d 552 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). The court recited the test for personal jurisdiction in "out-of-state doctor" cases, noting that medical services rendered outside the forum were not likely to meet the "purposely directed" element of minimum contacts. *Id.* at 559-60.

65. *Kytel Int'l Group, Inc. v. Rent-A-Center, Inc.*, 132 S.W.3d 717 (Tex. App.—Dallas 2004, no pet. h.).

66. *Equitable Prod. Co. v. Canales-Trevino*, 136 S.W.3d 235 (Tex. App.—San Antonio 2004, pet. denied).

67. *Isbell v. DM Records, Inc.*, No. Civ. A. 3:02-CV-1408-A, 2004 WL 1243153 (N.D. Tex. June 4, 2004).

68. *Id.* at *1-2.

DM's objections to both subject matter (not discussed here) and personal jurisdiction were denied after a thorough analysis. The court first found that DM had purposefully availed itself of the benefits and protections of Texas law by traveling here and contracting to buy the bankrupt estate's assets, which would have sufficed as the contacts portion of the minimum contacts test.⁶⁹ Second, the court found a stream-of-commerce basis, that is, that DM created a contact with Texas by placing the songs "into the stream of commerce with the knowledge and expectation that those compositions would reach the Texas market."⁷⁰ Stream of commerce is traditionally used for products liability cases; the court noted that although they were not binding precedent in the Fifth Circuit,⁷¹ a sufficient number of opinions broached the subject, leading the district court in the instant case to conclude that "copyright infringement activity *might*, in certain circumstances, satisfy the stream of commerce test for minimum contacts."⁷² Third, the court held that DM's acts of alleged tortious infringement of a Texas resident's copyrights satisfied the effects test as highlighted in defamation cases and used in various Fifth Circuit precedents.⁷³ These three bases—purposeful availment, stream of commerce, and tortious effects—satisfied only the contacts prong. The court then did an exhaustive analysis of the fair play and substantial justice balancing test and found that the Florida defendant was not unduly inconvenienced by litigating in Texas. The court did, however, issue a *sua sponte* ruling to transfer the case to the Eastern District of Texas in Sherman based on the presence of evidence there and the bankruptcy court's familiarity with the issues.⁷⁴

The second of the four intellectual property cases was *Delta Brands, Inc. v. Danieli Corp.*, which is similar to Delta's state-court claim of trade secret expropriation against the Finnish company Rautaruukki Steel.⁷⁵ In this case Texas-based Delta sued Swedish steel manufacturer SSAB Turnplat and Delta's Italian competitor Danieli corporation for SSAB's alleged sharing of Delta's manufacturing processes with Danieli, acquired when SSAB representatives visited Delta's Texas operation. Delta sued them in federal court in Texas, and despite SSAB's visit here, the court found the defendants lacked sufficient contacts with Texas to warrant ju-

69. *Id.* at *6-7.

70. *Id.* at *8-9.

71. *Id.* at *9 (citing *Nuovo Pignone, Spa v. Storman Asia M/V*, 310 F.3d 374, 381 (5th Cir. 2002) (noting the court's reluctance to extend stream-of-commerce principles outside of products liability)).

72. *Id.* (citing *Ham v. La Cienega Music Co.*, 4 F.3d 413, 415-16 (5th Cir. 1993); *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000)). The court further noted stream of commerce's weak plurality status in the Supreme Court. *Id.* at *8 (citing *Asahi Metal Indus. Co. Ltd. v. Superior Court*, 480 U.S. 102, 112 (1987)). The court also noted its valid status in the Fifth Circuit. See *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415 (5th Cir. 1993).

73. *Id.* at *10 (citing *Calder v. Jones*, 465 U.S. 783 (1984) (defamation); *Realsongs v. Gulf Broad. Corp.*, 824 F. Supp. 89 (M.D. La. 1993)).

74. *Id.* at *13 (relying on 28 U.S.C.A. § 1404(a) (West 2004)).

75. 99 Fed. Appx. 1, 2004 WL 960040 (5th Cir. 2004). See *supra* notes 16-19.

isdiction.⁷⁶ The Fifth Circuit affirmed, finding no personal jurisdiction as to SSAB and Danieli & C (the Italian defendant)⁷⁷ and granting a forum non conveniens dismissal to Danieli Corporation (the American defendant).⁷⁸

The third case, *Nations AG II, LLC v. Hide Co., LLC*,⁷⁹ involved two plaintiff corporations from Tennessee and Washington state suing a Mississippi corporation for trade-secret misappropriation related to the marketing of agricultural pesticides. Plaintiffs entered into sales agreements with The Hide Company in which certain technical information was necessarily disclosed and, according to plaintiffs, then shared with third parties. Plaintiffs sued The Hide Corporation and two of its sales agents, John Jordan and Larry Barefoot. Defendants' objections to personal jurisdiction failed, with Jordan's and Barefoot's sales calls to Texas binding both the company and them individually, over their fiduciary shield defense.⁸⁰

The fourth intellectual property case is *Vishy Dale Electronics, Inc. v. KOA Corp.*,⁸¹ involving parallel lawsuits in federal courts in Texas and Pennsylvania for patent infringement. The Texas case was filed first and defendants KOA and KOA Speer Electronics moved to dismiss or alternatively transfer to the federal court in Pennsylvania where they had filed a mirror-image action. Noting that plaintiffs need allege nothing more in most patent infringement cases than the sale of the infringing product in the forum, the court found jurisdiction in Texas.⁸² The court denied defendants' motion to transfer and issued an anti-suit injunction against defendants' Pennsylvania case as to two of the six patents at issue.⁸³

Moving away from intellectual property, *Elliot v. Firearms Training Systems, Inc.* echoes the *Bruno* case, discussed above, in its distinction between jurisdiction and the merits.⁸⁴ Elliot brought an Americans with Disabilities Act claim against his employer, Georgia-based Firearms Training Systems, alleging injury for not allowing Elliot to fly first class on trips between Texas and Georgia. The federal district court found general jurisdiction based on plaintiff's unrefuted allegations of their ongoing Texas business contacts,⁸⁵ but it nonetheless dismissed his claim based on federal statutory language requiring filing in Georgia.⁸⁶ Because this fil-

76. *Id.* at *3.

77. *Id.* at *4-8.

78. *Id.* at *8-10.

79. *Nations AG II, LLC v. Hide Co., LLC*, No. Civ. A. 3:04-CV-0511-K, 2004 WL 1496312 (N.D. Tex. June 30, 2004).

80. *Id.* at *4.

81. *Vishy Dale Elecs., Inc. v. KOA Corp.*, No. 4:04-CV-247-A, 2004 WL 1908244 (N.D. Tex. Aug. 24, 2004).

82. *Id.* at *3.

83. *Id.* at *4.

84. *Elliot v. Firearms Training Sys., Inc.*, No. 5A-04-CA-0490-RF, 2004 WL 2567619 (W.D. Tex. Oct. 21, 2004); see *Bruno* discussion *supra* notes 26-29.

85. *Elliot*, 2004 WL 2567619, at *2-3.

86. *Id.* at *4-5 (citing cases interpreting 42 U.S.C.A. § 2000e-5(e)(1) (West 2004)).

ing requirement appeared in the applicable federal substantive law, it was a dismissal on the merits rather than on jurisdiction.

b. Nationwide contacts—federal question cases applying a federal long-arm

Rule 4(k)(1) allows for a nationwide-contacts analysis for enumerated cases and 4(k)(2) for foreign defendants not otherwise subject to the jurisdictional reach of any one state. In cases applying these rules, sufficient contacts are assessed with the United States as a whole rather than any one state.⁸⁷ In one of the more unusual cases in any category during the Survey period, a San Antonio federal court found no jurisdiction under the Texas long-arm as to two defendants but held over the case to allow for service under a federal long-arm. *Nocando Mem Holdings, Ltd. v. Credit Commercial de France, S.A.*, involved a RICO claim regarding a Cayman Islands investment company named InverWorld that went bankrupt in 1999.⁸⁸ Its owner, Jose Zollino, was a Mexican national who moved to San Antonio where he established InverWorld and related companies for offshore transactions. When the operation went bankrupt, investors sued a number of allegedly related defendants in a San Antonio federal court. Four defendants objected to personal jurisdiction—Credit Commercial de France (a French bank), Finely, S.A. (a French company), HSBC Private Banking, Ltd. (a Bahamian bank), and Handelsfinanz-CCF Bank (a Swiss bank).⁸⁹ In a lengthy opinion, the court found specific jurisdiction over the first two, CCF and Finely, based on Texas contacts, and no jurisdiction over the third and fourth defendants under the Texas long-arm under which they were served. However, the court found that the third and fourth defendants were subject to the RICO long-arm with nationwide service of process and ordered that the claims against them be retained until service was made.⁹⁰ Finally, because of the difficult issues in the case, the court recommended that the parties seek a certified interlocutory appeal of the jurisdictional issues.⁹¹

Congress also enacted more specific long-arms, as illustrated by *In re L.D. Brinkman Holdings, Inc.*⁹² In 2003, Texas-based Brinkman filed a Chapter 11 bankruptcy petition in Dallas. And pursuant to that bankruptcy, it filed a claim against California-based Anderco to collect for the sale of vinyl flooring.⁹³ Anderco maintained its headquarters and sole business site in Los Angeles and purchased the flooring through Brinkman's facilities in California. Although the purchase was made through an independent agent in Atlanta, Georgia, all other buyer-seller activities

87. FED. R. CIV. P. 4(k)(2).

88. *Nocando Mem Holdings, Ltd. v. Credit Commercial de France, S.A.*, No. Civ. A. SA-01-1194-XR, 2004 WL 2603739 (W.D. Tex. Oct. 6, 2004).

89. *Id.* at *1.

90. *Id.* at *39.

91. *Id.* at *39 (citing 28 U.S.C.A. § 1292(b) (West 2004)).

92. 310 B.R. 686 (N.D. Tex. 2004).

