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## Conflict of Laws

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# CONFLICT OF LAWS

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STATES' and nations' laws collide when foreign factors appear in a lawsuit. Nonresident litigants, incidents outside the forum, parallel lawsuits, and judgments from other jurisdictions can create problems with personal jurisdiction, choice of law, and the recognition of foreign judgments. This Article reviews Texas conflicts cases from Texas state and federal courts during the Survey period from October 1, 2004 through November 31, 2005. The Article excludes cases involving federal-state conflicts, intrastate issues such as subject-matter jurisdiction and venue, and conflicts in time such as the applicability of prior or subsequent law within a state. State and federal cases are discussed together because conflict of laws is mostly a state law topic except for a few constitutional limits, resulting in the same rules applying to most issues in state and federal courts.<sup>1</sup>

During the Survey period, the Texas Supreme Court offered only two significant opinions: the first limited Texas jurisdiction for claims by Texas residents against nonresident vendors for products bought out of state,<sup>2</sup> and the second reaffirmed the requirement that trial courts conduct rigorous choice-of-law analyses before certifying multi-state or nationwide class actions.<sup>3</sup> Overall, the Survey period saw continued growth in forum contests, a record number of choice of law decisions, and a static number of judgment enforcements. Insurance-coverage disputes were prominent this year, including an impressive analysis by a Houston federal court in an Enron-related case.<sup>4</sup> Other cases of interest include the dismissal, on parallel-litigation grounds, of the largest bankruptcy ever filed in the

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

2. See *infra* notes 20-25 and surrounding text (discussing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777 (Tex. 2005)).

3. See *infra* notes 186-88 and surrounding text (discussing *Nat'l W. Life Ins. Co. v. Rowe*, 164 S.W.3d 389 (Tex. 2005)).

4. See *infra* notes 170-75 and surrounding text (discussing *In re Enron Corp. Sec. Derivative & "ERISA" Litig.*, 391 F. Supp. 2d 841 (S.D. Tex. 2005)).

United States;<sup>5</sup> a rare rejection of in rem jurisdiction on minimum-contacts grounds;<sup>6</sup> and a good analysis of multiple forum clauses in badly drafted joint venture agreements.<sup>7</sup>

## I. FORUM CONTESTS

Asserting jurisdiction over a nonresident defendant requires amenability to Texas jurisdiction and receipt of proper notice. Amenability may be established by consent (usually based on a contract's forum-selection clause), waiver (failing to give 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. PRESENCE

This Survey period's most unusual case was decided in the prior Survey year but was not released for publication until recently. *HMS Aviation v. Layale Enterprises, S.A.*<sup>8</sup> is a rare example of an in rem case that fails under a minimum-contacts analysis. Defendant HMS, an unincorporated Jordanian entity with offices in London, England and Amman, Jordan, leased a Boeing 727 airplane from two members of the Jordanian royal family. Upon leasing the plane, HMS flew it to Meacham Field in Fort Worth for repairs. While the plane was in Fort Worth, Layale filed an in rem action against HMS for a conversion that occurred in Jordan. HMS objected to personal jurisdiction on several grounds, lost in the trial court, and appealed. HMS then removed the case to federal court. The reported opinion does not discuss the federal proceedings except that the federal court remanded the case to the Fort Worth Court of Appeals for review of the trial court's ruling that HMS was subject to Texas jurisdiction.<sup>9</sup>

The court of appeals quickly rejected three arguments for jurisdiction: 1) specific jurisdiction because HMS's alleged conversion of the plane would have occurred in Jordan; 2) general jurisdiction because HMS had an extremely low level of contacts here; and 3) jurisdiction through a forum clause because it did not pertain to any agreement involving the plaintiff.<sup>10</sup> In rem jurisdiction, however, was a more obvious basis for jurisdiction because the airplane sat at Meacham Field. But in 1977, the United States Supreme Court ruled in *Shaffer v. Heitner* that all assertions of jurisdiction, including in rem, must satisfy the minimum-contacts

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5. See *infra* notes 134-41 and surrounding text (discussing *In re Yukos Oil Co.*, 321 B.R. 396 (S.D. Tex. 2005)).

6. See *infra* notes 8-12 and surrounding text (discussing *HMS Aviation v. Layale Enterprises*, 149 S.W.3d 182 (Tex. App.—Fort Worth 2004, no pet. h.)).

7. See *infra* notes 111-16 and surrounding text (discussing *Aerus L.L.C. v. Pro Team, Inc.*, No. Civ.A. 304CV1985M, 2005 WL 1131093, at \*1 (N.D. Tex. May 9, 2005)).

8. *HMS Aviation*, 149 S.W.3d at 182.

9. *Id.* at 187-88.

10. *Id.* at 192-96.

test.<sup>11</sup> This claim did not. The court found that HMS met the first element of the minimum-contacts test, minimal contact with Texas, because the plane's location was in Texas. However, it failed the second part of the test, the fair play and substantial justice balancing test, because the plane's location was intended as temporary, it was unrelated to any dealing with plaintiffs, a Texas forum would be burdensome for witnesses to the underlying facts of the alleged conversion, and Texas had no interest in litigating the claim.<sup>12</sup>

## B. CONSENT AND WAIVER

Contracting parties may agree to a forum-selection clause, which designates 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. Derogation clauses, on the other hand, are grounds for the forum to decline otherwise valid jurisdiction.<sup>13</sup> Both clauses are discussed in this section.

In this Survey period, only one unreported case considered a forum clause with Texas as the designated forum, *Enesco Offshore Co. v. Titan Marine L.L.C.*<sup>14</sup> In this case, an oil-drilling rig was damaged by Hurricane Ivan in 2004. Enesco owned the rig and contracted with Titan for salvage operations. At some point, the parties disagreed, the relationship broke down, and Enesco terminated the contract. Titan sought to enforce the parties' choice of forum clause, which stated that "any dispute arising out of this Agreement shall be referred to arbitration in London."<sup>15</sup> Enesco then brought a declaratory-judgment action in a federal court in Houston. The court agreed with Enesco, finding the arbitration clause unenforceable under a statute prohibiting enforcement if the agreement is between two United States citizens and their commercial relationship has no connection to the chosen forum.<sup>16</sup> The court also found, on similar grounds, that English law did not govern the determination because it lacked a reasonable relationship to the parties and the dispute.<sup>17</sup>

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11. 433 U.S. 186, 212 (1977). See also *HMS Aviation*, 149 S.W.3d at 196.

12. *HMS Aviation*, 149 S.W.3d at 197-98.

13. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 340-42 (4th ed. 2004) [hereinafter SCOLES & HAY]; James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 912-41 (1999) [hereinafter *Parallel Litigation*]. For a discussion of forum-derogation clauses, see *infra* notes 98-127 and accompanying text.

14. 370 F. Supp. 2d 594 (S.D. Tex. 2005).

15. *Id.* at 595.

16. *Id.* at 595-601 (citing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C.A. § 202 (West 2005)).

17. *Id.* at 596-97 (citing TEX. BUS. & COM. CODE ANN. § 35.51(d) (Vernon 2005) (defining "reasonable relationship" for choice-of-law clauses)).

## C. 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.<sup>18</sup> The Texas long arms also apply in Texas federal courts, unless Congress has enacted a federal long-arm statute for federal-law claims.<sup>19</sup> 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*

This year's commercial cases in Texas state courts clarified jurisdictional boundaries for out-of-state activities. In *Michiana Easy Livin' Country, Inc. v. Holten*,<sup>20</sup> the Texas Supreme Court reversed two lower courts' findings of jurisdiction over a nonresident seller and clarified jurisdictional rules regarding out-of-state purchases. In this case, James Holten purchased a \$64,000 recreational vehicle from the defendant seller in Indiana by telephone without seeing it first. Contrary to the purchase agreement's designation of Indiana courts, Holten sued in a Texas state court in Houston. Holten alleged that Michiana was subject to Texas jurisdiction on two grounds: misrepresentations made during telephone conversations with Holten at his Texas home and Michiana's arrangements with a shipper to deliver the vehicle to Holten in Texas. Both the trial court and court of appeals denied Michiana's special appearance. The supreme court quickly disposed of Holten's second argument based on Texas precedent.<sup>21</sup> Thus, the court focused its attention on the first ground, whether Texas jurisdiction can be based on a nonresident seller's alleged misrepresentations by telephone. The supreme court noted an appellate split within the state and resolved it in the defendant's favor. First, the supreme court held that the due-process requirement of purposeful availment was not met because the contact was the result of Holten's unilateral action in contacting defendant, Michiana's Texas contacts were more fortuitous than purposeful, and Michiana had not availed itself of the benefits or advantages of Texas law.<sup>22</sup> Second, the supreme court found that stream-of-commerce jurisdiction failed because, although stream-of-commerce jurisdiction does not require actual contacts

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18. 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 2005), and others are scattered throughout Texas statutes. See, e.g., TEX. AGRIC. CODE ANN. § 161.132 (Vernon 2005) (violation of certain agricultural statutes); TEX. FAM. CODE ANN. § 6.305 (Vernon 2005) (nonresident respondents in divorce actions); TEX. INS. CODE ANN. § 823.457 (Vernon 2005) (violations of duties imposed on insurance-holding companies).

19. See FED. R. CIV. P. 4(k)(1)(A) (state long arms in federal court), and 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 2005) for statutory interpleader and 15 U.S.C.A. § 78aa (West 1997) for claims under the Securities Exchange Act of 1934.

20. 168 S.W.3d 777 (Tex. 2005).

21. *Id.* at 788 (citing *CMMC v. Salinas*, 929 S.W.2d 435, 436 (Tex. 1996)).

22. *Id.* at 785-87, 789-90.

with the forum state, it is limited to nonresidents who direct their marketing or products at the forum state, which did not happen here.<sup>23</sup> The supreme court further noted that, while a single contact with a Texas resident may establish jurisdiction, it does not automatically do so.<sup>24</sup> Finally, the supreme court held that the lower courts erred in focusing on the concept that the defendant had directed a tort at Texas with its telephone misrepresentations. Doing so, the supreme court concluded, improperly focused on the relationship among the plaintiff, the forum, and the litigation rather than the relationship among the defendant, the forum, and the litigation.<sup>25</sup>

In *Morris v. Kohls-York*,<sup>26</sup> the Austin Court of Appeals upheld jurisdiction in a negligence and breach-of-warranty action against a nonresident veterinarian, an embryologist, and their corporation for the alleged use of a contaminated microscope while implanting livestock embryos. The court further rejected the defendants' claim of fiduciary shield—a doctrine immunizing nonresident corporate agents for acts done in Texas solely on behalf of the corporation.<sup>27</sup>

The opinion in *Royal American Construction Co. v. Comerica Bank*<sup>28</sup> mixed its terms, combining the concepts of general and specific jurisdiction to find the latter over a Florida-based construction company that ordered products from a Texas company. The court of appeals identified specific jurisdiction as the foundation for jurisdiction and listed the Texas contacts giving rise to the claim. However, it stated that “Royal has maintained continuous and systematic contacts with Texas that constitute a ‘substantial connection’ between Royal and Texas such that Royal should reasonably anticipate being called into court in Texas.”<sup>29</sup> This was a harmless terminology error because the court cited ample facts to create the minimal connection necessary for specific jurisdiction. Repeating this erroneous analysis, however, could lead to a harmful error in subsequent cases.

*Stein v. Deason*<sup>30</sup> presents an interesting and valid stretch of the Texas long arm. Texas resident Deason hired California resident Stein as a designer for Deason's residential construction project in California. Deason's decision to hire Stein was based in part on Stein's representation that he was a licensed architect, made when Stein visited Texas to confer on the project. When Deason subsequently had to hire other architects to conclude the project, he learned that Stein was not licensed. Deason

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23. *Id.* The supreme court further held that stream-of-commerce jurisdiction required a stream and not a dribble, and thus did not apply to Michiana's meager Texas sales. *Id.* at 786 (citing *CMMC*, 929 S.W.2d at 439).

24. *Id.* at 786-87.

25. *Id.* at 790-92. The supreme court also upheld the parties' agreement to litigate in Indiana. *Id.* at 793.

26. 164 S.W.3d 686 (Tex. App.—Austin 2005, pet. dism'd).

27. *Id.* at 689-94, 696-97.

28. 164 S.W.3d 466 (Tex. App.—Dallas 2005, no pet. h.).

29. *Id.* at 470 (citations omitted).

30. 165 S.W.3d 406 (Tex. App.—Dallas 2005, no pet. h.).

sued in Texas, the trial court rejected Stein's special appearance, and the court of appeals affirmed.<sup>31</sup>

In other commercial cases, Texas state courts upheld specific jurisdiction in (1) a fraud action by the Texas Insurance Commissioner's special deputy against nonresident health insurers and their agents;<sup>32</sup> (2) a radio station seller's claim against nonresident lawyers over legal advice given to their client, the nonresident buyer;<sup>33</sup> (3) a default judgment against three Georgia defendants in the sale of a truck, in which there was no indication of where the transaction was to occur;<sup>34</sup> (4) a Texas securities action against a California investment company;<sup>35</sup> (5) a trademark-infringement action against Florida companies regarding hair and beauty products, which included a finding of jurisdiction based on alter ego;<sup>36</sup> and (6) a Dallas company breach-of-contract action against a Michigan company for breaching a purchase agreement for assets located in Michigan.<sup>37</sup> No commercial cases in Texas state courts upheld general jurisdiction.