93. *Id.* at 687.

occurred in California.⁹⁴ Anderco objected to the Dallas bankruptcy court's jurisdiction and filed an affidavit establishing its lack of any contact with Texas.⁹⁵ The bankruptcy court noted the irrelevance of this argument in light of the federal long arm in Bankruptcy Rule 7004(d), authorizing nationwide service of process based on contacts with the United States.⁹⁶

4. Internet Jurisdiction

Three cases decided during the Survey period considered internet arguments as a basis for personal jurisdiction in Texas. *WorldPost Tech., Inc. v. Universal Express, Inc.* was a trademark infringement action arising from defendant's internet contacts with Texas.⁹⁷ The plaintiff, WorldPost, was in the telecommunications business and the defendant, Universal Express, was in the private postal business. Universal Express, through subsidiaries and fictitious names, began using variations of the Worldpost name on websites that successfully solicited Texas business and offered free network membership through the completion of an on-line form available on their website. The court found that these activities created sufficient contacts between Texas, the divisions or subsidiary companies, and the controversy to support specific personal jurisdiction.⁹⁸

In *Machinery Marketing, Inc. v. Breaux Machine Works, Inc.*, a court exercised specific jurisdiction over a company that used a passive website (through which direct transactions were not possible) to make the initial contact with Texas residents regarding the sale of office machines.⁹⁹ The opposite result occurred in *LCW Automotive Corp. v. Restivo Enterprises*, where the court applied the *Zippo* sliding scale to reject jurisdiction based on a passive website that was merely an advertising site.¹⁰⁰

5. Status Jurisdiction

Status jurisdiction is a special category recognizing a state's authority to adjudicate issues such as marital status, parental custody and mental competence. It is often characterized as subject matter jurisdiction but turns on amenability factors such as contacts with the forum state. Competence determinations do not often implicate interstate issues, and marital status litigation tends to tolerate parallel suits in different states and countries. The pervasive problem exists with child custody determina-

94. *Id.*

95. *Id.*

96. *Id.* at 689.

97. *WorldPost Tech., Inc. v. Universal Express, Inc.*, No. Civ. A. SA-03-CA0764XR, 2003 WL 22852839 (W.D. Tex. Dec. 1, 2003).

98. *Id.* at *5.

99. *Machinery Mktg., Inc. v. Breaux Machine Works, Inc.*, No. 01-03-00881-CV, 2004 WL 1403571 (Tex. App.-Houston [1st Dist.] June 24, 2004, no pet. h.).

100. *LCW Auto. Corp. v. Restivo Enters.*, No. SA-04-CA-0361-XR, 2004 WL 2203440 (W.D. Tex. Sept. 24, 2004) (citing *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) (in adopting the well-recognized standards for internet jurisdiction first stated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997))).

tions—both original and modifications—where conflicting judgments and parental abduction create problems. The solution has been legislation in the form of uniform acts or treaties designed to choose a single custody forum that other states will respect. Domestically, the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”)¹⁰¹ and the federal Parental Kidnaping Prevention Act (“PKPA”)¹⁰² seek to establish unitary child custody jurisdiction and apply full faith and credit to those decisions. Internationally, the UCCJEA governs both jurisdictional disputes and decree enforcement¹⁰³ and is joined by the International Child Abduction Remedies Act¹⁰⁴ (“ICARA”)—the United States version of the Hague Convention on Child Abduction¹⁰⁵—which seeks the return of children taken both within the United States and across international borders in violation of valid custody orders. These Acts often involve judgment enforcement and preclusion but are discussed here because they also involve questions of status jurisdiction.

a. Interstate custody disputes

Four cases decided during the Survey period involved interstate custody and related disputes. *In re Forlenza*¹⁰⁶ found exclusive continuing jurisdiction over children who resided out of state for more than five years. Ann Marie and Robert Forlenza divorced in Collin County in 1996. In July 1997, the Texas court entered an agreed custody modification order granting Robert primary custody of the couple’s two children and giving him the exclusive right to establish their primary physical residence. During the same month, the children moved with Robert to Washington state. Over the next five years Robert moved the children three more times. Ann Marie filed suit in 2001, claiming she was having difficulty exercising her possession rights and seeking a modification of the 1997 order. Robert challenged Texas’s continuing jurisdiction, but the trial court denied his motion to dismiss. The court of appeals reversed and ordered dismissal, and the Texas Supreme Court granted Ann Marie’s petition for writ of mandamus.¹⁰⁷

In reversing the court of appeals and affirming the trial court’s exercise of jurisdiction to modify custody, the Texas Supreme Court provided a brief but insightful history of the UCCJEA, the UCCJA, and the PKPA. It explained that Article 2 of the UCCJEA specifically grants exclusive continuing custody jurisdiction to the state that made the initial custody determination and provides rules on the continuation of that jurisdic-

101. TEX. FAM. CODE ANN. §§ 152.101-152.317 (Vernon 2002 & Supp. 2004).

102. 28 U.S.C.A. § 1738A (West 1994 & Supp. 2004).

103. TEX. FAM. CODE ANN. § 152.105 (Vernon 2002). The PKPA does not apply to child custody conflicts with foreign countries.

104. 42 U.S.C.A. §§ 11601-11610 (West 1995 & Supp. 2004).

105. Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, opened for signature on Oct. 25, 1980, T.I.A.S. 11670, 1343 U.N.T.S. 89, 19 I.L.M. 1501-15 (1980) (entered into force Dec. 1, 1983).

106. 140 S.W.3d 373 (Tex. 2004).

107. *Id.* at 374-75.

tion.¹⁰⁸ Texas adopted Article 2 without substantial variation in Family Code sections 152.201-210. Robert challenged the trial court's interpretation of section 152.202(a), which governs the duration of the decree-granting state's exclusive jurisdiction. That section provides in part that Texas retains jurisdiction until a Texas court determines that the child no longer has a significant connection to the state. The trial court had found a significant connection between the children and Texas based on visits here and the personal relationships maintained here. The supreme court agreed and found that those connections, coupled with the children's almost continual change of residence, supported continuing jurisdiction in Texas.¹⁰⁹

In other cases, Texas courts (1) exercised jurisdiction over a child with significant ties with both Texas and New York;¹¹⁰ (2) exercised jurisdiction over a child who resided in Tennessee for eleven continuous months prior to commencement of a custody proceeding;¹¹¹ and (3) declined jurisdiction over a Nevada court's initial custody determination because of the unjustifiable conduct of a mother whose parental rights had been terminated by Nevada and who subsequently interfered with custody.¹¹²

b. International custody disputes

The Survey period produced one notable international custody dispute, *In re Lewin*,¹¹³ involving the interplay between a Hague Convention order and the Texas UCCJEA and illustrating once again the regrettable legal complications inherent in cross-border custody disputes. Brenda Lewin and Robert Farnsworth, who never married, had a daughter in 1998 in New Jersey. The couple moved to Milam County, Texas in 2000, but in 2002, Brenda returned to New Jersey with the child. Shortly after her return to New Jersey, Robert took the child to Texas where he filed a suit affecting the parent-child relationship (a "SAPCR") and sought custody. In October 2002, Brenda filed her answer and counter-petitioned for custody. On November 5, 2002, the Texas district court entered an order granting joint managing conservatorship and giving Brenda exclusive right to determine the child's primary residence.¹¹⁴

108. *Id.*

109. *But see In re K.B.A., B.W.A., and D.J.A.*, 145 S.W.3d 685 (Tex. App.—Fort Worth 2004, no pet. h.). Where the court incorrectly cites *Forlenza* as direct support for retaining jurisdiction merely because one parent still resides in Texas. *Id.* at 689.

110. *In re L.E.*, No. 07-02-0417-CV, 2004 WL 62712 (Tex. App.—Amarillo Jan. 14, 2004, pet. denied).

111. *In re Powell*, 121 S.W.3d 846 (Tex. App.—Beaumont 2003, pet. filed). The court also found jurisdiction over the child's younger brother who was born in Texas after his parents were separated. The dissenting opinion suggested that rather than stretching the facts and finding that the older child's absence from Texas was temporary, the Texas court should have communicated with the Tennessee court and asked it to agree to a consolidation of the custody issues. *Id.* at 848-49 (Gaultney, J., dissenting).

112. *In re S.L.P.*, 123 S.W.3d 685 (Tex. App.—Fort Worth 2003, no pet.).

113. 149 S.W.3d 727 (Tex. App.—Austin 2004, no pet. h.).

114. *Id.* at 731.

Brenda and Robert followed the Texas custody schedule for seven months until July 5, 2003, when Robert again took the child from Brenda in New Jersey and fled to Montreal, Quebec, where he sued to modify the Texas custody. Because Robert had wrongfully retained the child, Brenda filed a Hague Convention application in the Montreal court seeking the return of her daughter based on the Texas custody order. Robert objected, arguing that the child had been abused and that Brenda had acquiesced in Robert's custody. After a three day hearing, the Canadian court ordered Robert to return the child to Brenda by noon the following day.¹¹⁵

Robert again fled with the child, this time back to Milam County where he filed a motion to modify, alleging Brenda's neglect and abuse, requesting the exclusive right to determine the child's residence, and requesting a temporary order restricting Brenda's visitation to Milam County. Less than an hour after that motion was filed, the Texas court signed a temporary order giving Robert custody. That afternoon, Brenda filed a motion to vacate the temporary order and for a writ of attachment, citing the Hague Convention order from the Montreal court.¹¹⁶ Brenda also filed suit in New Jersey to enforce the Hague Convention order and to obtain custody of the child. On December 5, 2003, the New Jersey court denied relief stating, "[j]urisdiction is with the State of Texas until further order of that court indicating that they are specifically changing same."¹¹⁷

At a December 11, 2003 hearing in Milam County, Brenda argued that the Hague Convention order was enforceable and that Texas did not have jurisdiction to modify custody because the Canadian court had determined in November that Brenda, Robert and their daughter no longer resided in Texas; this argument was ultimately persuasive to the Texas court of appeals. Robert argued for Texas residency and that Brenda had not complied with the original Texas SAPCR order. Robert prevailed again and won another temporary order confirming him as managing conservator with the right to determine the child's residence and enjoining Brenda from visiting with the child outside of Milam County. The court also denied Brenda's motion for rehearing, and she petitioned for a writ of mandamus.¹¹⁸ The Austin Court of Appeals found that the statutory framework of the UCCJEA, as adopted in Chapter 152 of the Texas Family Code, required the trial court to decline jurisdiction based on Robert's forum shopping and his wrongful retention and abduction of the child, and that the trial court abused its discretion in failing to enforce the Hague Convention order issued by the Montreal court.¹¹⁹

115. *Id.* at 732.

116. *Id.* at 733.

117. *Id.*

118. *Id.*

119. *Id.* at 741.

C. REASONS FOR DECLINING OTHERWISE VALID JURISDICTION

Even where all jurisdictional elements exist, courts may refrain from litigating cases involving a sovereign foreign government, cases contractually directed at other forums, cases in which convenience mandates another forum, and cases parallel to other litigation.

1. *Sovereign Immunity*

The Survey period produced one notable sovereign immunity case in which the Fifth Circuit Court of Appeals clarified the test for a sovereign's property being immune from garnishment and reversed a federal district court's finding that the sovereign's assets were immune. The case is fully discussed below in the Foreign Judgments section.¹²⁰

2. *Derogating Forum Selection Clauses*

The Consent section above discusses forum selection clauses that *establish* local jurisdiction.¹²¹ Somewhat different considerations arise when the plaintiff sues in a forum contrary to the parties' earlier choice in a forum selection clause. These are known as derogation clauses (in regard to that forum), and instead of justifying the court's retention of the case, they require the court to consider declining otherwise valid jurisdiction over the parties. The Survey period produced two such cases. In a 5-4 split, the Texas Supreme Court ruled in a case of first impression that mandamus was available as a remedy for a trial court's refusal to honor a choice of forum clause naming New York as the site for any lawsuits on liability insurance.¹²² Louis Dreyfus Corporation bought \$70 million in pollution liability coverage from AIU Insurance and sought coverage for a claim against its subsidiary, Louis Dreyfus Natural Gas, for an air-ground-water pollution lawsuit in Hidalgo County, Texas. Justice Owen wrote for the majority, finding the clause enforceable and the mandamus remedy appropriate.¹²³ Chief Justice Phillips led a four-justice dissent, attacking derogating forum clauses in general and the mandamus remedy in particular.¹²⁴ In the second case, a federal court honored a forum clause designating federal courts in the Western District of Oklahoma, regarding an allegedly defective compost machine.¹²⁵

3. *Forum Non Conveniens Dismissals*

Forum non conveniens, or inconvenient forum, is a common law objection to jurisdiction that now is also available by statutes such as 28 U.S.C.

120. See *infra* notes 263-69 (discussing *Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004)).

121. See *supra* notes 6-10.

122. *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004).

123. *Id.* at 110-11, 121.

124. *Id.* at 121-24 (Phillips, J., dissenting).

125. *Soil Bldg. Sys. v. CMI Terex Corp.*, No. Civ. A. 3:04-CV-0210-G, 2004 WL 1283966 (N.D. Tex. June 9, 2004).

§ 1404 for intra-jurisdictional transfers based on convenience.¹²⁶ Because intra-federal transfers under section 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 movant to show the availability of an adequate alternative forum and that a balancing of private and public interests favors transfer.¹²⁷

The Survey period produced six noteworthy forum non conveniens decisions. As discussed above, the Fifth Circuit affirmed a forum non conveniens dismissal in favor of litigation in Italy for a Texas manufacturer's claim of trade secret expropriation by a Swiss steel manufacturer and an Italian company, based on technical information the Swiss company acquired in Dallas and then allegedly revealed in Italy.¹²⁸

*Easter v. Technetics Management Corp.*¹²⁹ applied the statutory bar on forum non conveniens dismissals against a Texas resident. Dennis Easter worked for Arkansas-based Technetics on a job assignment in Tupelo, Mississippi. Easter later took a two month leave of absence and requested that he be allowed to do his work—information services—by remote-access dial-up connection. Technetics refused and soon fired him. Easter sued in Harris County district court, which granted a forum non conveniens dismissal to Technetics, presumably for refile in Arkansas or Mississippi.¹³⁰ The court of appeals reversed, noting that Easter alleged his Texas residency, Technetics never refuted it, and that the applicable forum non conveniens statute barred dismissals against a Texas resident.¹³¹

126. 28 U.S.C.A. § 1404 (West 1993 & Supp. 2004) 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).

127. See *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 423-24 (5th Cir. 2001). The private factors look to the parties' convenience and include the relative ease of access to sources of proof, the availability of compulsory process for the attendance of unwilling witnesses, and the cost of obtaining their attendance; the possibility of viewing the premises, if appropriate; and all other practical problems that make the trial easy, expeditious and inexpensive. The public factors look to the court's concerns and the forum state's interests and include the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum familiar with the law that must govern the action; the avoidance of unnecessary conflict of laws problems; and the unfairness of burdening citizens in an unrelated forum with jury duty. *McLennan*, 245 F.3d at 424. Texas' forum non conveniens law is multi-faceted. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(k) (Vernon 1997) applies to personal injury and wrongful death claims. Common law forum non conveniens, in line with *Gulf Oil v. Gilbert*, governs all other interstate and international forum convenience issues in Texas state courts. See *In re Smith Barney, Inc.*, 975 S.W.2d 593, 596 (Tex. 1998).

128. *Delta Brands, Inc. v. Danieli Corp.*, 99 Fed. Appx. 1, 2004 WL 96040 (5th Cir. 2004); see *supra* notes 75-78.

129. 135 S.W.3d 821 (Tex. App.—Houston [1st Dist.] 2004, pet. granted, judgment vacated & remanded by agr.).

130. *Id.* at 822-23.

131. *Id.* at 824-26 (citing TEX. CIV. PRAC. & REM. CODE § 71.051(e) (Vernon 2004)).

Rodriguez Delgado v. Shell Oil Co.,¹³² raised an interesting question regarding the validity of a forum non conveniens dismissal after a loss of subject matter jurisdiction that would arguably render the dismissal order moot. In 1995, a federal district court in Houston granted a forum non conveniens motion in a pesticide exposure case by Costa Rican banana workers.¹³³ The case had been removed from state court based on a federal question of sovereign immunity—a defendant company in the case was owned by Israel although the company's status was disputed.¹³⁴ In 2000, the Fifth Circuit affirmed both the defendant's sovereign status (and thus affirmed jurisdiction for removal) and the forum non conveniens dismissal.¹³⁵ Then, in 2003, the United States Supreme Court ruled in a different case that the same defendant did not qualify as a sovereign entity, thus undermining the Houston federal court's jurisdiction.¹³⁶ Plaintiffs moved to vacate the forum non conveniens dismissal and to remand the case to state court. The federal district court denied their motions and held that its forum non conveniens dismissal would remain valid after remand to state court.¹³⁷

In the other three cases, a federal court granted a forum non conveniens dismissal in (1) a child-sex-abuse claim against a defendant who was convicted on related criminal charges in a Dallas federal court and is now in federal prison;¹³⁸ (2) an Australian's injury claim regarding an oil rig accident in the waters off of the Republic of China;¹³⁹ and (3) in a products liability action against Ford for an accident in Venezuela.¹⁴⁰

4. *Parallel Litigation*

Parallel litigation is difficult to define, sometimes meaning identical lawsuits with exactly the same parties bringing the same claims, and sometimes meaning two or more lawsuits that may result in claim preclusion for some or all parties. It occurs both intra- and inter-jurisdictionally and involves remedies of transfer and consolidation (intra-jurisdictional only), stay, dismissal, and anti-suit injunction or, in many cases, allowing both cases to proceed and using the first-to-judgment to preclude the

132. 322 F. Supp. 2d 798 (S.D. Tex. 2004).

133. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995).

134. *Delgado*, 322 F. Supp. 2d at 800-801.

135. *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000).

136. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).

137. *Delgado*, 322 F. Supp. 2d at 808-16.

138. *Punye v. Bredimus*, No. Civ. A. 3:04-CV-0893-G, 2004 WL 2511144 (N.D. Tex. Nov. 5, 2004). Among other reasons, the court found that plaintiffs' wish to apply Texas punitive damages law was not warranted. *Id.* at *9. To protect the plaintiffs after denying them a Texas forum, the court made the dismissal conditional on litigation in Thailand and further required the defendant to make pertinent evidence available to the plaintiffs in Thailand, both routine in forum non conveniens dismissals. The court then ensured the remedy by requiring the defendant to agree that "any final judgment rendered by the Thai courts in this case shall be entitled to full faith and credit in the courts of the United States." *Id.*

139. *Dunsby v. Transocean, Inc.*, 329 F. Supp. 2d 890 (S.D. Tex. 2004).

140. *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672 (S.D. Tex. 2004).

other.¹⁴¹ This article discusses only parallel litigation involving at least one case outside of Texas; it does not consider multiple related actions where all the courts are located in Texas. The Survey period produced three parallel litigation rulings, the first resulting in an anti-suit injunction against second-filed patent litigation in Pennsylvania.¹⁴² The second resulted in a conditional dismissal of a Texas plaintiff's declaratory judgment action to nullify alleged gambling debts in Biloxi, Mississippi in favor of an identical case in Mississippi state court.¹⁴³ The third rejected a Texas plaintiff's argument that it was a victim of in abstentia litigation in Pennsylvania.¹⁴⁴

II. CHOICE OF LAW

Choosing the applicable substantive law is a question, like personal jurisdiction and judgment enforcement, involving both forum law and constitutional issues. Understanding these issues requires a clear focus on basic principles. First, choice of law is a question of *state* law, both in state and federal courts.¹⁴⁵ 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.¹⁴⁶ Third, the forum state has broad power to make choice-of-law decisions, either legislatively or judicially, subject only to limited constitutional requirements.¹⁴⁷

Within the forum state's control of choice-of-law is a hierarchy of choice-of-law rules. At the top are legislative choice of law rules, that is, statutes directing the application of certain state's laws based on events or people important to the operation of that specific law.¹⁴⁸ Second, in the

141. See generally *Parallel Litigation*, *supra* note 20; James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 *TEX. INT'L L. J.* 499 (2001).

142. *Vishy Dale Elecs., Inc. v. KOA Corp.*, No. 4:04-CV-247-A, 2004 WL 1908244 (N.D. Tex. Aug. 24, 2004), discussed *supra* at notes 81-83.

143. *Phillips v. Grand Casinos of Miss., Inc.—Biloxi*, No. Civ. A. 3:04-CV-0202B, 2004 WL 2533589 (N.D. Tex. Nov. 9, 2004). The dismissal was expressly conditioned on any failure "to completely resolve the matter" in the parallel Mississippi state court. *Id.* at *3.

144. *AVCO Corp. v. Interstate Southwest, Ltd.*, 145 S.W.3d 257 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.); see discussion *infra* at notes 283-84 and accompanying text.

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

146. 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 *SCOLES & HAY*, *supra* note 20, at 67-72 (especially 68 n. 4); *WEINTRAUB*, *supra* note 1 at 88-94. Texas law provides for *renvoi* in *TEX. BUS. & COM. CODE ANN.* §§ 1.105(b), 2.402(b), 4.102(b), 8.106, 9.103 (Vernon 1994 & Supp. 2004). For federal courts, *Klaxon* reiterates the forum state's control of choice of law. *Klaxon*, 313 U.S. at 497.