Texas state courts denied jurisdiction in (1) an ancillary probate action against nonresident heirs for illegal withdrawal of funds from a Laredo bank;<sup>38</sup> (2) a claim against nonresidents for reimbursement of fees for an Alaskan hunting trip that plaintiff had to cancel;<sup>39</sup> (3) a wrongful-discharge claim by a Texas employee against an Oklahoma boat dealer, in which the dealer had a loose corporate affiliation with the Texas boat dealer where plaintiff was employed;<sup>40</sup> (4) a Texas investor's claim against three California defendants—a bank, an investment firm, and the firm's manager—for breach of contract and fraud in relation to California investments;<sup>41</sup> and (5) a Texas business's claim against an Illinois-based company for fraud in the purchase of a San Antonio apartment complex.<sup>42</sup>

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31. *Id.* at 409-10.

32. *Ennis v. Loiseau*, 164 S.W.3d 698 (Tex. App.—Austin 2005, no pet. h.).

33. *Tempest Broad. Corp. v. Imlay*, 150 S.W.3d 861 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

34. *Morris v. Zesati*, 162 S.W.3d 669 (Tex. App.—El Paso 2005, no pet. h.). This case also serves as a good illustration of the jurisdictional allegations necessary to support a default judgment.

35. *IRA Res., Inc. v. Griego*, 161 S.W.3d 248 (Tex. App.—Corpus Christi 2005, pet. filed). Interestingly, no jurisdiction was found against two other California defendants in the same action.

36. *I & JC Corp. v. Helen of Troy, L.P.*, 164 S.W.3d 877, 890 (Tex. App.—El Paso 2005, pet. denied).

37. *Examination Mgmt. Servs., Inc. v. Partners for Ins., L.L.C.*, No. CIVA 3:03-CV-1665-B, 2005 WL 280323 (N.D. Tex. Feb. 3, 2005).

38. *Brittingham-Sada de Powers v. The Ancillary Estate of Brittingham-McLean*, 158 S.W.3d 518 (Tex. App.—San Antonio 2004, pet. denied).

39. *Zimmerman v. Glacier Guides, Inc.*, 151 S.W.3d 700 (Tex. App.—Waco 2004, no pet. h.).

40. *Nichols v. Bridges*, 163 S.W.3d 776 (Tex. App.—Texarkana 2005, no pet. h.).

41. *Bryant v. Roblee*, 153 S.W.3d 626 (Tex. App.—Amarillo 2004, no pet. h.).

42. *Oryx Capital Int'l, Inc. v. Sage Apartments, L.L.C.*, 167 S.W.3d 432 (Tex. App.—San Antonio 2005, no pet. h.).



Texas federal courts applying the Texas long arm in diversity cases found specific jurisdiction in (1) a Houston company's claim against an Ohio bank for alleged misappropriation of trade secrets relating to plaintiff's banking overdraft-protection service;<sup>43</sup> (2) a Texas homeowner's third-party claim against a nonresident carrier, in which the carrier arranged a shipment to Texas that led to litigation against the homeowner;<sup>44</sup> (3) investors' claims against a nonresident accounting firm for negligence and fraud;<sup>45</sup> and (4) an employment claim against a German employer for work done primarily in Germany.<sup>46</sup> One Texas court found general jurisdiction over investors' claims against a nonresident international accounting association for negligence and fraud.<sup>47</sup>

Federal courts applying the Texas long arm in diversity cases found neither general nor specific jurisdiction in actions against (1) a Maryland boatyard to recover the value of a sunken yacht moored there for repairs;<sup>48</sup> or (2) an Ohio company for its continued use of patented technology after the license had expired.<sup>49</sup>

## 2. *The Texas Long Arm in Non-Commercial Tort Claims and Other Cases*

In *Fielding v. Hubert Burda Media, Inc.*,<sup>50</sup> the plaintiff filed a defamation case in Texas court for actions arising entirely in Europe. This forum-shopping choice was quite puzzling, as it would have afforded defendants First Amendment protections unavailable in Europe. The plaintiff, Thomas Borer was the Swiss ambassador to Germany. In 1999 he married Shawne Fielding, a Dallas native, and they lived in Germany while he completed his diplomatic duties. While there, certain German newspapers published allegedly defamatory stories about both Borer and his wife. After moving to Texas, the couple filed defamation actions in a Texas state court against two German publications.<sup>51</sup> Defendants removed the case to federal court in Dallas, which dismissed for lack of personal jurisdiction. The Fifth Circuit upheld the dismissal on appeal, finding that the German publications' respective circulations in Texas were too small to support jurisdiction under the Supreme Court's juris-

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43. *MJCM, L.L.C., v. Sky Bank*, No. Civ.A. H-05-0664, 2005 WL 2121549 (S.D. Tex. Aug. 31, 2005).

44. *United Van Lines, L.L.C. v. Marks*, 366 F. Supp. 2d 468 (S.D. Tex. 2005).

45. *Deloitte & Touche Neth. Antilles & Aruba v. Ulrich*, 172 S.W.3d 255 (Tex. App.—Beaumont 2005, pet. denied).

46. *KMG Kanal-Muller-Gruppe Deutschland GMBH & Co. KG v. Davis*, 175 S.W.3d 379 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.).

47. *Deloitte & Touche Neth.*, 172 S.W.3d at 264-69.

48. *Barney F. Kogen & Co. v. Tred Avon Assocs.*, 393 F. Supp. 2d 519 (S.D. Tex. 2005).

49. *Hanson Pipe & Prods., Inc. v. Bridge Techs. L.L.C.*, 351 F. Supp. 2d 603 (E.D. Tex. 2004).

50. 415 F.3d 419 (5th Cir. 2005).

51. *Id.* at 422-24.

dictional tests for defamation.<sup>52</sup> The appellate court also upheld the district court's refusal to grant plaintiffs' request for additional discovery supporting jurisdiction.<sup>53</sup>

*Dickerson v. Doyle*<sup>54</sup> offers another interesting fact setting. Frank Doyle worked for the U.S. Army Corps of Engineers and lived with his wife Roelmina in Korea. While there, an American soldier named Bob Dickerson moved in with them and began a sexual relationship with Roelmina, allegedly resulting in the birth of Robert Doyle. When Frank and Roelmina moved to New York, Dickerson moved in with them. When Dickerson moved to El Paso, Roelmina, Frank, Robert, and the Doyle's teenage daughter joined him. Frank then returned to Korea to work with the Corps of Engineers, hoping that Roelmina and the children would join him. Dickerson, on the other hand, took a job in Hawaii and wanted Robert to go with him. Thus, Dickerson arranged for paternity tests for Robert. Fearing verbal and physical abuse and the loss of Robert to Dickerson, Roelmina fled to Alabama. When Dickerson filed a paternity action in El Paso, Roelmina was served in Alabama, and Frank was served in Korea. Both raised personal-jurisdiction objections.<sup>55</sup> The trial court agreed and dismissed the case. The El Paso Court of Appeals affirmed, finding that, while the trial court lacked authority under Texas law to dismiss under *forum non conveniens*,<sup>56</sup> the dismissal was appropriate on personal-jurisdiction grounds.<sup>57</sup> This was *not* a determination of home-state jurisdiction; rather, it was only a determination of personal jurisdiction.

*Metis International, L.L.C. v. Ace INA Holdings, Inc.*<sup>58</sup> arose from a Texas company's suit against two Mexican companies for misappropriation of trade secrets. In this case, plaintiff Metis and its predecessor company (Seguline, Inc.) agreed with Ace INA Holdings to form a partnership to market pre-paid insurance cards. Seguline required Ace to sign a confidentiality agreement, but no further written agreement ever resulted. Eventually, Ace's subsidiary (Ace Seguros, S.A.) began selling its own pre-paid insurance cards. Metis sued in a San Antonio federal court, and defendants challenged jurisdiction. The court held that it lacked jurisdiction over the subsidiary but had jurisdiction over the parent with whom plaintiffs had entered the agreement.<sup>59</sup>

In *Exito Electronics Co. v. Trejo*,<sup>60</sup> a court of appeals reconsidered jurisdiction after the Texas Supreme Court reversed its earlier finding that defendants had waived its jurisdictional objection with defective affida-

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52. *Id.* at 424-28 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984)).

53. *Id.* at 428-29.

54. 170 S.W.3d 713 (Tex. App.—El Paso 2005, no pet. h.).

55. *Id.* at 715-18.

56. *Id.* at 718-20.

57. *Id.* at 721.

58. No. Civ.A SA-04CA-XR, 2005 WL 1072587 (W.D. Tex. May 6, 2005).

59. *Id.*

60. 166 S.W.3d 839 (Tex. App.—Corpus Christi 2005, no pet. h.).

vits. On remand, the court of appeals maintained its finding of jurisdiction, this time based on general jurisdiction. The court also rejected the plaintiff's argument that the defendant waived its jurisdictional objection for failing to object to jurisdiction in another Texas lawsuit.<sup>61</sup>

In other cases, Texas state and federal courts found no jurisdiction in (1) a claim against shareholders of an undercapitalized corporation for personal injuries in a fire caused by a defective radio;<sup>62</sup> (2) a Texas jeweler's complaint against a New Mexico company for the development of scleroderma, which was allegedly caused by toxic cleaning materials supplied by the New Mexico company;<sup>63</sup> (3) an insurance coverage dispute with a Swedish insurer regarding the September 11, 2001 terrorist attacks on the World Trade Center;<sup>64</sup> (4) two multidistrict actions against New Jersey defendants for allegedly mishandling corpses purchased for medical uses from the University of Texas Medical Branch at Galveston.<sup>65</sup>

### 3. *Long Arms in Federal-Question Cases*

Federal courts ordinarily use the long-arm statute of the state where they are located, but in a few instances use a federal long-arm statute.

#### 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 thus 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 only one case involving the Texas long arm this past year. *Nocando Mem Holdings, Ltd. v. Credit Commercial de France, S.A.*<sup>66</sup> involved a class action for investment fraud under both state and federal law. Defendants, various foreign entities, encouraged investments in InverWorld, a company that was fraudulently made to appear solvent by Texas-based Sharp Capital. The plaintiff class sued in a San Antonio federal court, and the nonresident defendants challenged Texas jurisdiction. The court found that they had specific-jurisdiction over most of the foreign financial defendants under the Texas long arm statute because of the Texas contacts through Sharp.<sup>67</sup> The foreign defendants not having those contacts are discussed in the section immediately below.

61. *Id.* at 849, 860.

62. *Ramirez v. Hariri*, 165 S.W.3d 912 (Tex. App.—Dallas 2005, no pet. h.).

63. *Thunderbird Supply Co. v. Williams*, 161 S.W.3d 731 (Tex. App.—Beaumont 2005, no pet. h.).

64. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., v. IF P&C Ins., Ltd.*, No. Civ.A 3:04CV2185-G, 2005 WL 1639282, at \*1 (N.D. Tex. July 13, 2005).

65. *Perna v. Taylor*, 146 S.W.3d 791 (Tex. App.—Beaumont 2004, no pet. h.); *Perna v. Hogan*, 162 S.W.3d 648 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.).

66. No. Civ.A.SA-01-1194-XR, 2004 WL 2603739, at \*1 (W.D. Tex. Oct. 6, 2004).

67. *Id.* at \*1, \*12-28.

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

In certain situations, such as when foreign defendants are not otherwise subject to the jurisdictional reach of any one state, Rule 4(k)(1)-(2) allows for a nationwide-contacts analysis. Under a nationwide-contacts analysis, sufficient contacts are assessed with the United States as a whole, rather than any one state.<sup>68</sup> In the *Nocando* case noted immediately above, two foreign financial institutions—a Bahamian bank and a Swiss bank—lacked sufficient direct contacts with Texas. They were nonetheless held amenable to the Texas lawsuit for their nationwide contacts in allegedly furthering a fraudulent investment scheme.<sup>69</sup>

#### 4. Internet Jurisdiction

A number of American jurisdictions, including Texas and the Fifth Circuit, apply the *Zippo* sliding scale to assess personal jurisdiction based on Internet contacts. The test breaks down Internet use into a spectrum of three areas. On one end of the spectrum, personal jurisdiction is found over a defendant that enters contracts with forum residents that involve transmission of computer files over the Internet. At the other end of the spectrum, personal jurisdiction is not found over a defendant that creates a website that does little more than make information available. In the middle of the spectrum, jurisdiction depends on the level of interactivity and the commercial nature of the information exchanged between the forum resident and the defendant's host computer.<sup>70</sup> Four cases during the Survey period considered arguments for Internet jurisdiction as a basis for specific personal jurisdiction. *Paolino v. Argyll Equities, L.L.C.* questioned *Mink's* (or *Zippo's*) application to general jurisdiction because the action did not arise in Texas.<sup>71</sup> As the court explained, under a general jurisdiction analysis, it is not enough that an interactive website has the potential to reach a significant percentage of the forum state's population. Rather, there must be proof that the website is actually reaching a portion of the state's population. However, the difficult assessment was unnecessary in this case because the defendant's website was only minimally interactive and did not target Texas residents. Thus, there was no jurisdiction.<sup>72</sup>

*Global 360, Inc. v. Spittin' Image Software, Inc.*<sup>73</sup> was a copyright-in-

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68. FED. R. CIV. P. 4(k)(1)-(2).