147. See *infra* notes 193-94 and accompanying text for a brief description of these constitutional requirements.

148. *RESTATEMENT (SECOND) OF CONFLICTS OF LAWS* § 6(1) cmt. a (1971). See e.g., *TEX. CIV. PRAC. & REM. CODE ANN.* § 71.031 (Vernon 1997 & Supp. 2004)); *Owens Corning v. Carter*, 997 S.W.2d 560 (Tex. 1999) (applying an earlier version of the Texas wrongful

choice-of-law hierarchy is party-controlled choice of law, that is, choice-of-law clauses in contracts that control unless public policy dictates otherwise.¹⁴⁹ 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.¹⁵⁰ This Survey article is organized according to this hierarchy—that is, statutory choice of law, followed by choice-of-law clauses, and concluding with choice of law under the most significant relationship test. Special issues such as constitutional limitations are discussed in the following section. This grouping results in a discussion that mixes Texas Supreme Court opinions with those of Texas intermediate appellate courts, federal district courts, and the Fifth Circuit. In spite of this mix, readers should of course note that choice of law is a state law issue and the only binding opinions are those of the Texas Supreme Court.¹⁵¹

A. STATUTORY CHOICE-OF-LAW RULES

The Survey period produced three cases involving Texas choice-of-law statutes, with the first case raising an important point regarding parties waiving their choice-of-law options. As discussed in the Notice and Proof of Foreign Law section, *Vannoy v. Verio, Inc.* was a claim for stock options for which the defendant failed to convey as part of an employment benefits package.¹⁵² The defendant waited until the day of trial to argue that Delaware law applied and barred the claim, and the court accordingly tried the case to a jury. On post-trial motion for judgment as a matter of law, the court held that same-day notice was sufficient under Fifth Circuit precedent. It then considered whether Delaware law would govern under Texas choice of law rules. The applicable rule was a Texas statute directing that the law of the state of incorporation govern matters relating to a foreign corporation's shares.¹⁵³ The court deemed the Texas

death statute, requiring that the court "apply the rules of substantive law that are appropriate to the case.")

149. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) ("Law of the State Chosen by the Parties" allows contracting parties to choose a governing law, within defined limits.) As explained *infra* note 288, Texas has adopted § 187. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-78 (Tex. 1990).

150. See *infra* note 170 for the factors in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

151. 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.*, *Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004) (foreign sovereign immunity) (discussed *infra* at notes 263-69 and accompanying text); *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657 (Tex. 2004) (legislative jurisdiction) (discussed *infra* at notes 195-99 and accompanying text); *Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 132 S.W.3d 477 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (full faith and credit) (discussed *infra* at notes 234-41 and accompanying text).

152. *Vannoy v. Verio, Inc.*, No. Civ. A. 302-CV-0570K, 2004 WL 1717368 (N.D. Tex. July 29, 2004).

153. TEX. BUS. CORP. ACT ANN. art. 8.02 (Vernon 2003), states in pertinent part that "only the laws of the jurisdiction of incorporation of a foreign corporation shall govern (1) the internal affairs of the foreign corporation, including but not limited to the rights, pow-

statute on point for plaintiff's claim for stock and then found that Delaware's requirement of a writing and board approval barred this claim based on an oral agreement.¹⁵⁴

A Texas insurance statute provides that Texas law governs an insurance claim, regardless of the parties' agreement, if (1) the insurance proceeds are payable to a Texas citizen or inhabitant; (2) the policy is issued by an insurer doing business in Texas; and (3) the policy is issued in the course of the insurer's business in Texas.¹⁵⁵ Two Survey period cases rejected this statute's application, one with a ruling of first impression. In *Reddy Ice Corp. v. Travelers Lloyds Insurance Co.*, a court of appeals affirmed a trial court's judgment that a Nevada corporation with its principal place of business in Texas was not a Texas *inhabitant* for purposes of the first prong above.¹⁵⁶ But the court then found that Texas law governed anyway under the Second Restatement.¹⁵⁷ *Scottsdale Insurance Co. v. National Emergency Services, Inc.*¹⁵⁸ was an action for breach of contract and related claims for insurer's cancellation of malpractice policies for independent contractors who staffed hospital emergency rooms. The court rejected the application of a Texas statute regarding choice of law for the insuring of Texas property or interests because the proceeds in this case were not payable to Texas residents.¹⁵⁹

B. CHOICE-OF-LAW CLAUSES IN CONTRACTS

Texas law and the Restatement (Second) permit contracting parties to choose a governing law,¹⁶⁰ this was reflected in six Survey period cases. In *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*,¹⁶¹ the Fifth Circuit Court of Appeals determined which law governed a Swiss arbitration award that was subsequently ruled invalid by an Indonesian court. The Fifth Circuit upheld the federal district court's rejection of the Indonesian court order, finding that the Indonesian court improperly applied Indonesian law to nullify the award. The arbitration agreement designated Geneva as the forum but had also chosen Indonesian law to govern. The Fifth Circuit interpreted the agreement (as had the arbitral tribunal) to mean that Indonesian law would govern the substance and Swiss law would govern procedural issues. Because procedural issues such as selection of the panel were the basis for

ers, and duties of its board of directors and shareholders and matters relating to its shares

154. *Vannoy*, 2004 WL 1717368, at *5.

155. TEX. INS. CODE ANN. art. 21.42 (Vernon 1981).

156. 145 S.W.3d 337, 340-44 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

157. *Id.* at 344-46. The court applied the Second Restatement's section 6 (the most significant relationship test) and section 188(2) (governing contracts with no choice of law clause).

158. *Scottsdale Ins. Co. v. Nat'l Emergency Servs.*, No. 01-02-00929-CV, 2004 WL 1688540 (Tex. App.—Houston [1st Dist.] July 29, 2004, pet. denied).

159. *Id.* at *5-6 (citing TEX. INS. CODE ANN. art. 21.42 (Vernon 1981)).

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

161. 364 F.3d 274 (5th Cir. 2004).

the award's nullification in the Indonesian court, the Fifth Circuit rejected that opinion and affirmed the district court's enforcement.¹⁶²

Rmax, Inc. v. Sarnafil, Inc. is an illustration of disputed fact issues that precluded a choice-of-law decision.¹⁶³ Plaintiff Rmax is a Texas corporation that sold roofing insulation to Sarnafil, a Massachusetts corporation, over a twenty year relationship. But Sarnafil was unhappy with Rmax materials used in a Michigan job and informed Rmax that it would withhold payment until the problems were resolved. Rmax sued for payment, then moved for partial summary judgment on the issue of entitlement to attorney's fees under Texas law based on choice-of-law clauses in the parties' agreement.¹⁶⁴ The court declined to rule on the motion because it could not determine whether the choice-of-law clause was an integral part of the agreement. The opinion illustrated the argument for a valid choice-of-law agreement where the parties dealt in various documents for repeated purchases over the years, some designating Texas law and some not, with Rmax's eventual notification to Sarnafil of its intention that all the parties' agreements were subject to Texas law, and Sarnafil then objecting to Texas law controlling. In a lengthy analysis, the court noted that several states had a more significant relationship than Texas did to the parties' dealings and that whether Texas law would apply depended entirely on the effectiveness of the Texas choice-of-law clause. The parties' dealings, communications and actions were sufficiently ambiguous so the court denied the motion, allowing choice of law to await a trial-based fact finding.¹⁶⁵

In other cases, Texas courts (1) honored the parties' choice of Mexican law in an intellectual property licensing agreement, finding further that the choice bore a reasonable relationship to the contract and that Mexican law did not violate any fundamental policies of Texas;¹⁶⁶ (2) honored the parties' choice of Illinois law in a bankruptcy trustee's claim to establish a partnership with an insurer;¹⁶⁷ (3) honored the parties' choice of Massachusetts law in an employment contract for the issue of prejudgment interest;¹⁶⁸ and (4) reversed a trial court's judgment in an employment case where it applied California law (where plaintiff performed the contract) instead of Texas law as chosen in the parties' agreement.¹⁶⁹ Cases rejecting choice of law clauses included an arbitration defendant unsuccessfully arguing that the parties' choice of Texas law precluded the

162. *Id.* at 281, 288-94. See also *infra* notes 271-74 and accompanying text.

163. *Rmax, Inc. v. Sarnafil, Inc.*, No. Civ. A. 3:03-CV-1404-B, 2004 WL 2070967 (N.D. Tex. Sept. 16, 2004).

164. *Id.* at *1-3.

165. *Id.* at *3-6.

166. *El Pollo Loco, S.A. de C.V., v. El Pollo Loco, Inc.*, 344 F. Supp. 2d 986 (S.D. Tex. 2004) (citing *Caton v. Leach Corp.*, 896 F.2d 939, 942 (5th Cir. 1990)).

167. *In re Senior Living Props., L.L.C.*, 309 B.R. 223, 233 (N.D. Tex. 2004); see *infra* notes 203-07 and accompanying text.

168. *Smith v. EMC Corp.*, No. Civ. A. 302-CV-0862M, 2003 WL 22846404 (N.D. Tex. Nov. 13, 2003).

169. *Mary Kay, Inc. v. Woolf*, 146 S.W.3d 813 (Tex. App.—Dallas 2004, pet. denied).

application of the Federal Arbitration Act;¹⁷⁰ and a defendant's unsuccessful argument that its contract with a Texas company had an implicit choice of California law.¹⁷¹

C. THE MOST SIGNIFICANT RELATIONSHIP TEST

In the absence of a statutory choice-of-law rule or an effective choice of law clause, Texas courts apply the most significant relationship test from the Restatement (Second) of Conflict of Laws.¹⁷² The Survey period produced three noteworthy cases applying the test.

I. Contract Cases

Tilford v. McGraw Hill Cos. is an example of sua sponte choice of law, that is, an analysis conducted on the court's own motion.¹⁷³ Tilford was a California resident who filed a pro se lawsuit for a denied promotion. No choice of law had been raised in the case, but the defendant had premised its summary judgment motion on Texas law and the pro se plaintiff had not responded. The case had both Texas and California contacts. The court conducted a precise analysis under the Restatement (Second) and ruled that Texas law would apply, clarifying that Texas law was not so much the only choice for this unbriefed ruling, but that it was not manifestly unjust to apply Texas law.¹⁷⁴

In two cases involving lawsuit indemnification, Texas federal courts ruled that Texas law governed because of excessive Texas contacts and because the underlying lawsuits were both litigated in Texas.¹⁷⁵

170. *Dewey v. Wegner*, 138 S.W.3d 591, 596 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

171. *AMS Staff Leasing v. Starving Students, Inc.*, No. 3-03-CV-0383-BD, 2004 WL 251819, *2-3 (N.D. Tex. Jan. 4, 2004). The court noted that a "contract provision that 'merely refers to a particular state without providing any elaboration as to what should happen in the event of litigation does not serve to delineate the named state as the choice-of-law forum.'" *Id.* at *3 (citing *McLaughlin v. UNUM Life Ins. Co. of Am.*, 224 F. Supp. 2d 283, 289-90 (D. Me. 2002)).

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

173. *Tilford v. McGraw Hill Cos.*, No. Civ. A. 303-CV-07298, 2004 WL 2168369 (N.D. Tex. Oct. 28, 2004); see also *J & D Aircraft Sales, LLC v. Cont'l Ins. Co.*, No. Civ. A. 3:03-CV-0007-B, 2004 WL 2389445 (N.D. Tex. 2004) (air crash insurance claim in which the same judge took care to make a record on the applicable law where the parties were somewhat equivocal).

174. *Tilford*, 2004 WL 2168369, at *3.

175. *Commercial Underwriters Ins. Co. v. Royal Surplus Lines Ins. Co.*, 345 F. Supp. 2d 652, 659-61 (S.D. Tex. 2004); *Executive Risk Indem., Inc. v. Integral Equity, L.P.*, No. Civ. A. 3:03-CV-0269, 2004 WL 438936 (N.D. Tex. March 10, 2004).

2. Tort Cases

In *Mayo v. Hartford Life Insurance Co.*, the Fifth Circuit Court of Appeals affirmed a judgment involving Texas's insurable interest doctrine; the case was discussed in the 2002 Survey.¹⁷⁶ *Mayo* was an action by an employee's widow against Wal-Mart, seeking the proceeds of his life insurance policy that Wal-Mart took out with itself as beneficiary.¹⁷⁷ This practice is illegal in Texas, but Wal-Mart sought to bypass Texas law by having the policies governed by Georgia law.¹⁷⁸ The trial court rejected the policy's choice-of-law clause and applied Texas law. The Fifth Circuit affirmed this, deeming the issue not one of contract, but of tort akin to conversion. The tort characterization posed an additional problem for plaintiffs, however, with a two-year statute of limitations now applicable instead of the four years for contract claims. Here, too, the Fifth Circuit affirmed the district court's finding that Wal-Mart failed to produce evidence of the time it received the insurance proceeds, thus failing in its affirmative defense.¹⁷⁹

In two other cases, Texas courts—both federal—applied Texas law (1) to fraud claims by a Texas investment-information company against a New York marketing company,¹⁸⁰ and (2) applied Texas law to a tortious interference claim in a bankruptcy adversary proceeding, with the court pointing out that while the contractual choice of Utah law would govern a contract claim, this tortious interference claim was determined by the most-significant-relationship test.¹⁸¹ In an unreported case, the Fifth Circuit Court of Appeals affirmed the district court's application of Louisiana law to an employee's suit for injuries received in a car accident in Egypt.¹⁸²

3. Class Action Certifications

Vanderbilt Mortgage & Finance, Inc. v. Posey was an interlocutory appeal of class certification in an action by manufactured home buyers against a Tennessee mortgage lender.¹⁸³ The Poseys, residents of Fannin County, bought their manufactured home at a Denison dealership, signing a contract that contained a Texas choice-of-law clause.¹⁸⁴ The Poseys

176. 354 F.3d 400, 406-09 (5th Cir. 2004); see also *Mayo v. Hartford Life Ins. Co.*, 220 F. Supp. 2d 714 (S.D. Tex. 2002); James P. George & Anna K. Teller, *Conflict of Laws*, 56 SMU L. REV. 1283, 1324-26 (2003).

177. *Mayo*, 354 F.3d at 402-03.

178. *Id.* at 406 (citing *Empire Life Ins. Co. of Am. v. Moody*, 584 S.W.2d 855, 859 (Tex. 1979)). As one point on appeal, the Fifth Circuit reviewed the insurable interest doctrine's application to these facts and affirmed its relevance. *Id.* at 406-09.

179. *Id.* at 410-11.

180. *Insiders Edge, Inc. v. Institutional Research Servs., Inc.*, No. 3:94-CV-0088-R, 2004 WL 2203246, *9-10 (N.D. Tex. Sept. 30, 2004).

181. *In re All Trac Transp., Inc.*, 306 B.R. 859, 909-10 (N.D. Tex. 2004).

182. *DeShazo v. Baker Hughes Oilfield Operations, Inc.*, 84 Fed. Appx. 407 (5th Cir. 2003).

183. 146 S.W.3d 302 (Tex. App.—Texarkana 2004, no pet. h.).

184. *Id.* at 309.

did not contract with defendant Vanderbilt, rather the mortgage was assigned to Vanderbilt after the sale.¹⁸⁵ Vanderbilt began raising the interest rate and according to plaintiffs, made numerous misrepresentations regarding the plaintiff's obligations. The Poseys sued under the Tennessee Consumer Protection Act, and sought to certify a class of Vanderbilt customers in forty-four states. The trial court certified the class under Rule 42(b)(4) but refused to certify the class under 42(b)(2).¹⁸⁶

The court of appeals reversed because the trial court failed to conduct a sufficient class certification analysis regarding common questions of law or fact. Specifically, the court needed to ascertain that the laws of the forty-four jurisdictions were the same in order to establish a common question of law for class certification.¹⁸⁷ Plaintiffs had two further arguments. First was that full faith and credit mandated the application of Tennessee law, an argument quickly rejected by the court.¹⁸⁸ Second was a false conflicts argument based on an alternative meaning of that term; the court rejected this as inconsistent with Texas law¹⁸⁹ and noted that even if that view of false conflicts were applied, plaintiffs failed to demonstrate the consistency of Tennessee interests with the other forty-three states.¹⁹⁰

In other Survey period class action determinations involving choice-of-law analyses, Texas courts rejected nationwide class certifications because of a lack of uniform law to be applied in claims involving computer buyers,¹⁹¹ breach of warranty claims by truck buyers,¹⁹² Chrysler car owners regarding defective seat belts,¹⁹³ and an eighteen-state class of health insurance customers.¹⁹⁴

185. *Id.*

186. *Id.* at 310.

187. *Id.* at 312. Readers should note that the choice of law rule for class certification differs from ordinary lawsuits in which a presumption exists that the unproven foreign law is the same as Texas law. *Id.* This places the burden on the party invoking choice of law to prove a conflict (here, they had to prove the absence of a conflict); in this case, plaintiffs sought the application of Tennessee law, which would, in any case, need to be proven. Nonetheless, in a non-class action, unproven Tennessee law would be presumed the same as Texas law.

188. *Id.* at 316-17.

189. *Id.* at 318-19 (citing James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 *REV. LITIG.* 489, 511 (2004)).

190. *Id.* at 319.

191. There were two computer-purchaser class actions. See *eMachines, Inc. v. Packard*, 148 S.W.3d 695 (Tex. App.—Beaumont 2004, no pet. h.); *Hewlett-Packard Co. v. Alvis*, No. 04-03-369-CV, 2004 WL 1925443 (Tex. App.—Beaumont Aug. 31, 2004, no pet. h.).

192. *Ford Motor Co. v. Ocanas*, 138 S.W.3d 447, 453-54 (Tex. App.—Corpus Christi 2004, no pet. h.).

193. *DaimlerChrysler Corp. v. Inman*, 121 S.W.3d 862, 885-86 (Tex. App.—Corpus Christi 2003, pet. granted). The court of appeals reversed in part for a second choice of law analysis because the trial court failed to place the burden of demonstrating the absence of conflicting state laws on the plaintiff. *Id.*

194. *Philadelphia Am. Life Ins. Co. v. Turner*, 131 S.W.3d 576, 592-93, 595 (Tex. App.—Fort Worth 2004, no pet. h.).

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,¹⁹⁵ 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.¹⁹⁶ 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.

Compaq Computer Corp. v. Lapray was an interlocutory appeal of class certification regarding defective floppy disk controllers in personal computers, with a national class estimated at 1.8 million buyers.¹⁹⁷ The trial court certified the class, and the court of appeals affirmed without dissent.¹⁹⁸ The Texas Supreme Court reversed and asked for a more rigorous analysis of the choice-of-law factor in class certification, specifically whether the laws of the fifty-plus jurisdictions were sufficiently common. While other courts analyzing the applicable law for class actions will often limit the analysis to the commonality requirement—that is, that the claims must have a common question of law or fact¹⁹⁹—the Texas Supreme Court noted the constitutional requirement that forbade the application of Texas law to all claims.²⁰⁰ The court remanded the case for a state-by-state analysis of commonality and reasonable connection to the claims, and it demonstrated the likely differences with examples from va-

195. See *supra* notes 11-12.

196. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 9 cmt. (1971). See also SCOLLES & HAY, *supra* note 5, at 78-109; WEINTRAUB, *supra* note 1, at 585-648; James P. George, *Choice of Law: A Guide for Texas Attorneys*, 25 TEX. TECH. L. REV. 833, 844-46 (1994). Choice of law limits under full faith and credit are now questionable after *Franchise Tax Bd. of Ca. v. Hyatt*, 538 U.S. 488 (2003).

197. 135 S.W.3d 657 (Tex. 2004).

198. 79 S.W.3d 779, 784, 794 (Tex. App.—Beaumont 2002), *rev'd* 135 S.W.3d 657. This case is discussed at James P. George & Anna K. Teller, *Conflict of Laws*, 56 SMU L. REV. 1283, 1336 (2003). The court of appeals upheld the trial court's choice of law analysis because defendant Compaq failed to demonstrate any conflicts between the states' laws. This may well be appropriate in cases with fewer parties, but as both the Texas Supreme Court and the United States Supreme Court have held, it is inappropriate where it would result in the application of a state's law to claims not reasonably connected to that state. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985). The instant case does not cite a Texas precedent prior to this ruling.