69. *Nocando*, 2004 WL 2603739, at \*37-39.

70. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) and other cases cited therein. The Fifth Circuit adopted the *Zippo* test in *Mink v. AAAA Dev., L.L.C.*, 190 F.3d 333, 336 (5th Cir. 1999). Intermediate Texas appellate courts have used that test as well. See, e.g., *Experimental Aircraft Ass'n Inc. v. Doctor*, 76 S.W.3d 496 (Tex. App.—Houston [14th Dist.] 2002, pet. filed); *Townsend v. Univ. Hosp.*, 83 S.W.3d 913 (Tex. App.—Texarkana 2002, pet. denied).

71. 401 F. Supp. 2d 712 (W.D. Tex. 2005).

72. *Id.* at 723-24 (discussing the Fifth Circuit's decision in *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002)).

73. No. Civ.A 3:04-CV-1837-L, 2005 WL 625493, at \*1 (N.D. Tex. Mar. 17, 2005).

fringement action brought by Global against Spittin' Image and ImageMAKER. ImageMAKER did not dispute that their website, ImagingforWindows.com, was an interactive website on the *Mink* sliding scale; rather, they claimed that their activity did not meet the Texas minimum-contacts requirement. The district court looked at the interactivity and commercial nature of the exchange of information through the site according to *Zippo*. The court determined that ImageMAKER met the minimum-contacts requirement for personal jurisdiction because it sold the allegedly infringing products in Texas via its website, engaged in business transactions in Texas, and entered into contracts over the Internet with Texas residents. As such, ImageMAKER's Internet activities met the minimum-contacts requirement of purposeful availment of the privilege of conducting business in Texas.<sup>74</sup>

In *I & JC Corp. v. Helen of Troy, L.P.*,<sup>75</sup> a Texas state court found personal jurisdiction over I & JC through its maintenance of an interactive website marketing hair care products to Texas residents. I & JC also paid search engines to direct users to their site and allowed placement of orders through it. Therefore, the court held that the website fell into the interactive category on the *Mink* (or *Zippo*) sliding scale, and that this degree of interactivity was sufficient to support the exercise of jurisdiction.<sup>76</sup>

*Khalil v. Chatham College* held that a Pennsylvania university's passive website did not create sufficient contact with Texas for Texas courts to exercise jurisdiction over the university.<sup>77</sup>

### 5. Status Jurisdiction

Status jurisdiction is a special category of jurisdiction that recognizes 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. Mental-competence and marital-status cases do not often cause problems, as competence determinations do not often implicate interstate issues and marital-status litigation tends to tolerate parallel suits in different states and countries. However, conflicting judgments and parental abductions create problems with child-custody cases. 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")<sup>78</sup> and federally, the Parental Kidnapping Prevention Act ("PKPA")<sup>79</sup> establish unitary child-custody jurisdiction and apply full faith and credit to those decisions. Internationally, the UCCJEA governs

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74. *Id.* at \*4-5.

75. 164 S.W.3d 877 (Tex. App.—El Paso 2005, pet. denied).

76. *Id.* at 888-89.

77. 391 F. Supp. 2d 588, 594 (S.D. Tex. 2005).

78. TEX. FAM. CODE ANN. §§ 152.101-.317 (Vernon 2002).

79. 28 U.S.C.A. § 1738A (West 2005).

both jurisdictional disputes and decree enforcement,<sup>80</sup> and the International Child Abduction Remedies Act<sup>81</sup> (“ICARA,” the United States version of the Hague Convention on Child Abduction<sup>82</sup>) 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

Two Survey-period cases involved interstate custody and related disputes. *In re B.T.T.* held that Texas had jurisdiction to consider an alleged father’s motion to nullify a prior Hawaii order establishing paternity and a Texas order to pay child-support arrearages.<sup>83</sup> In 1996, B.T.T.’s mother, Emily Braddy, filed a paternity suit against Harold Thomas in Texas under the Uniform Interstate Family Support Act.<sup>84</sup> At the time, Thomas was serving on active military duty in Hawaii, resulting in a reciprocal suit there. In 1997, the Hawaii court entered a default order against Thomas, establishing paternity and awarding child support. In 1999, the Texas Attorney General filed a notice of registration of a foreign support order based on the Hawaii order and reduced it to a Texas arrearage judgment.<sup>85</sup>

After DNA tests excluded Thomas as B.T.T.’s biological father, he sued in Hawaii to set aside the 1997 paternity and child-support order as being null and void under the Soldiers’ and Sailors’ Relief Act of 1940 (“SCRA”).<sup>86</sup> In 2003, the Hawaii family court granted Thomas’ motion and set aside its 1997 order. Thomas’s Bexar County motion to set aside the arrearage judgment was granted in June 2003. The mother appealed, arguing that Thomas waived his collateral attack by failing to contest the earlier Hawaii judgment within twenty days of its filing in Texas.<sup>87</sup> The San Antonio Court of Appeals upheld the recognition of the later Hawaii order, finding no reason why the Texas Family Code would disallow a later judgment under SCRA or enforcement of full faith and credit.<sup>88</sup>

*In re G.M.*<sup>89</sup> is an unreported opinion with both interstate and international concerns. Paul Marinkovich and Sindi Graber obtained a court-

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80. TEX. FAM. CODE ANN. § 152.105 (Vernon 2005). The PKPA does not apply to child-custody conflicts with foreign countries.

81. 42 U.S.C.A. §§ 11601-11610 (West 2005).

82. Internal Child Abduction Convention Between the United States of America and the Governments Done at the Hague October 25, 1980, *opened for signature* Oct. 25, 1980, 1343 U.N.T.S. 89 (entered into force Dec. 1, 1983).

83. *In re B.T.T.*, 156 S.W.3d 612, 613 (Tex. App.—San Antonio 2004, no pet. h.).

84. TEX. FAM. CODE ANN. §§ 159.001-902 (Vernon 2005).

85. *In re B.T.T.*, 156 S.W.3d at 613.

86. 50 U.S.C.A. app. § 501 (West 2005).

87. *In re B.T.T.*, 156 S.W.3d at 613-14 (citing TEX. FAM. CODE ANN. § 159.606(a) (Vernon 2002)).

88. *Id.* at 614-15.

89. No. 13-02-00228-CV, 2005 WL 375479, at \*1 (Tex. App.—Corpus Christi Feb. 17, 2005, no pet. h.).

approved separation and support agreement from a California court, which included an award of joint custody of their child G.M. In 1995, Sindi filed an action in Texas seeking sole custody of G.M. and alleging that no other court had continuing jurisdiction. The Texas court awarded sole managing conservatorship to Sindi and possessory conservatorship to Paul. Paul returned to court in 1996, seeking to modify on the grounds that Sindi had taken the child to Sweden in violation of the Texas order and the Hague Convention on the Civil Aspects of Child Abduction.<sup>90</sup> After the Texas court granted Paul's motion and awarded him primary custody, Sindi filed a pro se appeal. The court of appeals upheld the trial court's decision favoring Paul, but a concurring opinion raised concerns that the Texas court lacked child-custody jurisdiction from the beginning because of the prior California custody order.<sup>91</sup>

b. International custody disputes

*Filsinger v. Filsinger*<sup>92</sup> involved a child from Finland embroiled in parallel custody suits in Texas and Florida. Brad and Meeri Filsinger separated in June 2000 after six months of marriage. Meeri, who was pregnant, left their marital home in Florida and returned to her home in Finland. On January 1, 2001, Meeri gave birth to a son in Finland. One month later, she and the child traveled to Florida to live with Brad. The attempted reconciliation failed, though, and on March 13, 2001, Brad filed for divorce in Florida. Brad also obtained an order prohibiting Meeri from removing the child from Florida during the divorce action. Despite the order, Meeri returned to Finland with the child and sued for custody there. Back in Florida, criminal charges were filed against Meeri for interference with child custody.<sup>93</sup>

Though the Florida court granted the divorce on November 21, 2001, it declined to hear the custody and visitation issues, deferring that jurisdiction to Finland since the child had been born and lived there most of his life. It did, however, expressly retain jurisdiction over child-support matters, any modifications, and enforcement powers. Two years later, the Finnish court awarded custody to Meeri and ordered Meeri not to unilaterally remove the child from Finland.<sup>94</sup> Both parties appealed the Finnish judgment, however, and before the appellate opinion would be rendered, Meeri and the child moved to El Paso, Texas, to live with Meeri's fiancé. Meeri did not inform Brad or the Finnish court that she had moved. Meeri was arrested in Texas in September 2003 on the outstanding Florida warrants. Texas child-protective-services authorities took her son into custody; he was then given to Brad for return to

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90. *Id.* at \*1-4.

91. *Id.* at \*2-7.

92. No. 08-04-00042-CV, 2005 WL 1992422 (Tex. App.—El Paso Aug. 18, 2005, no pet. h.).

93. *Id.*

94. *Id.*

Florida.<sup>95</sup>

After successive actions in Florida and Finland, parallel actions arose. In September 2003, Brad filed for custody in the Florida court that had granted the divorce and expressly retained jurisdiction over child-support issues. In October 2003, Meeri sued for custody in El Paso, alleging that no other court had continuing exclusive jurisdiction. Although she did not mention the Finnish custody determination, Meeri did file a habeas corpus application based on the Finnish judgment. The El Paso trial court granted the habeas writ and ordered Brad to return the child. Brad did not comply with the order, objecting to the exercise of jurisdiction under the UCCJEA and requesting the Texas court to confer with the Florida court.<sup>96</sup>

On October 4, 2003, the Florida court concluded that it had jurisdiction and awarded temporary custody to Brad. Two months later, the Florida court denied Meeri's motions to dismiss the Florida custody proceedings and to enforce the Texas writ of attachment. That same month, the Texas trial court conferred with the Florida court and decided to exercise jurisdiction. On January 14, 2004, the Texas trial court awarded custody to Meeri and ordered Brad to pay child support. Meeri subsequently filed a motion in Florida to enforce the Texas writ. The Florida court denied it, concluding that Texas did not have home-state jurisdiction, the Texas orders were not entitled to full faith and credit because they were not in substantial conformity with the UCCJEA, the Finnish court no longer had jurisdiction because both parties had permanently left Finland, and Florida was the most appropriate state to exercise jurisdiction in conformity with UCCJEA. On appeal in Texas, the El Paso Court of Appeals agreed and dismissed the Texas case.<sup>97</sup>

#### D. REASONS FOR DECLINING OTHERWISE-VALID JURISDICTION

Even if 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 dictates another forum, and cases parallel to other litigation. There were no sovereign-immunity cases, but examples did occur in the other three categories.

##### 1. *Derogating Forum-Selection Clauses*

Section B above discusses forum-selection clauses that *establish* local jurisdiction.<sup>98</sup> Somewhat different considerations arise when the plaintiff sues in a forum contrary to the forum agreed upon in the forum-selection clause. These are known as derogation clauses (in regard to that forum),

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95. *Id.*

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

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

98. See COLES & MAY, *supra* note 13 (citing sources discussing this distinction), and *EnSCO Offshore Co. v. Titan Marine L.L.C.*, 370 F. Supp. 2d 594 (S.D. Tex. 2005) (discussing prorogating forum clauses consenting to the forum's jurisdiction).



and instead of requiring justifications for the court to retain the case, they require justifications for the court to decline its otherwise-valid jurisdiction over the parties. The Survey period produced twelve such cases, including *Drug Test USA v. Buyers Shopping Network, Inc.*, an important decision from the Waco Court of Appeals that struggles with the cloudy relationship between two Texas statutes governing the parties' power to choose their forum and governing law.<sup>99</sup> In this case, Drug Test USA, a Texas company, sued Buyers Shopping Network, a Florida company, for breach of contract. Buyers objected to personal jurisdiction in the Texas court based on the contract's designation of a Florida forum. Drug Test argued that the forum clause was unenforceable because it violated section 35.53 of the Texas Business and Commerce Code, which requires "contracts to which this section applies" to be "set out conspicuously in print, type, or other form of writing that is bold-faced, capitalized, underlined, or otherwise set out in such a manner that a reasonable person against whom the provision may operate would notice."<sup>100</sup> The preceding subsection of the statute defines its scope as applying to (1) contracts for the sale, rental, or disposition of goods for \$50,000 or less; (2) in which any element occurred in Texas and a contracting party is a Texas resident, a Texas-created entity, or an entity with its principal place of business in Texas; and (3) to which section 1.105 of the Texas Business and Commerce Code does not apply.<sup>101</sup>

Section 1.105(a) is part of the Uniform Commercial Code ("UCC") and gives parties to UCC transactions the power to choose the governing law if it has a reasonable relation to their transaction.<sup>102</sup> Section 1.105(a) only governs the parties' choice of *law* and not their choice of *forum*. Nonetheless, according to the plain language of section 35.53, contracts under section 1.105 are exempt from section 35.53. Drug Test argued that this led to an absurd result—that because of the UCC's broad scope, section 35.53 "would never apply to any contract anywhere at any time in Texas."<sup>103</sup>

The court of appeals agreed and reversed the trial court's dismissal. The court reasoned that, if all contracts under section 1.105(a) (contracts in which one Texas party designated a reasonably related law) are excluded from the conspicuous-print requirement of section 35.53, then the latter will not apply to any contracts except those in which a Texas party chooses a law unrelated to the transaction.<sup>104</sup> A dissenting justice argued that this meaning is not absurd and in fact, makes perfect sense—that contracts choosing an unrelated law must do so in conspicuous

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99. 154 S.W.3d 191 (Tex. App.—Waco 2004, no pet. h.).