199. See *e.g.*, *supra* notes 181-88 and accompanying text.

200. *Lapray*, 135 S.W.3d at 680 (citing *Phillips*, 472 U.S. at 821-22).

rious states' laws on several pertinent issues, including notice of breach, reliance, and remedies.²⁰¹

2. False Conflicts

A false conflict exists when other potentially-applicable laws are the same as the forum state's or at least reach the same result.²⁰² Defining a clear outcome-changing difference between the forum and the foreign law is the first step in conducting a choice-of-law analysis, and the absence of a clear conflict should result in the application of forum law.²⁰³ The Survey period produced three false conflict cases, and the first one had the most states involved in a choice-of-law analysis—five—not including the class actions.²⁰⁴ *In re Senior Living Properties, L.L.C.*, was a bankruptcy adversary proceeding in which the trustee sued an insurer seeking partnership indemnification based on surety bonds the insurer had issued on behalf of the bankrupt.²⁰⁵ Senior Living Properties ("SLP") was a limited liability company licensed in Indiana, with its principal place of business in Wyoming, but which operated nursing homes in Illinois and Texas, the greater percentage of homes being in Texas.²⁰⁶ SLP entered into a Reimbursement Agreement with ZC Specialty Insurance Company ("ZC"), a Texas-based insurer, in which ZC agreed to reimburse SLP for certain debts and in return received direct payments and was entitled to share in the profits.²⁰⁷ When SLP filed for bankruptcy, its trustee pursued ZC for additional debts under a theory of partnership and argued that Texas law controlled. The bankruptcy court disagreed on the choice-of-law issue and instead applied the parties' choice of Illinois law as recited in their agreement, which was negotiated, drafted and executed in Maryland.²⁰⁸ Upon closer examination, however, the court found that a partnership existed under both Illinois and Texas law.²⁰⁹

In two unreported cases, courts found false conflicts in an insurance claim by a Texas woman who had been living in Oklahoma at the time the claim manifested,²¹⁰ and in a discovery dispute in an asbestos claim where the court found that both Texas and California laws observed attorney-

201. *Id.* at 674-81.

202. This is the Restatement's definition of false conflict. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971), cmt. i; *id.* § 186, cmt. c. A very different concept of false conflicts came from Professor Brainerd Currie's government interest analysis, which defines a false conflict as one in which only one state has a real interest. See SCOLES & HAY, *supra* note 20, at 16-19. Unfortunately, Texas courts have used both definitions, as discussed in James P. George & Anna K. Teller, *Conflict of Laws*, 56 SMU L. REV. 1283, 1335 n. 396 (2003).

203. *Phillips Petroleum*, 472 U.S. at 823-45 (Stevens, J., concurring in part and dissenting in part).

204. See *supra* note 185 for a discussion of choice of law in class action cases.

205. 309 B.R. 223, 228 (N.D. Tex. 2004).

206. *Id.* at 233.

207. *Id.* at 228-29.

208. *Id.* at 233.

209. *Id.* at 242, 266-69.

210. *Gibson v. Liberty Mut. Group*, No. Civ. A. 302-CV-2306D, 2004 WL 942280 (N.D. Tex. Apr. 30, 2004).

client privilege and the work-product exemption sufficiently similar to make choice of law irrelevant.²¹¹

3. Notice and Proof of Foreign Law

Litigants seeking the application of another state's or nation's law must comply with the forum's rules for pleading and proving foreign law. In both Texas and federal courts, judicial notice is sufficient for the application of sister-states' laws.²¹² Foreign country law, on the other hand, must be adequately pleaded and proven.²¹³ During the Survey period, four cases illustrated these points, with the most notable being a Dallas federal case that explored the lineage for the notice requirement for sister-state law and permitted day-of-trial notice. In *Vannoy v. Verio, Inc.*,²¹⁴ plaintiff argued that Verio's benefits package included 15,000 shares of its stock that Verio failed to convey within the agreed time period, and in fact waited until the stock had lost its value. On the first day of trial, Verio argued that the stock agreement was governed by Delaware law rather than Texas law, which Verio argued would bar the claim. With this short notice, the court tried the case on the fact issues and the jury found against plaintiff on part of her claim but it found in her favor on the 15,000 shares, awarding damages of \$195,000.²¹⁵ Verio then moved for judgment as a matter of law on the issue of Delaware law barring the claim. Plaintiff argued that Verio's assertion of Delaware law only on the first day of trial waived the claim. The federal district court disagreed and held that the applicability of another state's law need not be pleaded or proven, but that parties need only give notice "in time to

211. *In re Union Carbide*, No. 01-02-0153-CV, 2003 WL 22682301 (Tex. App.—Houston [1st Dist.] Nov. 3, 2003, no pet.). The case is discussed *infra* notes 224-26 and accompanying text.

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

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

214. *Vannoy v. Verio, Inc.*, No. Civ. A. 302-CV-0570K, 2004 WL 1717368 (N.D. Tex. July 29, 2004).

215. *Id.* at *1.

be properly considered.”²¹⁶ Looking to other precedent to determine whether day-of-trial notice was sufficient, the court found that it was and applied Delaware law which resulted in defendant Verio’s victory.²¹⁷

The opposite opinion resulted in three other Survey period cases, based on a litigant’s failure to comply with rules for pleading and proof of foreign law and triggering a presumption that the otherwise-applicable foreign law is the same as the forum’s law. *PenWell Corp. v. Ken Associates, Inc.*²¹⁸ was an action for breach of contract and related remedies regarding an oral agreement for defendant to be plaintiff’s exclusive sales representative of exhibition booth space at various conferences and exhibitions. The letter agreement provided compensation of 20% of the value of exhibit space sold and a sales territory limited to Japan. The agreement worked well from 1992 to 1999, after which PennWell refused to pay the commission on space sold to Mitsubishi and Hitachi. Ken sued PennWell in a Texas court, alleging breach of contract, suit on sworn account, quantum meruit, and violations of the Texas Sales Representative Act.²¹⁹ The trial court granted partial summary judgment to plaintiff on claims for breach of contract, sworn account and attorney’s fees and judgment interest, and summary judgment to defendant on the other claims. Both parties appealed, with defendant arguing that Japanese law controlled and prohibited the sworn account judgment, the attorney’s fees and judgment interest. Plaintiff cross-appealed for the treble damages not awarded under the Texas Sales Representative Act. The court of appeals affirmed in all respects, finding that the parties had adequately established Japanese law regarding attorney’s fees,²²⁰ but had not done so as to other issues such as sworn account and judgment interest, thus triggering a presumption that it was the same as Texas law,²²¹ that plaintiff’s sworn account claim was a procedural matter governed by forum law and not subject to choice-of-law analysis,²²² and that the trial court correctly withheld treble damages under the Texas Sales Representatives Act because it did not apply to actions outside of Texas.²²³

In *Johnson v. Structured Asset Services, LLC*, a court of appeals affirmed the trial court’s application of Texas law in an annuity interpleader

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

217. *Id.* at *5.

218. 123 S.W.3d 756 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

219. *Id.* at 759, 769-70 (citing TEX. BUS. & COM. CODE ANN. §§ 35.81-.86 (Vernon 2002 & Supp. 2004)).

220. *Id.* at 761-62. The court of appeals found Japanese law applicable to the attorney’s fees claim without performing any choice of law analysis, apparently because the parties conceded its applicability. Although the court of appeals found that the parties adequately established Japanese law on the attorney’s fees issues (and implicitly found it controlling), the court did not accept the defendant’s argument that Japanese law prohibited attorney fees; the opinion is confusing on this point. From the Japanese law materials submitted to the trial court, the court of appeals found that Japanese law allowed for attorney’s fees only in tort actions but all of the plaintiff’s claims sounded in contract. *Id.* at 761-63.

221. *Id.*

222. *Id.* at 764.

223. *Id.* at 769.

where the annuitant failed to request judicial notice of Pennsylvania law.²²⁴ In an unreported case, a Texas court of appeals affirmed a trial court's directed verdict in plaintiff's favor, overruling defendants' appeal argument that the plaintiff was permitted to use expert testimony as to Mexican law regarding its statute of limitation. Specifically, defendants appealed the finding that plaintiff failed to follow Texas Rule of Evidence 203 regarding notice and proof of foreign law. The court of appeals agreed that the record did not reflect compliance with Rule 203, but it further held that the defendants failed to show any prejudice because they failed to show that Mexico's law in fact differed from that asserted at trial.²²⁵

4. Use of the Forum's Procedural Rules

In re Union Carbide is an unreported opinion in which defendant Union Carbide inadvertently produced privileged documents during discovery in California.²²⁶ The defendant obtained a protective order from a California court barring the use of the privileged documents. The Texas trial court, however, ruled that California law did not apply and that under Texas law, Union Carbide waived its claim of privilege.²²⁷ The court of appeals reversed, finding a false conflict between Texas and California law, but first noting the applicability of Restatement (Second) Conflict of Laws section 139 regarding privilege and the Texas court holdings that "the state where the communication took place is the state with the most significant relationship to the communication."²²⁸

In *PennWell*, discussed above, the court of appeals affirmed a trial court's characterization of the plaintiff's claim for sworn account regarding the leasing of convention space in Japan as a procedural matter governed by Texas law rather than an issue subject to choice of law.²²⁹ In an unreported case, a Texas federal court applied the Texas limitations rule rather than California's, deeming the matter one of procedure.²³⁰

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

224. 148 S.W.3d 711, 720 (Tex. App.—Dallas 2004, no pet. h.).

225. *Thomas v. Arrendadora Internacional, S.A. de C.V.*, No. 13-02-154-CV, 2004 WL 1900821, *3-4 (Tex. App.—Corpus Christi Aug. 26, 2004, no pet. h.).

226. *In re Union Carbide*, No. 01-02-01153-CV, 2003 WL 22682301 (Tex. App.—Houston [1st Dist.] Nov. 13, 2003, no pet.).

227. *Id.* at *1. Specifically, the trial court found waiver in Union Carbide's failure to comply with the ten-day requirement to amend their response under TEX. R. CIV. P. 193.3 (Vernon 2004).

228. *Id.* at *3-4 (citing *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995)).

229. *PennWell*, 123 S.W.3d at 764. See *supra* notes 216-21 and accompanying text.

230. *Woolley v. Clifford Chance Rogers & Wells, L.L.P.*, No. Civ. A. 3:01-CV-2185, 2004 WL 57215, at *3 (N.D. Tex. Jan. 5, 2004) (citing *Baker and Hughes, Inc. v. Keco R & D, Inc.*, 12 S.W.3d 1, 4 (Tex. 1999)).

sister-states and foreign country judgments, but they do not include federal court judgments from districts outside Texas because those judgments are enforced as local federal court judgments.²³¹

A. ENFORCEMENT

Texas recognizes two methods of enforcing foreign judgments: the common law method using the foreign judgment as the basis for a local lawsuit,²³² and since 1981, the more direct procedure under the two uniform judgments Acts, along with similar acts for arbitration awards, child custody and child support. There were no instances of common law enforcement during the Survey period.²³³

1. *The Uniform Enforcement of Foreign Judgments Act*

The Uniform Enforcement of Foreign Judgments Act (“UEFJA”) provides for summary enforcement of non-Texas judgments that are entitled to full faith and credit.²³⁴ This includes sister-state judgments as well as foreign country money judgments that Texas recognizes under the Uniform Foreign Country Money-Judgment Recognition Act (“UFCMJRA”).²³⁵ The Survey period produced five UEFJA cases and two

231. See 28 U.S.C.A. § 1963 (West 1994 & Supp. 2004).

232. 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 (West 1994 & Supp. 2004). 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 1997).

233. Examples of common law enforcement after the UEFJA’s enactment include *Keller v. Nevel*, 699 S.W.2d 211 (Tex. 1985); *Escalona v. Combs*, 712 S.W.2d 822 (Tex. App.—Houston [1st Dist.] 1986, no writ); *First Nat’l Bank v. Rector*, 710 S.W.2d 100 (Tex. App.—Austin 1986, writ ref’d n.r.e.); *Cal Growers, Inc. v. Palmer Warehouse & Transfer Co.*, 687 S.W.2d 384 (Tex. App.—Houston [14th Dist.] 1985, no writ); *McFadden v. Farmers and Merchs. Bank*, 689 S.W.2d 330 (Tex. App.—Fort Worth 1985, no writ).

234. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-007 (Vernon 1997). The Act 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.

235. TEX. CIV. PRAC. & REM. CODE ANN. § 36.001-008 (Vernon 1997). 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(b), or the creditor, *id.* § 36.0043(a). The judgment debtor has thirty days to challenge enforcement, or sixty if domiciled in a foreign country, with a twenty-day extension available for good cause. *Id.* § 36.0044(a). Unlike the UEFJA, the UFCMJRA explicitly states ten grounds for non-recognition—three mandatory and seven discretionary. Briefly stated, the mandatory grounds are (1) lack of an impartial tribunal, (2) lack of personal jurisdiction, and (3) lack of subject matter jurisdiction. *Id.* § 36.005(a)(1)-(3). The discretionary grounds for non-recognition are that the foreign action (1) involved inadequate notice, (2) was obtained by fraud, (3) violates Texas public policy, (4) is contrary to another final judgment, (5) is contrary to the parties’ agreement (e.g., a contrary forum selection clause), (6) was in an inconvenient forum, and (7) is not from a country granting reciprocal enforcement rights. *Id.* § 36.005(b)(1)-(7). The UFCMJRA also provides for stays, *id.* § 36.007, and expressly reserves the right of enforcement of non-money judgments under traditional, non-statutory

foreign-money-judgment cases.

a. Interstate Enforcement

The Survey period included five interstate judgment enforcements, only two of which were reported, both from Georgia and both decided by the Houston Fourteenth District Court of Appeals. The more significant of the two, *Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*,²³⁶ illustrates several important features regarding foreign judgment enforcement, including the proper vehicle for appellate review of a vacated sister-state judgment and the proper standard of review. In 1996, Georgia-based Mindis bought oilfield machinery from three Texas companies ("the defendants"). Mindis later claimed the machinery was defective and sued for contract and warranty remedies in a Georgia court. Two of the Texas companies filed for bankruptcy and there was some confusion regarding which attorneys represented the remaining Texas defendant, Oilfield Motor & Control. Mindis eventually obtained a final judgment against Oilfield for \$116,653.88 and then domesticated the judgment in Texas. Oilfield filed a motion to vacate that the Texas trial court granted without stating a reason. Mindis filed both a writ of mandamus and an appeal.²³⁷

The court of appeals first noted that appeal is the proper method for reviewing the vacating of a foreign judgment.²³⁸ In addressing the vacated judgment, the court noted that a motion to vacate is viewed as a motion for new trial, but that because of the Constitution's full faith and credit mandate for foreign judgments, the trial judge did not have complete discretion to grant a new trial.²³⁹ The motion for new trial standard did mean, however, that the trial court's action would be reviewed under an abuse of discretion standard.²⁴⁰ Applying that standard, the court found that Oilfield's three arguments were groundless: the Georgia judgment was not interlocutory,²⁴¹ it was not subject to modification in Georgia in a way that defeated finality,²⁴² and it was not procured by extrinsic fraud.²⁴³

In *Charles Brown, L.L.P. v. Lanier Worldwide, Inc.*,²⁴⁴ Lanier sought enforcement of its Georgia arbitration award confirmed by a Georgia court against a Texas-based law firm. Brown L.L.P. entered into an agreement with Lanier for an office copy machine, and the agreement had an arbitration clause designating Atlanta, Georgia as the arbitration

standards, *id.* § 36.008. See *Hilton v. Guyot*, 159 U.S. 113, 165-66 (1895) (comity as discretionary grounds for recognizing and enforcing foreign country judgments).

236. 132 S.W.3d 477 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

237. *Id.* at 481-82.

238. *Id.* at 482-84.

239. *Id.* at 484-85.

240. *Id.* at 485-86.

241. *Id.* at 486-87.

242. *Id.* at 488-90.

243. *Id.* at 490.

244. 124 S.W.3d 883 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

location.²⁴⁵ When Brown and Lanier fell into a dispute regarding the copy machine, Brown filed a preemptive lawsuit in a county court at law in Harris County seeking an injunction against the arbitration in Georgia, arguing that he had never signed the document containing the arbitration clause; the Houston court denied the injunction and ordered Brown to arbitrate in Georgia.²⁴⁶ Brown then filed a similar lawsuit in state district court in Harris County and met the same outcome.²⁴⁷ Brown then appeared under protest, arguing that his firm was misidentified in the arbitration notice. These arguments failed as well and Brown was ordered to pay \$29,639.18 plus pre-judgment and post-judgment interest.²⁴⁸ Brown then returned to Harris County District Court and sought to vacate the award. Before Brown's claim could be heard, a Georgia court confirmed by Lanier's award; Lanier then sought enforcement in the same Texas court where Brown's claim was pending. The Texas trial court entered summary judgment for Lanier, and the court of appeals affirmed, finding that the misnomers were resolved by Brown's judicial admissions and waiver, and that Brown was subject to Georgia jurisdiction because of the forum clause,²⁴⁹ and that no other reasons existed to deny full faith and credit to the Georgia court judgment.²⁵⁰

An unreported case raised an important issue regarding punitive damages as grounds for rejecting a foreign judgment. Wayne Kraft obtained a default judgment against Reatta Resources in an Illinois state court, awarding \$6,000 in actual damages and attorney's fees and \$200,000 in punitive damages.²⁵¹ When Kraft domesticated the Illinois judgment in Texas, Reatta appealed on the grounds that the punitive damages ratio of thirty-three to one violated due process under the Supreme Court's recent analysis of punitive damages.²⁵² The Fifth District Court of Appeals in Dallas rejected this challenge, finding that in its tacit approval of single-digit multipliers for the ratio of punitive-to-actual damages, the Supreme Court did not create a bright-line test that would overcome the full faith and credit mandate. As such, there was no error on the face of the record and no grounds to deny enforcement.²⁵³ This is no doubt an accurate reading of an important constitutional clash between due process and full faith and credit. Attorneys are thereby cautioned to challenge shortfalls—even due process shortfalls—in the initial forum because full faith and credit will almost certainly bar that challenge later, except as to jurisdictional problems in default judgments.

245. *Id.* at 888-89.

246. *Id.* at 889.

247. *Id.* at 889-90.

248. *Id.* at 890.

249. *Id.* at 892, 900-01.

250. *Id.* at 902-06.

251. *Reatta Res., Inc. v. Kraft*, No. 05-03-00229-CV, 2004 WL 423144 (Tex. App.—Dallas Mar. 9, 2004, no pet. h.).

252. *Id.* at *1 (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

253. *Id.*

*Tracy v. Top Drawer Medical Art, Inc.*²⁵⁴ echoes the issues raised in *Mindis*. Top Drawer sued Todd Tracey in a Wisconsin state court for breach of contract. Tracey answered and objected to jurisdiction but later defaulted. Top Drawer domesticated the judgment in Texas and Tracey again raised objections as to lack of jurisdiction. The trial court failed to act within the appropriate seventy-five days of the court's plenary jurisdiction, but nonetheless granted Tracey's request and refused enforcement. Top Drawer filed a motion to reconsider on the grounds that the court lost jurisdiction, which the court granted and reinstated enforcement. Tracey appealed on grounds that treating his jurisdictional objection as a motion for new trial, when he was not seeking a new trial but merely to vacate the Wisconsin judgment, was a violation of due process.²⁵⁵ The court of appeals rejected his arguments and found that the remedies available in a motion for new trial were adequate for his jurisdictional challenge to the Wisconsin judgment, and he failed to resolve the matter heard within the proper time.²⁵⁶

*Mathis v. Nathanson*²⁵⁷ made another important judgment-enforcement point regarding offsets. Mathis lost an arbitration in Colorado that was then converted into a judgment for \$75,450.38. When judgment creditor Nathanson domesticated the Colorado judgment in Texas, Mathis sought to stay enforcement based on an unadjudicated offset. The trial court refused; Mathis appealed and lost.²⁵⁸

b. Foreign Country Money Judgments

The Survey period produced four foreign-country-money-judgment enforcements, all involving insurance claims. In *Society of Lloyd's v. Cohen*, the Fifth Circuit rejected the judgment-debtor's personal jurisdiction challenge to a British judgment, finding that he had submitted to England's jurisdiction when he became an underwriter for Lloyd's, and that he had received adequate notice of the suit.²⁵⁹ In *Society of Lloyd's v. Anderson*, a Dallas federal district court enforced a British judgment over objections that the statute of limitations had run (must be litigated in the first forum), due process (British process was sufficient), and fraud (but it was not fraud in the judicial proceeding and thus not a defense here).²⁶⁰ *Society of Lloyd's v. Price* considered the status of British judgment creditors against the Texas debtor's bankruptcy assets, specifically whether under the UFCMJRA the British judgment provided immediate creditor status (regarding to bankruptcy priority, or whether the status did not

254. *Tracy v. Top Drawer Medical Art, Inc.*, No. 08-02-00273-CV, 2003 WL 22361477 (Tex. App.—El Paso Oct. 16, 2003, no pet.).

255. *Id.* at *1.

256. *Id.* at *2-4.

257. *Mathis v. Nathanson*, No. 03-03-00123-CV, 2004 WL 162965 (Tex. App.—Austin 2004, pet. denied).

258. *Id.* at *1-3.

259. 108 Fed. Appx. 126 (5th Cir. 2004).