100. *Id.* at 192 (quoting TEX. BUS. & COM. CODE ANN. § 35.53(b) (Vernon 2005)).

101. *Id.* at 192-93 (quoting TEX. BUS. & COM. CODE ANN. § 35.53(a) (Vernon 2005)).

102. This law is now codified without substantive change as TEX. BUS. & COM. CODE ANN. § 1.301 (Vernon 2005).

103. *Drug Test USA*, 154 S.W.3d at 193.

104. *Id.* at 193-96.

print.<sup>105</sup> The majority, however, adopted an interpretation more absurd than the one it rejected. That is, the court held that section 35.53 only excluded the few contracts specifically mentioned under section 1.105(b). Section 1.105(b) is an exception to section 1.105(a) and provides that if the UCC has a more specific choice-of-law provision, section 1.105(a) and the parties' power to choose their law does not apply. The court thus held that section 35.53's exclusionary reference to section 1.105 was not to its primary provision but to an exception to that provision.<sup>106</sup> As the majority opinion points out, these statutes need clarifying.

*Boutte v. Cenac Towing, Inc.*<sup>107</sup> is a case of first impression in the Fifth Circuit, involving a forum clause in a Jones Act claim. Cenac Towing, incorporated and based in Louisiana, hired Louisiana resident Eric Boutte for maritime duties. Boutte injured his elbow while working on the Ohio River in Kentucky and reinjured it while working in Freeport, Texas. Boutte sued in federal court in Galveston. The defendant attempted to invoke the employment agreement's clause, which negated all courts outside of Louisiana, specifically Texas courts.<sup>108</sup> The defendant reserved his right to seek a venue transfer based on the forum clause and filed a motion to dismiss. The district court denied the defendant's motion to dismiss and the plaintiff's motion to disregard the forum clause. On reconsideration of the dismissal motion, the plaintiff argued that the Jones Act incorporates the Federal Employers Liability Act ("FELA"), and FELA does not permit forum clauses.<sup>109</sup> Although the issue of whether FELA's forum clause prohibition should be imputed to Jones Act claims was one of first impression for the Fifth Circuit, the court traced the case law from other circuits and found in the plaintiff's favor.<sup>110</sup>

*Aerus L.L.C. v. Pro Team, Inc.*<sup>111</sup> provides a good interpretive analysis for forum-selection clauses, as it involves three forum clauses in two agreements for the same venture. In particular, the court had to address which law governed the interpretation of the forum clauses, the priority of contrary forum clauses in multiple contracts between the parties, and the distinction between exclusive and permissive forum clauses in the same contract. Aerus L.L.C. (formerly Electrolux) is a Texas-based manufacturer of cleaning equipment such as vacuum cleaners. In 2001, Aerus

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105. *Id.* at 196 (Gray, C.J., dissenting).

106. *Id.* at 193-96.

107. 346 F. Supp. 2d 922 (S.D. Tex. 2004). The Jones Act, 46 U.S.C.A. app. 688 (West 2005), governs employment-related injuries under traditional admiralty jurisdiction.

108. *Boutte*, 346 F. Supp. 2d at 923-25. A single sheet of paper—apparently the only written part of the employment agreement—titled "Choice of Forum Agreement" stated in bold type: "I SPECIFICALLY AGREE THAT I WILL NEVER FILE A SUIT FOR PERSONAL INJURY AGAINST CENAC TOWING, INC. IN A STATE OR FEDERAL COURT LOACTED OUTSIDE THE STATE OF LOUISIANA, INCLUDING THE STATE OF TEXAS." *Id.* at 925.

109. *See id.* at 927-28 (discussing Federal Employers Liability Act, 45 U.S.C.A. §§ 55-56 (West 2005)).

110. *Id.* at 925-34.

111. No. Civ.A. 304CV1985M, 2005 WL 1131093, at \*1 (N.D. Tex. May 9, 2005).

entered a joint marketing agreement with Pro Team, an Idaho company that markets floor-care products for janitorial services. According to the agreement, Pro Team would purchase, sell, market, and distribute Aerus's products. The agreement also dealt with Pro Team's use of Aerus's trademarks and other intellectual property. Specifically, it provided that "[i]n the event [Aerus, LLC] asserts a breach or default by ProTeam under the terms of this Agreement, the jurisdiction, venue, and applicable law shall be the State of Texas, United States."<sup>112</sup> The parties ended this relationship with a 2003 Termination, Transition and Release Agreement. The 2003 Termination Agreement had two conflicting clauses. The first clause provided that, for claims by either party for breach of the 2003 Agreement, "the jurisdiction, venue, and applicable law shall be [the] City of San Diego, California."<sup>113</sup> The second clause provided that any disputes regarding trademarks, branding, or confidentiality may be brought in any court having jurisdiction.<sup>114</sup> Wading through these ambiguous and contrary clauses, the court found that (1) Texas law controlled the interpretation of the conflicting forum clauses, not because Texas law was designated in the contract, but because Texas was the forum state;<sup>115</sup> (2) the 2003 agreement superseded the 2001 agreement because of the former's integration clause, in spite of language in the 2001 Agreement that it would survive any termination of the agreement; (3) the exclusive forum clause controlled over the permissive clause in the 2003 agreement. The plaintiff argued that the ambiguous forum clauses in the 2003 agreement made both clauses permissive; the court found instead that the more specific choice of the California forum applied specifically to the claims raised in this action. Therefore, the court ordered a transfer to California and was thus spared the task of applying the laws of San Diego the 2003 agreement designated.<sup>116</sup>

In *Abramson v. America Online, Inc.*,<sup>117</sup> the court enforced AOL's forum clause even though the transaction originated in Texas. Plaintiff Elaine Abramson sued America Online in a Dallas federal court for allowing her email address to be used as an originator of thousands of messages with pornographic or lascivious content. Defendant moved to dismiss, invoking the forum-selection clause, which required litigation in "the courts of Virginia."<sup>118</sup> The district court found the clause enforceable as a valid contract. Plaintiff objected, arguing that she had not consented to the contract and had not received notice of the contract because her son set up the account with defendant. The court found an agency relationship between the son and mother, emphasizing that, even if the son was not fully authorized to act on plaintiff's behalf, she had ratified

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112. *Id.* at \*2.

113. *Id.*

114. *Id.* at \*5.

115. *Id.* at \*1.

116. *Id.* at \*2-3.

117. 393 F. Supp. 2d 438 (N.D. Tex. 2005).

118. *Id.* at 440.

his actions. Therefore, the court declined defendant's motion to dismiss and transferred the case to the Eastern District of Virginia.<sup>119</sup>

In *Michiana Easy Livin'*, the Texas Supreme Court denied Texas jurisdiction and gave effect to an Indiana choice-of-law clause. It rejected the plaintiff's arguments that the defendant had waived the clause by not raising it at the special appearance and that the clause should be limited to its express language.<sup>120</sup>

In other cases, courts upheld forum clauses (1) designating Norway as the forum for litigation of unseaworthiness on a boat purchased in Houston;<sup>121</sup> (2) designating Mississippi as the appropriate forum for the enforcement of gambling debts incurred there, which caused the dismissal of a Texas resident's action seeking a declaration that the debt violated Texas public policy;<sup>122</sup> (3) designating arbitration in Dayton, Ohio for any technology-licensing disputes.<sup>123</sup>

Courts denied forum clauses (1) designating California as the forum for breach of a recording contract because the clause was permissive rather than exclusive;<sup>124</sup> (2) designating New York as the situs for a manager's claim against a boxer because the defendant failed to prove that the clause was legal under New York law;<sup>125</sup> and (3) designating New York as the situs for arbitration in an insurance-coverage dispute related to the Enron litigation.<sup>126</sup> In addition, a federal court in Texas denied a Texas forum clause and upheld a Hong Kong judgment because, in spite of the parties' agreement to litigate in Texas, the Texas forum clause was permissive.<sup>127</sup>

## 2. *Forum Non Conveniens Dismissals*

Forum non conveniens, or inconvenient forum, is an old common-law objection to jurisdiction that is now available by statutes; for instance, 28 U.S.C. § 1404 allows intra-jurisdictional transfers based on convenience.<sup>128</sup> However, because intra-federal transfers under § 1404 do not

119. *Id.* at 440-43.

120. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 792-94 (Tex. 2005).

121. *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, No. Civ.A. H-04-3010, 2005 WL 1693150, at \*12 (S.D. Tex. July 19, 2005).

122. *Phillips v. Grand Casinos of Miss., Inc.*, No. Civ.A 3:04-CV-02023, 2004 WL 2533589, at \*1-3 (N.D. Tex. Nov. 9, 2004).

123. *Hanson Pipe & Prods., Inc. v. Bridge Techs. L.L.C.*, 351 F. Supp. 2d 603 (E.D. Tex. 2004).

124. *Williams v. RIP Records*, No. Civ.A H-05-183, 2005 WL 1924181, at \*1 (S.D. Tex. Aug. 9, 2005).

125. *Lowing v. Williams*, No. 07-03-0393-CV, 2005 WL 20531 (Tex. App.—Amarillo Jan. 4, 2005, no pet. h.).

126. *In re Enron Corp. Sec., Derivative & "ERISA" Litigation*, 391 F. Supp. 2d 541 (S.D. Tex. 2005). See *infra* notes 170-75 for a more complete discussion.

127. *Siko Ventures, Ltd. v. Argyll Equities, L.L.C.*, No. SA-05-CA-100-0G, 2005 WL 2233205, at \*1 (W.D. Tex. Aug. 5, 2005).

128. Federal law provides for a transfer to another federal court in the case of an inconvenient forum under 28 U.S.C.A. § 1404 (West 2005). Texas law provides for in-state venue transfers based on convenience under TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (Vernon 2005).

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, which is available in state and federal courts in Texas if the movant shows that an adequate alternative forum is available and that a balancing of private and public interests favors transfer.<sup>129</sup>

In a case by a Thai parent against a Texas resident for the alleged sexual molestation of her children in Thailand, a federal court in Dallas granted a forum non conveniens dismissal in favor of litigation in Thailand.<sup>130</sup> In two other cases, Texas federal courts granted forum non conveniens dismissals against Ford Motor Company for accidents in Venezuela and Mexico. In one, the court held that the plaintiffs' unwillingness to litigate in a parallel action in Venezuela was irrelevant to the issue of an available alternative forum.<sup>131</sup> In the other, the court denied forum non conveniens dismissal in the largest bankruptcy ever filed in the United States.<sup>132</sup>

When considering the private interests in favor of transfer, courts generally look to the parties' convenience. They consider the relative ease of access to sources of proof, the availability and cost of compulsory process for obtaining the attendance of unwilling witnesses, the possibility of viewing the premises if appropriate, and all other practical problems that make the trial easy, expeditious, and inexpensive. When considering the public interests in favor of transfer, courts generally look to the court's concerns and the forum state's interests. They consider the administrative difficulties flowing from court congestion, the local interest in having localized controversies decided at home, the interest in having a diversity case tried 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.<sup>133</sup>

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129. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251-55 (1981).

130. *Boonma v. Bredimus*, No. Civ.A.3:05-CV-0684-0, 2005 WL 1831967, at \*1 (N.D. Tex. July 29, 2005). See also *Punyee v. Bredimus*, No. Civ.A.3:05-CV-0893-G, 2004 WL 2511144, at \*1 (N.D. Tex. Nov. 5, 2004) and James P. George & Anna K. Teller, *Conflict of Laws*, 58 SMU L. REV. 679, 698 (2005) (discussing *Punyee v. Bredimus*).

131. *Lizardo v. Ford Motor Co.*, No. CIV.A.13-04-187, 2005 WL 1164200, at \*1 (S.D. Tex. May 10, 2005) (noting this case's relationship to *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672 (S.D. Tex. 2004)); *Rodriguez v. Ford Motor Co.*, No. Civ. 13-04-036, 2004 WL 2952612 (S.D. Tex. 2004).

132. See *In re Yukos Oil Co.*, 321 B.R. 396, 399 (S.D. Tex. 2005).

133. *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 423-24 (5th Cir. 2001). Texas forum non conveniens law is multi-faceted. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon Supp. 2003) applies to personal injury and wrongful death claims. Acts of 1997, 75th Leg., ch. 424, § 2, *repealed by* Acts of 2003, 78th Leg., ch. 204, § 3.09 (effective Sept. 1, 2003) apply to asbestosis claims filed by persons not residing in Texas when their claims arose. 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).

### 3. *Parallel Litigation*

Parallel litigation is difficult to define. Sometimes it means identical lawsuits with exactly the same parties bringing the same claims; sometimes it means two or more lawsuits that may result in claim preclusion for some or all parties. It occurs both intra- and inter-jurisdictionally. Remedies include transfer and consolidation (intra-jurisdictional only), stay, dismissal, and anti-suit injunction. In many cases, courts allow both cases to proceed and the first to judgment precludes the other.<sup>134</sup> This Article discusses only parallel litigation involving at least one case outside of Texas; in other words, it will not consider multiple related actions involving courts only located in Texas.