260. *Society of Lloyd's v. Price*, No. 3-03-MC-112-D, 2004 WL 905618, *3-4 (N.D. Tex. Apr. 27, 2004).

vest until the British judgments were domesticated in Texas.²⁶¹ The court held that creditor status occurred upon rendition in England but remanded the case to the bankruptcy court for further findings regarding dates of asset transfers.²⁶² In *Society of Lloyd's v. Abramson*, a Dallas federal court overruled the judgment debtor's objections that the English judgment was obtained by fraud; the court found inadequate evidence of fraud and that it had no offset on the amount owed.²⁶³

2. Judgments Against Sovereigns

The Foreign Sovereign Immunities Act ("FSIA")²⁶⁴ regulates judgment enforcement against the assets of sovereign governments. In *Af-Cap, Inc. v. Republic of Congo*,²⁶⁵ the Fifth Circuit Court of Appeals revisited a long-litigated claim arising from a 1984 road-construction loan to the Republic of Congo. It defaulted in 1985, leading to a default judgment for \$13,628,340.11 in a British court, which was domesticated in a New York state court for the attachment of any oil and gas proceeds in New York. Debt remained after that action and in 2001, the creditor registered the New York judgment in a Texas state court and sought to garnish the assets of various businesses owned by the debtor government, all collectively referred to as "the Congo defendants."²⁶⁶

The Congo defendants removed the action to federal court and moved to dismiss on the grounds that all defendant-owned assets in Texas were immune from execution pursuant to the FSIA; the creditor argued that the Republic of Congo had waived the defendants immunity in the loan contract and that this was adjudicated in the New York action.²⁶⁷ The federal district court dismissed. On appeal the Fifth Circuit agreed that the New York ruling on execution was not preclusive in this action and held that the district court applied the wrong asset-immunity test under the FSIA. Specifically, the appellate court ruled that immunity waivers apply only " 'against property that meets . . . two statutory criteria,' namely, that the property in question be 'in the United States' and 'used for commercial activities in the United States.'"²⁶⁸ The court also found error in the district court's focus on how the Texas assets were generated instead of how they were used.²⁶⁹ On remand, the district court re-evaluated the Congo defendants' Texas assets and again found them exempt under federal law.²⁷⁰ The creditor again appealed, and this time the Fifth

261. *In re Price*, No. SA-03-CA-0883, 2004 WL 2550590, *3-4 (W.D. Tex. Oct. 27, 2004).

262. *Id.* at *6.

263. *Society of Lloyd's v. Abramson*, No. 3-3MC001-P, 2004 WL 690878, *4-6 (N.D. Tex. Mar. 29, 2004).

264. 28 U.S.C.A. §§ 1602-11 (West 1994 & Supp. 2004).

265. 383 F.3d 361 (5th Cir. 2004).

266. *Id.* at 364-65.

267. *Id.* at 365.

268. *Id.* (quoting *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002)).

269. *Id.* at 365 n.3 (quoting *Conn. Bank*, 309 F.3d at 251).

270. *Id.* at 366.

Circuit resolved the matter, reversing the district court and finding that the assets were primarily used for a commercial purpose in the United States and thus subject to garnishment.²⁷¹

3. *Arbitration Enforcement*

Foreign arbitration awards may be enforced in Texas under federal and state law.²⁷²

The most notable case during the Survey period involved the vacating of an international arbitration award during its enforcement in a Texas federal court. Karaha Bodas LLC is a Cayman Islands company that had contracted to build and operate a geothermal power plant in Indonesia.²⁷³ When the Indonesian government suspended the project and failed to pay, Karaha Bodas obtained an arbitral award that it filed in a Texas federal court, seeking enforcement under the so-called New York Convention.²⁷⁴ The district court ordered enforcement but during the appeal, Indonesia obtained an order from an Indonesian court nullifying the arbitral award. On remand from the first appeal, the district court denied effect to the Indonesian court order and held that Swiss law rather than Indonesian law governed the award, pursuant to the arbitral panel's earlier decision, based on the site of arbitration.²⁷⁵ Under Swiss law, the district court found the award to be proper and again ordered enforcement. Indonesia appealed again, but the Fifth Circuit affirmed.²⁷⁶

4. *Family Law Judgments*

Texas laws also provide for recognition and enforcement of sister-state and foreign country child custody under the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA")²⁷⁷ and child support under the Uniform Interstate Family Support Act ("UIFSA").²⁷⁸ These cases often overlap with jurisdictional issues and are discussed in the jurisdiction section.²⁷⁹

271. *Id.* at 366-73.

272. *See* Federal Arbitration Act, 9 U.S.C.A. §§ 1-16 (West 1999 & Supp. 2004); Texas International Arbitration Act, TEX. CIV. PRAC. & REM. CODE § 172.082(f) (Vernon 1997 & Supp. 2004).

273. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 281-82 (5th Cir. 2004).

274. *Id.* at 281 (citing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2157, 330 U.N.T.S. 38 (entered into force in the United States, Dec. 29, 1970) (codified at 9 U.S.C.A. §§ 201 *et seq.* (West 1999 & Supp. 2004)).

275. *Id.* at 285-87.

276. *Id.* at 287-310. *See also supra* notes 159-60 and accompanying text.

277. *See* TEX. FAM. CODE ANN. §§ 152.001-.317 (Vernon 2002 & Supp. 2004).

278. *See* TEX. FAM. CODE ANN. §§ 159.001-902 (Vernon 2002 & Supp. 2004).

279. *See supra* notes 101-17 and accompanying text.

B. PRECLUSION

Both sister-state and foreign country judgments are entitled to preclusive effect in Texas courts. The full-faith-and-credit clause compels full faith and credit for valid and final sister-state judgments involving the same parties and claims, as well as collateral estoppel if the required elements are satisfied.²⁸⁰ Under the doctrine of comity, foreign country judgments may also be given *res judicata* and preclusive effect, subject to discretion based on the nature of the foreign proceeding and satisfaction of traditional preclusion requirements.²⁸¹

1. *Interstate Preclusion*

In a case turning more on federalism than interstate conflicts, the Fifth Circuit Court of Appeals dismissed a consumer class action regarding defective polybutylene plumbing pipes, based on the preclusive effect of an earlier Tennessee state court class action.²⁸² To avoid preclusion, the plaintiff asserted a civil rights claim, based on alleged due process violations in the Tennessee settlement. The Fifth Circuit affirmed the trial court's holding that this new claim was a collateral attack on the Tennessee state court settlement, from which federal courts are barred by the Rooker-Feldman doctrine.²⁸³ The court noted that Rooker-Feldman applied only if the state court judgment was entitled to preclusion, that is, it was valid and final under the law of the rendering state.²⁸⁴

A Houston Court of Appeals used the preclusion doctrine to reverse the trial court's anti-suit injunction.²⁸⁵ The parties were involved in parallel lawsuits in Texas and Pennsylvania regarding failed aircraft crankshafts. The Texas trial court enjoined defendants from pursuing the Pennsylvania case, persuaded by plaintiff's argument that its interests were being litigated in absentia. The court of appeals reversed, reasoning that "either (1) the Pennsylvania lawsuit cannot affect ISW's interests, or (2) ISW's interests are represented in the Pennsylvania lawsuits by a party in privity with it."²⁸⁶

The El Paso Court of Appeals denied an Arizona court's rejection of a Texas case. Access Healthsource obtained a \$10 million judgment against

280. U.S. CONST. art. IV, § 1; see WEINTRAUB, *supra* note 1, at 701-02; see also 28 U.S.C.A. § 1738 (West 1994 & Supp. 2004).

281. SCOLES & HAY, *supra* note 20, at 999-1001.

282. *Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 347-48, 350, 354 (5th Cir. 2003). A federal district court in Houston considered similar issues in an Enron dispute involving a prior Texas state court judgment and related claims in federal court. See *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, No. Civ. A-03-4973, 2004 WL 2278770 (S.D. Tex. Sept. 14, 2004).

283. *Richard*, 355 F.3d at 350-52 (citing *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 416 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983)).

284. *Id.* at 350-51 (citing *In re Lease Oil Antitrust Litig.*, 200 F.3d 317, 319 n.1, 320 (5th Cir. 2000)).

285. *AVCO Corp. v. Interstate Southwest, Ltd.*, 145 S.W.3d 257, 263-64 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

286. *Id.* at 263.

Ross in an El Paso court and then sought enforcement in Arizona, where Ross was able to block enforcement on the grounds of improper service.²⁸⁷ When Access sought Texas enforcement, Ross argued that the Arizona court's finding should be preclusive of the Texas judgment's invalidity. The Texas trial court disagreed and the court of appeals affirmed, finding that the Arizona decision had done nothing more than vacate the domestication in Arizona.²⁸⁸

2. *International Preclusion*

In *International Transactions Ltd. v. Embotelladora Agral Regiomontana, S.A. de C.V.*,²⁸⁹ the Fifth Circuit Court of Appeals rejected a Mexican bankruptcy court's ruling that the Texas plaintiff lacked standing to collect on an arbitration award against the defendant. Plaintiff ITL loaned money to Embotelladora and other companies who intended to build a Pepsi-Cola bottling plant in Monterrey, Mexico. ITL was acting through an undisclosed agent, Sharp Capital, and when the defendant companies defaulted on the loan, ITL instructed Sharp to take the matter to arbitration in Texas. Sharp did so and won \$11,374,859. The arbitration award named Sharp, who then assigned it to ITL, and ITL then sued in a Texas state court to confirm and enforce the award. Embotelladora and the other defendant companies removed the Texas suit to federal court and argued that by not being named in the award, ITL lacked standing to collect it. In support, defendants offered an ex parte order they obtained from a Mexican bankruptcy court holding that ITL was not entitled to enforce the award against defendants' assets.²⁹⁰ Under the doctrine of comity, the federal district court recognized the Mexican bankruptcy court order.²⁹¹ The Fifth Circuit reversed, based on the Mexican court order's ex parte nature.²⁹² Judge Smith dissented, arguing that the Mexican bankruptcy order was entitled to recognition in Texas because ITL knew of the proceeding and declined to participate.²⁹³

The opposite result was reached in *Gulf Petro Trading Co., Inc. v. Nigerian National Petroleum Corp.*, where a federal district court applied comity to uphold a Swiss decision disallowing an earlier arbitration award arising from a joint venture in Nigeria.²⁹⁴

287. *Ross v. Access Healthsource, Inc.*, No. 08-03-00079-CV, 2003 WL 22870451 (Tex. App.—El Paso Dec. 4, 2003, pet. denied).

288. *Id.* at *2-4.

289. 347 F.3d 589 (5th Cir. 2003).

290. *Id.* at 590-92.

291. *Id.* at 593.

292. *Id.* at 593-96.

293. *Id.* at 596-98.

294. 288 F. Supp. 2d 783, 785-86, 795 (N.D. Tex. 2003).