One of the Survey period's most interesting cases fits under several categories—choice of law, forum non conveniens, and personal jurisdiction—but is placed here because of its size and significance. *In re Yukos Oil Co.* concerns the largest bankruptcy ever filed in the United States.<sup>135</sup> Yukos is a holding company for approximately 200 entities organized, inter alia, under the laws of the Russian Federation, Cyprus, and the United Kingdom. It became Russia's first privatized oil company in 1995 and has 100,000 employees, nearly all in Russia. In December 2003, the Russian government began pursuing retroactive taxes of \$27.5 billion for periods beginning in 2000. Yukos filed lawsuits in Russia and several other countries, seeking either to protest the tax or to seek other shelter. For instance, on December 14, 2004, Yukos incorporated a subsidiary in Texas, Yukos USA, and deposited \$480,000 in the Southwest Bank of Texas. Less than two hours later, Yukos filed its petition in bankruptcy in Houston.<sup>136</sup> Deutsche Bank AG, a German bank and creditor of Yukos, moved to dismiss Yukos's bankruptcy petition on several grounds, including eligible debtor status, forum non conveniens, comity, and the act-of-state doctrine. The bankruptcy court found each one of these grounds inadequate standing alone. The Texas bank deposit made Yukos an eligible debtor even though it was a foreign corporation.<sup>137</sup> The application of forum non conveniens was unclear under legal precedent, and the court declined to extend it.<sup>138</sup> A comity dismissal was vague at best,<sup>139</sup> and the act-of-state doctrine did not apply because the court did not need to evaluate the legality of a final, nonappealable act by the Russian government.<sup>140</sup> The bankruptcy court nonetheless dismissed the case under a totality-of-the-circumstances argument. Specifically, the court cited:

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134. See generally GEORGE, *supra* note 13 and James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 TEX. INT'L L.J. 499 (2001).

135. *In re Yukos Oil*, 321 B.R. at 399.

136. *Id.* at 400-02.

137. *Id.* at 399-407.

138. *Id.* at 407-08.

139. *Id.* at 408-09.

140. *Id.* at 409-10. Moreover, the Russian government had not entered an appearance and had, to the contrary, refused service of process. *Id.* at 410.

Yukos's inability to use a bankruptcy reorganization plan without the Russian government's cooperation because most of its assets are oil and gas within Russia; the timing of the Texas bank deposit and the bankruptcy filing; the inappropriateness of applying United States law to alter creditor priorities for a company whose operations should be governed by Russian and other European laws; the existence of parallel actions in several other forums including the European Court of Human Rights (where Yukos protested the excessive tax); and the need for the Russian government's participation in a dispute that would so heavily impact the Russian economy.<sup>141</sup>

In another bankruptcy case, a Dallas bankruptcy court refused to defer to Canadian litigation. In that case, a bankruptcy trustee filed a turnover motion in Dallas seeking the debtor's interest in a 1996 Mexican judgment. The debtor objected, arguing that the money was subject to a receiver-type action in Canada. Nonetheless, the Dallas bankruptcy court held that it would consider the turnover order because there was no evidence that the Canadian court had taken in rem jurisdiction over the debtor's assets.<sup>142</sup>

#### 4. Sovereign Immunity

The Survey period had two sovereign-immunity opinions, both arising out of a contractor's claim against the Republic of Congo. One opinion reaffirmed the sovereign's immunity from garnishment, and the other awarded attorney's fees to the garnishee. Both cases are fully discussed below in the Foreign Judgments section.<sup>143</sup>

## II. CHOICE OF LAW

Choosing the applicable substantive law is a question, like personal jurisdiction and judgment enforcement, involving both forum law and constitutional issues. Understanding these issues requires a review of basic principles. First, choice-of-law is a question of *state* law, both in state and federal courts.<sup>144</sup> Second, it is a question of *forum state* law. *Renvoi*—the practice of using another state's choice-of-law rule—is almost never employed unless the forum state directs it, and even then, the forum state remains in control.<sup>145</sup> Third, the forum state has broad power to make choice-of-law decisions, either legislatively or judicially, subject only to

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141. *Id.* at 410-11.

142. *In re Offshore Fin. Corp.*, 319 B.R. 845 (N.D. Tex. 2005).

143. See *infra* notes 245-48 (discussing *Walker Int'l Holdings, Ltd. v. Republic of Congo*, 395 F.3d 229 (5th Cir. 2004); *Walker Int'l Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413 (5th Cir. 2005)).

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

145. The Restatement (Second) creates a presumption against *renvoi* except for limited circumstances. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971) [hereinafter RESTATEMENT]. Although commentators promote *renvoi*'s use, they acknowledge its general lack of acceptance in the United States except in limited circumstances, such as when statutes direct the use of *renvoi*. See SCOLES & HAY, *supra* note 13, at 142 (especially n.4); WEINTRAUB, *supra* note 1, at 88-94. Texas law provides for *renvoi* in TEX. BUS. & COM.

limited constitutional requirements.<sup>146</sup>

Within each forum state, a hierarchy of choice-of-law rules govern. At the top are legislative choice-of-law rules, that is, statutes directing the application of a state's law when certain events or people are implicated.<sup>147</sup> Second in the hierarchy is party-controlled choice-of-law, that is, choice of law clauses in contracts that control unless public policy dictates otherwise.<sup>148</sup> Third in the hierarchy is the common law, now controlled in Texas by the most significant relationship test of the Restatement (Second) of Conflict of Laws.<sup>149</sup> This Survey Article is organized according to this hierarchy, that is, beginning with statutory choice-of-law, continuing with 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 note that, because choice of law is a state law issue, the only binding opinions are those of the Texas Supreme Court.<sup>150</sup>

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

The Survey period offered four cases involving choice-of-law statutes—two involving Texas statutes, two applying Oklahoma statutes, and one of the latter illustrating the choice-of-law rule for inconvenient forum transfers. Choice-of-law statutes most often involve the forum state applying its own statute. An exception this year is *Precis, Inc. v. Federal Insurance Co.*,<sup>151</sup> an insurance-coverage action in which the application of another state's choice-of-law statute nonetheless resulted in a choice of Texas law for the merits. Facing claims by customers in a separate Texas state-court action, *Precis* filed suit in an Oklahoma state court against two insurers

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CODE ANN. §§ 1.105(b), 2.402(b), 4.102(b), 8.106, 9.103 (Vernon 2005). For federal courts, *Klaxon* reiterates the forum state's control of choice of law. *Klaxon*, 313 U.S. at 497.

146. See *infra* notes 210-11 and accompanying text for a brief description of these constitutional requirements.

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

148. RESTATEMENT § 187 (“Law of the State Chosen by the Parties”) allows contracting parties to choose a governing law within defined limits, as explained *infra* note 167. Texas has adopted § 187. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-78 (Tex. 1990).

149. See *infra* note 185 for the factors in RESTATEMENT § 6 (1971).

150. The exceptions are when a federal court rules on a constitutional issue such as legislative jurisdiction, full faith and credit, or federal questions such as foreign sovereign immunity. See, e.g., *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657, 662-63 (Tex. 2004) (legislative jurisdiction); *Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 132 S.W.3d 477, 484 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (full faith and credit); *Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361, 373 (5th Cir. 2004) (foreign sovereign immunity).

151. No. 4:05-CV-411-A, 2005 WL 1639319 (N.D. Tex. July 12, 2005).



that had issued policies for periods in 2003 and 2004. The first policy was issued in Oklahoma, where Precis was originally headquartered; the company had since moved to Texas. Based on the policies' language, it was unclear when the underlying claims by customers had been made, and thus, Precis sought a declaration of coverage to determine which insurer should defend and indemnify which customers' claims. The defendant insurers removed Precis's action to federal court in Oklahoma City, from which it was transferred to federal court in Dallas and assigned to federal court in Fort Worth.<sup>152</sup> To determine which law controlled the coverage issue, the court first noted that for inconvenient forum transfers, the law of the transferor court controlled.<sup>153</sup> And since federal courts apply the choice-of-law rules of the local state, Oklahoma law controlled. The court thus invoked an Oklahoma statute for contract disputes, which states that the law of the place of performance controls, or, if none is indicated, the place of making.<sup>154</sup> Applying this, the court held that (1) Texas law governed the second policy because it was clearly to be performed in Texas after Precis moved here; and (2) Texas law controlled the original policy because it had been renewed, and the renewal would also have to be performed in Texas.<sup>155</sup>

*Cabelka v. Herring National Bank*<sup>156</sup> is the second application of an Oklahoma choice-of-law statute. Oklahoma resident Cabelka sued his bank, located in Texas, for its alleged negligence in dishonoring his check of \$37,500 for the purchase of two tractors. In granting the defendant's motion for summary judgment, the court applied a statute in Oklahoma's version of the Uniform Commercial Code. According to the statute, the law of the state where the bank is located applies. Thus, the court held that Texas law applied. The court also ruled that, to the extent that plaintiff's numerous negligence claims (all alleged under Oklahoma law) fell outside the Code and raised tort issues, the most-significant-relationship test also pointed to Texas law.<sup>157</sup>

A "borrowing statute" is one designating the application of another state's statute of limitation. Texas has one, and the Fort Worth Court of Appeals considered it in *Malone v. Sewell*.<sup>158</sup> Sewell was Malone's psychotherapist in Fort Worth during 1995 and 1996. When the treatment ended, the two began a sexual relationship and moved to Seattle together later that year. The relationship ended when Malone moved back to Fort Worth. She then sued Sewell for sexual exploitation, breach of fiduciary duty, and fraud. The trial court granted summary judgment to Sewell, applying Washington's three-year limitation period by way of the Texas

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152. *Id.* at \*1.

153. *Id.* at \*5 (citing *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990)).

154. *Id.* (citing OKLA. STAT. ANN. tit. 15, § 162 (West 2004)).

155. *Id.*

156. No. 7:04CV43R, 2005 WL 735035 (N.D. Tex. Mar. 31, 2005).

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

158. 168 S.W.3d 243 (Tex. App.—Fort Worth 2005, pet. denied).

borrowing statute.<sup>159</sup> The court of appeals reversed, finding that Sewell's summary-judgment motion failed to establish necessary facts to trigger the borrowing statute—that the relevant conduct, if it occurred at all, occurred in Washington.<sup>160</sup>

A Texas insurance statute provides that Texas law will govern 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.<sup>161</sup> During the Survey period, this statute applied to an insurer's action seeking a declaration of noncoverage for a mortgage lender subject to a deceptive trade practices claim.<sup>162</sup>

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

Texas law and the Restatement (Second) of Conflict of Laws permit contracting parties to choose a governing law,<sup>163</sup> as reflected in ten Survey-period cases. In *Panatrol Corp. v. Emerson Electric Co.*,<sup>164</sup> the San Antonio Court of Appeals provided this year's most instructive analysis for choice-of-law clauses overcome by another state's interests. In 1999, a frier at a turkey-processing plant in Fredericksburg, Texas, caused a fire that destroyed a building and its contents. Panatrol manufactured the allegedly faulty panel, which included a temperature controller made by Emerson. The plant's owners sued the frier's manufacturer and several component makers, including Emerson Electric but excluding Panatrol. Emerson thus brought a third-party claim against Panatrol, and Panatrol counterclaimed. The trial court granted summary judgment to Panatrol and Emerson on the plaintiffs' claims; it also granted summary judgment to Panatrol and Emerson on each other's indemnity claims. The San Antonio Court of Appeals reversed the summary judgment on the plaintiffs' claims. However, the importance of this appeal lies in the choice-of-law issues in the indemnity claims.<sup>165</sup>

As to these claims, the court found Texas law controlling. Although the contract between Panatrol and Emerson had a Missouri choice-of-law clause, Panatrol alleged a claim under the Texas Product Liability Act, which established the component manufacturer's duty.<sup>166</sup> The court noted that, under the Restatement (Second) of Conflict of Laws and Texas precedent, it was obligated to honor the parties' contractual choice

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159. *Id.* at 253 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a) (Vernon 2005)).

160. *Id.*

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

162. Certain Underwriters at Lloyd's, London v. Amwest Fin., Inc., No. Civ. H-04-4024, 2005 WL 1994290, at \*3 (S.D. Tex. Aug. 17, 2005).

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

164. 163 S.W.3d 182 (Tex. App.—San Antonio 2005, no pet. h.).

165. *Id.* at 184-85, 191.

166. *Id.* at 186 (referring to the Texas Product Liability Act, TEX. CIV. PRAC. & REM. CODE ANN. § 82.002(a) (Vernon 2005)).

of law unless that choice was overcome by a *DeSantis* analysis, that is, unless another state's interests outweigh those of the parties' chosen state. Specifically, the parties' chosen law should govern "unless (1) there is a state with a more significant relationship to the transaction, and (2) applying the chosen law would contravene a fundamental policy of that state, and (3) that state has a materially greater interest in the determination of the particular issue."<sup>167</sup> Applying that analysis, the court found the contract's choice of law could be overcome. Missouri's only contact was as Emerson's state of incorporation. Panatrol, an Illinois corporation, had ordered the temperature control from an Emerson division in Illinois, not in Missouri. Further, the claims arose from a Texas fire. Thus, the more significant contacts were with Texas.<sup>168</sup> The court then noted that, except for a statutory indemnity rule in Texas, all three states' laws appeared to be the same. Therefore, the court ignored the false conflict and designated Texas law as controlling on the indemnity claims.<sup>169</sup>

*In re Enron Corp. Securities, Derivative & "ERISA" Litigation*<sup>170</sup> may be this Survey period's most complex choice-of-law analysis, necessarily resulting in brief reporting here. In this case, movants sought enforcement of the arbitration provisions of various insurance-coverage policies, arguing that New York law governed the enforceability of those provisions. The Houston federal court found that New York law did not likely conflict with Texas law.<sup>171</sup> However, to be cautious, the court analyzed the arbitration agreements under Texas and New York substantive law<sup>172</sup> as well as Texas and New York choice-of-law rules.<sup>173</sup> The court also found that, to the extent that movants' construction of New York law was accurate (that is, that it compelled enforcement of the arbitration provisions), New York law was inapplicable on two distinct grounds: 1) it bore no relation to the parties or the contracts; and 2) it contravened important Texas public policies.<sup>174</sup> Thus, Texas had a more significant relationship to the dispute.<sup>175</sup>

In other cases, the Fifth Circuit Court of Appeals honored a choice of Massachusetts law in a suit for unpaid salary and commissions, even though the defendant employer failed to invoke the clause until its motion in limine, filed just before the trial.<sup>176</sup> An El Paso federal court upheld the parties' choice of California law in an employment-discrimination case.<sup>177</sup> A San Antonio federal court found the parties'

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167. *Id.* at 187 (citing *DeSantis*, 793 S.W.2d at 678 and RESTATEMENT § 187(2)(b) (1971)).

168. *Id.* at 186-88.

169. *Id.* at 188-89.

170. 391 F. Supp. 2d 541 (S.D. Tex. 2005).

171. *Id.* at 584 n.51.

172. *Id.* at 580-86.

173. *Id.* at 582 n.46.

174. *Id.* at 585.

175. *Id.* at 595.

176. *Smith v. EMC Corp.*, 393 F.3d 590, 597 (5th Cir. 2004).

177. *Lora v. Providian Bancorp Servs.*, No. EP-05-LA-045-DB, 2005 WL 1743878, at \*3 (W.D. Tex. July 22, 2005).

choice of New Jersey law sufficiently broad to cover tortious interference with contract claims for the procurement and sale of human bone and soft tissue.<sup>178</sup> A Houston court of appeals affirmed that the parties' choice of Pennsylvania law was sufficiently broad to govern an attorney-fee claim.<sup>179</sup> Finally, a Laredo federal court found the parties' choice of Mexico law applicable to contract and tort claims in an intellectual-property dispute, although Mexico law also governed the tort claims under a most-significant-relationship analysis.<sup>180</sup>

Four Survey-period opinions rejected choice-of-law clauses on the most basic premises. A federal court in Houston rejected a choice-of-law clause appearing in an invoice because it was not part of any agreement between the litigating parties.<sup>181</sup> An El Paso federal court applied the same reasoning to reject an unsigned purchase order's choice-of-law clause, even though that order reflected the parties' dealings.<sup>182</sup> A Dallas federal court rejected a New York choice-of-law provision and applied Texas law because both plaintiff and defendant had pleaded their claims and defenses only under Texas law.<sup>183</sup> A Houston federal court rejected an England choice-of-law clause because it lacked a reasonable relation with the parties and the dispute, which violated a Texas statute governing choice-of-law clauses in contracts exceeding a million dollars.<sup>184</sup>

### C. THE MOST-SIGNIFICANT-RELATIONSHIP TEST

In the absence of a statutory choice-of-law rule or an effective choice-of-law clause, Texas courts apply the most-significant-relationship test from the Restatement (Second) of Conflict of Laws.<sup>185</sup> The Survey period produced thirteen cases applying the test.

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178. *Tissue Transplant Tech., Ltd. v. Osteotech, Inc.*, No. Civ.A.5A-04-CA-0819, 2005 WL 958407, at \*3 (W.D. Tex. Apr. 26, 2005).

179. *Fairmont Supply Co. v. Hooks Indus., Inc.*, 177 S.W.3d 529, 534-37 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). The court observed that it was possible that one state's law could govern a contract claim while another state's law governed attorney fees; this practice is called "depechage." However, the court found that it was unnecessary here because of the wording of the choice-of-law clause. *Id.* at 534.

180. *El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc.*, 344 F. Supp. 2d 986, 988-90 (S.D. Tex. 2004).

181. *Enpro Sys., Ltd. v. Namasco Corp.*, 382 F. Supp. 2d 874, 893-94 (S.D. Tex. 2005).

182. *Sunshine Traders of El Paso, Inc. v. Dolgencorp. Inc.*, No. EP-02-CA-439-DB, 2005 WL 1009590, at \*3 (W.D. Tex. Mar. 29, 2005).

183. *AT&T Corp. v. The Vialink Co.*, No. Civ.A. 3:03-CV-1954D, 2005 WL 2007102, at \*4 n.7 (N.D. Tex. Aug. 18, 2005).

184. *Enesco Offshore Co. v. Titan Marine L.L.C.*, 370 F. Supp. 2d 594, 596-97 (S.D. Tex. 2005) (citing TEX. BUS. & COM. CODE ANN. § 35.51 (Vernon 2002)).

185. The most-significant-relationship test balances seven factors 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.

## I. Contract Cases

*National Western Life Insurance Co. v. Rowe*<sup>186</sup> involved a nationwide class action seeking reimbursement of child-rider premiums on life insurance policies that were inappropriately collected after the children reached majority age. The Texas Supreme Court reversed the lower courts' certification and remanded for a more rigorous choice-of-law analysis, as discussed in the Class Certification section.<sup>187</sup> Without ruling on which law or laws governed, the supreme court noted the pertinence of section 192 of the Restatement, which governs life insurance contracts. In particular, the supreme court highlighted the strong interest each state has in the regulation of local resident's insurance contracts and accordingly, the inappropriateness of one state's law governing a nationwide class action.<sup>188</sup>

A federal court in Houston made short work of the need for choice-of-law analysis in *Williams v. Amerus Life Insurance Co.*,<sup>189</sup> holding in a footnote that "[t]he most significant relationship test clearly supports application of California law to all claims."<sup>190</sup> Most of the parties had conceded this, but two plaintiffs urged that their claims for certain retained asset accounts were separate. The court rejected Texas law for those claims as well, finding that the asset accounts were completely dependent on the policies concededly governed by California law.<sup>191</sup>

*Fleming & Associates v. Miller & Associates*<sup>192</sup> involved a dispute between attorneys for recovery of litigation expenses. Fleming, a Houston firm, agreed to work with Miller, a Mississippi firm, in a fen/phen case that settled before trial. Fleming billed Miller \$150,000 for its expenses. Miller sent Fleming a check for \$23,000, but Fleming returned it. Fleming sued Miller in federal court in Houston, and Miller promptly moved for summary judgment. In granting a partial summary judgment, the court rejected Fleming's argument that Texas law should control. Rather, under section 196 of the Restatement (governing contracts for services), the case's heavy Mississippi flavor dictated the application of that state's law.<sup>193</sup>

*Lennar Corp. v. Great American Insurance Co.*<sup>194</sup> is an unreported but nonetheless complex opinion concerning insurance coverage for plaintiff homebuilder's application of defective stucco to numerous homes in

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RESTATEMENT § 6(2) (1971). This listing is not by priority, as priority will vary from case to case. *Id.* at cmt. c. In a larger sense, the most-significant-relationship test includes the other choice-of-law sections in the Restatement (Second).

186. 164 S.W.3d 389 (Tex. 2005).

187. See *infra* notes 204-08 and accompanying text.

188. *Nat'l W. Life Ins.*, 164 S.W.3d at 391-92.

189. No. Civ.A. H-03-4672, 2005 WL 1847111 (W.D. Tex. 2005).

190. *Id.* at \*4 n.3.

191. *Id.* at \*4.

192. No. Civ.A. H-03-4672, 2005 WL 1155118, at \*1 (S.D. Tex. May 11, 2005).

193. *Id.* at \*2-3.

194. No. 14-02-00860-CV, 2005 Tex. App. LEXIS 4214 (Tex. App.—Houston [14th Dist.] June 2, 2005, pet. filed).

Texas. Addressing a number of summary-judgment motions from both sides, the Houston Court of Appeals found that Texas's choice-of-law statute for insurance disputes did not apply because the policy was issued out of Florida. Instead, the court applied a most-significant-relationship analysis, finding that Texas law governed the coverage claims.<sup>195</sup>

## 2. Tort Cases

A late-released case from the prior Survey period applied the most-significant-relationship test to a complex securities-fraud claim governed by state law. *Greenberg Traurig v. Moody*<sup>196</sup> was a claim by four Texas investors against a New York law firm for allegedly committing securities fraud in the initial public offering for a food-technology venture. The Fourteenth District Court of Appeals reversed the trial court's verdict for over \$20 million and ordered a new trial under New York state securities law rather than Texas law.<sup>197</sup>

In *Cates v. Creamer*,<sup>198</sup> the plaintiff sued Hertz and its rental driver in a Dallas federal court for injuries from a Texas car collision. The trial court granted summary judgment to Hertz under Texas law. The Fifth Circuit reversed, finding that the choice-of-law analysis was inadequate. Under its own analysis, the court found that Florida law should govern because the bailment relationship was centered there.<sup>199</sup>

*Stelax Industries, Ltd. v. Donahue*<sup>200</sup> involved an employer's claim against a dishonest employee who, in a conspiracy with outside defendants, apparently bled the company. The facts involved claims potentially arising in a number of places including Alabama, Texas, New York, and England. Stelax moved for summary judgment based on Texas law. When Donahue did not respond, the court noted that his acquiescence waived any objection to Texas law. After a *sua sponte* choice-of-law analysis demonstrating Texas law's applicability, the court granted the plaintiff's summary judgment.<sup>201</sup>

In other cases, a Dallas federal court applied Texas law to an Oklahoma resident's claim that a Texas bank negligently handled his draft.<sup>202</sup> Finally, the First District Court of Appeals found that Wisconsin, rather than Texas, law governed the charitable immunity of a non-profit aircraft association from plaintiff's quadriplegic injuries sustained at an air show in Wisconsin.<sup>203</sup>

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195. *Id.* at \*3-4, \*11-12, \*16-17.

196. 161 S.W.3d 56 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

197. *Id.* at 63-64, 76.

198. 431 F.3d 456 (5th Cir. 2005).

199. *Id.* at 463-69.

200. No. Civ.A.3:03CV923-B, 2005 WL 39084 (N.D. Tex. Jan. 7, 2005).

201. *Id.* at \*1-6.

202. *Cabelka v. Herring Nat'l Bank*, No. 7:04CV43R, 2005 WL 735035, at \*2 (N.D. Tex. Mar. 31, 2005).

203. *Doctor v. Pardue*, 178 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2005), *withdrawn*, No. 01-03-00899-CV, 2005 WL 2234073 (Tex. App.—Houston [1st Dist.] Sept. 15, 2005, no pet. h.).

### 3. Class Action Certifications

Class actions certified under the common-question-predominates standard of Texas and federal law require a showing that a common question of law or fact predominates over disparate issues in the case.<sup>204</sup> Trial court certifications of multi-state or nationwide classes that fail to make a record on this issue are now routinely reversed, as illustrated by four cases during this Survey period. Two of these cases were reversed by the Texas Supreme Court, one in an action against insurers for failing to refund premiums collected on life insurance after termination of the child-rider coverage,<sup>205</sup> and the other in an action by a Texas class of insurance policy holders regarding insufficient dividends on company profits.<sup>206</sup> The same result was obtained in two courts of appeals rulings involving computer purchases<sup>207</sup> and real estate loans.<sup>208</sup>

## D. OTHER CHOICE-OF-LAW ISSUES

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

Similar to the due-process limitation on state long-arm statutes,<sup>209</sup> the United States Constitution also limits a state's ability to choose the governing law in its courts. However, unlike the limits on state long-arm statutes (which arise only under the due-process clause), the choice-of-law limits arise under several doctrines—due process (requiring a reasonable connection between the dispute and the governing law), full faith and credit (requiring the choice-of-law analysis to consider the interests of other affected states), and, to a lesser extent, equal protection, privileges and immunities, the commerce clause, and the contract clause.<sup>210</sup> Constitutional problems most often occur when a state court chooses its own law in questionable circumstances. But the inappropriate choice-of-

204. See FED. R. CIV. P. 23(b)(3) (2006); TEX. R. CIV. P. 42(b)(3) (2005). See also *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 663 (Tex. 2004), in which the Texas Supreme Court clarified the need for an appropriate choice-of-law analysis in certifying multi-state class actions. *Lapray* is discussed in James P. George & Anna K. Teller, *Conflict of Laws*, 58 SMU L. REV. 679, 706-07 (2005).

205. *Nat'l W. Life Ins. Co. v. Rowe*, 164 S.W.3d 389 (Tex. 2005) (attempted nationwide class).

206. *State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550 (Tex. 2004). Plaintiffs initially sought a nationwide class but amended to seek only a Texas-resident class. The Texas Supreme Court did not necessarily reject the class; it only remanded for a more rigorous analysis of the choice-of-law issues. *Id.* at 556-57.

207. *Compaq Computer Corp. v. Albanese*, 153 S.W.3d 254, 262 (Tex. App.—Beaumont 2004, no pet. h.) (attempted nationwide class).

208. *GMAC Commercial Mortgage Corp. v. Tex. Bay Oaks Ltd. P'ship*, No. 05-04-00899-CV, 2005 WL 2234596, at \*8 (Tex. App.—Dallas Aug. 24, 2005, no pet. h.) (attempted nationwide class of borrowers).

209. See *supra* notes 18-25 and surrounding text.

210. See RESTATEMENT § 9 (1971) and comments following. See also SCOLES & HAY, *supra* note 13, at 149-77; WEINTRAUB, *supra* note 1, at 585-648; James P. George, *Choice of Law: A Guide for Texas Attorneys*, 25 TEX. TECH. L. REV. 833, 844-46 (1994). Choice of law limits under full faith and credit are now questionable after *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 499 (2003).

forum law is not the only conceivable constitutional issue. For instance, even when choosing foreign law, courts must apply choice-of-law rules with an eye toward constitutional limitations. No cases during the Survey period invoked these constitutional principles, but several cases discussed in the class-action/choice of law section followed *Lapray*, a 2004 Texas Supreme Court decision that was based on those principles.<sup>211</sup>

## 2. False Conflicts

A false conflict exists either when other potentially-applicable laws are the same as the forum law or when the laws reach the same result.<sup>212</sup> In conducting a choice-of-law analysis, the first step is to define a clear, outcome-changing difference between the forum and the foreign law. Absent a clear conflict, the forum law should apply.<sup>213</sup> This Survey period produced five false-conflict cases with no complex opinions, unlike the prior Survey period in which one court found a false conflict between the laws of five states.<sup>214</sup> The same plaintiff from that complex case—*In re Senior Living Properties L.L.C. Trust*—had another false-conflict case reported this year. *Senior Living Properties L.L.C. Trust v. Clair Odell Insurance Agency, L.L.C.*<sup>215</sup> involved a claim by the bankruptcy trustee for seventy-three nursing homes against a management company, alleging that the latter's misrepresentations led to insurance cancellations and bankruptcy. The court found a false conflict because, while the defendants argued that summary judgment was warranted under both Texas and Pennsylvania law, the plaintiff failed to raise any affirmative argument under Pennsylvania law.<sup>216</sup> Other false conflicts included an airline's indemnity claim against a security company regarding a paraplegic passenger's injury claim;<sup>217</sup> a claim for attorney's fees in which the term "prevailing party" had similar definitions under Massachusetts and Texas law;<sup>218</sup> an insurance-coverage claim against a bus company that had recently moved

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211. See *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004), discussed in James P. George & Anna K. Teller, *Conflict of Laws*, 58 SMU L. REV. 679, 705 (2005). See also *supra* notes 204-08 and accompanying text for the class-action-certification opinions following *Lapray*.

212. This is the Restatement's definition of false conflict. See RESTATEMENT §§ 145 cmt. i, 186 cmt. c. Professor Brainerd Currie provides a very different concept of false conflict—one in which only one state has a real interest. See SCOLES & HAY, *supra* note 13, at 25-38. 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).

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

214. See *In re Senior Living Props. L.L.C. Trust*, 309 B.R. 223, 233 (N.D. Tex. 2004), reported in James P. George & Anna K. Teller, *Conflict of Laws*, 58 SMU L. REV. 679, 702-03 (2005).

215. No. Civ.A.3:04-CV-0816-G, 2005 WL 1383359 (N.D. Tex. June 7, 2005).

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

217. *Delta Air Lines, Inc. v. ARC Sec., Inc.*, 164 S.W.3d 666, 667 (Tex. App.—Fort Worth 2005, pet. denied).

218. *Memon v. Baskin-Robbins Inc.*, No. Civ.A. H-03-1944, 2005 WL 1606930 (S.D. Tex. July 6, 2005).



from Wisconsin for a bus accident in Texas;<sup>219</sup> and an indemnity claim against Texas builders to collect on performance bonds in which the court found no distinction between New Jersey and Texas law.<sup>220</sup>

### 3. *Notice and Proof of Foreign Law*

Litigants seeking the application of another state's or nation's law must comply with the forum's rules for pleading and proving foreign law. In both Texas and federal courts, judicial notice is sufficient for the application of sister states' laws.<sup>221</sup> Foreign law, on the other hand, must be adequately pleaded and proven.<sup>222</sup> In *Schaefer v. Belfort Chateau L.P.*,<sup>223</sup> the Fourteenth District Court of Appeals in Houston discussed the difference between the court's duty to take judicial notice of a sister state's law and the proffering party's duty to demonstrate an actual conflict with Texas law. Plaintiff Belfort Chateau sued Schaefer and his two sons for fraudulent transfer. At trial, defendants moved for a directed verdict on the grounds that, under California law, the trusts from which the assets were transferred terminated automatically when the beneficiaries reached eighteen years of age. After the plaintiff's objection for not raising the foreign-law issues previously was overruled, the defendants offered copies of the pertinent California code and cases. The trial court denied the defendants' motion without stating whether California or Texas law governed. The court of appeals affirmed, noting that, while the court could take judicial notice of the content of California law, that issue was distinct from deciding which state's law governed. The court further held that if the defendants had not demonstrated a conflict be-

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219. Republic W. Ins. Co. v. Rockmore, No. 3-02-CV-1569-K, 2005 WL 57284, at \*5 (N.D. Tex. June 10, 2005).

220. Ins. Co. of the State of Pa. v. A-Unique Home Builders, Inc., No. Civ.A. H-04-1154, 2005 WL 2044960, at \*2 n.2 (S.D. Tex. Aug. 29, 2005).

221. 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). Under Rule 201(b), facts for judicial notice must be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Thus, 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. See FED. R. EVID. 201(b).

222. TEX. R. EVID. 203 requires written notice of foreign law by pleading or other reasonable notice at least thirty days before trial. The rule applies to all written materials and sources offered as proof, including 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. For non-English originals, parties must provide copies of both the original and the English translation. Federal practice is similar. See FED. R. CIV. P. 44.1.

223. No. 14-04-00254-CV, 2005 WL 1981299 (Tex. App.—Houston [14th Dist.] Aug. 18, 2005, no pet. h.).

tween Texas and California law, the court was entitled to presume that they were the same.<sup>224</sup>

The burden on the proponent of a claim under foreign law includes adequate pleading of the foreign claim, as seen in *Internet Corporativo S.A. de C.V. v. Business Software Alliance, Inc.* InterCorp is a Mexican company that provides Internet and e-commerce services in Mexico and certain Spanish-speaking areas of the United States.<sup>225</sup> Microsoft Corporation and Business Software Alliance complained to a Mexican government agency—the Mexican Institute of Intellectual Property—that InterCorp was using unlicensed software. The Mexican agency decided in InterCorp’s favor. InterCorp then sued Microsoft and Business Alliance in a federal court in Houston. In addition to various claims under United States and Texas laws (including antitrust, tortious interference, and business disparagement), InterCorp alleged that defendants had violated the Mexican Commercial Code. Microsoft objected, arguing that InterCorp had not pleaded any specific cause of action under Mexican law. InterCorp responded that it “simply invokes the applicable Mexican law, should the Court find that Mexican law applies.”<sup>226</sup> The court ruled in favor of Microsoft, holding that, “to the extent that InterCorp is alleging causes of action under the Commercial Code of Mexico, those claims must be dismissed as inadequately pleaded.”<sup>227</sup>

#### 4. Use of the Forum’s Procedural Rules

Not only did InterCorp struggle with proving foreign law, but it also struggled with the forum’s procedural rules, as seen in a subsequent opinion to *InterCorp*. In the first opinion noted above, the Houston federal court dismissed not only InterCorp’s claims under Mexican law, but also dismissed its claims under United States federal and state laws for violation of the statute of limitations—InterCorp had waited more than four years to sue.<sup>228</sup> Although InterCorp had an opportunity to amend its claims under Mexican law, it did not file an amended complaint before the dismissal of all claims on November 15, 2004. Some time after the dismissal, InterCorp filed a motion to reconsider and attached an amended complaint reasserting the claim under Mexican law. InterCorp argued that Mexico’s law should govern the limitations period and that under Mexican law,<sup>229</sup> the claim had a two-year limitation period that did not commence until the Mexican government agency issued its ruling. The court noted, however, that the forum’s limitation period ordinarily applies unless the claim is one that did not exist at common law. Since the court found the Mexican law claim to be analogous to one at common

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224. *Id.* at \*3.

225. No. Civ.A. H-04-2322, 2004 WL 3331843 (S.D. Tex. Nov. 15, 2004).

226. *Id.* at \*1, \*12.

227. *Id.*

228. *Id.* at \*14.

229. *Internet Corporativo, S.A. de C.V. v. Bus. Software Alliance, Inc.*, No. Civ.A. H-04-2322, 2005 WL 1155702, at \*1 (S.D. Tex. May 6, 2005).

law, it rejected the Mexican limitation period. However, even if the Mexican limitation period applied, the court stated that its two-year span was expressly directed to “the date that the damage occurred.” The application of the forum’s procedural rules also barred InterCorp in another way—the plaintiff’s argument following dismissal could not be raised by an amended complaint, but only by reopening the case under Rule 59 or Rule 60.<sup>230</sup>

*Shirvanian v. DeFrates*<sup>231</sup> involved the gray area between substance and procedure—the definition of litigant status. Plaintiffs were the trustees of family trusts, which had investments in Waste Management, Inc., a Delaware corporation. Waste Management’s shareholders filed a derivative suit in Delaware state court; the suit settled in 2001 with explicit language regarding its preclusive effect. The plaintiffs then brought an action in Texas, but lost to the defendants’ summary-judgment motion on the preclusion issue. A Texas court of appeals reversed the summary judgment and remanded for trial under Delaware law, finding that the Shirvanians’ suit was a direct action and not derivative. Pending a motion for rehearing, the Delaware Supreme Court issued an opinion in an unrelated case clarifying Delaware law on derivative suits. Based on this Delaware holding, the Texas court of appeals withdrew its earlier ruling and affirmed the trial court’s judgment for defendants.<sup>232</sup> *Shirvanian* thus is an instance of both *stare decisis* (the Delaware clarification) and preclusion (the Delaware action against Waste Management) in the same case.

### III. FOREIGN JUDGMENTS

Foreign judgments from other states and countries create Texas conflict-of-laws issues in two ways: (1) their local enforcement, and (2) their preclusive effect on local lawsuits. Foreign judgments include those from sister states and foreign countries but do not include federal court judgments from districts outside Texas. Those judgments are enforced as local federal-court judgments.<sup>233</sup>

#### A. ENFORCEMENT

Texas recognizes two methods of enforcing foreign judgments: 1) the common-law method using the foreign judgment as the basis for a local lawsuit;<sup>234</sup> and 2) since 1981, the more direct procedure under two uniform judgment acts and other similar acts for arbitration awards, child custody, and child support. There were no instances of common-law en-

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

231. 161 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

232. *Id.* at 105-10.

233. See 28 U.S.C.A. § 1963 (West Supp. 2002).

234. The underlying mandate for 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 (1948). The Uniform Enforcement of Foreign Judgments Act specifically reserves the common-law method as an alternative to the Act. See TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon 2005).

forcement of sister-state judgments during the Survey period,<sup>235</sup> but there was one case involving a Hong Kong judgment not eligible for the Uniform Foreign Country Money Judgment Recognition Act (“UFCMJRA”).

### 1. *The Uniform Enforcement of Foreign Judgments Act*

The Uniform Enforcement of Foreign Judgments Act (“UEFJA”) provides summary enforcement for non-Texas judgments that are entitled to full faith and credit.<sup>236</sup> This includes sister-state judgments as well as foreign-country money judgments that Texas recognizes under the UFCMJRA.<sup>237</sup> The Survey period produced only one UEFJA case and no UFCMJRA cases.

In *Boyes v. Morris Polich & Purdy, L.L.P.*,<sup>238</sup> the El Paso Court of Appeals had to consider whether to set aside a Nevada judgment based on a post-answer default. The judgment debtor argued that Nevada lacked jurisdiction. The El Paso Court of Appeals, however, found that the Nevada court had jurisdiction, based both on a forum clause and on defendant’s having submitted himself to the Nevada court’s jurisdiction. In assessing the appropriateness of Nevada’s jurisdiction, the Texas court inexplicably engaged in a lengthy recitation of personal jurisdiction rules

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235. Examples of common-law enforcement after the UEFJA’s enactment include *McFadden v. Farmers & Merchs. Bank*, 689 S.W.2d 330, 331-32 (Tex. App.—Fort Worth 1985, no writ); *Cal Growers, Inc. v. Palmer Warehouse & Transfer Co.*, 687 S.W.2d 384, 386 (Tex. App.—Houston [14th Dist.] 1985, no writ); *First Nat’l Bank v. Rector*, 710 S.W.2d 100, 103-07 (Tex. App.—Austin 1986, writ ref’d n.r.e.); *Escalona v. Combs*, 712 S.W.2d 822, 823-26 (Tex. App.—Houston [1st Dist.] 1986, no writ); *Keller v. Nevel*, 699 S.W.2d 211, 212 (Tex. 1985).

236. TEX. CIV. PRAC. & REM. CODE ANN. §§ 35.001-007 (Vernon 2005). The Act requires (1) the judgment creditor to file a copy of the judgment authenticated under federal or Texas law (§ 35.003); and (2) either the clerk (§ 35.004) or the judgment creditor (§ 35.005) to provide notice to the judgment debtor. The judgment debtor may (1) move to stay enforcement if grounds exist under Texas law or the rendering state (§ 35.006); or (2) challenge enforcement along traditional full faith and credit grounds such as the rendering state’s lack of personal or subject-matter jurisdiction (§ 35.003).

237. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-008 (Vernon 2005). 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 (§ 36.0041) and either the clerk (§ 36.0042) or the creditor (§ 36.0043) to provide notice to the debtor. The judgment debtor has thirty days to challenge enforcement, unless he is domiciled in a foreign country, in which case he has sixty days and a twenty-day extension available for good cause. *Id.* § 36.0044. Unlike the UEFJA, the UFCMJRA explicitly states ten grounds for non-recognition—three mandatory and seven discretionary. Briefly stated, the mandatory grounds are (1) lack of an impartial tribunal, (2) lack of personal jurisdiction, and (3) lack of subject-matter jurisdiction. *Id.* § 36.005(a). The court may grant discretionary non-recognition if 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, or (7) is not from a country granting reciprocal enforcement rights. *Id.* § 36.005(b). The UFCMJRA also provides for stays (§ 36.007) and expressly reserves the right of enforcement of non-money judgments under traditional, non-statutory standards (§ 36.008). See *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (comity as discretionary grounds for recognizing and enforcing foreign-country judgments).

238. 169 S.W.3d 448 (Tex. App.—El Paso 2005, no pet. h.).

under Texas law and then analyzed the defendant's amenability to Nevada jurisdiction under Texas law.<sup>239</sup>

## 2. Common-Law Enforcement

As noted above, the common law provides a basis for sister-state judgment enforcement even in the absence of the UEFJA. The common-law remedy for enforcing foreign-country judgments is comity and preclusion. One of these rare cases occurred during the Survey period, *Siko Ventures Ltd. v. Argyll Equities, L.L.C.*<sup>240</sup> Siko is a British Virgin Islands corporation with its principal place of business in Hong Kong; Argyll is a Texas-based lender. As security for a loan, Siko transferred to Argyll fifty million shares of its stock in Kanstar Environmental Technologies. However, Argyll allegedly failed to follow through on the loan and sold the shares of pledged stock. Thus, Siko obtained an injunction from a Hong Kong court, which forbade Argyll to sell additional shares of Kanstar stock and required Argyll to return the remaining stock and the proceeds. Siko then sought enforcement of the injunction in Texas. Argyll raised three objections: this was not a money judgment, the Hong Kong court lacked personal jurisdiction, and the Hong Kong judgment was contrary to a Texas choice-of-forum clause in the parties' agreement.<sup>241</sup>

The court first noted that this could be a case of first impression—the domestication of a foreign-country injunction. The court then noted the express language of the Texas UFCMJRA, which states that it “does not prevent the recognition of a foreign country judgment in a situation not covered by this chapter.”<sup>242</sup> Also, although there were no Texas cases supporting Siko's effort, the court found sufficient persuasion in cases enforcing sister-state injunctions. Thus, the court enforced the injunction, rejecting Argyll's other objections to jurisdiction because they had been litigated and decided in the Hong Kong action.<sup>243</sup>

## 3. Judgments against Sovereigns

The Foreign Sovereign Immunities Act (“FSIA”)<sup>244</sup> regulates judgment enforcement against the assets of sovereign governments. The Fifth Circuit Court of Appeals issued two opinions during the Survey period related to FSIA—*Walker I*<sup>245</sup> and *Walker II*<sup>246</sup>—which involved claims against the Republic of Congo (“ROC”). The foreign judgment originated in an arbitral award of \$26,093,251 from the International Chamber of Commerce in Paris. The judgment was upheld by a French court and then registered as a foreign judgment in the District of Colum-

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239. *Id.* at 455-59.

240. No. SA-05-CA-100-0G, 2005 WL 2233205 (W.D. Tex. Aug. 5, 2005).

241. *Id.* at \*1.

242. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 36.008 (Vernon 2005)).

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

244. 28 U.S.C.A. §§ 1602-11 (West 2005).

245. *Walker Int'l Holdings, Ltd. v. Republic of Congo*, 395 F.3d 229 (5th Cir. 2004).

246. *Walker Int'l Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413 (5th Cir. 2005).

bia. Using the D.C. judgment, Walker filed a garnishment action in the Southern District of Texas seeking money owed to ROC by Murphy Exploration & Production, International. In *Walker I*, the Fifth Circuit affirmed the district court's denial of garnishment, finding that (1) Murphy, as garnishee, could raise an FSIA defense as FSIA defenses are not limited to sovereign parties; (2) ROC waived immunity in its arbitration agreement and that waiver controlled here; and (3) the garnished property, though intangible, was located in Texas for purposes of judgment enforcement. However, in spite of all this, the court held that the immunity waiver was inoperative because the garnished property was not being used in a commercial activity, a necessary predicate for the immunity waiver to be operative.<sup>247</sup> In *Walker II*, the court of appeals upheld the federal magistrate judge's award of attorney's fees to Murphy for defending the garnishment action.<sup>248</sup>

#### 4. Arbitration Enforcement

Foreign arbitration awards may be enforced in Texas under federal and state law.<sup>249</sup>

The Survey period produced no cases involving the direct recognition of a foreign arbitral award in a Texas court. But *Walker I*, discussed immediately above, was based on an ICC arbitral award that was first recognized in the District of Columbia.<sup>250</sup>

#### 5. Family-Law Judgments

Texas laws also provide for recognition and enforcement of sister-state and foreign-country child-custody judgments under the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA")<sup>251</sup> and child-support judgments under the Uniform Interstate Family Support Act ("UIFSA").<sup>252</sup> The custody cases under the UCCJEA often overlap with jurisdictional issues and are discussed in the jurisdiction section.<sup>253</sup> The Survey period produced one interstate support case.

*In re T.J.*<sup>254</sup> enforced a Michigan child-support arrearage order in Texas and illustrated how procedurally awkward interstate support collection can be. In 1974, Peggy and Jordan Jones obtained a divorce in Macomb County, Michigan. Under the terms of the divorce decree, Jordan was ordered to pay child support for the couple's minor child, T.J. Jordan failed to pay and moved to Texas. Texas obtained an arrearage order under the Texas Uniform Reciprocal Enforcement of Support

247. *Walker Int'l*, 395 F.3d at 233-37.

248. *Walker Int'l*, 415 F.3d at 419.

249. See Federal Arbitration Act, 9 U.S.C.A. § 1 (West 2005); Texas International Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 172.082(f) (Vernon 2005).

250. See *supra* notes 245-47 and accompanying text.

251. See TEX. FAM. CODE ANN. §§ 152.001-.317 (Vernon 2002).

252. See *id.* §§ 159.001-.902 (Vernon 2002 & Supp. 2005).

253. See *supra* notes 78-97 and accompanying text.

254. No. 12-03-00331-CV, 2005 WL 588875 (Tex. App.—Tyler Mar. 14, 2005, no pet. h.).

Act<sup>255</sup> in 1983 and initiated a proceeding to enforce the 1983 order in 1988. In the 1988 proceeding, the trial court entered judgment, including the unpaid portion of the arrearage from the 1983 order and the additional arrearage incurred between 1983 and 1988. On May 6, 1991, the Texas attorney general filed a Release of Judgment Lien, stating that the parties had settled the 1988 judgment and that the State of Texas released and discharged the lien created by the judgment. In a letter dated May 22, 1991, a Michigan Friend of the Court (functioning not as amicus but as a guardian ad litem) acknowledged the Texas release of lien but informed Jordan that he still owed \$5,536.89, the difference between the Michigan arrearage and what the Texas order had discharged.<sup>256</sup>

In January of 2002, the State of Michigan registered an authenticated and certified copy of an arrearage order with Texas (the "2001 order"), stating that Jordan owed over \$9,000 for unpaid child support and service fees. Jordan contested registration of the 2001 order, arguing that the alleged child support owed was from before 1984, that a support order was entered and payments had been made for that time period under the 1983 Texas order, and that a Release of Judgment Lien had been filed. At hearings in October and June, the trial court sustained Jordan's contest to registration of the 2001 Michigan order. On appeal, the court reversed and rendered. The court concluded that Jordan failed to overcome the presumption that the 2001 order was valid and failed to establish any defense to the registration contest under section 159.607(a) of the Texas Family Code.<sup>257</sup>

## 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; it also compels collateral estoppel if the required elements are satisfied.<sup>258</sup> 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 the satisfaction of traditional preclusion requirements.<sup>259</sup>

### 1. Interstate Preclusion

As discussed in a prior section of this Article, the court in *Shirvanian v. DeFrates*<sup>260</sup> reversed itself on the issue of whether plaintiffs were barred in their Texas action by an earlier shareholders' derivative suit in Dela-

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255. The Uniform Interstate Family Support Act is the current version of the Act. See TEX. FAM. CODE ANN. §§ 159.001-901 (1995).

256. *In re T.J.*, 2005 WL 588875, at \*1.

257. *Id.* at \*5-8.

258. U.S. CONST. art. IV, § 1. See also 28 U.S.C. § 1738 (1948). See WEINTRAUB, *supra* note 1, at 701-02.

259. SCOLLES & HAY, *supra* note 13, at 1268.

260. 161 S.W.3d 102, 111 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

ware. The Texas court originally ruled that the Texas plaintiffs—the Shirvianians—brought a direct action rather than a derivative one, but changed its mind when an unrelated Delaware Supreme Court opinion clarified derivative actions under Delaware law. The Texas court granted *stare decisis* to the Delaware opinion, ruling that the Delaware definition of derivative action controlled because all parties agreed that Delaware law governed the suit.<sup>261</sup> However, rules of preclusion and full faith and credit also required this result. Under the rules of preclusion and full faith and credit, the court was required to give the Delaware decision involving Waste Management the same effect that it would be given by a Delaware court.<sup>262</sup> The *Shirvianian* dismissal was compelled regardless of whether the parties in the Texas case agreed that Delaware law controlled.

## 2. International Preclusion

*In re Offshore Financial Corp.*<sup>263</sup> wins this year's award for the most difficult case to explain in a short space and involves parties to cases that won the award in past Surveys. In 1999, Milo Segner (bankruptcy trustee for Offshore Financial) obtained a judgment in a bankruptcy court in Dallas against 80451 Holdings, Ltd., a Canadian company. The judgment remained unenforceable because of 80451's problems, including a Canadian lawsuit resembling a receivership. Segner, learning that 80451 had obtained a Mexican judgment against several parties in 1996, filed a turnover order in the Dallas bankruptcy court. This order asked the court to order 80451 to surrender its ownership of the Mexican judgment. Had this turnover motion been successful, it would not have been an enforcement of the Mexican judgment. Rather, it would have given preclusive effect to the Mexican court's decision that 80451 had a property interest capable of seizure.<sup>264</sup>

Attorneys for 80451 objected to the turnover motion on the grounds that (1) its own Mexican judgment was fraudulently obtained (this apparent admission against interest may be explained by the fact that 80451 had come under different management in light of the Canadian lawsuit); and (2) the Dallas bankruptcy court should abstain in deference to the receiver-type action in Canada.<sup>265</sup> The bankruptcy court did not abstain, holding that 80451 had not met its burden of showing that the Canadian

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261. *Id.* at 105-10.

262. *See Purcell v. Bellinger*, 940 S.W.2d 599, 601 (Tex. 1997). For a discussion of the outer limits of this rule, *see Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 372-87 (1996) (Delaware state court class-action settlement/judgment entitled to full faith and credit in a California federal class action, even though the claims released in the Delaware action were within the exclusive jurisdiction of federal courts).

263. 319 B.R. 845 (N.D. Tex. 2005). *See James P. George & Anna K. Teller, Conflict of Laws*, 56 SMU L. Rev. 1283, 1300 (2002) (discussing *Brousseau v. Ranzau*, 81 S.W.3d 381 (Tex. App.—Beaumont 2002, pet. denied)). *Brousseau* and *Ranzau* were involved in both that case and this case.

264. *In re Offshore*, 319 B.R. at 846-47.

265. *Id.* at 846-47.



court had obtained exclusive in rem jurisdiction over 80451's assets.<sup>266</sup> However, the court agreed with 80451's first objection, finding that Segner had not shown that 80451 owned a valid and enforceable Mexican judgment. In fact, the Beaumont Court of Appeals ruled in 2002 that this same Mexican judgment was inappropriately obtained in violation of earlier bankruptcy orders.<sup>267</sup> Although Segner was not a party to the case in front of the Beaumont court and thus was not bound by that decision, the Beaumont court was persuasive in showing that the Mexican judgment was invalid. The Dallas bankruptcy court accordingly denied Segner's turnover motion.<sup>268</sup>

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266. *Id.* at 850-51.

267. *Id.* at 849 (discussing *Brosseau*, 81 S.W.3d at 381).

268. *Id.* at 848-50.